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CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

167, 168, 169, 170 U. S.

BOOK 42,

LAWYERS' EDITION,

CITED "LAW. ED."

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY

STEPHEN K. WILLIAMS, LL.D.

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JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MELVILLE WESTON FULLER.

ASSOCIATE JUSTICES,

HON. STEPHEN JOHNSON FIELD,[1]
HON. JOHN MARSHALL HARLAN,
HON. HORACE GRAY,
HON. DAVID JOSIAH BREWER,
HON. HENRY BILLINGS BROWN,
HON. GEORGE SHIRAS, JR.,
HON. EDWARD DOUGLASS WHITE,
HON. RUFUS W. PECKHAM,
HON. JOSEPH MCKENNA.[2]

ATTORNEY GENERAL,

HON. JOSEPH MCKENNA.
HON. JOHN W. GRIGGS.[3]

SOLICITOR GENERAL,

HON. HOLMES CONRAD.
HON. JOHN K. RICHARDS.[4]

CLERK,

JAMES HALL MCKENNEY, ESQ.

REPORTER,

HON. J. C. BANCROFT DAVIS.

MARSHAL,

JOHN MONTGOMERY WRIGHT, ESQ.

---

1. Retired Dec. 1, 1897.
2. Took his seat Jan. 26, 1898.
3. Appointed to succeed Judge McKenna; Commission recorded Feb. 21, 1898.
4. Commission recorded Oct. 11, 1897.

126044

ALLOTMENT, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS THEY STOOD DURING THE TIME OF THESE REPORTS, TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

Allotment, Feb. 3, 1896, see Appendix IV. Book 40.
Allotment, Dec. 13, 1897, see Appendix III Book 42.
Allotment, Feb. 21, 1898, see Appendix VII. Book 42.

Names of Justices, and whence appointed.	By whom Appointed.	Circuits, 1897–1898.	Commissioned.	Sworn in.
Associate Justice HORACE GRAY, Massachusetts.	President Arthur.	First. Me., N. H., Mass., Rhode Island.	1881. (Dec. 20.)	1882. (Jan. 9.)
Associate Justice RUFUS W. PECKHAM,	President Cleveland.	Second. Vermont, Conn., New York.	1895. (Dec. 9.)	1896. (Jan. 6.)
Associate Justice GEORGE SHIRAS, Jr., Pennsylvania.	President Harrison.	Third. New Jersey, Penn., Del.	1892. (July 26.)	1892. (Oct. 10.)
Chief Justice MELVILLE W. FULLER, Illinois.	President Cleveland.	Fourth. Md., Va., N. C., W. Va., S. C.	1888. (July 20.)	1888. (Oct. 8.)
Associate Justice EDWARD D. WHITE, Louisiana.	President Cleveland.	Fifth. Ga., Ala., Fla., Miss., La., Tex.	1894. (Feb. 19.)	1894. (Mar. 12.)
Associate Justice JOHN M. HARLAN, Kentucky.	President Hayes.	Sixth. Ky., Tenn., Ohio, Mich.	1877. (Nov. 29.)	1877. (Dec. 10.)
Associate Justice HENRY B. BROWN, Michigan.	President Harrison.	Seventh. Ind., Ill., Wis.	1890. (Dec. 29.)	1891. (Jan. 6.)
Associate Justice DAVID J. BREWER, Kansas.	President Harrison.	Eighth. Minn., Iowa, Mo., Kan., Ark., Neb., Colo., N. D., S. D., Wyo.	1889. (Dec. 18.)	1890. (Jan. 6.)
Associate Justices STEPHEN J. FIELD,[1] California.	President Lincoln.	Ninth. Cal., Or., Nev., Mont., Wash., Idaho.	1863. (Mar. 10.)	1863. (May 20.)
DAVID J. BREWER,[2] Kansas	President Harrison.		1839. (Dec. 18.)	1890. (Jan. 6.)
JOSEPH McKENNA,[3] California.	President McKinley.		1898. (Jan. 21.)	1898. (Jan. 26.)

1. To his resignation Dec. 1, 1897.
2. From Dec. 13, 1897, to Feb. 21, 1898.
3. From Feb. 21, 1898.

GENERAL TABLE OF CASES REPORTED IN THIS BOOK.

VOLUMES 167, 168, 169, 170.

A.

Abbott v. Ross (167 U. S. 548) - - 270
Adams v. Henderson (168 U. S. 573) - 584
Shepard v. - - - - - 602
v. Texas (mem.) - - - - - 1208
Adams Exp. Co. v. Ohio (mem.) - 1209
Akin, Illinois *ex rel.*, Kipley v. - - 998
Alabama M. R. Co., Interstate Commerce Commission v. - - - - 414
Alaska Treadwell Gold Min. Co. v. Whelan (168 U. S. 86) - 390
Alene, The, Hall v. (mem.) - - - 1212
Alford, McHenry v. - - - - - 614
Allender v. Hale (mem.) - - - - 1212
American Bell Teleph. Co., United States v. - - - - - 144
American Exp. Co. v. Ohio (mem.) - 1209
American Grocery Co. v. Godilot (mem.) 1210
American Loan & T. Co. v. Clark (mem.) 1218
American Surety Co., Continental Trust Co. v. (mem.) - - - - 1211
v. Pauly (No. 1) (170 U. S. 133) - 977
v. Pauly (No. 2) (170 U. S. 160) 987
Ames, Smyth v. - - - - - - 819
Amoni v. United States (mem.) - 1209
Andersen v. United States (170 U. S. 481) 1116
Archibald, Texas & P. R. Co. v. - 1188
Arlington Hotel Co., Muse v. - - 531
Armes, Ross v. - - - - - - - 270
Armstrong, Ogden v. - - - - - 444
Ashley, Presque Isle County Supers. v. (mem.) - - - - - 1216
Atchison, T. & S. F. R. Co., Hedrick v. 320
Atlantic Trust Co., Darlington v. (mem.) 1214
Atlas S. S. Co., Calderon v. - - 1033
Aultman & T. Co. v. Syme (mem.) - 1210
Aultman, M. & Co., Holder v. - - 669
Aultman-Miller Co., McCormick Harvesting Mach. Co. v. - 875
Austin, Baker v. - - - - - 751
Penn Mut. L. Ins. Co. v. - - 626

B.

Baca v. United States (Nos. 1 and 2) (mem.) - - - - - 1207
Backus v. Fort Street Union Depot Co. (169 U. S. 557) - - - 858
Bacon v. The Poconoket (mem.) - 1214
Baker v. Austin (169 U. S. 294) - - 751
v. Cummings (169 U. S. 189) - 711
v. Finley (169 U. S. 294) - - 751
v. Grice (169 U. S. 284) - - 748
v. Hawkins (169 U. S. 294) - - 751
v. Walker Baker & Co. (mem.) 1214
Baldwin v. Washington County (mem.) 1212
Baltimore & O. R. Co., Hetzel v. - 648
Stewart v. - - - - - - 537
Warner v. - - - - - - 491
Baltimore & P. R. Co., Fletcher v. - 411
Bank, California Nat., v. Kennedy (167 U. S. 362) - - - - 198
Central Nat., v. Stevens (169 U. S. 432) - - - - - - 807
Citizens', Louisiana *ex rel.*, v. Orleans Assessors (167 U. S. 407) - - - - - 215
Citizens', New Orleans v. - - 202
Essex Sav., Beal v. (mem.) - 1210
First Nat., Brown v. (mem.) - 1209
Lumberman's Nat., v. Huston (167 U. S. 203) - - - - 186
Marion Nat., Brown v. - - 801
Merchants' & M. Nat., v. Pennsylvania (167 U. S. 461) - 336
Twin City Nat., v. Nebeker (167 U. S. 196) - - - - 184
Wichita Nat., Smith v. (mem.) - 1214
Banning, De Guyer v. - - - 340
Barber Asphalt Pav. Co., Denver v. (mem.) - - - - 1218
Barbour v. Moore (mem.) - - - 1211
Barker, Smiley v. (mem.) - - - 1216
Barrett v. United States (No. 1) (169 U. S. 218) - - - - - 723
v. United States (No. 2) (169 U. S. 231) - - - - - 727
Barrow v. Milliken (mem.) - - 1210
Barrow S. S. Co. v. Kane (170 U. S. 100) 964
Bauman v. Ross (167 U. S. 548) - - 270
Beal v. Essex Sav. Bank (mem.) - 1210
Beardsley v. Broom (mem.) - - 1213
Behlmer, Louisville & N. R. Co. v. - 889
Beley v. Naphtaly (169 U. S. 353) - 775
Belt, Magruder v. (mem.) - - - 1216
Benjamin v. New Orleans (169 U. S. 161) - - - - - 700
Bent v. Miranda (168 U. S. 471) - - 547
Bergere v. United States (168 U. S. 66) 383
Bernardin, United States, *ex rel.*, v. Butterworth (169 U. S. 600) - 873
Birtwell, Peck v. (mem.) - - - 1213
Black v. Black (mem.) - - - 1208
Blackman, Dull v. - - - - - 733
Blythe v. Hinckley (mem.) - - - 1210
Boardman, *Re*, (169 U. S. 39) - - 653
Bondholders & P. of Iron R. R. v. Toledo, D. & B. R. Co. (mem.) 1210
Bonnifield, Thorp v. (mem.) - - 1211
Boston & A. R. Co., Lyman v. (mem.) 1217
Boston Safe Deposit & T. Co. v. Wilkins (mem.) - - - - - 1209

Bowdoin College, Merritt *v.* - - 850
Merritt *v.* (mem.) - - - 1209
Bowles, Houston & T. C. R. Co. *v.* (mem.) - - - - 1213
Boyden Power Brake Co. *v.* Westinghouse (170 U. S. 537) - 1136
Bram *v.* United States (168 U. S. 532) - 568
Brauer, Compania de Navigacion La Flecha *v.* - - - - - 398
Broom, Beardsley *v.* (mem.) - - - 1213
Brown *v.* First Nat. Bank (mem.) - 1209
v. Marion Nat. Bank (169 U. S. 416) - - - - - - 801
Bruce, National Safe Dep. S. & T. Co. *v.* (mem.) - - - - - 1217
Bryant, *Ex parte*, (167 U. S. 104) - - 94
v. United States (167 U. S. 104) - 94
Buckstaff *v.* Russell (mem.) - - 1216
Budzisz *v.* Illinois Steel Co. (170 U. S. 41) 941
Buford, Virginia, *ex rel.*, Southern Exp. Co. *v.* (mem.) - - - 1212
Building & L. Asso. *v.* Price (169 U. S. 45) - - - - - - - 655
Bull *v.* Dickerman (mem.) - - - 1207
Burdon Central Sugar Ref. Co. *v.* Payne (167 U. S. 127) - - - 105
Burke *v.* Pierce (mem.) - - - 1214
Burney, Roff *v.* - - - - - - - 442
Burnham, Post *v.* (mem.) - - - 1215
Butterworth, United States, Bernardin, *v.* 873

C.

Calderon *v.* Atlas S. S. Co. (170 U.S. 272) 1033
Caldwell, North Carolina, Wilson, *v.* - 865
California, Crossley *v.* - - - - 610
California Nat. Bank *v.* Kennedy (167 U. S. 362) - - - - - - 198
Cameron, Oklahoma, *ex rel.*, Parker *v.* (mem.) - - - - - - 1208
Camfield *v.* United States (167 U. S. 518) 260
Campbell, Chicago, M. & St. P. R. Co. *v.* (mem.) - - - - - - - 1207
v. Ellet (167 U. S. 116) - - 101
Carib Prince, The, (170 U. S. 655) - - 1181
Wuppermann *v.* - - - - 1181
Carley *v.* Gitchell (mem.) - - - 1207
Carroll *v.* Goldschmidt (mem.) - - 1215
Castillo *v.* McConnico (168 U. S. 674) - 622
C. Aultman Co., McCormick Harvesting Mach. Co. *v.* - - - - - 875
Central Nat. Bank *v.* Stevens (169 U. S. 432) - - - - - - - 807
Central R. & B. Co., Virginia & A. Coal Co. *v.* - - - - - - 1068
Cessna *v.* United States (169 U. S. 165) 702
Chandos, Warren *v.* (mem.) - - - 1216
Chappell *v.* Stewart (mem.) - - 1215
Charles, United States *v.* (mem.) - - 1217
Charles Pope Glucose Co. *v.* Chicago Sugar Ref. Co. (mem.) - 1218
Charleston & S. S. Bridge Co. *v.* West Virginia (mem.) - - - 1212
Chaves *v.* United States (168 U. S. 177) 426
Chesapeake & O. R. Co., Powers *v.* - 673
Chicago & N. W. R. Co. *v.* Cicero (mem.) 1207
v. Elmhurst (mem.) - - 1212
Parsons *v.* - - - - - - - 231
Chicago, B. & Q. R. Co. *v.* Nebraska, Omaha (170 U. S. 57) - - 948
Chicago, M. & St. P. R. Co. *v.* Campbell (mem.) - - - - - - 1207
v. Solan (169 U. S. 133) - - 688
Chicago Sugar Ref. Co., Charles Pope Glucose Co. *v.* (mem.) - - 1218
Cicero, Chicago & N. W. R. Co. *v.* (mem.) 1207
Cincinnati, N. O. & T. P. R. Co., Interstate Commerce Commission *v.* 243
Citizens' Bank, Louisiana, *ex rel.*, *v.* Orleans Assessors (167 U. S. 407) 215
New Orleans *v.* - - - 202
Clark, American Loan & T. Co. *v.* (mem.) 1218
v. Harmer (mem.) - - - 1208
Coe, United States *v.* - - - - 1195
Coffin, Stewart *v.* (mem.) - - - 1213
Cohn, Latta *v.* - - - - - - 87
Collier *v.* Hopkins (mem.) - - - 1209
Collins, Walker *v.* - - - - - 76
Colman, United States *v.* (mem.) - - 1215
Columbian Equipment Co., Highland Ave. & B. R. Co. *v.* - - 605
Companhia de Moagens Do Barreiro, London Assurance *v.* - 113
Compania de Navigacion La Flecha *v.* Brauer (168 U. S. 104) - - 398
Compton *v.* Jesup (167 U. S. 1) - 55
Conde *v.* York (168 U. S. 642) - - 611
Continental Trust Co. *v.* American Surety Co. (mem.) - - - - 1121
Cooper, Tompkins *v.* (mem.) - - 1217
Cornwall R. Co., Miller *v.* - - - 409
Cox, Meyer *v.* (mem.) - - - 1217
Montague *v.* (mem.) - - - 1213
Craemer *v.* Washington (168 U. S. 124) 407
Crespin *v.* United States (168 U. S. 208) - 438
Cross *v.* Evans (167 U. S. 60) - - 77
Crossley *v.* California (168 U. S. 640) - 610
v. Taylor (mem.) - - - 1212
Crosthwaite, United States *v.* - - - 507
Crowley, Tuttle *v.* (mem.) - - - 1209
Cummings, Baker *v.* - - - - 711

D.

Dakota Bldg. & L. Asso. *v.* Price (169 U. S. 45) - - - - - - 655
Darlington *v.* Atlantic Trust Co. (mem.) 1214
Darragh *v.* H. Wetter Mfg. Co. (mem.) 1216
Davis, Leyson *v.* - - - - - - 939
v. Massachusetts (167 U. S. 43) - 71
Dawson *v.* Rushin (mem.) - - - 1218
Defer *v.* De May (mem.) - - 1211
Defiance, Wabash R. Co. *v.* - - - 87
DeGuyer *v.* Banning (167 U. S. 723) - 340
Delaney *v.* San Francisco (mem.) - - 1217
De May, Defer *v.* (mem.) - - - 1211
Dennison *v.* United States (168 U. S. 241) 453
Denver *v.* Barber Asphalt Pav. Co. (mem.) 1218
Detroit, G. H. & M. R. Co., Interstate Commerce Commission *v.* - 306
DeWitt, Warnock *v.* (mem.) - - 1207
Dickerman, Bull *v.* (mem.) - - - 1207
Dietz, Texas & P. R. Co. *v.* (mem.) - 1208
Dillon, Menotti *v.* - - - - - 333
District of Columbia, Parsons *v.* - 943
Dobson, United States *v.* (mem.) - - 1216
Dodge *v.* Menasha Wood Split Pulley Co. (mem.) - - - - - - 1217
v. Strasburger (mem.) - - 1216
Doran, Walker *v.* (mem.) - - - 1210
Douglas, Holtzman *v.* - - - - 466
v. Kentucky (168 U. S 488) - - 553
Drake *v.* Kochersperger (170 U. S. 303) 1046
Dull *v.* Blackman (169 U. S. 243) - - 733
Dunham, Holloway *v.* - - - - 1165

Durrant, *Re*. See Boardman, *Re*.
v. Hale (mem.) - - - - 1213

E.

Eastern Trust & B. Co., Willis v. - - 83
Willis v. - - - - - - 752
Easton, Stewart v. - - - - - - 1078
United States v. - - - - 767
Ebanks v. Hale (mem.) - - - - 1214
Eggleston, Williams v. - - - 1047
Elder v. United States (mem.) - - 1216
Ellet, Campbell v. - - - - - 101
Elliott, Hovey v. - - - - - - 215
Texas & P. R. Co. v. (mem.) - 1208
Elmhurst, Chicago & N. W. R. Co. v. (mem.) - - - - - - 1212
Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co. (167 U. S. 108) 96
Essex Sav. Bank, Beal v. (mem.) - - 1210
Evans, Cross v. - - - - - - 77
v. Wagoner (170 U. S. 588) - - 1154
Evey, Mexican C. R. Co. v. (mem.) - 1210
Ex parte Bryant (167 U. S. 104) - - 94
Johnson (167 U. S. 120) - - 103

F.

Farmers' Loan & T. Co., Mercantile Trust Co. v. (mem.) - - 1213
Venner v. (mem.) - - - 1218
Farwell v. United States (mem.) - - 1216
Fenwick Hall Co. v. Old Saybrook (mem.) 1215
Fink v. United States (170 U. S. 584) - 1153
Finley, Baker v. - - - - - 751
First Nat. Bank, Brown v. (mem.) - 1209
Fitzhugh v. Hazzard (mem.) - - 1218
Fletcher v. Baltimore & P. R. Co. (168 U. S. 135) - - - - - 411
Fulton v. (mem.) - - - 1215
Florida Fruit Exch., Savannah, F. & W. R. Co. v. - - - - - 257
Folsom, Schofield v. (mem.) - - 1213
Ford, Springer Land Asso. v. - - 562
Foreman, United States v. (mem.) - 1210
Fort Street Union Depot Co., Backus v. 853
Fuller, Missouri, K. & T. R. Co. v. (mem.) - - - - - 1215
Fulton v. Fletcher (mem.) - - - 1215

G.

Galveston, H. & S. A. R. Co. v. Texas (170 U. S. 226) - - - 1017
Galvin v. Palmer (mem.) - - - 1208
Garlinger, United States v. - - - 762
Garnett, Latta v. - - - - - - 87
Garter, United States v. - - - 1133
Gay, Texas & P. R. Co. v. (mem.) - 1209
v. Thomas (169 U. S. 264) - 740
Georgia, Nobles v. - - - - - 515
Gitchell, Carley v. (mem.) - - 1207
Glide, The, (167 U. S. 606) - - 296
Godilot, American Grocery Co. v. (mem.) 1210
Goldenberg, United States v. - - 394
Goldschmidt, Carroll v. (mem.) - - 1215
Grafton v. Paine (mem.) - - - 1212
Grand De Tour Plow Co., McBride v. (mem.) - - - - - - 1208
Granger, Latta v. - - - - - - 85
Grice, Baker v. - - - - - - 748
Gruetter v. Stuart (169 U. S. 1) 639, 1204

H.

Haber, Missouri, K. & T. R. Co. v. - 878
Hale, Allender v. (mem.) - - - 1212
Durrant v. (mem.) - - - 1213
Ebanks v. (mem.) - - - 1214
Hill v. (mem.) - - - - 1208
Hall, *Re*, (167 U. S. 38) - - 69
v. The Alene (mem.) - - - 1212
v. United States (168 U. S. 632) 607
Hammond v. Horton (mem.) - - 1215
Hannaman, Karrick v. - - - - 484
Harding v. Minneapolis N. R. Co. (mem.) 1217
Hardy, Holden v. - - - - - 780
Harmer, Clark v. (mem.) - - - 1208
Harrison v. Perea (168 U. S. 311) - 478
Harry, Rouse v. (mem.) - - - 1208
Havnor v. New York (170 U. S. 408) 1087
Hawker v. New York (170 U. S. 189) 1002
Hawkins, Baker v. - - - - - 751
v. Watson (mem.) - - - 1209
Hayden, Stuart v. - - - 639, 1204
Hayes v. United States (170 U. S. 637) 1174
Hazzard, Fitzhugh v. (mem.) - - 1218
Hedrick v. Atchison, T. & S. F. R. Co. (167 U. S. 673) - - - 320
Henderson, Adams v. - - - - - 584
Plaquemines Tropical Fruit Co. v. 1126
Henry v. Pittsburg Clay Mfg. Co. (mem.) 1217
Hernandez, Underhill v. - - - - 456
Herron, United States v. - - - 1132
Hetzel v. Baltimore & O. R. Co. (169 U. S. 26) - - - - - - 648
Heurich, Peck v. - - - - - 802
Higginson, Smyth v. - - - - - 819
Highland Ave. & B. R. Co. v. Columbian Equipment Co. (168 U. S. 627) 605
Hill v. Hale (mem.) - - - - 1208
Hinckley, Blythe v. (mem.) - - 1210
Hodgson v. Vermont (168 U. S. 262) - 461
Holden v. Hardy (169 U. S. 366) - - 780
Holder v. Aultman, M. & Co. (169 U. S. 81) - - - - 669
Holladay, Texas & P. R. Co. v. (mem.) 1217
Holloway v. Dunham (170 U. S. 615) 1165
Holtzman v. Douglas (168 U. S. 278) - 466
Hooper, Jacksonville, M. P. R. & Nav. Co. v. (mem.) - - - 1217
Hopkins, Collier v. (mem.) - - - 1209
Horton, Hammond v. (mem.) - - 1215
Houston & T. C. R. Co. v. Bowles (mem.) 1213
v. Morgan (mem.) - - - 1214
v. Smith (mem.) - - - 1214
v. Strycharski (mem.) - - 1213
v. Texas (170 U. S. 243) - 1028
Hovey v. Elliott (167 U. S. 409) - - 215
Humes v. United States (170 U. S. 210) 1011
Huston, Lumberman's Nat. Bank v. - 136
H. Wetter Mfg. Co., Darragh v. (mem.) 1216
Hyer v. Richmond Traction Co. (168 U. S. 471) - - - - - 547

I.

Illinois, Akin, Kipley v. - - - 996
Illinois Steel Co., Budzisz v. - - 941
Illinois Trust & S. Bank, Magoun v. 1037
Indiana v. Kentucky (167 U. S. 270) - 164

Insurance Co., Mutual L., Ritter *v.* - 693
Penn Mut. L., *v.* Austin (168 U. S. 685) - - - - - - 626
Union Mut. L., *v.* Kirchoff (169 U. S. 103) - - - - - 677
Interstate Commerce Commission *v.* Alabama M. R. Co. (168 U. S. 144) 414
v. Cincinnati, N. O. & T. P. R. Co. (167 U. S. 479) - . 243
v. Detroit, G. H. & M. R. Co. (167 U. S. 633) - - - - - 306
Iowa, Rhodes *v.* - - - - - - 1088
Iron Railroad *v.* Toledo, D. & B. R. Co. (mem.) - - - - - 1210
Irvine, United States *v.* (mem.) - - 1215

J.

Jacksonville, M. P. R. & Nav. Co. *v.* Hooper (mem.) - - 1217
Jesup, Compton *v.* - - - - - - 55
J. H. Mohlman Co., Western Assur. Co. *v.* (mem.) - - - - - 1213
J. J. Warren Co. *v.* Rosenblatt (mem.) 1211
Johanson, Johnston *v.* (mem.) - - 1218
John G. Stevens, The, (170 U. S. 113) 969
Johnson, *Ex parte*, (167 U. S. 120) - 103
Johnston *v.* Johanson (mem.) - - 1218
Jolly *v.* United States (170 U. S. 402) 1085
Jones, McQueen *v.* (mem.) - - 1214
Jordan, McDonnell *v.* (mem.) - - 1215
J. P. Donaldson, The, (167 U. S. 599) 292
Juneman, Texas & P. R. Co. *v.* (mem.) 1208

K.

Kane, Barrow S. S. Co. *v.* - - 964
Karrick *v.* Hannaman (168 U. S. 328) - 484
Kellogg, Shaw *v.* - - - - - 1050
Kemp, United States *v.* (mem) - - 1215
Kengla, Levis *v.* - - - - - - 728
Kennedy, California Nat. Bank *v.* - - 198
United States *v.* (mem.) - - 1210
Kentucky, Douglas *v.* - - - - - 553
Indiana *v.* - - - - - - 164
Louisville Water Co. *v.* - - 975
Kettenring *v.* United States (mem.) - 1211
Kingman & Co. *v.* Western Mfg. Co. (170 U. S. 675) - - - 1192
Kiowa County *v.* Rathbone (mem) - 1218
Kipley *v.* Illinois, Akin (170 U. S. 182) 998
Kirchoff, Union Mut. L. Ins. Co. *v.* - 677
Kirwan *v.* Murphy (170 U. S. 205) - 1009
Klumpp, United States *v.* - - - 720
Kochersperger, Drake *v.* - - - - 1046
Sawyer *v.* - - - - - - 1046

L.

Laclede Gaslight Co., Missouri, *ex rel.*, *v.* Murphy (170 U. S. 78) - 955
Lambert, Wilson *v.* - - - - - 599
Latta *v.* Cohn (167 U. S. 87) - - - 87
v. Garnett (167 U. S. 87) - - 87
v. Granger (167 U. S. 81) - - 85
v. Neubert (167 U. S. 87) - - 87
v. Rugg (167 U. S. 87) - - 87
v. Sumpter (167 U. S. 87) - - 87
Lawrence, Stearns *v.* (mem.) - - 1217
LeClaire *v.* Old Peasup (mem.) - - 1209
Ledbetter *v.* United States (170 U. S. 606) 1162
Leonard *v.* Sims (mem.) - - - 1213
Levis *v.* Kengla (169 U. S. 234) - - 728
Levy *v.* San Francisco Super. Ct. (167 U. S. 175) - - - - - - 126
Leyson *v.* Davis (170 U. S. 36) - - 939
Lies, United States *v.* - - - - 1170
Logan County Sinking Fund Comrs. *v.* United States (169 U. S. 255) - 737
London Assurance *v.* Companhia de Moagens Do Barreiro (167 U. S. 149) - - - - - - 113
Louisiana, *ex rel.* Citizens' Bank, *v.* Orleans Assessors (167 U. S. 407) 215
Louisville & N. R. Co. *v.* Behlmer (169 U. S. 644) - - - - - 889
Richardson *v.* - - - - - 687
Louisville, N. A. & C. R. Co., Pope *v.* (mem.) - - - - - 1216
Louisville Sinking Fund Comrs., United States *v.* - - - - - - 735
Louisville Water Co. *v.* Kentucky (170 U. S. 127) - - - - - - 975
Lumbermans' Nat. Bank *v.* Huston (167 U. S. 203) - - - - - 136
Lyman *v.* Boston & A. R. Co. (mem.) 1217

M.

McBride *v.* Grand De Tour Plow Co. (mem.) - - - - - - 1208
McColgan, Virginia, *ex rel.*, Southern Exp. Co. *v.* (mem.) - 1212
McConnico, Castillo *v.* - - - - 622
McCormick Harvesting Mach. Co. *v.* Aultman Miller Co. (169 U. S. 606) - - - - - 875
v. C. Aultman Co. (169 U. S. 606) 875
McDonnell *v.* Jordan (mem.) - - - 1215
McGavock, Virginia, *ex rel.*, Southern Exp. Co. *v.* (mem.) - - 1212
McGlashan, United States *v.* (mem.) - 1218
MacGreal *v.* Taylor (167 U. S. 688) - 326
McHenry *v.* Alford (168 U. S. 651) - 614
Mackall *v.* Willoughby (167 U. S. 681) 323
McLeod, Mason *v.* (mem.) - - - 1209
McMullen, Ritchie *v.* (mem.) - - 1212
McQueen *v.* Jones (mem.) - - - 1214
Magoun *v.* Illinois Trust & S. Bank (170 U. S. 283) - - - - - 1037
Magruder *v.* Belt (mem.) - - - 1216
Marion Nat. Bank, Brown *v.* - - 801
Mason *v.* McLeod (mem.) - - - 1209
Massachusetts, Davis *v.* - - - 73
Maxwell Land Grant & R. Co., Thompson *v.* - - - - - - 539
May *v.* May (167 U. S. 310) - - - 179
Meech, Smithsonian Institution *v.* - 793
Menasha Wood Split Pulley Co., Dodge *v.* (mem.) - - - - - 1217
Menotti *v.* Dillon (167 U. S. 703) - - 333
Mercantile Trust Co. *v.* Farmers' Loan & T. Co. (mem.) - - - 1213
Mercer County, Provident Life & T. Co. *v.* - - - - - - - 1156
Merchants' & M. Nat. Bank *v.* Pennsylvania (167 U. S. 461) - - 286
Merritt *v.* Bowdoin College (169 U. S. 551) 850
v. Bowdoin College (mem.) - 1209
Mexican C. R. Co. *v.* Evey (mem.) - - 1210
Meyer *v.* Cox (mem.) - - - - 1217
Michigan Land & L. Co. *v.* Rust (168 U. S. 589) - - - - - - 591

Milchrist, United States *v.* (mem.) - 1210
Miller *v.* Cornwall R. Co. (168 U. S. 131) 409
O'Brien *v.* - - - - - - 469
Milliken, Barrow *v.* (mem.) - - - 1210
Minneapolis Mill Co. *v.* St. Paul Water Comrs. (168 U. S. 349) - 497
Minneapolis N. R. Co., Harding *v.* (mem.) 1217
Minnesota Ry. Transfer Co., Wetzel *v.* 730
Miranda, Bent *v.* - - - - - 547
Mississippi, Williams *v.* - - - - 1012
Missouri, *ex rel* Laclede Gaslight Co., *v.* Murphy (170 U. S. 78) - 955
Missouri, K. & T. R. Co. *v.* Fuller (mem.) 1215
v. Haber (169 U. S. 613) - - 878
Mobile & O. R. Co., United States *v.* (mem.) - - - - - - 1217
Montague *v.* Cox (mem.) - - - 1213
Montoya *v.* United States (mem.) - - 1213
Moore, Barbour *v.* (mem.) - - - 1211
Morgan, Houston & T. C. R. Co. *v.* (mem.) 1214
Morton *v.* United States (167 U. S. 278) 168
Moyer, Nordstrom *v.* (mem.) - - - 1218
Multnomah County, Savings & L. Soc. *v.* 803
Murphy, Kirwan *v.* - - - - - 1009
Murphy, Missouri, Laclede Gaslight Co., *v.* - - - - - - - 955
Muse *v.* Arlington Hotel Co. (168 U. S. 430) - - - - - - 531
Musser Sauntry Land, L. & M. Co., Northern P. R. Co. *v.* - - - 596
Mutual L. Ins. Co., Ritter *v.* - - 693

N.

Naphtaly, Beley *v.* - - - - - - 775
Smith *v.* - - - - - - - 779
National Acci. Soc. *v.* Spiro (mem.) - 1211
National Safe Dep. S. & T. Co. *v.* Bruce (mem.) - - - - - 1217
Nebeker, Twin City Nat. Bank *v.* - 134
Nebraska, Omaha, Chicago, B. & Q. R. Co. *v.* - - - - - - 948
Neeley *v.* Newman (mem.) - - - 1211
Neubert, Latta *v.* - - - - - - 87
Newman, Neely *v.* (mem.) - - - 1211
New Orleans, Benjamin *v.* - - - 700
v. Citizens' Bank (167 U. S. 371) - 202
Warner *v.* - - - - - - 209
New York, Hanover *v.* - - - - 1087
Hawker *v.* - - - - - - 1002
Turner *v.* - - - - - - - 392
New York Indians *v.* United States (170 U. S. 1) - - - - - - 927
v. United States (170 U. S. 614) - 1105
Nobles *v.* Georgia (168 U. S. 398) - 515
Nordstrom *v.* Moyer (mem.) - - - 1218
North Carolina, Wilson *v.* - - - 873
North Carolina, Caldwell, Wilson *v.* - 865
Northern P. R. Co. *v.* Musser Sauntry Land, L. & M. Co. (168 U. S. 604) - - - - - - 596
v. Poirier (167 U. S. 48) - 72
Noyes *v.* Silver Queen Min. Co. (mem.) 1214

O.

O'Brien *v.* Miller (168 U. S. 287) - 469
Ogden *v.* Armstrong (168 U. S. 224) - 444
Ohio, Adams Exp. Co. *v.* (mem.) - 1209
v. American Exp. Co. *v.* (mem.) - 1209
United States Exp. Co. *v.* (mem.) 1209
Oklahoma, Cameron, Parker *v.* (mem.) 1208
Old Peasup, Le Claire *v.* (mem.) 1209
Old Saybrook, Fenwick Hall Co. *v.* (mem.) - - - - - - 1215
Oliver, Reaves *v.* (mem.) - - - 1212
Omaha, Nebraska, *ex rel.*, Chicago, B. & Q. R. Co. *v.* - - - - - 948
Orleans Assessors, Louisiana, Citizens' Bank, *v.* - - - - - 215

P.

Paine, Grafton *v.* (mem.) - - - 1212
Williams *v.* - - - - - 658
Palmer, Galvin *v.* (mem.) - - - 1208
Paris Gaslight & C. Co., Pratt *v.* - 458
Parker *v.* Oklahoma, Cameron (mem.) - 1208
Parsons *v.* Chicago & N. W. R. Co. (167 U. S. 447) - - - - 231
v. District of Columbia (170 U. S. 45) - - - - - - - 943
v. Pratt (mem.) - - - 1214
v. United States (167 U. S. 324) - 185
Passavant, United States *v.* - - - 644
Patrick, United States *v.* (mem.) - - 1216
Pauly, American Surety Co. *v.* - - 977
American Surety Co. *v.* - - 987
Payne, Burdon Central Sugar Ref. Co. *v.* 105
v. Robertson (169 U. S. 323) - 764
Peck *v.* Birtwell (mem.) - - - - 1213
v. Heurich (167 U. S. 624) - - 302
Peddie, Roemer *v.* (mem.) - - - 1211
Pendleton, Virginia, *ex rel.*, Southern Exp. Co. *v.* (mem.) - - 1212
Penn Mut. L. Ins. Co. *v.* Austin (168 U. S. 685) - - - - - 626
Pennsylvania, Merchants' & M. Nat. Bank *v.* - - - - - 236
Peraltareavis *v.* United States (mem.) - 1207
Perea *v.* Harrison - - - - 478
Philler, Yardley *v.* - - - - - 192
Pickham *v.* Wheeler-Bliss Mfg. Co. (mem.) - - - - - 1211
Pierce, Burke *v.* (mem.) - - - - 1214
Pinkerton *v.* United States (mem.) - 1207
Pittsburg Clay Mfg. Co., Henry *v.* (mem.) 1217
Plaquemines Tropical Fruit Co. *v.* Henderson (170 U. S. 511) - 1126
Platt *v.* Threadgill (mem.) - - - 1208
Plymothian, The, (168 U. S. 410) - 519
Poconoket, The, Bacon *v.* (mem.) - - 1214
Poirier, Northern P. R. Co. *v.* - - 72
Pope *v* Louisville, N. A. & C. R. Co. *v.* 1216
Post *v.* Burnham (mem.) - - - 1215
Potsdamer *v.* United States (mem.) - 1209
Powers *v.* Chesapeake & O. R. Co. (169 U. S. 92) - - - - - 673
Pratt *v.* Paris Gaslight & C. Co. (168 U. S. 255) - - - - - 458
Parsons *v.* (mem.) - - - 1214
Presque Isle County Supers. *v.* Ashley (mem.) - - - - - 1216
Price, Building & L. Asso. *v.* - - 655
Provident Life & T. Co. *v.* Mercer County (170 U. S. 592) - - 1156
Purdy *v.* United States (mem.) - - 1207

R.

Railroad Co., Atchison, T. & S. F., Hedrick *v.* - - - - - - 320

Railroad Co., Baltimore & O., Hetzel *v.* 648
Baltimore & O., Stewart *v.* - - 537
Baltimore & O., Warner *v.* - 491
Baltimore & P., Fletcher *v.* - - 411
Chicago, B. & Q., *v.* Nebraska, Omaha (170 U. S. 57) - 948
Cornwall, Miller *v.* - - - - 409
Highland Ave. & B., *v.* Columbian Equipment Co. (168 U. S. 627) 605
Houston & T. C., *v.* Bowles (mem.) 1213
Houston & T. C., *v.* Morgan (mem.) - - - - - - - 1214
Houston & T. C., *v.* Smith (mem.) 1214
Houston & T. C., *v.* Strycharski (mem.) - - - - - 1213
Iron, *v.* Toledo, D. & B. R. Co. (mem.) - - - - - - - 1210
Louisville & N., *v.* Behlmer (169 U. S. 644) - - - - - 889
Louisville & N., Richardson *v.* - 687
Louisville, N. A. & C., Pope *v.* (mem.) - - - - - - - 1216
Mexican C., *v.* Evey (mem.) - 1210
Mobile & O., United States *v.* (mem.) - - - - - - - 1217
Northern P., *v.* Musser Sauntry Land, L. & M. Co. (168 U. S. 604 - - - - - - - 596
Northern P., *v.* Poirier (167 U. S. 48) - - - - - - - - 72
Richmond & A., *v.* R. A. Patterson Tobacco Co. (169 U. S. 311) - 759
St. Joseph & G. I., *v.* Steele (167 U. S. 659) - - - - - 315
St. Paul & N. P., *v.* St. Paul, M. & M. R. Co. (mem.) - - 1212
Salt Lake City, *v.* Smith (mem.) 1208
Southern P., *v.* United States (168 U. S. 1) - - - - - - 355
Tampa Suburban, *Re*, 168 U. S. 583) - - - - - - - 589
Toledo, D. & B., Bondholders & P. of Iron R. R. *v.* (mem.) - 1210
Wabash, *v.* Defiance (167 U. S. 88) 87
Railroad & Bkg. Co., Central, Virginia & A. Coal Co. *v.* - - 1068
Railway Co., Alabama M., Interstate Commerce Commission *v.* . 414
Boston & A., Lyman *v.* (mem.) 1217
Chesapeake & O., Powers *v.* - 673
Chicago & N. W., *v.* Cicero (mem.) 1207
Chicago & N. W., *v.* Elmhurst (mem.) - - - - - - - 1212
Chicago & N. W., Parsons *v.* - 231
Chicago, M. & St. P., *v.* Campbell (mem.) - - - - - - - 1207
Chicago, M. & St. P., *v.* Solan (169 U. S. 133) - - - - - 688
Cincinnati, N. O. & T. P., Interstate Commerce Commission *v.* 243
Detroit, G. H. & M., Interstate Commerce Commission *v.* - 306
Galveston, H. & S. A., *v.* Texas (170 U. S. 226) - - - - 1017
Houston & T. C., *v.* Texas (170 U. S. 243) - - - - - - 1023
Minneapolis N., Harding *v.* (mem.) 1217
Missouri, K. & T., *v.* Fuller (mem.) 1215
Missouri, K. & T., *v.* Haber (169 U. S. 613) - - - - - 878
St. Paul, M. & M., *v.* Sage (mem.) 1218
St. Paul, M. & M., St. Paul & N. P. R. Co. *v.* (mem.) - - 1212
Railway Co., Savannah, F. & W., *v.* Florida Fruit Exch. (167 U. S. 512) 257
Spokane Falls & N., *v.* Ziegler (167 U. S. 65) - - - - 79
Texas & P., *v.* Archibald (170 U. S. 665) - - - - - 1188
Texas & P., *v.* Dietz (mem.) - 1208
Texas & P., *v.* Elliott (mem.) - 1208
Texas & P., *v.* Gay (mem) - 1209
Texas & P., *v.* Holladay (mem.) 1217
Texas & P., *v.* Juneman (mem.) 1208
Texas & P., *v.* Reeder (170 U. S. 530) - - - - - - 1134
Texas & P., *v.* Spradling (mem.) 1208
Texas & P., *v.* Thompson (mem.) 1208
Union P., United States *v.* - 559
Union Street, *v.* Snow (mem.) - 1214
Railway & Nav Co., Jacksonville, M. P., *v.* Hooper (mem.) - 1217
R. A. Patterson Tobacco Co., Richmond & A. R. Co. *v.* - - - 759
Rathbone, Kiowa County *v.* (mem.) - 1218
Reaves *v.* Oliver (mem.) - - - 1212
Re Boardman (169 U. S. 39) - - 653
Durrant. See *Re* Boardman -
Hall (167 U. S. 38) - - - - 69
Tampa Suburban R. Co. (168 U. S. 583) - - - - - - - 589
Reed, United States *v.* - - - - - 317
Reeder, Texas & P. R. Co. *v.* - - 1134
Rennie, Watkins *v.* (mem.) - - - 1207
Resolute, The, (168 U. S. 437) - - 533
Rhodes *v.* Iowa (170 U. S. 412) - - 1088
Richardson *v.* Louisville & N. R. Co. (169 U. S. 128) - - - - 687
Richmond & A. R. Co. *v.* R. A. Patterson Tobacco Co. (169 U. S. 311) - - - - - - - 759
Richmond Traction Co., Hyer *v.* - 547
Rico-Aspen Consol. Min. Co., Enterprise Min. Co. *v.* - - - - - 96
Rio Arriba Land & C. Co. *v.* United States (168 U. S. 298) - 175
Ritchie *v.* McMullen (mem.) - - 1212
Ritter *v.* Mut. L. Ins. Co. (169 U. S. 139) 693
Robertson, Payne *v.* - - - - - 764
Rocker Spring Co. *v.* Thomas (mem.) 1211
Roemer *v.* Peddie (mem.) - - - 1211
Roff *v.* Burney (168 U. S. 218) - - 441
Rogers Twp., Rondot *v.* (mem.) - 1213
Rondot *v.* Rogers Twp. (mem.) - - 1211
Rosenblatt, J. J. Warren Co. *v.* (mem.) 1211
Ross, Abbott *v.* - - - - - - - 270
v. Armes (167 U. S. 548) - - 270
v. Bauman (167 U. S. 548) - 270
Rouse *v.* Harry (mem.) - - - - 1208
Rowell *v.* Woodward (mem.) - - 1216
Rugg, Latta *v.* - - - - - - - 87
Rushin, Dawson *v.* (mem.) - - 1218
Russell, Buckstaff *v.* (mem.) - - 1216
Rust, Michigan Land & L. Co. *v.* - 591
Rymer, Wetmore *v.* - - - - - 682

S.

Sage, St. Paul, M. & M. R. Co. *v.* (mem.) 1218
Swenson *v.* (mem.) - - - - 1215
St. Anthony Falls Water Power Co. *v.* St. Paul Water Comrs. (168 U. S. 349) - - - - 497
St. Joseph & G. I. R. Co. *v.* Steele (167 U. S. 659) - - - - - 315

St. Paul & N. P. R. Co. v. St. Paul, M. & M. R. Co. (mem.) - 1212
St. Paul, M. & M. R. Co. v. Sage (mem.) 1218
St. Paul & N. P. R. Co. v. (mem.) 1212
St. Paul Water Comrs., Minneapolis Mill Co. v. - - - - - 497
St. Anthony Falls Water Power Co. v. - - 497
Salambier, United States v. - - 1167
Salt Lake City R. Co. v. Smith (mem.) 1208
San Angelo, Shapleigh v. - - - - 310
Sandoval, United States v. - - - - 168
v. United States (mem.) - - 1210
San Francisco, Delaney v. (mem.) - 1217
San Francisco Super. Ct., Levy v. - 126
Savannah, F. & W. R. Co. v. Florida Fruit Exch. (167 U. S. 512) 257
Savings & L. Soc. v. Multnomah County (169 U. S. 421) - - - 803
Sawyer v. Kochersperger (170 U. S. 303) 1046
Schofield v. Folsom (mem.) - - 1213
Selvester v. United States (170 U. S. 262) 1029
Shapleigh v. San Angelo (167 U. S. 646) 310
Shaw v. Kellogg (170 U. S. 312) - 1050
Shepard v. Adams (168 U. S. 618) - - 602
Silver Queen Min. Co., Noyes v. (mem.) 1214
Sims, Leonard v. (mem.) - - - - 1213
Smiley v. Barker (mem.) - - - 1216
Smith, Houston & T. C. R. Co. v. (mem.) 1214
v. Naphtaly (169 U. S. 365) - - 779
Salt Lake City R. Co. v. (mem.) 1208
Smyth v. - - - - - - 819
v. United States (170 U. S. 372) 1074
v. Wichita Nat. Bank (mem.) - 1214
Smithsonian Institution v. Meech (169 U. S. 398) - - - - - 793
Smyth v. Ames (169 U. S. 466) - - 819
v. Higginson (169 U. S. 466) - 819
v. Smith (169 U. S. 466) - - 819
Snow, Union Street R. Co. v. (mem.) - 1214
Solan, Chicago, M. & St. P. R. Co. v. 688
Southern Exp. Co. v. Virginia, Buford, (mem.) - - - - - 1212
v. Virginia, McColgan, (mem.) 1212
v. Virginia, McGavock, (mem.) 1212
v. Virginia, Pendleton, (mem.) 1212
v. Virginia, Walker, (mem.) - 1212
Southern P. R. Co. v. United States (168 U. S. 1) - - - - - 355
Spekky, United States v. (mem.) - 1210
Spiro, National Acci. Soc. v. (mem.) - 1211
Spokane Falls & N. R. Co. v. Ziegler (167 U. S. 65) - - - - 79
Spradling, Texas & P. R. Co. v. (mem.) 1208
Springer Land Asso. v. Ford (168 U. S. 513) - - - - - - 562
Stearns v. Lawrence (mem.) - - 1217
Steele, St. Joseph & G. I. R. Co. v. - 315
Stevens, Central Nat. Bank v. - - 807
Stewart v. Baltimore & O. R. Co. (168 U. S. 445) - - - - - 537
Chappell v. (mem.) - - - 1215
v. Coffin (mem.) - - - 1213
Stone v. United States (167 U. S. 178) - 127
Strasburger, Dodge v. (mem.) - - 1216
Strycharski, Houston & T. C. R. Co. v. (mem.) - - - - - 1213
Stuart v. Easton (170 U. S. 383) - 1078
Gruetter v. - - - - - 639, 1204
v. Hayden (169 U. S. 1) - 639, 1204
Summers v. White (mem.) - - - - 1208
Sumpter, Latta v. - - - - - 87
Swenson v. Sage (mem.) - - - - 1218
Syme, Aultman & T. Co. (mem.) - 1210

T.

Tampa Suburban R. Co., *Re* (168 U. S. 583) - - - - - - 583
Taylor, Crossley v. (mem.) - - - 1212
MacGreal v. - - - - - - 826
Texas, Adams v. (mem.) - - - - 1208
Galveston, H. & S. A. R. Co. v. - 1017
Houston & T. C. R. Co. v. - - 1023
Texas & P. R. Co. v. Archibald (170 U. S. 665) - - - - - 1188
v. Dietz (mem.) - - - - 1208
v. Elliott (mem.) - - - 1208
v. Gay (mem.) - - - - 1209
v. Holladay (mem.) - - - 1217
v. Juneman (mem.) - - - 1208
v. Reeder (170 U. S. 530) - - 1134
v. Spradling (mem.) - - - 1208
v. Thompson (mem.) - - 1208
The Alene, Hall v. (mem.) - - - 1212
The Carib Prince (170 U. S. 655) - 1181
Wuppermann v. - - - - - 1181
The Glide (167 U. S. 606) - - - 296
The John G. Stevens (170 U. S. 113) - 969
The J. P. Donaldson (167 U. S. 599) - 292
The Plymothian (168 U. S. 410) - - 519
The Poconoket, Bacon v. (mem.) - 1214
The Resolute (168 U. S. 437) - - - 533
The Three Sisters (168 U. S. 443) - 537
The Victory (168 U. S. 410) - - - 519
The William H. Hoag (168 U. S. 443) - 537
Thomas v. Gay (169 U. S. 264) - - 740
Rocker Spring Co. v. (mem.) - 1211
Thompson v. Maxwell Land Grant & R. Co. (168 U. S. 451) - - 539
Texas & P. R. Co. v. (mem.) - 1208
v. Utah (170 U. S. 343) - - - 1061
Thorp v. Bonnifield (mem.) - - 1211
Threadgill, Platt v. (mem.) - - - 1208
Three Sisters, The (168 U. S. 443) - 537
Tindal v. Wesley (167 U. S. 204) - - 137
Tla-Koo-Yel-Lee v. United States (167 U. S. 274) - - - - - - 166
Toledo, D. & B. R. Co., Bondholders & P. of Iron R. R. v. (mem.) - 1210
Tompkins v. Cooper (mem.) - - - 1217
Turner v. New York (168 U. S. 90) - 392
Tuttle v. Crowley (mem.) - - - 1209
Twin City Nat. Bank v. Nebeker (167 U. S. 196) - - - - - - 184

U.

Underhill v. Hernandez (168 U. S. 250) 456
Union Mut. L. Ins. Co. v. Kirchoff (169 U. S. 103) - - - - - 677
Union P. R. Co., United States v. - 559
Union Street R. Co. v. Snow (mem.) - 1214
United States v. American Bell Teleph. Co. (167 U. S. 224) - - 144
Amoni v. (mem.) - - - - 1209
Anderson v. - - - - - - 1116
Baca v. (mem.) - - - - - 1207
Barrett v. - - - - - 723, 727
v. Bergere (168 U. S. 66) - - 383
Bram v. - - - - - - - 568
Bryant v. - - - - - - - 94

United States, Camfield v. - - 260
Cessna v. - - - - - - 702
v. Charles (mem.) - - - 1217
Chaves v. - - - - - - 426
v. Coe (170 U. S. 681) - - 1195
v. Colman (mem.) - - - - 1215
Crespin v. - - - - - - 438
v. Crosthwaite (168 U. S. 375) - 507
Dennison v. - - - - - 453
v. Dobson (mem.) - - - - 1216
v. Eaton (169 U. S. 331) - - 767
Elder v. (mem.) - - - - 1216
Farwell v. (mem.) - - - 1216
Fink v. - - - - - - - 1153
v. Foreman (Nos. 1 and 2) - 1210
v. Garlinger (169 U. S. 316) - - 762
v. Garter (170 U. S. 527) - - 1133
v. Goldenberg (168 U. S. 95) - - 394
Hall v. - - - - - - - 607
Hayes v. - - - - - - - 1174
v. Herron (170 U. S. 527) - - 1132
Humes v. - - - - - - - 1011
v. Irvine (mem.) - - - 1215
Jolly v. - - - - - - - 1085
v. Kemp (mem.) - - - 1215
v. Kennedy (mem.) - - - 1210
Kettenring v. (mem.) - - 1211
v. Klumpp (169 U. S. 209) - 720
Ledbetter v. - - - - - 1162
v. Lies (170 U. S. 628) - - 1170
Logan County, Sinking Fund Comrs. v. - - - - - 737
v. Louisville Sinking Fund Comrs. (169 U. S. 249) - - - 735
v. McGlashen (mem.) - - 1218
v. Milchrist (mem.) - - - 1210
v. Mobile & O. R. Co. (mem.) - 1217
Montoya v. (mem.) - - 1213
Morton v. - - - - - - 168
New York Indians v. - - - 927
New York Indians v. - - - 1165
Parsons v. - - - - - - 185
v. Passavant (169 U. S. 16) - 644
v. Patrick (mem.) - - - - 1216
Peraltareavis v. (mem.) - - 1207
Pinkerton v. (mem.) - - - 1207
Potsdamer v. (mem.) - - 1209
Purdy v. (mem.) - - - - 1207
v. Reed (167 U. S. 664) - - 317
Rio Arriba Land & C. Co. v. - 175
v. Salambier (170 U. S. 621) - 1167
v. Sandoval (167 U. S. 278) - - 168
Sandoval v. (mem.) - - - 1210
Selvester v. - - - - - - 1029
v. Skelly (mem.) - - - 1210
Smith v. - - - - - - - 1074
Southern P. R. Co. v. - - 355
Stone v. - - - - - - - 127
Tla-Koo-Yel-Lee v. - - - 166
v. Union P. R. Co. (168 U. S. 505) 559
Valk v. (mem.) - - - - 1211
v. Wagner (mem.) - - - 1216
Whitfield v. (mem.) - - - 1207
Whitney v. - - - - - 263
Wight v. - - - - - - 258
Williams v. - - - - - 509
v. Wilson (168 U. S. 273) - - 464
v. Winston (170 U. S. 522) - 1130
v. Wong Kim Ark (169 U. S. 649) 890
Zia v. - - - - - - - 434
United States, *ex rel.* Bernardin, v. Butterworth (169 U. S. 600) - 873
United States Exp. Co. v. Ohio (mem.) 1209
Utah, Thompson v. - - - - 1061

V.

Valk v. United States (mem.) - - - 1211
Vance v. W. A. Vandercook Co. (No. 1) (170 U. S. 438) - - - 1100
v. W. A. Vandercook Co. (No. 2) (170 U. S. 468) - - - 1111
Venner v. Farmers' Loan & T. Co. (mem.) - - - - - - 1218
Vermont, Hodgson v. - - - - - 461
Victory, The, (168 U. S. 410) - - 519
Virginia, *ex rel.* Buford, Southern Exp. Co. v. (mem.) - - - 1212
McColgan, Southern Exp. Co. v. (mem.) - - - - - - 1212
McGavock, Southern Exp. Co. v. (mem.) - - - - - 1212
Pendleton, Southern Exp. Co. v. (mem.) - - - - - - 1212
Walker, Southern Exp. Co. v. (mem.) - - - - - - 1212
Virginia & A. Coal Co. v. Central R. & B. Co. (170 U. S. 355) - 1068

W.

Wabash R. Co. v. Defiance (167 U. S. 88) 87
Wagner, United States v. (mem.) - - 1216
Wagoner v. Evans (170 U. S. 588) - 1154
Walker v. Collins (167 U. S. 57) - - 76
v. Doran (mem.) - - - 1210
Virginia, *ex rel.*, Southern Exp. Co. v. (mem.) - - - - - 1212
Walter Baker & Co. v. (mem.) - - 1214
Warner v. Baltimore & O. R. Co. (168 U. S. 339) - - - - - 491
v. New Orleans (167 U. S. 467) 239
Warnock v. De Witt (mem.) - - - 1207
Warren v. Chandos (mem.) - - - 1216
Washington, Craemer v. - - - - 407
Washington County, Baldwin v. (mem.) 1213
Watkins v. Rennie (mem.) - - - 1207
Watson, Hawkins v. (mem.) - - - 1209
W. A. Vandercook Co., Vance v. - 1100
Vance v. - - - - - - - 1111
Wesley, Tindal v. - - - - - 137
West Virginia, Charleston & S. S. Bridge Co. v. (mem.) - - 1212
Western Assur. Co. v. J. H. Mohlman Co. (mem.) - - - - - 1213
Western Mfg. Co., Kingman & Co. v. - 1192
Westinghouse v. Boyden Power Brake Co. (170 U. S. 537) - - 1136
Wetmore v. Rymer (169 U. S. 115) - 682
Wetzel v. Minnesota Ry. Transfer Co. (169 U. S. 237) - - - 730
Wheeler-Bliss Mfg. Co., Pickham v. (mem.) - - - - - - 1211
Whelan, Alaska Treadwell Gold Min. Co. v. - - - - - - 390
White, Summers v. (mem.) - - 1208
Whitfield v. United States (mem.) - - 1207
Whitney v. United States (167 U. S. 529) 263
Wichita Nat. Bank, Smith v. (mem.) - 1214
Wight v. United States (167 U. S. 512) 258
Wilkins, Boston Safe Deposit & T. Co. v. (mem.) - - - - - 1209

William H. Hoag, The, (168 U. S. 443) 537
Williams v. Eggleston (170 U. S. 304) - 1047
v. Mississippi (170 U. S. 213) - 1012
v. Paine (169 U. S. 55) - - - 658
v. United States (168 U. S. 382) 509
Willis v. Eastern Trust & B. Co. (167 U. S. 76) - - - - - 88
v. Eastern Trust & B. Co. (169 U. S. 295) - - - - - 752
Willoughby, Mackall v. - - - - 823
Wilson v. Lambert (168 U. S. 611) - 599
v. North Carolina (169 U. S. 600) 873
v. North Carolina, Caldwell (169 U. S. 586) - - - 865
United States v. - - - 464
Winston, United States v. - - - 1180
Wong Kim Ark, United States v. - 800
Woodward, Rowell v. (mem.) - - 1216
Wuppermann v. The Carib Prince (170 U. S. 655) - - - - 1181

Y.

Yardley v. Philler (167 U. S. 344) - 192
York, Conde v. - - - - - - 611

Z.

Zia v. United States (168 U. S. 198) - 434
Ziegler, Spokane Falls & N. R. Co. v. 79

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1896.

Vol. 167.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1896,

AND REPORTED HEREIN,

VOL. 167,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 167 U. S.	Title.	Here in.
1–8	Compton v. Jesup	55
8–6	" "	56
6–9	" "	57
9–11	" "	58
11–14	" "	59
14–17	" "	60
17–20	" "	61
20–23	" "	62
23–25	" "	63
25–26	" "	64
26–29	" "	65
29–32	" "	66
32–34	" "	67
34–37	" "	68
38–40	*Re* Hall	69
40–43	"	70
43–46	Davis v. Massachusetts	71
46–48	" "	72
48	Northern P. R. Co. v. Poirier	72
49–51	" " "	73
51–54	" " "	74
54–57	" " "	75
57–59	Walker v. Collins	76
59–60	" "	77
60–61	Cross v. Evans	77
61–64	" "	78
64–65	" "	79
65–66	Spokane Falls & N. R. Co. v. Ziegler	79
66–69	" " " " "	80
69–72	" " " " "	81
72–75	" " " " "	82
76–78	Willis v. Eastern Trust & B. Co.	83
78–81	" " " "	84
81–84	Latta v. Granger	85
84–87	" "	86
87	" "	87
87	Latta v. Neubert	
	Latta v. Cohn	
	Latta v. Rugg	
	Latta v. Garnett	
	Latta v. Sumpter	87
88	Wabash R. Co. v. Defiance	87
88–91	" " "	88
91–92	" " "	89
92–94	" " "	90
94–97	Wabash R. Co. v. Defiance	91
97–100	" " "	92
100–102	" " "	93
102–104	" " "	94
104–105	Bryant v. United States ("*Ex parte* Bryant")	94
105–108	" "	95
108	" "	96
108	Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.	96
108–109	" " "	97
109–110	" " "	98
110–111	" " "	99
111–114	" " "	100
114–116	" " "	101
116	Campbell v. Ellet	101
116–119	" "	102
119–120	" "	103
120–122	*Re* Johnson	103
122–125	"	104
125–127	"	105
127	Burdon Central Sugar Ref. Co. v. Payne	105
129–132	" " " " "	106
132–138	" " " " "	107
138–139	" " " " "	108
139–140	" " " " "	109
140–143	" " " " "	110
143–146	" " " " "	111
146–149	" " " " "	112
149	" " " " "	113
149	London Assurance v. Companhia de Moagens do Barreiro	113
150	" " " "	114
150–151	" " " "	115
151–152	" " " "	116
152–155	" " " "	117
155–157	" " " "	119
157–160	" " " "	120
160–163	" " " "	121
163–166	" " " "	122
166–169	" " " "	123
169–172	" " " "	124
172–175	" " " "	125
175–177	Levy v. San Francisco Super. Ct.	126
177–178	" " "	127

Off. Rep. 167 U. S.	Title.	Here in.
178	Stone v. United States	127
179-180	" "	128
180-183	" "	129
183-186	" "	130
186-189	" "	131
189-192	" "	132
192-195	" "	133
195-196	" "	134
196-198	Twin City Bank v. Nebeker	
	("Twin City Nat. Bank v. Nebeker")	134
198-201	" " "	135
201-203	" " "	136
203	Lumberman's Bank v. Huston	
	("Lumberman's Nat. Bank v. Huston")	136
203-204	" " "	137
204-206	Tindal v. Wesley	137
206-209	" "	138
209-212	" "	139
212-215	" "	140
215-217	" "	141
217-220	" "	142
220-223	" "	143
223-224	" "	144
224	United States v. American Bell Teleph. Co.	144
226-227	" " "	145
237-238	" " "	153
238-241	" " "	154
241-244	" " "	155
244-247	" " "	156
247-250	" " "	157
250-253	" " "	158
253-256	" " "	159
256-259	" " "	160
259-262	" " "	161
262-264	" " "	162
264-267	" " "	163
267-270	" " "	164
270	Indiana v. Kentucky	164
270-273	" "	165
273-274	" "	166
274-275	Tla-Koo-Yel-Lee v. United States	166
275-278	" "	167
278-280	United States v. Sandoval Morton v. United States	168
280-283	" "	169
283-286	" "	170
286-289	" "	171
289-292	" "	172
292-295	" "	173
295-298	" "	174
298-300	Rio Arriba Land & C. Co. v. United States	175
300-303	" " "	176
303-306	" " "	177
306-309	" " "	178
309	" " "	179
310	May v. May	179
311-313	" "	181
313-316	" "	182
316-319	" "	183
319-322	" "	184
322-323	" "	185
324-325	Parsons v. United States	185
325-328	" "	186
328-331	" "	187
331-334	" "	188
334-337	" "	189
337-340	Parsons v. United States	190
340-343	" "	191
343-344	" "	192
344-345	Yardley v. Philler	192
346-348	" " "	193
348-351	" " "	194
351-354	" " "	195
354-357	" " "	196
357-360	" " "	197
360-362	" " "	198
362	California Bank v. Kennedy	
	("California Nat. Bank v. Kennedy")	198
363-365	" " "	199
365-368	" " "	200
368-371	" " "	201
371	" " "	202
371-373	New Orleans v. Citizens' Bank	202
373-376	" "	203
376-379	" "	204
379-382	" "	205
382-384	" "	206
384-387	" "	207
387-389	" "	208
389-392	" "	209
392-396	" "	210
396-399	" "	211
399-402	" "	212
402-404	" "	213
404-407	" "	214
407-408	Louisiana v. New Orleans	
	("Louisiana, *ex rel.* Citizens' Bank, v. Board of Assessors")	215
409	Hovey v. Elliott	215
409-411	" "	218
411-413	" "	219
413-416	" "	220
416-419	" "	221
419-422	" "	222
422-425	" "	223
425-428	" "	224
428-431	" "	225
431-434	" "	226
434-437	" "	227
437-440	" "	228
440-443	" "	229
443-445	" "	230
445-447	" "	231
447	Parsons v. Chicago & N. W. R. Co.	231
447-450	" " "	232
450-453	" " "	233
453-456	" " "	234
456-459	" " "	235
459-460	" " "	236
461	Merchants' & M. Bank v. Pennsylvania	
	("Merchants' & M. Nat. Bank v. Pennsylvania")	236
461-464	" "	237
464-467	" "	238
467	" "	239
467-469	Warner v. New Orleans	239
469-472	" "	240
472-475	" "	241
475-478	" "	242
479-480	Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.	243
480-482	" " "	244
482-488	" " "	245

Off. Rep. 167 U. S.	Title.	Herein.
493–495	Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.	251
495–498	" " "	252
498–501	" " "	253
501–504	" " "	254
504–506	" " "	255
506–509	" " "	256
509–512	" " "	257
512	Savannah, F. & W. R. Co. v. Florida Fruit Exchange	257
512–515	Wight v. United States	258
515–518	" "	259
518	" "	260
518–520	Camfield v. United States	260
520–523	" "	261
523–526	" "	262
526–528	" "	263
529	Whitney v. United States	263
529–531	" "	264
531–534	" "	265
534–537	" "	266
537–540	" "	267
540–543	" "	268
543–546	" "	269
546–548	" "	270
548	Bauman v. Ross	
	Ross v. Bauman	
	Abbot v. Ross	
	Ross v. Armes	270
549–550	" "	274
550–553	" "	275
553–556	" "	276
556–559	" "	277
559–562	" "	278
562–565	" "	279
565–568	" "	280
568–571	" "	281
571–573	" "	282
573–576	" "	283
576–579	" "	284
579–582	" "	285
582–585	" "	286
585–588	" "	287
588–591	" "	288
591–594	" "	289
594–596	" "	290
596–599	" "	291
599	The J. P. Donaldson	292
600	" "	293
600–603	" "	294
603–606	" "	295
606–608	The Glide	296
608–611	"	297
611–614	"	298
614–617	"	299
617–619	"	300
619–622	The Glide	301
622–624	"	302
624	Peck v. Heurich	302
625–627	" "	303
627–629	" "	304
629–632	" "	305
633–635	Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.	306
635–638	" " "	307
638–641	" " "	308
641–644	" " "	309
644–646	" " "	310
646	Shapleigh v. San Angelo	310
647–649	" "	311
649–652	" "	312
652–655	" "	313
655–658	" "	314
658–659	" "	315
659–660	St. Joseph & G. I. R. Co. v. Steele	315
660–663	" " "	316
663–664	" " "	317
664–665	United States v. Reed	317
665–668	" "	318
668–671	" "	319
671–673	" "	320
673–674	Hedrick v. Atchison, T. & S. F. R. Co.	320
674–677	" " "	321
677–680	" " "	322
680–681	" " "	323
681–682	Mackall v. Willoughby	323
682–685	" "	324
685–688	" "	325
688	MacGreal v. Taylor	326
690–693	" "	329
693–696	" "	330
696–698	" "	331
698–701	" "	332
701–703	" "	333
703	Menotti v. Dillon	333
705–708	" "	334
708–711	" "	335
711–714	" "	336
714–717	" "	337
717–720	" "	338
720–722	" "	339
722–725	De Guyer v. Banning	340
725–728	" "	341
728–731	" "	342
731–734	" "	343
734–737	" "	344
737–740	" "	345
740–743	" "	346
743–744	" "	347
745	Memorandum Cases	1207
746	" "	1218

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1896.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

1] JAMES COMPTON, *Appt.*,
v.
JAMES R. JESUP and Edward H. Dixon, Trustees, *et al.*

(See S. C. Reporter's ed. 1-37.)

Right of lien claimant—acquiescence in decree—purchaser on foreclosure sale—trust relation—failure to appeal.

1. The right of a lien claimant reserved in a foreclosure decree which provides that if his lien is established he shall be paid a certain sum, in default of which the court shall resume possession of the property affected by his lien, and enforce the decree rendered in his favor "by a resale of such property or otherwise, as this court may direct,"—includes the right to a resale of the property, and is not limited to a redemption thereof.
2. Persons who procure or acquiesce in a decree of foreclosure reserving the rights of a lien claimant, and who participate in the benefits of an early sale thus secured, cannot object to the enforcement of the lien in the manner pointed out by the decree.
3. A purchaser on a foreclosure sale cannot object to the terms of a decree of sale which provided for a resale on certain conditions.
4. A purchaser of a railroad on foreclosure under a decree reserving the rights of a lien claimant holds a trust relation which involves an accounting until the lien is disposed of.
5. Failure of one claiming a lien on a railroad to appeal from a decree of the United States circuit court for the district of Indiana declaring that his remedy is merely by redemption of a railroad in Indiana and Ohio does not estop him from enforcing his lien against the Ohio division only, under decrees of the state court and of the United States circuit court in that state establishing his right to a sale of the Ohio division or to some equivalent remedy.

[No. 314.]

Argued December 4, 1896. Decided May 10, 1897.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit propounding questions concerning which instructions are asked in a railroad mortgage foreclosure suit in which James R. Jesup *et al.*, trustees, were plaintiffs, and James Compton *et al.* were defendants. *Questions answered.*

See same case below, 45 Ohio St. 592.

Statement by Mr. Justice **Shiras:**

This case comes to this court on a certificate from the United States circuit court of appeals for the sixth circuit, propounding questions concerning which instructions are asked, in accordance with § 6 of the act to establish circuit courts of appeals, approved March 3, 1891.

The statement of facts and questions are as follows:

This is an appeal from that part of a decree in a railroad mortgage foreclosure suit, rendered by the circuit court of the United States for the northern district of Ohio, which fixes the priority of a lien of the appellant and prescribes the remedy for its enforcement. James Compton, the appellant, was a citizen of the District of Columbia. Holding equipment bonds issued by the Toledo & Wabash Railway Company, which subsequently became one of the constituent *companies of the [3 Wabash system, he obtained a decree from the Ohio supreme court, declaring them to be a valid lien on that part of the main line of the Wabash system reaching from Toledo west to the Illinois line, and awarding to him, as a means of enforcing the lien, an order for sale of the portion of the line lying in Ohio. 45 Ohio St. 592. Shortly after the entry of this

NOTE.—*As to lien of mortgage on after-acquired property*, see note to Pennock v. Coe, 16: 436.

As to strict foreclosure of mortgage, see note to Clark v. Reyburn, 19: 354.

As to who is entitled to redeem from the lien of a mortgage, see note to Noyes v. Hall, 24: 909.

As to parol trust on conveyance of land, see note to Hughes v. Edwards, 6: 142.

As to when and to what extent a judgment is a lien on lands, see note to Waller v. Best, 11: 518.

decree by the Ohio supreme court and before it was executed, upon the prayer of the complainant and a cross-complainant in the foreclosure proceedings in the court below and after the filing of the necessary affidavit, the court entered an order based on § 8 of the act of Congress of March 3, 1875, directing that Compton be served with subpœna in the District of Columbia, and required to appear and set up his lien in this cause. The order was complied with, and Compton, appearing only for the purpose of objecting to the validity of the service, moved the court to set the service aside and to dismiss him from the case. The motion was overruled. He then demurred to the jurisdiction on the ground that citizens of the same state appeared on both sides of the controversy. His demurrer was overruled. The amendments to the bill and cross bills concerning Compton denied the validity of his lien, and asserted that he was estopped by matter of record to claim a lien because of a decree of the supreme court of the United States to which he was in law privy, in the case of *Wabash, St. L. & P. R. Co.* v. *Ham*, 114 U. S. 587 [29: 235], denying the existence of a lien in favor of the equipment bondholders. Compton in his answers which he filed after his demurrer was overruled set up his lien as declared by the Ohio supreme court decree and his right thereunder to have the Ohio division sold to satisfy it. Compton also claimed in his answer that his bonds were a first lien upon certain terminals of the defendant company at Toledo on the ground that the Ohio divisional mortgage did not cover this property. The court below adjudged that Compton had a valid lien on the Ohio and Indiana lines by virtue of the Ohio decree, but denied his right to a first lien on the Toledo terminals or to a separate sale of the Ohio line, and declined to afford him any relief but that [4]of redeeming *the four divisional mortgages, two on the Ohio line and two on the Indiana line, by the payment of about $8,000,000. The sale under the decrees of foreclosure in the court below, against Compton's objection, took place before the validity and character of his lien were determined, and a provision was inserted in the decree saving his rights. Compton contended that the language of this saving clause entitled him to the payment of his lien by the purchaser or in default thereof a resale of the Ohio part of the railroad. At the hearing of the appeal, a motion was made to dismiss on the ground that the same decree as that here appealed from was entered by the United States circuit court for Indiana in a case between the same parties.

This appeal presents the questions:

1st. Had the court jurisdiction of the original bill?

2d. Had it power to make Compton party by substituted service?

3d. Was Compton estopped to assert a lien for his bonds by a decree of the United States circuit court for Indiana denying it for bonds of the same kind in what was claimed to be a representative suit?

4th. Did the Ohio divisional mortgages not cover certain after-acquired terminal property at Toledo so that Compton had a first lien thereon?

5th. What was the effect of the proviso in the decree of sale upon Compton's rights and remedy?

6th. What relief was he entitled to under the Ohio decree?

7th. Is Compton estopped to prosecute this appeal by the fact that a decree identical in terms with the one here appealed from was entered in the United States circuit court for Indiana, and has not been appealed from?

The facts of the case are quite complicated, and many of them must be stated for a clear understanding of the issues.

The Wabash, St. Louis, & Pacific Railway Company, usually known as the Wabash system, comprised as its main line a railroad which ran from Toledo, Ohio, west through Ohio, Indiana, Illinois, and Missouri to Kansas City. It was the result of a consolidation of separate railroads, one in Ohio, *one in In- [5 diana, three or four in Illinois, and one or more in Missouri. First the Ohio and Indiana companies were consolidated, then the companies east of the Mississippi river, and finally in 1880 all of them were united in the Wabash, St. Louis, & Pacific Company. Many of the constituent companies had issued bonds secured by mortgage upon their respective lines, and as consolidations took place the new companies assumed the obligation of the mortgage and bonded debts of their constituents. When the Ohio and Indiana companies were united in 1858 under the name of the Toledo & Wabash Railway Company, there were two mortgages on the Ohio part, one to the Farmers' Loan & Trust Company, trustee, to secure $900,000 of bonds, and a second to E. D. Morgan, trustee, to secure bonds, amounting to $1,000,000. There were also two mortgages on the Indiana part, one to the Farmers' Loan & Trust Company, trustees, for $2,500,000, and a second to E. D. Morgan, trustee, for $1,500,000. The Toledo & Wabash Company in 1862 issued equipment bonds to the amount of $600,000, but gave no mortgage to secure them. It is $150,000—par value—of the equipment bonds which is the subject-matter of this appeal. In 1865 the Toledo & Wabash Railway Company united with several Illinois companies and became the Toledo, Wabash, & Western Company, with a line reaching from Toledo to the Mississippi river. It was this consolidation which the supreme court of Ohio held, by virtue of the Ohio statute authorizing it, to have the effect of fastening the equipment bonds as a lien on the property of the Toledo & Wabash Railway Company which passed to the new company. The articles of agreement contained the following provisions:

"Now, therefore, the said companies by their respective directors agree to consolidate their said roads, property, and capital stock into one company upon the basis and conditions hereinafter specified, to be submitted by the directors of each of said roads, to the stockholders thereof for ratification, to wit:

"The Toledo & Wabash Railway Company enters into said consolidation on the following basis, *viz.*:

*"Its capital is..... $10,000,000 [6

Composed as follows:

First-mortgage bonds.....	$3,400,000
Second-mortgage bonds....	2,500,000

Convertible equipment bonds	600,000
Convertible preferred stock..	1,000,000
Common stock.....	2,500,000

. . . . . .

"It is further agreed that, on the terms and condition above specified, the four railroad companies hereto do agree, each for itself severally, that the several companies named shall be and they hereby are consolidated into and form one corporation, etc.

. . . . . .

"It is further agreed that the bonds and other debts hereinabove specified, in the manner and to the extent specified, and not otherwise provided for in this agreement, shall, as to the principal and interest thereof, as the same shall respectively fall due, be protected by the said consolidated company, according to the true meaning and effect of the instruments or bonds by which such indebtedness of the several consolidating companies may be evidenced."

The new company, the Toledo, Wabash, & Western Railway Company, shortly after the consolidation offered a mortgage to Knox and Jesup, trustees, upon its entire road, known as the consolidated mortgage, with the purpose therein recited of using the proceeds of their sale to take up and refund all previous indebtedness, including the equipment bonds. The purpose was never carried out, but some $2,500,000 of bonds were issued and the proceeds expended for the use of the company. In the foreclosure of a subsequent mortgage called the gold-bond mortgage, and the consequent reorganization, the property of the Toledo, Wabash, & Western Company passed, subject to all previous mortgages, to a consolidated company of the same three states called the Wabash Railway Company, which issued bonds amounting to $2,000,000 secured by mortgage on its line to Humphreys and Lindley, 7] *trustees. In the decree for sale and deeds under it, it was provided that the sale should be without prejudice to the equipment bondholders' rights, which were left open. Then the Wabash Company united with a Missouri company to make the Wabash, St. Louis, & Pacific Company a consolidated company of Ohio, Indiana, Illinois, and Missouri, with a line of railway extending from Toledo to Kansas City. This company issued bonds amounting to $17,000,000, and secured them by mortgage on its entire line to the Central Trust Company and James Cheney of Indiana as trustees. In 1884 the Wabash, St. Louis, & Pacific Railway Company filed a bill in the circuit court for the eastern district of Missouri against the Central Trust Company, a citizen of New York, and James Cheney, a citizen of Indiana, trustee under the last mortgage, averring its insolvency, praying for the appointment of a receiver, the marshaling of liens upon it, the sale of its road, and a distribution of proceeds for the benefit of its creditors. A similar bill was filed in the circuit courts for the northern district of Ohio and for other districts. Receivers were appointed, who took possession of the railroad, and operated it. Shortly afterward the Central Trust Company and Cheney filed a bill to foreclose their mortgage in state courts of the several states where the mortgaged property lay. These suits were removed to the proper Federal courts, and were consolidated with the insolvency bills (so called) already referred to. The consolidated causes proceeded to decrees for sale in the various jurisdictions. The property was bid off in each court to James F. Joy and others, a purchasing committee under a plan of reorganization entered into by the foreclosing bondholders. The sales were confirmed and deeds ordered to be executed. The committee took possession from the receivers of the part of the railroad west of the Mississippi river, but for some reason, not clearly disclosed in the record, the court did not order the receivers to deliver possession to the purchasers of the lines east of the Mississippi. The sale of Joy and associates in Ohio was subject to the Humphreys and Lindley mortgage, the Knox and Jesup mortgage, the Compton lien if any he *had, and the Ohio divisional mortgages. [8 While the railroad in Illinois, Indiana, and Ohio was still in the hands of the receivers, Knox and Jesup began the proceeding in which this appeal was taken, by filing bill against the Wabash, St. Louis, & Pacific Railway Company to foreclose their mortgage in the circuit courts of northern Ohio, Indiana, and Illinois, and for the appointment of receivers, and made parties defendant those holding mortgages on the part of the road within each jurisdiction as well as the purchasing committee at the former sale. Humphreys and Lindley and the Farmers' Loan & Trust Company filed answers, which by stipulation were taken as cross bills, setting up their mortgage liens on the Ohio property, and praying a foreclosure and sale. The bills and cross bills all averred that at the time of filing the same the road was in the possession of the receivers appointed by the court below in the previous foreclosure suit. Citizens of the same state appeared on both sides of the controversy thus presented. Compton was made a party in the way already stated both to the Indiana and Ohio bills and cross bills. The litigation in the courts of the three states proceeded together. Judge Jackson, the circuit judge for the sixth circuit, and Judge Gresham, the circuit judge for the seventh circuit, sat together, heard the points in dispute argued, and made the same orders in their respective jurisdictions. The pleadings in the court below are quite confusing, and do not seem to have been prepared or filed with much care to keep separate the jurisdictions of the circuit courts of the three districts in which the litigation was pending. The amended bill of Knox and Jesup recited that a similar bill had been filed in the southern district of Illinois, and attached the same as an exhibit. Both bills made parties all persons having or claiming an interest in any part of the line in the three states. Among these defendants were James F. Joy, as substituted trustee under the second Ohio divisional mortgage, and also as substituted trustee under the second Indiana divisional mortgage. The cross bill of Humphreys and Lindley, trustees, under the mortgage issued by the Wabash Railway Company on the entire line east of the Mississippi river, made *the same parties as [9 in the amended bill. The amended cross bill of the Farmers' Loan & Trust Company, seeking to foreclose that part of the railroad lying

in Ohio, only made parties defendant those having a mortgage lien on the Ohio division. Compton was made a party to this cross bill as was also James F. Joy, as trustee under the second mortgage on the Ohio property. By some error, Joy, as an answer to the amended bill of complaint and the cross bills of Humphreys and Lindley and of the Farmers' Loan & Trust Company, filed the same answer made by him in the Indiana suit, in which he only set up and asked to be protected in his rights as substituted trustee in the mortgage of the Wabash & Western Railway Company, and made no averment or prayer in regard to the mortgage on the Ohio part of the railroad in which he had also been substituted as trustee in place of E. D Morgan, trustee. Other answers were filed by parties defendants, and the cause proceeded in the three different courts in Ohio, Indiana, and Illinois as if the same questions were pending in each court, and the same issues were raised, without respect to the territorial jurisdiction of each court. Identically the same decree foreclosing all the mortgages on all the railroad property east of the Mississippi river, divisional and otherwise, was entered in each district. The decree was entered March 23, 1889. Compton was not required to answer the bill and cross bills until April following, but in fact did answer March 28, 1889, so that when the decree for sale was passed the controversy over his claim was not at issue. This decree, though entered in the circuit court for the northern district of Ohio, purports to foreclose divisional mortgages in Indiana and Illinois, and to order to a separate sale property without the territorial jurisdiction of the court, although there is no prayer for such relief, and there is nothing in the decree intended to operate upon the defendant mortgagor company to compel a conveyance of property in another jurisdiction. The decree provided that each division of the road covered by an underlying divisional mortgage should be offered separately, and then the whole road east of the Mississippi river should be offered as a unit. If the 10] sum offered *for the whole road exceeded the total of the separate bids the road was to be struck off to the one making the unit bid, and the share of each division in the amount of the unit bid was to be determined in the proportion of the separate bids. The decree provided that no bids should be received on the Ohio bid which did not equal the sum due on both the Ohio divisional mortgages, and that no bid should be received on the Indiana division which did not equal the amount due on the first Indiana divisional mortgage. Under this decree, Joy and his associates, the purchasing committee in the previous foreclosure proceedings, became the purchasers of the road on their unit bid of $15,500,000. This exceeded by several thousand dollars the sum total of the bids on the separate divisions of the road. The separate bid on the Ohio property amounted to $2,840,595.68, or a little more than enough to pay the principal and interest of the two divisional mortgages. The separate bid on the Indiana division was $3,650,000. This was about $1,300,000 less than would have been required to pay the second divisional mortgage on that division. The purchasing committee organized a new company called the Wabash Railroad Company, to which they conveyed the railroad.

The new company was made a party below to contest Compton's lien and his right to a resale or redemption of the Ohio property, and is a party to this appeal to oppose the reversal or modification of the decree, claiming to assert the rights of all mortgagees whose interests passed to the purchaser by the foreclosure proceeding. Because of the discussion of the effect of the decree for sale on Compton's right, it is necessary to make a somewhat fuller refereuce to it. After finding the amount due upon each mortgage and foreclosing each mortgage in default of the several payments directed to be made by the mortgagors, the decree ordered a sale at the city of Chicago, at which the mortgaged property should first be offered for sale separately, as described in each of the divisional mortgages. It was further provided that there should be deposited with the special master as security for each bid $100,000 in cash or in bonds; that after such bids *had been made [11 they should be accepted conditionally upon the result of the offer of the entire railway as a unit; that, if the highest bid for the railroad as an entirety exceeded the sum of the highest bids for the separate divisions, the entire property should be struck off to the highest bidder for the entire road; that in such case the court would distribute to each division its share of the unit bid in proportion to the separate bids received for the separate divisions, and that in case of a sale of the property as a unit the purchaser must deposit in cash or in bonds $900,000 as a pledge that he would comply with his bid. The provision with reference to the payment was as follows:

"There shall be paid in cash, of the price at which the said mortgaged premises and property shall be sold, in addition to the amount which may be paid at the time of sale, such further sums thereafter of the purchase money as the court may direct. The remainder of such purchase price may be paid either in cash, or in bonds, with the overdue coupons thereto appertaining, at such proportion or value as the holders thereof would be entitled to receive thereon in case the said purchase price were paid by the purchasers in cash, and in all cases in which bonds shall be received by the said special masters, whether as a deposit at the time of said sale or sales, to bind the bids thereat, or in payment of the remainder of the purchase price at the time of the consummation of such sale or sales, the said bonds shall be so received at the rate or amount to which the holders thereof will be entitled to dividend thereon, and in case of the receipt of bonds for security at the time of sale, and said special masters shall at the time exercise their judgment in determining the probable amount of the dividend to which such bonds will be entitled."

The decree directed that upon the confirmation of the sale by the court and the full payment of the entire purchase price, and the compliance by the purchaser with the condition of the sale and orders of the court in that behalf, the special masters should convey the property by good and sufficient deed, to vest

in the grantee "all the right, title, estate, interest, property, and equity of redemption ex-
12] cept as hereby *reserved of, in, and to all and singular the real estate, property, premises, and franchises therein described in fee simple forever, and shall entitle the grantees to the possession thereof."

All questions of account between the several different divisions of the railway as to earnings and expenses, as to payments made by the receivers on coupons or bonds secured by the mortgages upon the divisions, and all questions of the disposition of the proceeds arising from the sales under the decree, were reserved for future settlement and adjustment. The masters were required to pay the proceeds into court to remain subject to the further order of the court. The decree then proceeded:

"All other questions arising under any of the pleadings or proceedings herein not hereby disposed of or determined are hereby reserved for future adjudication; including the claim for unearned interest on bonds not yet due.

"And the defendant James Compton having in open court on the final hearing herein objected to the rendering or entry of any decree in this cause at this time on the ground that the issue raised by the amendment to the complainants' amended and supplemental ancillary bill and to the cross bill of the cross complainants Solon Humphreys and Daniel A. Lindley, trustees, and the answers of the defendant James Compton to be filed herein have not been tried and determined, the court overruled such objection, and the defendant James Compton duly excepts to such ruling and the entry of this decree. But it is adjudged and decreed in the premises that the rendering and entry of this decree in advance of the trial and determination of such issues is upon and subject to the following conditions, to wit:

"If upon the determination of such issues it shall be adjudged by this court that the decree rendered by the supreme court of the state of Ohio, in the suit brought by said James Compton against the Wabash, St. Louis, & Pacific Railway Company and others, referred to in the pleading herein and the lien thereby declared and adjudicated in his favor, continue in full force and effect, then the purchaser or purchasers at any sale or sales had hereunder
13] *of that portion of the property sold, covered and affected by said lien, or the successors in the title of said purchaser or purchasers, shall pay to said James Compton or his solicitors herein within ten days after the entry of the decree herein in favor of said James Compton the sum of $339,920.40, with interest thereon at 6 per cent per annum from May 1, 1888, being the amount found due on the equipment bonds by him owned, by the supreme court of Ohio, in his said suit, upon the surrender by him of the bonds and coupons owned by him, referred to in his petition in such suit; and in default of such payment this court shall resume possession of the property covered and affected by the said lien of the defendant James Compton, and enforce such decree as it may render herein in his favor by a resale of such property or otherwise as this court may direct.

"And it is further ordered and adjudged, that notwithstanding the entry of this decree the said issues concerning the claim and interest of said Compton shall proceed to a final determination and decree in accordance with the rules and practice of this court, and any decree rendered thereupon shall bind the purchaser or purchasers at any sale or sales had hereunder, and all persons and corporations deriving any title to or interest in the said property affected by such lien from or through them, or any of them, and nothing in this decree contained shall be construed as an adjudication of any matter or thing as against the said James Compton, or to prejudice, annul, or abridge any right, claim, or interest or lien which the said James Compton may have in in, to, or upon the premises hereby directed to be sold, or any part thereof, or in, to, or upon any property whatsoever embraced in this decree; it being the intention to hereby preserve the rights of said Compton in the relation in which he now stands towards the mortgagees parties hereto.

"Any sale, conveyance, or assignment of the railway and property hereinabove described, made under this decree, shall not have the effect of discharging any part of said property from the payment or contribution to the payment of claims *or demands chargeable against the
14] same, whether for costs and expenses, the expenses of the receivership of said property and the full payment of all the debts and liabilities of the receivers of the Wabash, St. Louis, & Pacific Railway Company, namely, Solon Humphreys and Thomas E. Tutt, Thomas M. Cooley and General John McNulta, or upon intervening claims and allowances that have been or may hereafter be charged against the property of the Wabash, St. Louis, & Pacific Railway Company or any part thereof, or said receiver or either of them, or the adjustment of any equities arising out of the same between the parties thereto, or their successors, either by this court or by the circuit court of the United States for the eastern district of Missouri, or by any United States circuit court exercising either original or ancillary jurisdiction over said property of the Wabash, St. Louis, & Pacific Railway Company, or any part thereof, or by any United States circuit court to which any of the parties in the consolidated cause of the Central Trust Company of New York and others against the Wabash, St. Louis, & Pacific Railway Company and others in the circuit court of the United States for the eastern district of Missouri, including the receivers, have been by said circuit court of the United States remitted in proceedings or actions ancillary to the jurisdiction of said last-named court or otherwise.

"Nor shall any such sale, conveyance, transfer, or assignment made under and pursuant to this decree withdraw any of said railroad property or interests to be sold under this decree as hereinbefore directed from the jurisdiction of this and the other courts aforesaid, but the same shall remain in the custody of the receiver until such time as the court shall on motion direct said property in whole or from time to time in part to be released to the purchaser or purchasers thereof or any of them, and shall afterwards be subject to be retaken, and, if necessary, resold if the sum so charged or to be charged against said property

or any part thereof, or said receivers shall not be paid within a reasonable time after being required by order of this or said other courts.

15] *"The conveyance and transfer of said property sold under this decree shall be subject to the powers and jurisdiction of the said courts, and the purchasers of the property sold under this decree or any part thereof, and the parties hereto or their successors, shall thereby become and remain subject to said jurisdiction of said courts so far as necessary to the enforcement of this provision of this decree, and such jurisdiction shall continue until all the claims and demands have been or may be allowed against said property of the Wabash, St. Louis, & Pacific Railway Company or any part thereof, or said receivers, by order of said courts, shall be fully paid and discharged.

"The provision aforesaid shall apply to the purchasers of the same under this decree, and all persons taking said property through or under them, but the foregoing provisions shall not nor shall any reservation of this decree contained have the effect or be construed, nor are they or any of them intended, to give any claims that may exist any validity, character, or status superior to what they now have, nor to decide or imply that any such claims exist.

"The effect of said provisions and reservations shall be to prevent this decree operating as an additional defense to claims, if any there are, prior in right to the liens of the mortgages upon said property heretofore and hereby foreclosed, and to preserve the prior right and lien of such claims and all allowances if found and decreed to exist."

The masters reported the making of the sale in accordance with the decree, and the sale was confirmed May 18, 1889. On June 18 an order requiring the masters to execute a deed and to deliver possession was made. This order recited that the purchasers had on deposit a large number of the bonds under all the mortgages, giving the exact amount of each, and then proceeded:

"And it further appearing that the said purchasers, by their said petition, offer to deposit at such time and in such amounts as the court may direct, cash sufficient to pay the expenses that the court may require to be paid, and to pay such sums on the first-mortgage bonds and

16] funded debt bonds not deposited *in said trust company as the court may direct to be paid in cash, and, as security for such payment, to deposit all or any part of the bonds held by said trust company as the court may direct, and to substitute cash for bonds at such time and in such amounts as the court may require, and further, to hold the said purchased property subject to be retaken by the court in the event any cash payments directed by the court shall not be made in pursuance of the court's direction.

"The court thereupon, having duly considered the premises, does order, adjudge, and decree that the prayer of said petition be granted; that the said purchasers shall forthwith transfer to the said special masters, Bluford Wilson and A. J. Ricks, the bonds deposited with the Central Trust Company of New York, and hereinbefore mentioned, to be held and disposed of by said special masters as the court may direct. Notwithstanding such transfers of said bonds to said masters, said purchasing committee shall pay all such sums as may be required from them in carrying out their purchase, and in case of their failure to comply with any orders of the court with respect thereto, the court may retake the property, and all of it conveyed by said deed, and annul the title of the purchasing committee with respect thereto, and hold the same for further disposition and as security for the rights of the bondholders under the various mortgages foreclosed. Upon such transfer the said special masters shall forthwith make, execute, and deliver to said purchaser a deed or deeds, conveying to them or their assigns all and singular the railways, premises, and property described in and covered by the said several mortgages foreclosed and sold as aforesaid under the decree in this cause, and all the right, title, interest, and estate of all the parties in said cause, of, in, and to the same and each and every part thereof, except as particularly reserved in and by said decree of foreclosure and sale, by a good and sufficient deed therefor."

Then followed an order to deliver possession, closing with these words: "This order is made subject in all respects to the provisions of said decree of March 23, 1889."

On August 17, 1889, the court ordered "that the issues *presented in this cause as to the [17 lien and claim of James Compton, made by the various pleadings herein, upon and concerning said claim and lien, and reserved in the former decree herein, saving the rights of said Compton, be and the same are hereby referred to Bluford Wilson," etc.

The special master reported that Compton's lien was a valid one, and that he was entitled by the saving clause of the decree to have the Ohio division resold if the purchaser did not pay off his bonds, principal, and interest in full. The court below sustained the master in holding Compton's lien valid, but decided, as already stated, that his only remedy was to redeem the four divisional mortgages, two in Ohio and two in Indiana. Compton's counsel filed affidavits at the final hearing below to show that their client was deterred from bidding by their advice that the saving clause in the decree made it necessary for him thus to protect his claim, because if his lien was held to be valid the purchaser was required to pay it off or let the property go to a resale, and that but for his reliance on the saving clause Compton could easily and safely have made a bid high enough to secure the payment of his claim from the proceeds of sale.

The facts on which turned the issue as to whether the divisional mortgages were a first lien on the Toledo terminals were as follows:

The first Ohio company was the Toledo & Illinois Railroad Company. Its charter of incorporation, dated April 20, 1853, provided for building a railroad from the city of Toledo through the counties of Lucas, Henry, Fulton, Defiance, and Paulding, or parts of said counties, to the west boundary line of the state of Ohio, in the township of Harrison, in Paulding county. On September 8, 1853, it made a mortgage (known as the first Ohio mortgage) to the Farmers' Loan & Trust Company, to secure an issue of bonds amounting to $900,-

000. The property covered by that mortgage was described as follows, *viz.*:

"Their road made and to be made, including the right of way and the land occupied thereby, together with the superstructure and tracks thereon, and all rails and other materials

18] *and machinery used thereon or procured therefor, including the furniture and equipments of the road and those to be purchased or paid for with the above-described bonds, and the bridges, viaducts, culverts, fences, depot grounds, and buildings erected or to be erected thereon, and all franchises, rights, or privileges of the said party of the first part of, in, to or concerning the same." Printed Record, p. 120.

The habendum clause is: "To have and to hold the said premises and every part thereof, with the appurtenances unto the same party of the second part."

In June, 1856, the Toledo & Illinois Railroad Company entered into an agreement of consolidation with the Lake Erie, Wabash, & St. Louis Railroad Company, and the Toledo, Wabash, & Western Railroad Company was thereby formed. That agreement provided that "all mortgages given by either of the parties shall be as valid and binding upon the whole of the road, real estate, fixtures, and personal property which may be described in such mortgage as though the same had been originally executed by such consolidated corporation."

The Toledo, Wabash, & Western Railroad Company made a mortgage which was subsequently foreclosed. By the decree of sale the purchaser of the Ohio part, Boody, took subject to the first mortgage. Boody conveyed the Ohio division to a new Ohio corporation, organized with power to construct, maintain, and operate a road from Toledo to the Indiana state line, and called the Toledo & Wabash Railroad Company. This company on October 12, 1858, gave a bond to Edwin D. Morgan, trustee, for $900,000, and secured it by mortgage of its railroad, made and to be made; all right of way and all lands occupied thereby, together with the superstructure, depots, depot grounds, and buildings erected thereon, and the rails, tracks, side tracks, bridges, fences, viaducts, culverts, rights, privileges, franchises, and accessions of the party of the first part, together with all its rolling stock, machinery, furniture, and equipments of its said road now and hereafter to be acquired, being the same property described in the deed of Matthew Johnson, marshal and commis-

19] sioner, to A. Boody, *Esq., and dated October 8, 1858, and A. Boody conveyed to the party of the first part.

The habendum clause was "To have and to hold the premises and every part and parcel thereof, and all its increase, accessions, and incidents unto the said Morgan and his successors," etc.

The condition of the mortgage and bond was that the Toledo & Wabash Railroad Company would pay the $900,000 of bonds issued by the Toledo & Illinois Railroad Company and secured by the first mortgage. The mortgage recites that it is executed for the benefit of the bondholders under the first mortgage. On October 15, 1858, the Toledo & Wabash Railroad Company gave a second mortgage to E. D. Morgan, trustee, for $1,000,000, in which the description of the property conveyed is the same as above, as is also the habendum clause. The true intent and meaning of this mortgage are declared to be as follows:

First. That this mortgage attaches to the property above described as subject to and subordinate to said bonds of the Toledo & Illinois Railroad Company, or said issue of $900,000, whether evidenced by said bond of the party of the first part, made to Edwin D. Morgan, trustee, etc.

Second. That the party of the first part, or any railroad company into which it may become a component part by consolidation, shall be chargeable with said sum of $900,000, as a prior lien and encumbrance to any other debt thereon.

The Toledo & Wabash Railroad Company of Ohio, soon after executing the foregoing mortgages, entered into articles of consolidation with the Wabash & Western Railway Company, an Indiana corporation, thereby forming the Toledo & Wabash Railway Company. It was provided in that agreement that all mortgages given by either of the parties "shall be as valid and binding upon the whole of the road, real estate, fixtures, and personal property which may be described in such mortgage as though the same had been originally executed by such consolidated corporation."

*This company took possession of the [20 property and operated it. Later it acquired certain terminal property in Toledo. It issued the equipment bonds. It made no mortgage at any time.

In 1865 the Toledo & Wabash Railway Company and various Illinois companies entered into an agreement of consolidation, whereby the Toledo, Wabash, & Western Railway Company was formed. It was this agreement which created the lien in favor of the equipment bonds which was adjudicated in Compton's suit.

Another issue raised by the bill and cross bills and Compton's answers was the effect of a decree of United States circuit court of Indiana denying the existence of a lien in favor of equipment bonds of the same issue as those held by Compton, upon the Ohio decree in Compton's favor. It was contended by complainant below that Compton was a party to the Indiana decree, and was thereby estopped to plead the Ohio decree. The master and the court below decided in Compton's favor on this point. The facts in respect to this issue were as follows: In 1878 one Tysen brought suit on behalf of himself and such other owners of equipment bonds of this issue as might desire to come into said suit and contribute to the expense thereof, to establish that the bonds entitled their owners to a lien on the part of the Wabash main line extending from Toledo to the Illinois state line. The cause was removed to the Federal circuit court and resulted in a decree sustaining the lien. *Wabash, St. L. & P. R. Co.* v. *Ham*, 114 U. S. 587 [29: 235], 15 Fed. Rep. 763. It was appealed to the Supreme Court of the United States, the decree of the lower

court was reversed and the bill of complaint was dismissed. To this action Compton never became a party. When he began his suit the Indiana action had been discontinued. It was subsequently revived, however, and then for the first time a lien was asserted under the consolidation statutes. Compton's counsel did file a brief in the supreme court, but he paid no part of the expense of the suit.

In 1880, pending the suit in the Indiana court, 21] but prior *to the rendition of the Indiana decree, Compton began a suit in the common pleas court of Lucas county to establish and enforce a lien on the railroad extending from Toledo to the Illinois state line by virtue of his ownership of $150,000 of the par value of these equipment bonds. Compton made parties to this suit all the railway companies succeeding the Toledo & Wabash Railway Company (which issued the equipment bonds) in the ownership of the property and all the mortgagees whose mortgages were executed, after the issuance of the bonds, except the Central Trust Company and Cheney, trustees, who took their mortgage pending the appeal from the common pleas decree. Neither the Farmer's Loan & Trust Company nor E. D. Morgan, trustees of the underlying Ohio divisional mortgages, were parties.

In March, 1882, the common pleas court entered a decree sustaining the lien claimed, and ordered a sale of the part of the railroad in Ohio to pay the amount of the bonds found due, subject to the prior lien of the mortgages of the Farmers' Loan & Trust Company and E. D. Morgan, trustee, on the same property. The cause was appealed to the district court of the proper judicial district and by that court reversed for decision to the supreme court of the state, which in 1888 sustained the rulings of the common pleas court (*Compton* v. *Wabash, St. L. & P. R. Co.* 45 Ohio St. 592), found that the amount due on Compton's bonds was $339,920.40 with interest from May 1, 1888, and that this amount was a lien on the railroad in Ohio and Indiana, and ordered that on default in the payment of the amount due after ten days the Ohio part of the road should be sold to enforce the lien.

The finding and action of the supreme court of Ohio sufficiently appeared from the 5th and 6th paragraphs of its decree as follows:

"That upon the consummation of such consolidation, said bonds issued as aforesaid by the Toledo & Wabash Railway Company, known as equipment bonds, and all moneys due and to grow due thereon, and among them such of said bonds as are now owned, as aforesaid, by the plaintiff, and the moneys due and to grow due thereon, became an equit-22] able *lien upon all of the said railroad and real property and the structures thereupon, and the fixtures and appurtenances thereto appertaining, which were owned by said Toledo & Wabash Railway Company at the time of said consolidation, and which through said consolidation passed to and vested in the said Toledo, Wabash & Western Railway Company, and which afterwards passed to and vested in the defendant, the Wabash, St. Louis, & Pacific Railway Company, which last-named company was, at the time of the commencement of this suit, in possession of the same, being all of its railroad and property connected therewith, commencing in the city of Toledo in the state of Ohio and extending therefrom through the counties of Lucas, Henry, Fulton, Defiance, and Paulding in said state, and through the counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain, and Warren in the state of Indiana, to and terminating at a point in the west line of State Line City in said last-named county, and that said bonds are now a lien on such railroad and property, and the plaintiff is entitled to enforce the same. That the said lien of said bonds is prior and superior to the rights, interests, estates, claims, and liens of the defendants in this action and each of them, in and upon said railroad and property upon which said lien is hereby declared, and is prior and superior to the rights, interests, estates, claims, and liens of all persons and corporations who have derived any such rights, estates, claims, and liens from, by, or through the said defendants, or any of them, since the commencement of this action or otherwise; but as to all that part of said railroad and property which is situate within the state of Ohio, such lien is inferior and subject, but inferior and subject only to the two mortgages mentioned in the petition herein, one of which was executed by the Toledo & Illinois Railroad Company to the Farmers' Loan & Trust Company on the 8th day of September, 1853, for the security of the bonds of that company, amounting to $900,000, due as extended August 1, 1890, and bearing interest at the rate of 7 per cent per annum, payable semi-annually on the 1st day of February and August in each year, and the other *of which was executed by [23 the Toledo & Wabash Railroad Company to Edwin D. Morgan, trustee, on the 5th day of October, 1858, for the security of the bonds of that company, amounting to $1,000,000, due on the 1st of November, 1878, and bearing interest at the rate of 7 per cent per annum, payable semi-annually on the 1st day of May and November in each year.

"6. That the said defendants or any of them pay to said plaintiff the said sum of $339,820.40 now due on said bonds owned by the plaintiff as aforesaid within ten days from the entry of this decree, and if default shall be made in such payment that an order of sale issue for the sale as upon execution at law of all said railroad and real property, together with the structures thereupon, and the fixtures and appurtenances thereto appertaining, upon which the lien of said bonds, known as equipment bonds, is hereby declared to exist, which is situated in the state of Ohio and the jurisdiction of this court, subject, however, but subject only to the lien of the two mortgages hereinbefore mentioned as executed by the Toledo & Illinois Railroad Company to the Farmers' Loan & Trust Company and the Toledo & Wabash Railroad Company to Edwin D. Morgan, and to the indebtedness secured by each of said mortgages, and that from the proceeds of such sale the costs of this action as taxed to be paid, and the residue of such proceeds be brought into court to abide its further order herein on the footing of this decree. That before offering the property hereby directed to be sold, for sale, the officer

conducting the same shall cause the same to be appraised according to law by three disinterested freeholders of either or any of the counties in which the same is situated, and such appraisal shall be of the value of said property subject to the encumbrance and lien of the two mortgages hereinbefore mentioned, as executed, respectively, by the Toledo & Illinois Railroad Company and the Toledo & Wabash Railroad Company, subject to which it is directed to be sold and over and above the lien of such mortgages according to the amount of the indebtedness secured thereby, as the same 24] shall be ascertained by the officer *conducting such sale, with interest computed to the time of the sale."

After this case had been appealed to this court and before the hearing, a motion was made by appellees to dismiss the appeal or affirm the decree of the court below on the ground that since the rendition of the decree herein a decree had been rendered in the United States circuit court for Indiana on the same cause of action limiting Compton's remedy to a redemption of the four senior mortgages, two in Ohio and two in Indiana, and no appeal had been taken from that decree—and the record of the Indiana suit was filed to establish ground for the motion. The record shows that the Indiana decree was exactly like that from which this appeal was taken, and contained the same provision in respect to Compton's lien requiring him to redeem the Ohio and Indiana divisions by payment of the amount due on both the Ohio and the Indiana divisional mortgages, with interest within ten days, and in default of such payment he should be taxed with the costs of all the matters in connection with his intervention.

Because the court finds difficulty in reaching a conclusion with reference to the following questions, it is ordered that upon the foregoing statement of facts the following three questions, concerning which this court requests the instruction of the Supreme Court of the United States for its proper decision, be certified to that court in accordance with § 6 of the act to establish circuit courts of appeals, approved March 3, 1891. The said questions are:

First. Had Compton the right under the saving clause of the decree for sale to a decree for the redemption of the Ohio division only?

Second. In fixing the amount to be paid in redemption, is he entitled to have the principal and interest of the mortgages to be redeemed reduced by the net earnings received by the purchaser?

Third. Is the decree of the circuit court of the United States for the district of Indiana between the same parties and unappealed from *res judicata* upon the foregoing questions in this court?

25] *It is further ordered, for the convenience of the Supreme Court of the United States, that the opinions of Judge Taft and Judge Lurton in this cause be also certified to the Supreme Court of the United States.

It is also further ordered that all proceedings of the cause be stayed until the instructions of the Supreme Court upon these questions shall be received by this court.

Messrs. **Judson Harmon**, *Attorney General*, **John G. Milburn**, and *John H. Doyle*, for appellant:

Compton had the right, under the saving clause of the decree for sale, to a decree for the redemption of the Ohio property alone.

Whiting v. *Bank of United States*, 38 U. S. 13 Pet. 15 (10: 37); *Grant* v. *Phœnix Mut. L. Ins. Co.* 106 U. S. 431 (27: 238); *Parsons* v. *Robinson*, 122 U. S. 112 (30: 1122); *Burlington, C. R. & N. R. Co.* v. *Simmons*, 123 U. S. 55 (31: 74); *Hill* v. *Farmers' & M. Nat. Bank*, 97 U. S. 450 (24: 1051); *Nash* v. *Williams*, 87 U. S. 20 Wall. 249 (22: 258); *Winter* v. *Eckert*, 93 N. Y. 367.

Compton's decree is conclusive as to every question necessarily within the issues, whether actually raised or not.

Cromwell v. *Sac County*, 94 U. S. 351 (24: 195); *Stout* v. *Lye*, 103 U. S. 66 (26: 428); *Dimock* v. *Revere Copper Co.* 117 U. S. 559 (29: 994).

Compton's decree is an effective appropriation of the Ohio property to the payment of the amount due him which is binding on every interest in the Ohio property and necessarily entitles him to redeem it separately.

It is argued that the consolidated company became the principal debtor as to the Ohio mortgage bonds, the Indiana mortgage bonds, and the equipment bonds, and the Toledo & Wabash Railway Company was thenceforth merely a surety which could resist any redemption by equipment bondholders except of the entire property in both Ohio and Indiana. This, however, we contend, is incorrect.

It is not the relation of principal and surety, but the substitution of one debtor for another, which results from a consolidation of railroad companies.

Shields v. *Ohio*, 95 U. S. 319 (24: 357); *Atlantic & G. R. Co.* v. *Georgia*, 98 U. S. 359 (25: 185); *Maine C. R. Co.* v. *Maine*, 96 U. S. 499 (24: 836); *St. Louis, I. M. & S. R. Co.* v *Berry*, 113 U. S. 465 (28: 1055); *Shields* v *Ohio*, 26 Ohio St. 86; *State, Attorney General*, v. *Sherman*, 22 Ohio St. 411; *McMahan* v. *Morrison*, 16 Ind. 172, 79 Am. Dec. 418.

The Wabash Railroad Company, as the successor or equitable assignee of the first and second Indiana mortgages, has no grounds on which to object to Compton's redemption of the Ohio property alone and no standing in this suit as such to object, if such grounds existed.

Doe, Brobst, v. *Roe, Brock*, 87 U. S. 10 Wall. 519 (19: 1002); *Childs* v. *Childs*, 10 Ohio St. 339; *Stark* v. *Brown*, 12 Wis. 573, 78 Am. Dec. 762; *Johnson* v. *Sandhoff*, 30 Minn. 197; *Brewer* v. *Nash*, 16 R. I. 458.

The Wabash Railroad Company has no standing in this suit as the equitable assignee of the Indiana mortgagees to assert any rights it may have acquired from the Indiana mortgagees through the sale on the foreclosure of the Indiana liens.

Mercantile Trust Co v. *Kanawha & O. R. Co.* 39 Fed. Rep. 337; *Toland* v. *Sprague*, 37 U. S. 12 Pet. 300, 327 (9: 1093, 1104); *Northern Indiana R. Co.* v *Michigan C. R. Co.* 56 U. S. 15 How. 233, 242 (14: 674, 678).

The purchaser is strictly bound by the saving clauses and reservations in the final decree.

Blossom v. *Milwaukee & C. R. Co.* 68 U. S.

1 Wall. 655 (17: 673); *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207 (34: 97); *Kneeland* v. *American Loan & T. Co.* 136 U. S. 89 (34: 379); *Swann* v. *Fabyan*, 110 U. S. 590 (28: 252); *Swann* v. *Clark*, 110 U. S. 602 (28: 256).

Compton is not estopped from prosecuting this appeal by the fact that a decree similar in its terms with the one here appealed from was entered in the United States circuit court for Indiana and has not been appealed from.

There was neither identity of issues, controversies, or parties between this suit and the suit in the circuit court for the district of Indiana. This identity is neeessary before a decree in one suit can be a bar or an estoppel, and the principle is fundamental.

Bigelow, Estoppel, 5th ed. p. 80; Freem. Judgm. 244; *Palmer* v. *Hussey*, 87 N. Y. 306.

Messrs. **Rush Taggart** and **Henry Crawford,** for appellees:

In granting Compton the right to redeem from the four prior mortgages in Ohio and Indiana, the circuit court gave him all the relief to which he was entitled.

Lawrence Mfg. Co. v. *Janesville Cotton Mills*, 138 U. S. 561 (34:1008); *Hassall* v. *Wilcox*, 130 U. S. 493 (32: 1001); *Simmons* v. *Taylor*, 38 Fed. Rep. 682; *Simmons* v. *Burlington, C. R. & N. R. Co.* 159 U. S. 278 (40:150).

It was the duty of the court of equity to examine the grounds upon which the original Compton decree was based, to ascertain whether it was equitable or not to enforce the same according to its terms.

Lawrence Mfg. Co. v. *Janesville Cotton Mills*, *supra*; *Hamilton* v. *Haughton*, 2 Bligh, 193; *Wadhams* v. *Gay*, 73 Ill. 415; *Gay* v. *Parpart*, 106 U. S. 679 (27:256).

There was a unit agreement on the part of the Toledo, Wabash, & Western Railway Company to protect the equipment bonds, and to receive the property in Ohio and Indiana, not as separate parcels each charged with the lien of these equipment bonds, but as a single parcel charged with this lien, and the single promise to pay would require a single redemption.

Wells v. *Tucker*, 57 Vt 223.

Where several parcels of land are charged with the payment of a common debt, each part will be compelled to ratable contributions for its discharge.

Deering v. *Winchelsea*, 2 Bos. & P. 270; *Cooper* v. *Sterens*, 1 Johns. Ch. 425; *Campbell* v. *Mesier*, 4 Johns. Ch. 338; *McDonald* v. *Magruder*, 28 U. S. 3 Pet. 477 (7:747); *Bourne* v. *Maybin*, 3 Woods, 738; *Adams* v. *Smilie*, 50 Vt. 1.

When a common creditor holds in his hands the right to resort to two properties equally bound for the payment of his debt equity will not permit him so to use his lien as to cast the whole debt upon one portion and practically release the other.

Cooper v. *Sterens*, 1 Johns. Ch. 425; *Barnes* v. *Racster*, 1 Younge & C. Ch. 401; *Athill* v. *Athill*, L. R. 16 Ch. D v. 211; *Allen* v. *Clark*, 17 Pick. 47; *Detweiler* v. *Holderbaum*, 42 Fed. Rep. 337.

The rule is universal that the redemption must be total. The creditor cannot be compelled to split his debt or his security. The Wabash Railroad Company, therefore, holding as a single lien the entire mortgages in the two states, is not compelled to release any of the property to the complainants, except upon the tender of the entire amount of the four mortgages.

Powell, Mortg. 342; *Meacham* v. *Steele*, 93 Ill. 135; *Pearce* v. *Morris*, L. R. 5 Ch. App. 237; *Lamb* v. *Montague*, 112 Mass. 352; *Wood* v. *Goodwin*, 49 Me. 260.

A railroad is an entirety and no such division into parts should take place as against the interests of the public, unless it is imperatively necessary.

Philadelphia, W. & B. R. Co. v. *Woelpper*, 64 Pa. 366; *Dunham* v. *Cincinnati, P. & C. R. Co.* 68 U. S. 1 Wall. 254 (17: 584); *Shaw* v. *Bill*, 96 U. S. 16 (24:335); *Pierce* v. *Milwaukee & St. P. R. Co.* 24 Wis. 551, 1 Am. Rep. 203; *Farmers' Loan & T. Co.* v. *Fisher*, 17 Wis. 114.

The decree of the United States circuit court of Indiana is a conclusive adjudication of all the questions sought to be raised in this case.

The appellate court should therefore proceed no further with this case.

South Spring Hill Gold Min. Co. v. *Amador Medean Gold Min. Co.* 145 U. S. 300 (36:72); *Little* v. *Bowers*, 134 U. S. 547 (33:1016); *California* v. *San Pablo & T. R. Co.* 149 U. S. 308 (37:747); *East Tennessee, V. & G. R. Co.* v. *Southern Teleg. Co.* 125 U. S. 695 (31:853); *Washington Market Co.* v. *District of Columbia*, 137 U. S. 62 (34:572); *Singer Mfg. Co.* v. *Wright*, 141 U. S. 696 (35:906); *Elwell* v. *Fosdick*, 134 U. S. 500 (33:998).

Mr. Justice **Shiras** delivered the opinion of the court:

When by virtue of the decrees of foreclosure in the several circuit courts of Ohio, Indiana, and Illinois, entered March 23, 1889, the entire line in the three states was, on May 15, 1889, sold as a unit to the purchasing committee, and when that committee organized a new company, called "The Wabash Railroad Company," to which, on August 1, 1889, was conveyed the entire line so purchased, it would seem that all questions and disputes pending between the several mortgage trustees were settled and arranged upon the terms fixed by that decree. At all events, no appeal appears to have been taken by any party except Compton.

What are Compton's rights under the saving clause of the decree for sale; whether he is entitled, in case of a sale or redemption, to have the principal and interest of the prior mortgages reduced by the net earnings received by the purchaser since the sale, and what effect is to be given to the decree of the circuit court of the United States for the district of Indiana, are the questions certified to us by the circuit court of appeals. It is true that the form in which the first question is put in the certificate would seem to go on the assumption that Compton's only right is to redeem, and that the disputable matter is whether the redemption is to cover *as well the Indiana as the Ohio [26 division. In the view, however, that we take of the subject, we prefer to read the certificate as propounding the question of the real meaning and effect of the decree of sale as affecting Compton's rights, and to thus enable the circuit court of appeals to finally deter-

mine the controversy. It is, indeed, contended in the appellees' brief that this court is precluded, by the form of the question, from going back of the decree of the circuit court, requiring Compton to redeem, but the circuit court of appeals has certified to us for our consideration, in connection with the questions propounded, the entire decree of the circuit court, a full statement of the history of the whole case, and copies of the opinions of the circuit judges, in which are fully discussed the various questions that arise under the appeal to the circuit court of appeals; among others the very question whether Compton's right is or is not a right to have a resale. And this alleged right of Compton is considered at length, in every aspect, in the briefs of the respective counsel.

It may be well to have before us the very language of that portion of the decree which we are asked to construe:

"And the defendant James Compton, having in open court, on the final hearing herein, objected to the rendering or entry of any decree in this cause at this time, on the ground that the issue raised by the amendment to the complainant's amended and supplementary ancillary bill and to the cross bill of the cross-complainants, Solon Humphreys and Daniel A. Lindley, trustees, and the answers of the defendant, James Compton, to be filed herein, have not been tried and determined, the court overrules such objection, and the defendant, James Compton, duly excepts to such ruling and the entry of this decree. But it is adjudged and decreed in the premises that the rendering and entry of this decree in advance of the trial and determination of such issues is upon and subject to the following conditions, to wit:

"If, upon the determination of such issues, it shall be adjudged by this court that the decree rendered by the supreme court of the state of Ohio, in the suit brought by said James Compton against the Wabash, St. Louis, & Pacific [27] Railway *Company and others, referred to in the pleading herein, and the lien thereby declared and adjudicated in his favor, continue in full force and effect, then the purchaser or purchasers, at any sale or sales, hereunder of that portion of the property sold, covered, and affected by said lien, or the successors in title of said purchaser or purchasers, shall pay to the said James Compton or his solicitors herein, within ten days after the entry of the decree herein in favor of said James Compton, the sum of $339,920.40, with interest thereon at 6 per cent per annum from May 1, 1888, being the amount found due on the equipment bonds by him owned, by the supreme court of Ohio in his said suit, upon the surrender by him of the bonds and coupons owned by him, referred to in his petition in this suit; and in default of such payment this court shall resume possession of the property covered and affected by the said lien of the defendant James Compton, and enforce such decree as it may render herein in his favor by a resale of such property or otherwise as this court may direct.

"And it is further ordered and adjudged that, notwithstanding the entry of this decree, the said issues concerning the claim and interest of said Compton shall proceed to a final determination and decree in accordance with the rules and practice of this court, and any decree rendered thereupon shall bind the purchaser or purchasers at any sale or sales had hereunder, and all persons and corporations deriving any title or interest in said property affected by such lien, from or through them or any of them, and nothing in this decree contained shall be construed as an adjudication of any matter or thing as against the said James Compton, or to prejudice, annul, or abridge any right, claim, or interest, or lien which the said James Compton may have in, to, or upon the premises hereby directed to be sold, or any part thereof, or in, to, or upon any property whatsoever embraced in this decree; it being the intention to hereby preserve the rights of said Compton in the relation in which he now stands towards the mortgagees parties hereto."

*The masters reported the making of the [28] sale in accordance with the decrees, which sale was confirmed May 18, 1889, and on June 18 an order requiring the masters to execute a deed and to deliver possession was made. On August 17, 1889, the court ordered "that the issues presented in this cause as to the lien and claim of James Comp on, made by the various pleadings herein upon and concerning said claim and lien, and reserved in the former decree herein saving the rights of said Compton, be and the same are hereby referred to Bluford Wilson as special master," etc.

The special master reported that Compton's lien was a valid one, and that he was entitled by the saving clause of the decree to have the Ohio division resold if the purchaser did not pay off his bonds, principal and interest, in full. The circuit court sustained the master in holding Compton's lien valid, but decided that his only remedy was to redeem the four divisional mortgages, two in Ohio and two in Indiana. In refusing Compton a right to a resale of the Ohio property, and in restricting him to a redemption of the Ohio and Indiana divisions in favor of the divisional mortgages thereon, we think the circuit court erred.

The language of that court was as follows:

"There is nothing in the reservations of the decree of March 23, 1889, which requires the court to order a resale of the property covered by Compton's equitable lien. That lien was in fact discharged by the foreclosure of the four mortgages ahead of it, which foreclosure Compton had no right to interfere with or delay. The reservations in the decree of sale were not intended to and cannot affect the purchaser's title acquired under those mortgages. We cannot properly, therefore, direct a resale without disregarding the prior right of said mortgagees and of the purchasers who have succeeded thereto. If we had the discretion to do so, it should not be exercised in his favor, for it does not appear that any larger sum could be obtained on a resale: it is not shown that it sold for an inadequate price, and Compton offers no guaranty or security that a resale will bring a larger amount and realize a surplus to which he would be entitled. It is not proper for *the court to order resales as a matter of [29] experiment, and thereby cast clouds upon the title of the purchasers or present owner. As stated by the Supreme Court in *Robinson* v.

Iron R. Co. 135 U. S. 522 [34: 276], his failure to offer to redeem is evidence that he does not think the property was worth more than it brought at the sale. Besides he was as free to bid at the sale already made as he would be upon a resale. Under such circumstances we give full effect to his equitable lien by allowing him to redeem the property upon the terms indicated."

We think that these observations show a plain oversight or disregard by the learned court of the terms and obvious meaning of the decree of March 23, 1889. When the terms of that decree were fixed, all parties to be affected thereby agreed to the same. The issues raised by the pleadings as to Compton's claim were still pending and undetermined. It was evidently the wish and the interest of all the other parties to have the sale effected at once, and, in order to avoid the further delay that would be occasioned by awaiting the determination of those issues, the provisions or reservations in Compton's favor were put in the decree.

Substantially those provisions were that the entry of the decree of sale should not foreclose Compton's claim, but that the issues concerning it should be inquired into and determined; "that if upon the determination of such issues it shall be adjudged by the court that the decree rendered by the supreme court of Ohio, in the suit brought by said James Compton, referred to in the pleadings herein, and the lien thereby declared and adjudicated in his favor, continues in full force and effect, then the purchaser or purchasers at any sale or sales had hereunder of that portion of the property sold, covered, or affected by said lien, or the successors in the title of said purchaser or purchasers, shall pay to said James Compton or his solicitors herein, within ten days after the entry of the decree herein in favor of said James Compton, the sum of $339,920, with interest at 6 per cent per annum from May 1, 1888, . . . **30**] and in default of such *payment this court should resume possession of the property covered and affected by the said lien of the defendant James Compton, and enforce such decree as it may render herein in his favor by a resale of such property or otherwise as this court may direct."

When the report of the special master finding the issues in Compton's favor, that his lien was a valid one, and that he was entitled to have the Ohio division resold if the purchaser did not pay off his bonds as provided in the decree, was sustained by the court so far as the validity of Compton's lien was concerned, we do not think it was open for the court, consistently with the terms of the decree of March 23, 1889, to deprive Compton of the rights and remedies therein conferred. The various questions and equities arising out of the dates of the mortgages, etc., which are discussed by the court, were all waived and removed from consideration, so far as Compton was concerned, by the express provisions of the decree. It is suggested that because it was said that the decree in Compton's favor should be enforced by a resale of the property or *otherwise* as the court might direct that thereby it was intended that the court should have as full power to determine and regulate Compton's rights and remedies as if the reservations in the decree had never been made. This we think a strained and unnatural interpretation to put upon the phrase mentioned. We do not understand it as intended to enable the court to disregard its decree of March 23, but rather as a provision in Compton's favor, as, for instance, that the court might empower Compton to take possession of the property covered by his lien, instead of resorting to a sale.

When the circuit court speaks of a resale as inequitably affecting the rights of the prior mortgagees and of the purchasers who have succeeded thereto, it is evident that the court overlooked those provisions of the decree which, in express terms, subjected such purchasers to Compton's rights to a resale, if they do not choose to pay him the sum awarded by the decree. So, when the court says that Compton could as well have been a bidder at the sale as at a resale if one be ordered, it omits to notice that when the sale took place under *the decree Compton's claim was still unde-[**31** termined, but that provision had been made for him in the event that his claim was held valid. He could not safely bid because he could not foresee whether his claim would be allowed, and the arrangement made relieved him, very properly, from the perplexity to which he would have been subjected if the sale had been unconditionally made, when the fate of his claim was still uncertain.

It was well said by Mr. Chief Justice Waite, speaking for this court in *Fosdick* v. *Schall*, 99 U. S. 252 [25: 342], that "railroad mortgages are peculiar in their character and affect peculiar interests. The amounts involved are generally large, and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained, and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation."

The decree of March 23, 1889, under which the sale was made and confirmed on May 18, 1889, was, in all essential respects, the final decree in the case, the questions reserved being merely incidental to carrying the decree into full effect. That portion of said decree which established Compton's rights was in its nature final; the only matter which was kept in reserve as respects Compton was the awaiting the determination of the validity and amount of his claim by the report of the special master. And it may well be doubted whether it was competent for the circuit court at a subsequent term to disturb the rights of Compton defined and adjudicated at a previous term in the final decree of sale. In several particulars the case of *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207 [34: 97], would seem to be applicable. That was a case like the present one, of several suits brought to foreclose mortgages in two or more of the circuit courts of the United States having jurisdiction over distinct railroads which had been consolidated. Two such suits were brought in the circuit court for *the southern district of Ohio, and a [**32**

receiver was appointed. While the proceedings were pending the Grant Locomotive Works intervened by petition in both suits, and set up claims arising out of the use by the receiver of certain locomotive engines belonging to the intervener. Upon a hearing and on the 22d day of December, 1883, of the October term, orders were entered in each of said causes in favor of the intervening petitioner, by which the receiver was ordered to pay certain considerable sums to the Grant Locomotive Company by way of rent and purchase money of the engines, and further declaring that the said several amounts with interest thereon should be a charge upon the earnings, income, and all the property of the Toledo, Cincinnati, & St. Louis Railroad Company (the consolidated company), and especially of the Ohio division, prior to the first mortgage or other bonded debt of said railroad or of said division thereof, and that any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of said railroad or division should be a first lien thereon, and the said sale should be made subject thereto. On March 7, 1884, the same being one of the days of the February term, these orders were suspended by an order of the court, the petitioner objecting. On March 15, 1884, the Central Trust Company, complainant, filed an answer to the intervening petition, and also a petition for a rehearing and review of the orders of December 22, 1883, which it further asked should be annulled and set aside.

On April 10 of the April term, 1884, the court ordered and decreed that the said decrees of December 22, 1883, be set aside and annulled. In June, 1884, the two Ohio divisions of the railroad were sold, and the sales were confirmed by an order made July 9, 1884. The decrees for sale contained provision for the payment into the court by the purchasers at these sales of certain amounts of cash, and also provided that the decrees of confirmation of the sale should be subject to the terms and provisions of the decrees of sale theretofore made; and the court reserved the right to resell said railroad property upon failure by the purchasers to comply with such terms and provisions.

33] *On the 8th day of February, 1887, the Grant Locomotive Works and R. S. Grant severally filed petitions in said causes, setting forth the matters hereinbefore detailed, and alleging that the orders of April 10, 1884, purporting to annul the decrees of December 22, 1883, were void, and that those decrees were still in force. The Central Trust Company answered, and the purchasers of the Ohio divisions demurred; and on June 11, 1887, the court adjudged and decreed that the order of April 10, 1884, be set aside, and that the said orders of December 22, 1883, be restored. January 28, 1889, on motion of the intervening creditors that the purchasers of the railroad property be required to pay into the registry of the court, for the use of the interveners, the amounts due under the decrees, and that in default thereof the said railroad property be resold for the benefit of the interveners, decrees so prayed for were entered over the objections of the Central Trust Company and of the purchasers. The court also refused to entertain bills of review on the part of the Central Trust Company and of the purchasers, seeking to have said orders of December 22, 1883, reconsidered.

From these orders and decrees an appeal was taken on the part of the Central Trust Company and the purchasers to this court, where the action of the circuit court was approved, and it was *held* that if the decree of sale in a suit for foreclosing a railroad mortgage provides that the purchaser shall pay down a certain sum in cash when the sale is made and do certain other acts prescribed, the purchaser is bound by the decision of the court as to such other claims, and has no appealable interest therein; that a decree, in a suit for foreclosing a railroad mortgage, that the claim by an intervening creditor of an interest in certain locomotives in possession of the receiver and in use on the road was just and entitled to priority over the debt secured by the mortgage, is a final decree upon a matter distinct from the general subject of the litigation, and it cannot be vacated by the court of its own motion after the expiration of the term at which it was granted.

In the opinion in this case *Swann* v. *Wright's Executor* [*Swann* v. *Fabyan*], 110 U. S. 590 [28: 252], *was cited. There Swann had pur [34 chased a railroad under a decree which provided that the sale should be subject to the liens already established, or which might be established on references then pending, as prior and superior to the lien of the mortgage, and the claim of Wright was one of this class. It was pending before the master and reported on after the sale, when the purchaser applied to oppose its confirmation, and was not allowed to do so; and Swann afterwards filed a bill to set aside Wright's claim for fraud in its inception, which bill was dismissed, and the dismissal was on appeal affirmed on the ground that the property was purchased expressly subject to all established claim or claims which might be established on references then pending, which included Wright's, and it was decided that as neither the purchaser nor his grantee proposed to surrender the property to be resold for the benefit of those concerned, such purchase had no standing in court for the purpose of relitigating the liens expressly subject to which he bought and took title.

The apprehensions expressed in their brief by the learned counsel of the appellees, that because of the absence of the other holders of the equipment bonds, the purchasers or their successor, the Wabash Railroad Company, may yet be subjected to their claims, are without foundation. It would seem that their claims were disposed of by the decree of this court in the case of *Wabash, St. L. & P. R. Co.* v. *Ham*, 114 U. S. 587 [29: 235], where it was held that the property sold under the decree of foreclosure is not subject to any lien in favor of the holders of the equipment bonds. We think it quite plain that Compton is the only party having an interest in and a right to enforce the decree of the Ohio supreme court. The provision contained therein assessing the amount of his claim at the amount of the bonds held by him shows that the decree was intended to operate solely for his benefit, and the direction that the proceeds of sale should be brought into court, to abide its further order on the footing of the decree, is the order usually made

when a sale is made by an officer appointed by the court. Such a sale might result in a sum [35] in *excess of Compton's claim, and, in such event, there would be room for a further order of the court.

This view of the import of the decree of March 23, 1889, relieves us from a consideration of the difficult questions that would arise if Compton were compelled to proceed by way of redemption. Those questions are discussed with learning and ability in the respective opinions of the circuit judges, furnished us in connection with the certificate, and also in the elaborate briefs of the appellees' counsel. *Compton* v. *Wabash R. Co.* 31 U. S. App. 486.

But, as we have already said, all parties who have had the benefit of the decree of sale are precluded from going back of it, and from now raising questions that might otherwise have arisen. Not only were those who were parties to the proceedings in the Ohio court bound by the decree, therein reached, that Compton had a right to sell the Ohio line in satisfaction of his lien, but the Ohio divisional mortgagees who were not parties to that decree, but who procured, or, at least, have acquiesced in, the decree of March 23, 1889, and have participated in the benefits of the early sale thus secured, have no right now to object to the enforcement of Compton's lien in the manner pointed out in the decree. *The Stephen Morgan* [*The Stephen Morgan* v. *Good*], 94 U. S. 599 [24: 266]; *Mount Pleasant* v. *Beckwith*, 100 U. S. 527 [25: 702].

No objections were taken by any of the parties to the decree of sale of March, 1889, either for want of parties or for any other reason. Indeed, it was plainly a conventional decree. Any inconvenience that would be occasioned by a re-sale of a portion of the entire line can be avoided by complying with the decree and making payment accordingly. If the Wabash Railroad Company be regarded simply as an outside purchaser, it cannot be heard to object to the terms of the decree of sale. If, what is apparently its real character, it be regarded as a company formed by an arrangement between the parties controlling the sale, it has even less right to disregard the rights of Compton as stipulated for in the decree.

The next question put is whether Compton is entitled to have the prior mortgages on the [36] Ohio division reduced by the *net earnings received by the purchasers since the receivers turned over possession of the road to them.

If the Wabash Railroad Company, as the successor of the purchaser at the sale, is to be regarded as the Ohio mortgagees in possession, it is liable to account for the rents and profits or net earnings of the mortgaged property. Such, certainly, is the general rule when property is redeemed, either by the mortgagor or by a junior encumbrancer having a right to redeem, and we see no reason why that rule should not be applied in a case like the present. 2 Jones, Mortg. 5th ed. § 114.

But we think the better view is that the Wabash company should be regarded as a party in possession under the express terms of the order of sale, and as representing all parties in interest, including Compton; and hence cannot claim to be an absolute purchaser of the rights of a mortgagor not subject to account for rents and profits. In that point of view there is a trust relation, which involves an accounting until Compton is disposed of.

Whether the decree of the circuit court of the United States for the district of Indiana between the same parties and unappealed from, and which, while recognizing Compton's lien, declares his remedy to be a redemption of the railroad in Indiana and Ohio, estops Compton from enforcing his lien or claim against the Ohio division only, is the third question put to us.

This question should be answered in the negative, and, indeed, is covered by the view which we take of the real nature of Compton's remedy, as entitling him to a sale of the Ohio division if his debt should not be paid by the purchaser under the decree of sale. Compton's claim, in its present status, consists of the decree of the Ohio state court in his individual favor, fixing the amount of his debt, and decreeing a sale of the Ohio property, and of the decree of sale of the circuit court of the United States affirming the decree of the Ohio court as to the validity and amount of the claim, and providing that if it should not be paid by the purchaser, Compton should have a right to a sale of the Ohio road or to some equivalent remedy.

*Upon the theory of the mortgagees [37] themselves, the suits in the circuit courts of Ohio and Indiana were two distinct proceedings, having in view the sale of two distinct portions of the road, and while the decree of the circuit court of the Indiana district may restrict Compton from proceeding in that court and district, so as to affect property in Indiana, except on the terms of that decree, such decree cannot, as we view it, be used by the purchaser to affect or defeat Compton's rights in the circuit court of the United States for the Ohio district. This contention overlooks the distinction between Compton as one of a class of bondholders and Compton recognized in the decree as the owner of a final judgment or decree of the state court of Ohio.

Upon the whole, we answer the questions propounded thus:

1st. That the decree of sale of March 23, 1889, confers upon Compton, in event that his claim shall not be paid by the purchaser, the right to a decree of resale of the property situated in Ohio and covered and affected by his lien.

2d. That, in event of such sale, and in applying the proceeds thereof, Compton will be entitled to an account of the net earnings of the Ohio division over and above all operating expenses, taxes paid, and cash paid, if any, in redemption of receiver's certificates and other expenses properly chargeable against the Ohio division, which net earnings should be deducted from the amount due on the two prior mortgages on said division.

3d. That the decree rendered in the circuit court of the United States for Indiana is not *res judicata* upon the foregoing questions. Let it be so certified.

38] *Re* JOSEPH T. H. HALL, *Petitioner.*

(See S. C. Reporter's ed. 38-43.)

Motion for judgment—jurisdiction of court of claims.

1. A court engaged in the regular trial of causes on a day which is not a motion day according to the practice of the court is not bound to drop all other business and immediately grant a motion for judgment in accordance with the mandate and opinion of a higher court on reversal of its decision; but it has the right and duty to take the motion into consideration, if it deems it necessary.

2. The jurisdiction of the court of claims to proceed further in a case founded upon a statute is taken away by the repeal of the act after a reversal of the judgment of the court and the remanding of the case for further proceedings.

[No. 17, Original.]

Submitted April 12, 1897. Decided May 10, 1897.

APPLICATION for a writ of mandamus commanding the Court of Claims to cause to be entered a judgment in favor of Joseph T. H. Hall against the District of Columbia. *Denied.*

The facts are stated in the opinion.

Mr. **Edwin Forrest** for petitioner.

Mr. **Joshua Eric Dodge,** Assistant Attorney General, for respondent.

Mr. Justice **Peckham** delivered the opinion of the court:

This is an original application to this court for a writ of mandamus to the judges of the court of claims commanding them to cause to be entered a judgment in favor of petitioner and against the District of Columbia for the sum of $8,664.19, as of March 2, 1897, the date of the filing of a mandate from this court with the court of claims in the case of *District of Columbia* v. *Hall.* The record now before us gives the history of that case since it was decided by this court in February last.

The facts in the original litigation out of 39] which this *application grows are to be found in the report of the cases of *District of Columbia* v. *Hall*, 165 U. S. 340 [41 : 738], and *District of Columbia* v. *Johnson*, 165 U. S. 330 [41 : 734] It appears therein that this petitioner, under the provisions of the act of Congress approved February 13, 1895, had recovered a judgment in the court of claims which was entered June 22, 1896, against the District of Columbia, for the above named sum of $8,664.19, with a declaration contained in the judgment that such amount became due and payable on the 1st of January, 1877, the effect of which was to grant interest thereon from the last-named date. Upon appeal this court determined that the court of claims erred in the matter of granting interest, and therefore the judgment of that court was reversed and the cause remanded. On the 1st day of March, 1897, the mandate from this court was issued, in which it was "ordered and adjudged by this court that the judgment of said court of claims in this cause be, and the same is hereby, reversed. And it is further ordered that this cause be, and the same is hereby, remanded to said court of claims for further proceedings not inconsistent with the opinion of this court." The mandate was filed with the court of claims on the 2d day of March, 1897, and on the opening of the court on that day application was made for judgment in accordance with the mandate and the opinion of this court, the petitioner waiving any interest on the judgment This motion was consented to by the attorney representing the District of Columbia, but the court of claims refused to immediately grant the motion, and soon thereafter adjourned to the 8th of March. On the 15th of March the court entered an order declining to take any further proceedings in any suits based on the act of Congress, among them being the petitioner's claim, for the reason that the act had been repealed. The repealing act was enacted one day after the filing of the mandate in this case in the court of claims and the making of the motion by the petitioner for judgment.

The judges of the court of claims have made return to the order to show cause why the mandamus should not issue, and in that return they state:

*"That on the 2d day of March, 1897, that [40 not being a motion day according to the practice of said court, was presented in open court the mandate of the supreme court reversing the judgment in favor of Joseph T. H. Hall, which is described and set forth in the petition, together with a motion for entry of judgment for the sum of $8,664.19; that said motion was presented upon a day when the court was engaged in the regular trial of cases, and according to the practice of the court was received without argument and taken under advisement for decision thereafter; that at or about the same time the attention of the court was called to the pendency of the various motions for new trial from the numerous judgments, embodying the same characteristics which had been held to be erroneous by the supreme court, and on the said 2d day of March, 1897 mandates from the supreme court reversing the three other judgments appealed from as aforesaid and heard together with that of Joseph T. H. Hall, and in the same form as the mandate set forth in the petition, were filed.

"That on the said 2d day of March, 1897, and before the court in the ordinary course of its business had been able to take up for consideration the motion for judgment in favor of said petitioner, or to examine the opinion of the supreme court, referred to in the mandate and set forth in the petition, the court adjourned to the 8th day of March, and while so adjourned, Congress enacted and the President approved the act of March 3, 1897, entitled 'An Act Making Appropriations to Provide for the Expenses of the District of Columbia for the Fiscal Year Ending June 30, 1898, and for Other Purposes,' which said act contained, amongst other things, the following provision: 'That the act approved February 13, 1895, entitled "An Act to Amend an Act, Entitled 'An Act to Provide for the Settlement of all Outstanding Claims against the District of Columbia, and Conferring Jurisdiction upon the Court of Claims to Hear the Same, and for Other

NOTE.—*As to effect of repeal of statute on pending action,* see note to United States v. Tynen, 20:153.

Purposes,' Approved June 16, 1880," be, and the same is hereby, repealed, and all proceedings 41] pending shall be vacated *and no judgment heretofore rendered in pursuance of said act shall be paid.

"That at the time of the passage of said act the judgment in favor of the petitioner, as also of said three other appellants, had been by the action of the supreme court reversed and set aside. The judges of the court of claims, upon conference and due consideration, reached the conclusion that said act of Congress had taken away the power of the court to render judgment or take any step or proceeding in the said case, or in any of the other cases pending, or with reference to any of the judgments theretofore rendered under and by virtue of the jurisdiction conferred by said act of February 13, 1895; wherefore on the 15th day of March, 1897, that being the first motion day after the court resumed its sittings on the 8th of March, and the regular day upon which, according to the practice of the court of claims, judgments and decisions are rendered and entered, the said court of claims made the order set forth on page 7 of the petition in the following words, to wit:

" 'The act of 13 February, 1895 (28 Stat. at L. 664, chap. 87), having been repealed by Congress, it is ordered in all suits brought under or subsequent to said act that motions for new trial, applications for judgments, and all other papers in such suits, be restored to and retained upon the files of the court without further proceedings being had.'"

The petitioner now insists that he has the legal right to a judgment in the court of claims for the original sum of $8,644.19, because he says the judgment of that court originally awarding him that sum was not in effect wholly reversed by this court, but only in part in regard to interest, and that as to all other matters the judgment, under the opinion of this court, substantially remained and was in full force on the 2d day of March, at the time of the filing of the mandate and of the making of his motion to the court of claims; he therefore further insists that he was, when he made that motion, entitled at once to the judgment he asked for, and that if it had then been given, he would have been enabled to obtain payment of the judgment prior to the repeal of the act 42] upon *which the judgment was originally founded. He asks, therefore, that this court direct the court of claims to enter a judgment *nunc pro tunc* as of March 2, 1897.

In this case the judgment was, in form at least, absolutely reversed and the case remanded to the court of claims for further proceedings not inconsistent with the opinion of this court. Confessedly, further proceedings by virtue of the mandate and under the direction of the court of claims were necessary to be taken before any judgment could be entered in such court and thereafter enforced, and before any proceedings were taken by way of the entry of any judgment Congress interfered by repealing the statute. When the mandate was filed in the court of claims and the motion made for judgment, that court was engaged in the regular trial of causes; it was not a motion day according to the practice of the court, and the court received the mandate and heard the request, and took the same under advisement for decision thereafter. The court was not bound, upon the simple presentation of the mandate and the statement of counsel, even if there were no opposition on the part of the attorney for the District of Columbia, to immediately drop all other business and grant the motion; it had the right, and it was its duty in the due and orderly progress of its work, to take the motion into consideration if it thought it necessary, so that it might examine the opinion and come to an intelligent conclusion as to what action was required of it for the purpose of complying with the terms of the mandate. The fact that the court had already heard of the decision of this court and had casually seen the opinion, did not alter the case.

The effect of the passage of the repealing act was to take away the jurisdiction of the court of claims to proceed further in those cases which were founded upon the act thus repealed. This the Congress had power to do. *Merchants' Ins. Co.* v. *Ritchie*, 72 U. S. 5 Wall. 541, 544 [18: 540, 542]; *Ex parte McCardle*, 74 U. S. 7 Wall. 506 [19: 264]; *Ex parte Yerger*, 75 U. S. 8 Wall. 85 [19: 332]; *Baltimore & P. R. Co.* v. *Grant*, 98 U. S. 398 [25: 231]; *Gurnee* v. *Patrick County*, 137 U. S. 141 [34: 601].

This court had just decided that the act of February 13, 1895 (28 Stat. at L. 664, chap. 87), simply conferred a gratuity upon the persons *covered by its provisions: that there was [43 no element of a legal or an equitable claim in their favor against the municipal authorities of the District, but that the act provided for a gift which was wholly without consideration. The repeal of the act took away all jurisdiction in the court of claims to proceed further, so far as concerned any rights founded upon the acts so repealed. If there had been no repeal, and the court of claims had, after the filing of the mandate from this court, proceeded to a new trial of the whole merits of the original judgment, the case cited by the petitioner (*Gaines* v. *Rugg* [*Gaines* v. *Caldwell*], 148 U. S. 228 [37: 432]), might be in point. It does not touch the case upon the facts here presented.

In this case, however, the record orginally before us showed that the petitioner had at one time obtained a judgment for over a thousand dollars against the District of Columbia upon a cause of action not founded upon the act of Congress just repealed. This judgment had been vacated. We do not intimate by this decision that the court of claims would not have jurisdiction to entertain and grant a motion on the part of petitioner, if he should be so advised, to reinstate that original judgment. That question is not before us, and we allude to it simply for the purpose of stating that our decision herein should not be taken as any expression of opinion adverse to the granting of a motion such as is above mentioned.

The application for a writ of mandamus is denied.

WILLIAM F. DAVIS, *Plff. in Err.*,
v.
COMMONWEALTH OF MASSACHUSETTS.

(See S. C. Reporter's ed. 43-48.)

Ordinance prohibiting speaking on public ground.

An ordinance prohibiting any person from making any public address on any public grounds of a city without a permit from the mayor is within the police power, and does not violate the 14th Amendment of the Constitution of the United States.

[No. 229.]

Argued and Submitted March 25, 1897. Decided May 10, 1897.

IN ERROR to the Superior Court of the County of Suffolk, State of Massachusetts, to review a judgment of that court, after exceptions thereto were overruled by the Supreme Judicial Court of that state, convicting William F. Davis of making a public address upon public grounds commonly called the "Common" of the city of Boston, in violation of an ordinance of that city. *Affirmed.*

See same case below, 162 Mass. 510 [26 L. R. A. 712].

Statement by Mr. Justice **White:**

44] *It was charged against the plaintiff in error, in the municipal court of the city of Boston, that "in and upon certain public grounds of said city, within said district, called the 'Common,'" he "did make a public address, the same not being then and there in accordance with a permit from the mayor of said city, against the peace of said commonwealth, the form of the statute of said commonwealth and the revised ordinance of said city in such cases made and provided."

The ordinance claimed to be violated was § 66 of the revised ordinances of the city of Boston (1893), and reads as follows:

"Sec. 66. No person shall, in or upon any of the public grounds, make any public address, discharge any cannon or firearm, expose for sale any goods, wares, or merchandise, erect or maintain any booth, stand, tent, or apparatus for the purposes of public amusement or show, except in accordance with a permit from the mayor."

The proceedings were removed to the superior court of the county of Suffolk, where the accused renewed a motion which he had interposed in the municipal court to quash the complaint. The grounds assigned in support of this motion were seven in number, and, among other objections, it was substantially asserted that the ordinance violated rights alleged to be secured to the accused by the Constitution of the state and by the 14th Amendment to the Constitution of the United States. The motion to quash being overruled and an exception noted, the accused was tried before the court and a jury.

At the trial the government put in evidence the ordinance heretofore referred to, and called the attention of the court to §§ 35 and 39 of chapter 448 of the acts passed by the legislature of Massachusetts in the year 1854, which sections are as follows:

"Sec. 35. All other powers heretofore by law vested in the town of Boston or in the inhabitants thereof as a municipal corporation, or in the city council of the city of Boston, shall be and hereby are continued to be vested in the mayor, aldermen, and common council of the said city, to be exercised by *concur- [**45** rent vote, each board, as hereby constituted, having a negative upon the proceedings of the other, and the mayor having a veto power as hereinafter provided.

"More especially they shall have power to make all such needful and salutary by-laws and ordinances not inconsistent with the laws of this commonwealth as towns by the laws of this commonwealth have power to make and establish, and to annex penalties not exceeding $50 for the breach thereof, which by-laws and ordinances shall take effect and be in force from and after the time therein respectively limited without the sanction or confirmation of any court or other authority whatsoever.

"Sec. 39. The city council shall have the care and superintendence of the public buildings, and the care, custody, and management of all the property of the city, with power to lease or sell the same except the Common and Faneuil Hall. And the said city council shall have power to purchase property, real or personal, in the name and for the use of the city, whenever its interest or convenience may in their judgment require it."

In behalf of the accused, eleven instructions were requested to be given to the jury, all of which were refused, and exceptions were reserved to such refusal. But one of these requested instructions set up alleged rights under the Constitution of the United States as follows:

"10. That said ordinance, and the proceedings under said ordinance, and in enforcement thereof, are in conflict with the Constitution of the United States, and the 1st section of the 14th Amendment thereof; that the power given to the mayor of the city of Boston by said ordinance is in derogation of the rights secured to the defendant by said amendment, and said ordinance is null and void."

There was a verdict of guilty. The exceptions taken during the trial were certified to the supreme judicial court of the commonwealth, where they were overruled. 162 Mass. 510 [26 L. R. A. 712]. The superior court sentenced Davis to pay a fine and the costs of the prosecution, and the cause was brought here for review.

Mr. **James F. Pickering** for plaintiff in error.

Messrs. **Hosea M. Knowlton,** Attorney General of Massachusetts, and *George C. Travis,* Assistant Attorney General of said state, for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

In the brief of counsel for plaintiff in error many presumed errors are elaborately discussed, all of which when analyzed rest on the assumption that there was a right in the plain-

NOTE.—*As to police power of states; instances of its exercise,*—see note to Barbier v. Connolly, 28: 923.

tiff in error to use the Common of the city of Boston free from legislative or municipal control or regulation. It is argued that:

"Boston Common is the property of the inhabitants of the city of Boston, and dedicated to the use of the people of that city and the public in many ways, and the preaching of the gospel there has been, from time immemorial to a recent period, one of these ways. For the making of this ordinance in 1862 and its enforcement against preaching since 1885, no reason whatever has been or can be shown."

The record, however, contains no evidence showing the manner in which the ordinance in question had been previously enforced, nor does it include any proof whatever as to the nature of the ownership in the Common from which it can be deduced that the plaintiff in error had any particular right to use the Common apart from the general enjoyment which he was entitled, as a citizen, to avail of along with others and to the extent only which the law permitted. On the contrary, the legislative act and the ordinance passed in pursuance thereof, previously set out in the statement of facts, show an assumption by the state of control over the Common in question. Indeed, the supreme judicial court, in affirming the conviction, placed its conclusion upon the express ground that the Common was absolutely under the control of the legislature, which, in the exer-
47] cise of *its discretion, could limit the use to the extent deemed by it advisable, and could and did delegate to the municipality the power to assert such authority. The court said:

"There is no evidence before us to show that the power of the legislature over the Common is less than its power over any other park dedicated to the use of the public or over public streets the legal title to which is in a city or town. *Lincoln* v. *Boston*, 148 Mass. 578, 580 [3 L. R. A. 257]. As representative of the public it may and does exercise control over the use which the public may make of such places, and it may and does delegate more or less of such control to the city or town immediately concerned. For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the lesser step of limiting the public use to certain purposes. See Dill. Mun. Corp. §§ 393, 407, 651, 656, 666; *Brooklyn Park Comrs.* v. *Armstrong*, 45 N. Y. 234, 243, 244 [6 Am. Rep. 70]. If the legislature had power under the Constitution to pass a law in the form of the present ordinance, there is no doubt that it could authorize the city of Boston to pass the ordinance, and it is settled by the former decision (*Com.* v. *Davis*, 140 Mass. 485) that it has done so."

It is therefore conclusively determined there was no right in the plaintiff in error to use the Common except in such mode and subject to such regulations as the legislature in its wisdom may have deemed proper to prescribe. The 14th Amendment to the Constitution of the United States does not destroy the power of the states to enact police regulations as to the subjects within their control (*Barbier* v. *Connolly*, 113 U. S. 27, 31 [28: 925]; *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26, 29 [32: 585, 586]; *Giozza* v. *Tiernan*, 148 U. S. 657 [37: 599]; *Jones* v. *Brim*, 165 U. S. 180 [41 : 677]), and does not have the effect of creating a particular and personal right in the *citizen to use public property in de- [48
fiance of the Constitution and laws of the state.

The assertion that although it be conceded that the power existed in the state or municipality to absolutely control the use of the Common, the particular ordinance in question is nevertheless void because arbitrary and unreasonable in that it vests in the mayor the power to determine when he will grant a permit, in truth, whilst admitting on the one hand the power to control, on the other denies its existence. The right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser. The finding of the court of last resort of the state of Massachusetts being that no particular right was possessed by the plaintiff in error to the use of the Common, is in reason, therefore, conclusive of the controversy which the record presents, entirely aside from the fact that the power conferred upon the chief executive officer of the city of Boston by the ordinance in question may be fairly claimed to be a mere administrative function vested in the mayor in order to effectuate the purpose for which the common was maintained and by which its use was regulated. *Ex parte Kollock*, 165 U. S. 526, 536, 537 [41 : 813, 816, 817]. The plaintiff in error cannot avail himself of the right granted by the state and yet obtain exemption from the lawful regulations to which this right on his part was subjected by law.

Affirmed.

NORTHERN PACIFIC RAILROAD COMPANY *et al.*, *Plffs. in Err.*,
v.
NARCISSE POIRIER.

(See S. C. Reporter's ed. 48-57.)

Rule of railroad company—wild train.

1. When the rules of a railroad company require that when a train is stopped by accident or obstruction or is unable to make its time a brake-

NOTE.—*As to liability of railroad companies to switchmen or brakemen for injuries while coupling cars; violation of rules,*—see note to Kohn v. McNulta, 37: 150.

As to fellow servants and their negligence; who are fellow servants; vice principal; superior servant; liability of master,—see note to Baltimore & O. R. Co. v. Baugh, 37: 772.

As to who are coemployees and coservants within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a coservant,—see note to Hough v. Texas & P. R. Co. 25: 612.

As to negligence; responsibility of master to servant for carefulness and competency of coservants,—see note to Wabash R. Co. v. McDaniels, 27: 605.

man must go back with danger signals, a following rule that when a "train stops for any cause" the train must be protected as per the preceding rule applies to trains stopped by accident or obstruction or unexpectedly compelled to stop between stations, and not to a train which stops at a station.

4. The mere fact that a train is a "wild" train not running on schedule time does not justify an inference that the conductor is relieved from the rules regulating the running of trains, and is under control of some agent or despatcher of the company.

[No. 295.]

Argued April 27, 28, 1897. Decided May 10, 1897.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment affirming the judgment of the Circuit Court of the United States for the District of Washington in favor of plaintiff, Narcisse Poirier, against the Northern Pacific Railroad Company *et al.*, for damages for personal injuries occasioned by the negligence of that company. *Judgment of Circuit Court of Appeals and of Circuit Court reversed*, and cause remanded for a new trial.

See same case below, 29 U. S. App. 583

Statement by Mr. Justice **Shiras:**

49] *This was an action originally brought in a court of the state of Washington, and which was removed into the circuit court of the United States for the district of Washington.

The plaintiff in his complaint alleged that, on the 7th day of December, 1892, while in the employ of the Northern Pacific Railroad Company as a brakeman, he received personal injuries of a severe character occasioned by the negligence of the defendant company. The plaintiff recovered a verdict in the sum of $21,600, which was reduced upon the election of the plaintiff to avoid a new trial, to the sum of $7,500, for which judgment was entered. The case was taken to the circuit court of appeals of the ninth circuit, where the judgment of the trial court was affirmed. The case was then brought to this court on a writ of error to the judgment of the circuit court of appeals. The principal facts of the case are thus stated in the opinion of the circuit court of appeals:

"The collision occurred about midnight. The first train was a regular local freight train running on schedule time, under the management, control, and direction of the conductor. The second train was running under telegraphic orders, without any schedule or time card, known in railroad parlance as a 'wild train.' At Moscow, a station on the railroad, the second train was standing upon the track when the first train left that station. At Vollmer, another station, the first train stopped to drop some cars. It was detained about ten minutes, when it resumed its course over the mountain grade. The second train was then in sight, standing on the track, a short distance in the rear, with its lights plainly visible. Clyde Spur, where the collision occurred, is about 6 miles from Vollmer. It is a place on the road where there is a spur track running out to a logging camp where saw logs and cordwood are loaded on the cars. There is a side track or switch upon which cars are left to be run out on the spur track. It is not a regular station, and the regular freight train only stops there when there are empty cars to be left or loaded ones to be taken away. The first train, on *the night [**50** in question, had certain cars to be left at this place, and stopped there for that purpose. There were three brakemen on the train. The head brakeman, when the train was slowing up, left his place and started forward to open the switch. The rear brakeman, at this time, saw the second train rounding a curve in the road and immediately signaled it to stop, and at the same time shouted as loud as he could. The second train was then about ¼ of a mile behind the first train. The first train had barely come to a full stop when the second train, moving at a speed of about 4 miles an hour, struck it by running the cowcatcher of its engine under the rear end of the caboose on the first train. The conductor of the first train had been lying down, but was in his seat in the lookout of the caboose, and passed out of the rear end just before the collision occurred. The conductor of the second train had not been notified that the first train would stop at Clyde Spur."

By the shock caused by the collision of the two trains the plaintiff, who was acting as middle brakeman, was thrown from the car on which he was standing, and received severe injuries.

In the plaintiff's complaint it was alleged "that the said defendant, the Northern Pacific Railroad Company, was guilty of carelessness and negligence in this, that the conductor of said first train well knew that said second train was following said first train and failed to leave a flagman in the rear of said first train before and at the time said first train stopped at said Clyde Spur, to hold and stop said second train, as he was in duty bound to do; that the place where said collision occurred was on a mountain grade, and the said defendant the Northern Pacific Railroad Company was guilty of carelessness and negligence in allowing said second train to follow the first train closely, and was guilty of carelessness and negligence in running the second train into said first train, whereby the plaintiff was injured as aforesaid." The defendant, answering, denied negligence on its part, and alleged that plaintiff's injuries were owing to and caused by his contributory negligence and by the carelessness and negligence of his *fellow servants. It is admitted in [**51** the brief of the plaintiff in error that the defense of contributory negligence on the part of the plaintiff was not made out, and the controversy resolves itself into the question whether the plaintiff's injuries were caused by the negligence of his fellow servants within the rule on that subject.

Before the trial, and on the application of the attorneys for the plaintiff, it was ordered that Thomas F. Oakes, Henry C. Paine, and Henry C. Ronse, the receivers of the defendant company, be, and they were thereby, made parties defendant in the action.

Mr. **C. W. Bunn** for plaintiffs in error.
Mr. **S. C. Hyde** for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

At the close of the evidence the plaintiff moved the court to give the following instruction:

"In this case there is no evidence that the defendant the Northern Pacific Railroad Company was guilty of any negligence which caused the accident by which plaintiff was injured, or which contributed thereto, and that if there was any negligence it was that of the engineer and conductor, or of one of them, of the second train, and such conductor and engineer being fellow servants of the plaintiff, there would be no liability therefor on the part of the railroad company, and therefore you will return a verdict for the defendants."

The refusal of the trial court to give this instruction was assigned for error in the circuit court of appeals, and the ruling of the latter court in affirming such refusal is complained of in the first assignment in this court.

This request assumes that there was no evidence of negligence on the part of the conductor of the first train sufficient to submit to the jury. The trial court said as to this question: "The particular negligence charged against the [52] railroad *company is that the conductor of the first train, the one upon which the plaintiff was employed as a brakeman, when he brought his train to a stop at Clyde station, neglected his duty by failing to place a flagman a sufficient distance back on the track to warn the following train, which is called the second train in this complaint, of the danger of coming too close to that station while the first train was stopped there." The circuit court of appeals made no observation on this part of the case. Both the courts discuss the case chiefly upon the question of the liability of the company arising out of the negligence shown in the management of the second train.

The counsel for the defendant in error contends in his brief that the conductor of the first train was guilty of negligence in not obeying the following rules of the company, put in evidence by the plaintiff:

"Rule 133. When a train is stopped by an accident or obstruction, the rear brakeman must immediately go back with danger signals to stop any train moving in the same direction. At a point fifteen telegraph poles from the rear of his train he must place one torpedo on the rail; he must then continue to go back at least thirty telegraph poles from the rear of his train and place two torpedoes on the rail, 10 yards apart, when he may return to the point where first torpedo was placed, and he must remain there until recalled by the whistle of his engine; but if a passenger train is due within ten minutes he must remain until it arrives. When he comes in he will remove the torpedo nearest the train, but the two torpedoes must be left on the rail as a caution signal to any following train. If it becomes necessary to protect the front of the train, the front brakeman must go forward and use the same precautions. In case of necessity the fireman will be required to act as flagman.

"Rule 134. When a flagman is sent out to signal any approaching train, he must if possible, avoid stopping on a curve, or behind any obstruction, endeavoring to pass beyond the same, should such exist, and reach a position where he can be clearly seen from the approaching train, for at least* one quarter [53] of a mile. The conductor must know that his train is fully protected in both directions, and he will be held responsible if any accident occurs from want of any precaution which could have been taken."

"Rule 156. When any section of a train is unable to make the specified time, the conductor will drop a man with danger signals to warn the following train. It is the duty of the conductor of every train, when the train stops for any cause, to immediately protect the rear end of his train as per rule 133. No understanding with conductor of the following train will relieve from this duty."

It is difficult to perceive that these rules had any applicability to a case like the present. They seem plainly intended to meet the exigency of a train stopped by an accident or obstruction or unexpectedly compelled to stop between stations. It can scarcely be supposed that their directions are to be followed every time a train stops at a station.

Moreover, in the present case, it appears from the testimony of the plaintiff's witnesses that no time was afforded for the use of such precautions. The second train was following so closely that the collision took place almost at the instant the first train had come to a stop, and before the rear breakman could do more than to signal with his lantern and to call out. The conductor of the first train is not shown to have had any reason to suppose that the second train would run into him when stopping at a station, in utter disregard of the company's rules.

We are inclined to think that, if the plaintiff's case depended wholly on his being able to convict the conductor of the first train of negligence, there was not sufficient evidence adduced at this trial to have justified the trial judge in submitting the case to the jury on that issue.

It is, however, further contended on behalf of the defendant in error, and upon this the stress of the case is mainly put, that, under the facts disclosed in the record, the trial court was justified in submitting to the jury and the jury in finding that the defendant company was liable for the results of the negligence in the management of the second train.

*There is no effort to call into question [54] the numerous decisions of this court, whereby it has been firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment. Indeed, it is conceded in both the opinion of the circuit court of appeals (*Northern P. R. Co.* v. *Poirier*, 29 U. S. App. 583) and in the brief of the defendant in error that the conductor of the second train was a fellow servant with the plaintiff, and that if the collision was caused solely by his negligence the defendant would not be liable.

The argument to maintain the liability of the defendant company, notwithstanding this concession, is based upon the evidence that tended to show that the second train was a "wild train," running on telegraphic orders, without any schedule or timetable, and that the con-

ductor of that train was not notified that the first train would stop at Clyde Spur.

One of the plaintiff's witnesses, Allen, the rear brakeman on the first train, testified that the second train was "running by telegraphic orders and had no schedule orders or time card." This was doubtless true, as it is true of every "wild" or extra train; but such a fact by no means warrants the inference drawn by the trial court and given in the charge to the jury that "the train was running under special orders as to the time it was to make, where it was to go and when it should reach the different stations." It cannot be justly inferred from the mere fact that the second train was a "wild train" that its conductor was relieved from obeying the laws of the company. Among those rules put in evidence by the defendant company is:

"Rule 120. A train must not leave a station to follow a passenger train until five minutes after the departure of such passenger train, unless some form of block signal is used. In mountain districts they will not follow first-class trains descending, under any circumstances, until such trains are duly reported at next telegraph station. Freight trains must not follow each other descending mountain grades. They may ascend in sections when [55] handled with mountain power in the *rear. Descending passenger trains may follow freight trains as per rule 121. Ascending passenger trains will not leave station at foot of mountain until track is known to be clear."

"Rule 122. Freight trains following each other must keep not less than ten minutes apart (except in closing up at stations or at meeting or passing points), unless some form of block signal is used."

Assuredly more evidence must be given than the mere fact that the second train was a "wild" train, not running on schedule time, to justify an inference, by either court or jury, that the conductor was relieved by such fact from regarding the rules of the company regulating the running of its train. Nor does the statement of the conductor of the second train, that he had not been notified that the first train was to stop at Clyde Spur, show that he had any right to dispense with the rules. While he did say that he had not been notified that the first train would stop at Clyde Spur, he does not say that he did not know of such intention. At all events, it was clearly shown by the plaintiff's witnesses that the trains were in immediate proximity to each other at Vollmer, the last station before reaching Clyde Spur; that the second train followed the first so closely that the collision occurred almost immediately after the leading train had come to a stand; and that the rear brakeman, who saw the second train approaching before his own train had fully stopped, did not have time to warn his fellow brakeman, nor himself get to the ground, before the collision took place.

These facts disclose a palpable disregard by the conductor and engineer in charge of the second train of ordinary prudence and of the rules which it was their duty to observe. We see no ground for the assertion that their conduct was directed or controlled, in these particulars, by orders from some agent or despatcher of the defendant company "clothed with the duty of sending out the second train and having the control, management, and direction of its movements." Such conjectures did not constitute evidence to be submitted to the jury.

Accordingly we think that the defendant was entitled to *have had the following instruc-[56 tions given to the jury: "If the jury find from the evidence in this case that the accident which caused the plaintiff's injury was caused by the negligence of the conductor or engineer of the extra train in following the first train too closely, or by running down the grade at too high a rate of speed, or in not keeping the extra train in proper control, or by any other act or neglect of the conductor or engineer of the first train, then I instruct you that the defendants are not liable, and that you shall return a verdict for the defendants." But this prayer was refused.

So, too, we think the following instruction asked for should have been given: "In determining the question of whether the defendant, the Northern Pacific Railroad Company, was guilty of negligence in the management of their trains, or either of them, the jury are instructed that they may consider the rules of the company, which have been read in evidence, and that if appears therefrom that the running and conduct of this second train was provided for, and that the accident was caused by the engineer or conductor of the second train in disregarding such rules, then your verdict must be for the defendants." This instruction was modified by the court adding the following words: "Unless it appeared that the conductor of the train, or someone under whose orders he was acting, had authority in the special case to deviate from the rules." This modification was not warranted by any evidence disclosed in this record. The only orders shown, controlling the conductor and engineer in the management of the second train, were those contained in the rules of the company. As we have already said, to instruct the jury that they might infer, from the mere fact that the second train was a "wild" train, not running by schedule time, that someone in authority had dispensed with the rules in this special case, was to submit mere matter of conjecture as evidence on which they might base a verdict.

The same error vitiates portions of the general charge, which were duly excepted to and assigned for error; but we do not deem it necessary to discuss those assignments in detail. They are disposed of by the observations already made.

*Upon the whole, we are of opinion that, [57 giving to the plaintiff's evidence its utmost effect, it did not make a case which should have been submitted to the jury.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is likewise reversed, and the cause is remanded to that court with directions to set aside the verdict and award a new trial.

R. L. WALKER *et al., Plffs. in Err.*,
v.
E. COLLINS and W. H. Bretch, Partners as Collins & Bretch.

(See S. C. Reporter's ed. 57-60.)

Removal of case—costs.

1. A case not depending on the citizenship of the parties, nor otherwise specially provided for, cannot be removed from a state court into the circuit court of the United States on the ground that it arises under the Constitution, laws, or treaties of the United States unless that appears by the plaintiff's statement of his own claim; and if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings.
2. On reversal of a judgment in a case improperly removed to the Federal court, the plaintiff in error will be charged with all the costs from the time of such removal, if it was taken upon his application.

[No. 59.]

Argued and Submitted March 3, 1897. Decided May 10, 1897.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the District of Kansas in favor of E. Collins *et al.*, plaintiffs, against R. L. Walker *et al.*, in an action brought in the District Court of Harvey County, Kansas, and removed to the Circuit Court, for an unlawful seizure of property of the plaintiff. *Reversed*, and cause remanded to the Circuit Court of the United States for the District of Kansas with directions to remand the cause to the District Court of Harvey County, Kansas.

See same case below, 4 U. S. App. 406, 19 U. S. App. 807.

The facts are stated in the opinion.

Mr. **W. E. Brown** for plaintiffs in error.

Messrs. **A. P. Jetmore,** *C. S. Bowman*, and *Chas. Bucher* for defendants in error.

Mr. Justice **White** delivered the opinion of the court:

The action below was commenced in April, 1890, in the district court of Harvey county, Kansas, by Collins and Bretch, to recover damages from the present plaintiffs in error for an alleged unlawful seizure of goods and chattels, the property of the plaintiffs. In their answer the defendants averred that during the times mentioned in the complaint the defendant Walker was the marshal of the United States for the district of Kansas, and the other defendants were his deputies, and that the seizure complained of was made under the authority of an order of attachment issued out of the circuit court of the United States for the district of Kansas in an action therein pending, in which E. H. Van Ingen & Co. were plaintiffs and H. Cannon was defendant, and it was averred that the goods were liable to be seized by virtue of said order of attachment as the property of said Cannon. Thereafter the defendants made application for the removal of the cause into the circuit court of the United *States for the district of Kansas, upon the [58 ground that the action and the defense thereto arose under the laws of the United States The application was denied, but subsequently, on application of the plaintiffs, the court reconsidered its decision, rescinded its former action, and allowed the application, the order entered reciting, "the plaintiffs interposing no objection thereto."

On June 4, 1890, after the removal of the cause into the Federal court, a motion was filed by the attorneys for plaintiffs to remand the cause to the district court of Harvey county, Kansas, for the reason that the record and petition for removal showed no sufficient ground for such removal, and that the record and petition did not set up and show sufficient facts and allegations to give the Federal court jurisdiction over the cause by removal. The record does not show that any action was taken by the court upon this motion.

A judgment recovered by the plaintiff was reversed by the circuit court of appeals for the eighth circuit. 4 U. S. App. 406. Upon a second trial, in November, 1892, the plaintiff again recovered judgment, which, on error, was affirmed by the appellate court. 19 U. S. App. 307. A writ of error was allowed, the cause was brought to this court, and it is now sought to obtain a reversal of the judgment of affirmance rendered by the circuit court of appeals.

Various specifications of error are assigned in this court. We need, however, only consider the first specification discussed in the brief of counsel for the plaintiff in error, to wit, *that the circuit court and circuit court [59 of appeals were without jurisdiction over the controversy, and the judgments rendered were erroneous, by reason of the fact that the cause was improperly removed from the state court. This objection must be sustained upon the authority of *Chappell* v. *Waterworth*, 155 U. S. 102 [39: 85]. That was an action of ejectment brought in a state court, both plaintiff and defendant being residents of the same state, the declaration merely describing the land and alleging an ouster of the plaintiff by the defendant. The cause was removed into a circuit court of the United States upon the petition of the defendant setting forth that the United States owned and held the land for a lighthouse, and that the defendant was holding possession as the keeper thereof under the authority of the United States. This court declined to consider

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NOTE.—*As to removal of causes under act of 1875; citizenship,*—see note to Meyer v. Delaware R. Const. Co. 25: 598.

As to removal by one of two or more defendants; separable controversies,—see note to Sloane v. Anderson, 29: 899.

As to removal of causes to United States courts for local prejudice, see notes to Gaines v. Fuentes, 23: 524, and Jefferson v. Driver, 29: 897

As to removal of causes from state to Federal court, where United States Constitution, act of Congress, or treaty comes in question, see note to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

As to civil rights; removal of causes, when denied,—see note to Civil Rights Cases, 27: 835.

As to removal of actions against officers; U. S. Rev. Stat. § 643,—see note to Davis v. South Carolina, 27: 574.

the question presented by the record and argued at the bar, because the cause was removed into the circuit court of the United States without authority of law, holding that under the acts of March 3, 1887 (24 Stat. at L. 552, chap. 373), and August 13, 1888 (25 Stat. at L. 433, chap. 866), a case (not depending on the citizenship of the parties, nor otherwise specially provided for) cannot be removed from a state court into the circuit court of the United States, as one arising under the Constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim, and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings.

As in the complaint in the case at bar there are no facts averred showing that the controversy was one arising under the laws of the United States, and it was not essential to the statement of the cause of action that such facts should be averred, the case comes directly within the operation of the ruling cited. In reversing the judgments, however, as the cause was removed from the state court upon the application of the present plaintiffs in error, all the costs from the time of such removal must be borne by them. *Postal Teleg. Cable Co.* v. *Alabama* (*"Postal Teleg. Cable Co.* v. *United States"*) 155 U. S. 482, 488 [39: 231, 233], and cases cited.

60] **The judgments below are reversed*, and the cause is remanded to the circuit court of the United States for the district of Kansas with directions to remand the cause to the district court of Harvey county, Kansas.

Mr. Justice **Harlan** dissented.

H. C. CROSS and George A. Eddy, Receivers of the Missouri, Kansas, & Texas Railway, and the Missouri, Kansas, & Texas Railway Company of Texas, *Plffs. in Err.*,

v.

J. M. EVANS.

See S. C. Reporter's ed. 60 65.)

Questions certified—when will not be considered —general questions.

1. A certificate of questions will be dismissed when the questions impose upon the court the labor of determining the whole case and all questions of law which may be lurking in the record.
2. Questions certified by the circuit court of appeals under the judiciary act of 1891 will not be considered when other separate and distinct propositions of law not expressly referred to in the certificate are essential to be passed upon in considering the general questions certified.
3. When the questions propounded are general in their nature, and amount simply to submitting the whole case upon the entire record to this court for decision, the questions certified cannot be treated as stating distinct propositions of law.

[No. 268.]

Argued and Submitted April 2, 1897. Decided May 10, 1897.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fifth Circuit certifying certain questions to this court in an action brought by J. M. Evans against H. C. Cross *et al.*, receivers, to recover damages for personal injuries sustained by plaintiff by acting as a brakeman upon a train operated by said receivers. *Dismissed.*

The facts are stated in the opinion.

Messrs. **F. C. Dillard, James Hagerman,** and *T. S. Miller* for plaintiffs in error.

Mr. **Rush Taggart** for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

The action below was commenced in September, 1890, by Evans in a Texas state court against Cross and Eddy as receivers of the Missouri, Kansas, & Texas Railway Company, a corporation of the state of Kansas, to recover damages for personal injuries sustained within the state of Texas while acting as brakeman upon a train running over a branch line of said railway system while it was being operated by the receivers. On the petition of the receivers, the cause was removed into the circuit court of the United States for the *east-[61 ern district of Texas. Subsequently the railway properties were returned to the Kansas company, and in the fall of 1891 that company transferred its lines of railroad to a new corporation, styled the Missouri, Kansas, & Texas Railway Company of Texas. The receivers were finally discharged in the month of July, 1892. In August, 1893, service was had on the Texas company under a second amended petition, in which the Texas company was made a codefendant with the receivers, its liability to the plaintiff being asserted to arise from the terms of the order of the circuit court directing the receiver to surrender the property to the Kansas company, and upon the provisions of a special act of the legislature of Texas authorizing the sale by the Kansas company of its properties and subjecting the purchaser to the payment of all the liabilities of the Kansas company. Demurrers to the jurisdiction as also to the merits of the amended petition were filed and overruled, and an answer was interposed by the Texas company, which was adopted by the receivers by way of amendment, the latter then setting up for the first time their discharge in bar of further proceedings.

The cause was tried upon the issues made by the second amended petition and the answers thereto, and a verdict was returned against the Texas company for the sum of $7,500. By direction of the court, the jury found in favor of the receivers. The cause was then taken by writ of error to the circuit court of appeals for the fifth circuit, and, on the hearing, that court certified to this court, under the judiciary act of 1891, a statement, declared to consist of matter appearing in the transcript of record filed in that court, and the instructions of this court were requested upon four propositions of law, as being desired "for the proper disposition of the questions arising herein." Following the questions propounded

NOTE.—*As to jurisdiction of United States Supreme Court in cases certified on division of circuit court; on what division should be,*—see note to Webster v. Cooper, 13: 325.

was a direction that "certified copies of the printed record and briefs on file in this case be transmitted with this certificate to the honorable the Supreme Court of the United States."

What may be termed the statement of facts embraces a recital of the various steps in the liti-
62] gation, and what *purports to be the substance of the contents of the various pleadings filed in the cause, and the assignments of error (ten in number) filed by the defendants in error in the circuit court of appeals, the latter document being set out *in extenso*, and being followed by the recital that "all of the questions presented by the assignments of error were duly made in the circuit court, and the adverse rulings thereon are duly shown by exceptions made and saved on the trial."

In the statement, attention is called to the fact that the plaintiff in his original petition asserted that the wreck which occasioned his injury was caused by a defective drawhead, while in the amended petition, filed more than a year after the injury was sustained, it was alleged that the roadbed and track at the place and time where and when the derailment happened were in a defective and unsafe condition.

It was also specifically stated that the pleadings of the plaintiff contained no allegation that any betterments had been put upon the road by the receivers while they were in charge, and that at the trial no evidence was offered on the subject.

The assignments of error reiterated in various forms the objections taken prior to the trial to the sufficiency of the second amended complaint, also the objections taken to the refusal of the trial court to sustain exceptions to its jurisdiction based upon the fact that the plaintiff and the Texas company were citizens of the same state, and that the action had abated by the discharge of the receiver, and objections raised by the plea of the statute of limitations. The fifth assignment of error was to the refusal of the court to return a verdict for the defendants, among other reasons, because the plaintiff did not allege or prove that earnings had been applied by the receivers to betterments upon the road, or that the road had been returned to the Kansas company enhanced in value by said betterments. The questions propounded read as follows:

"I. Under the facts of the case, as shown by the pleadings hereinbefore recited, was the Missouri, Kansas, & Texas Railway Company of Texas properly made a codefendant with the receivers Cross and Eddy?

63] *"II. Under the facts of the case, as shown by the pleadings and hereinbefore recited, had the circuit court of the United States for the eastern district of Texas jurisdiction and authority to try and determine the issues arising on the record between the plaintiff Evans and the defendant the Missouri, Kansas, & Texas Railway Company of Texas, and give judgment accordingly?

"III. If the first and second questions or either of them are answered in the negative, has this court, under the writ of error jointly sued out by the receivers Cross and Eddy, and the Missouri, Kansas, & Texas Railway Company of Texas, jurisdiction and authority to reverse *in toto* the judgment of the circuit court and direct a dismissal of the case as against the Missouri, Kansas, & Texas Railway Company of Texas and award a new trial as against Eddy and Cross, receivers?

"IV. In case this court is without authority to reverse the judgment of the circuit court in favor of Cross and Eddy, receivers, the same not having been complained of by the defendant in error, and in case the first two questions herein certified shall be answered in the negative, has this court authority to reverse the judgment of the circuit court and remand the cause with instructions to remand the whole cause back to the state court from which it was originally removed?"

In *Graver* v. *Faurot*, 162 U. S. 435 [40: 1030], it was held that a circuit court of appeals has no power under the judiciary act of 1891 to certify the whole case to this court, but can only certify distinct questions or propositions of law, unmixed with questions of fact or of mixed law and fact. The questions certified in the case at bar are clearly violative of this rule, as, in effect, the entire record is sent up, and, by the general questions propounded, the labor is imposed upon this court of determining the whole case and all questions of law which may be lurking in the record.

Thus, in the briefs filed in this court and in the court below, counsel discuss the effect of §§ 2 and 6 of an act of the legislature of Texas approved March 19, 1889, which it is claimed *affected pending receiverships, whether [64 created by a court of the state of Texas or by a Federal court, and absolutely fixed the liability both of the Kansas company and the Texas company to pay any valid claims which might be asserted against the receivers, and also authorized the joinder of the Texas company as a codefendant with the receivers in any pending suit. Whether such was the effect of the statute would seem to be a question or proposition of law entering into a consideration of the general questions propounded. The certificate, however, contains no allusion to the point. So, also, in briefs filed here and below, the question is presented of the effect of a general statute of Texas enacted in 1891, which authorized the formation of corporations for the purchase of railroads, under which statute the Texas company was organized. It is argued in the briefs that upon a proper construction of that law it imposed upon the Texas company a liability to the plaintiff irrespective of any order of the Federal court in the foreclosure suit, and it is further contended that this statute was competent authority for the joinder of the Texas company in the pending suit against the receivers. This is clearly a separate and distinct proposition of law, essential to be passed upon in considering the general questions certified, though the point is not expressly referred to in the certificate. So, also, there is no mention in the statement of facts that plaintiff in his second amended petition averred that the Texas company was liable to pay plaintiff's claim, by reason of the order of the Federal court in the foreclosure suit directing the surrender of the property by the receivers to the Kansas company. That order is not set out in the statement, but the sec-

tions of the order upon which the plaintiff relied below were introduced in evidence at the trial and appear in the record filed in the circuit court of appeals. Thus another distinct proposition of law, *viz.*, as to the legal meaning and effect of that order, is plainly latent in the record. So, also, the general questions certified might call for a consideration of whether in the event that a liability was not imposed upon the Kansas company by the order of the Federal court, a liability resulted by reason 65] of the character of the claim of *plaintiff, and the fact that the property of the Kansas company was returned to it by its procurement without actual foreclosure, irrespective of the fact whether or not betterments had been put upon the property with moneys earned during the operation of the road by the receivers. Again, a distinct proposition of law results from the record, dependent upon an affirmative answer to the last proposition, as to whether the cause of action against the receivers abated by their discharge, and whether the claim against the Texas company was a new and independent cause of action to be tried and disposed of in a distinct action, or was a claim in the nature of a demand against a purchaser *pendente lite*, and a mere continuance of the pending action.

These illustrations clearly show that the questions propounded are general in their nature, and amount simply to submitting the whole case upon the entire record to this court for decision, and therefore that the questions certified can in no sense be treated as stating distinct propositions of law. From this conclusion it follows that *the certificate does not comply with the rules of law controlling the subject, and it must therefore be dismissed*, and it is so ordered.

Mr. Justice **Brown** dissented, and Mr. Justice **Brewer**, not having heard the argument, took no part in the decision of this cause.

SPOKANE FALLS & NORTHERN RAILWAY COMPANY, *Plff. in Err.*,
v.
WILLIAM H. ZIEGLER.

(See S. C. Reporter's ed. 65-75.)

Action under United States laws—judicial notice—pre emption claimant—damages against railroad company.

1. A cause of action arising under the laws of the United States, cognizable by the United States circuit court, is stated by a complaint alleging plaintiff's possession as a pre-emptor, and that he had done all acts necessary to entitle him to a patent for land, and that the defendant, a territorial corporation, entered upon and seized the land under territorial laws authorizing its appropriation for railroad purposes.
2. Judicial notice is taken of the fact that the authority of a territory to legislate in respect to the right of a territorial railroad corporation to enter upon the public lands of the United States was derived from the act of Congress of March 3, 1875, giving a right of way through public lands to railroads organized under the laws of a state or territory.
3. A pre-emption claimant in possession of the land, who has done all the law requires to give him a right to a patent before the land is seized by a railroad company, can recover damages as the owner of the fee if he obtains the patent before bringing the suit.
4. The right of a settler in possession of unsurveyed lands of the United States, who had made improvements with the intention of procuring a title under the pre-emption laws as soon as the same should be surveyed by the government, is a possessory claim within the meaning of the act of Congress of March 3, 1875, for which compensation must be made by a railroad company which appropriates a part of the land for its tracks.

[No. 211.]

Submitted March 12, 1897. Decided May 10, 1897.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment affirming the judgment of the Circuit Court of the United States for the District of Washington, Eastern Division, in favor of the plaintiff, Wm. H. Ziegler, against the Spokane Falls & Northern Railway Company for the value of certain land taken by the company for its right of way and damages for its appropriation. *Affirmed.*

See same case below, 15 U. S. App. 472, 29 U. S. App. 69.

Statement by Mr. Justice **Shiras**:

This action was commenced in the superior court of Spokane county, state of Washington, wherein William H. Ziegler, on October 5, 1891, filed his complaint against the Spokane Falls & Northern Railway Company, a corporation organized under the laws of the territory of Washington, seeking to recover the value of a certain piece of land taken by the company for its roadbed and right of way, and also to recover damages for the alleged diminution in value of the tract of land through which the strip extended, caused by the construction of the road and the use of the same as a steam railway. Upon petition of the defendant company, alleging that the suit arose under the laws of the United States, and that the rights of the parties depended upon the construction thereof, the case was removed into the circuit court of the United States for the district of Washington, eastern division.

In his complaint the plaintiff alleged that, on May 1, 1889, he was in possession as a pre-emptor, under the laws of the United States, for the east half of the southeast quarter of section 4, township 25 north, range 43 east, Willamette meridian, in the said county, containing about 80 acres, and had then made all such improvements, had lived on the land for

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NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 331.

As to errors in surveys and descriptions in patents for lands, how construed, see note to Watts v. Lindsey, 5: 423.

As to land grants to railroads, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

such length of time, and had done all such 67] *acts as were necessary to entitle him to a patent to the land from the United States upon making final proofs and paying the purchase price required by statute, and had then made final proofs and filed the same in the land office of the United States at Spokane Falls, and had tendered the purchase price of the land, or $2.50 per acre, to the receiver of that office, and had demanded from the register and receiver of the office a final receipt evidencing the plaintiff's entry of the land and payment therefor; that the defendant company was authorized by its articles of incorporation to build, equip, maintain, and operate a line of steam railway from the city of Spokane Falls (now the city of Spokane) in a northerly direction to the Columbia river; that on the said date the company, acting in pursuance of the laws of the territory of Washington authorizing railway companies to appropriate lands for railway tracks, entered upon and seized, without making compensation to the plaintiff, and without his consent, a strip of land 50 feet wide, extending through the said land, and built thereon its tracks, and had ever since been using the same as a line of steam railway. The plaintiff averred that the said land was in close proximity to the city of Spokane, and at the time of the taking of the same by the company was very valuable for the purpose of being divided into blocks and lots; that the company's road extended diagonally across the land, and prevented the portions of the land abutting on the road from being platted advantageously; that the operating of a line of steam railway through the land largely diminished its value for residence purposes, or for any purpose; that the road was built upon a grade which was higher at some places and lower at others than the natural surface of the land, by reason whereof cuts and fills were made, which diminished the value, for residence purposes, of the land abutting on the road, and made it necessary that all streets laid out across the road should conform to the grade thereof. It was further averred by the plaintiff that since the taking of the said strip of land and the building of the road thereon by the company, the final proofs made by him and filed in the land office, as aforesaid, had 68]*been passed upon and accepted as satisfactory by the proper officers; that the money tendered, as aforesaid, had been accepted, and that a patent to the land had been duly executed and delivered to him by the United States. The plaintiff demanded judgment for $30,000, asserting that the value of the said strip of land taken was $5,000, and that the tract of land through which it extended was damaged by the construction and operation of the road to the extent of $25,000.

The defendant company filed its answer on February 19, 1892, wherein it denied the essential allegations of the complaint as to the damage to the said tract of land caused by the construction and operation of the road through the same, and, in defense of the plaintiff's demand of compensation for the strip of land taken, alleged that on June 5, 1888, the company filed in the office of the Secretary of the Interior of the United States a copy of its articles of incorporation, and due proof of its organization under the same, which were duly approved by the Secretary on that date, and that thereupon the defendant became entitled to survey, locate, construct, and maintain its railroad through and over all lands between the termini of the road which were public lands of the United States at the time of the filing of said copy of the articles of incorporation, and proof of organization, and became the owner of a right of way through the public lands to the extent of 100 feet on each side of the central line of the road upon such route as it might select, and also acquired the right to take from the public lands adjacent to the line of the road material, earth, stone, and timber necessary for the construction of the road, as granted by the act of Congress entitled "An Act Granting to Railroads the Right of Way through the Public Lands of the United States," approved March 3, 1875, and that by the filing of the said copy of the articles of incorporation, and proof of organization, and the approval thereof as aforesaid, the grant in the said act became operative and applied to the defendant company to the same extent as if it had been a special grant in the name of that company; that afterwards, and in the month of March, 1889, the company, acting under the provisions of said act, and as authorized by its articles *of incorporation, commenced the [69 construction of its road between the city of Spokane Falls and the Columbia river, and between March 8, and April 8, 1889, surveyed the definite line of its road from a point in that city to a point 20 miles in a northerly direction therefrom, and caused such survey to be marked on the ground in the manner customary in surveying and marking lines for railways, and that the line so surveyed and marked ran through and over the land described in the complaint; that in June, 1889, the defendant had fully constructed and completed its road, upon the said line of survey, through the said land, and within the year 1889 had fully completed the road from the city of Spokane Falls to the Columbia river, and had ever since operated the same; that at the time of the filing of a copy of the articles of incorporation, and proof of organization, with the Secretary of the Interior, and during all the time thereafter until the completion of the road, the lands described in the complaint were public lands of the United States, and the title thereto was in the United States, and the lands were subject to the grant contained in the said act of Congress; that on August 3, 1889, within twelve months after the location of the road over the said land, the company filed with the register of the land office where the land was located a profile of its road, which profile was duly approved by the Secretary of the Interior in December, 1889; that the plaintiff's entry of the land was made and the patent thereto issued long subsequent to the construction of the road and the approval of the said profile; and that the sale and conveyance of the land by the United States to the plaintiff was subject to the defendant's said right of way. The defendant asked for a judgment quieting its title.

All of the foregoing allegations of the answer tending to show title to the said strip of land in the defendant were denied by the plaintiff in his replication, filed March 11, 1892.

The case was tried in the said circuit court

before the court and a jury. At the close of the testimony the defendant requested the court to give the jury the following instruction:

"It appearing from the uncontroverted proof 70] in this case that *at the time the defendant filed its articles of incorporation and proofs of its organization with the Interior Department, on the 5th day of June, 1888, the plaintiff was a pre emption claimant to the land in controversy, and did not pay for said land until after that date nor until after the construction of said road over the premises, he is not entitled to a verdict for any amount, and the jury are instructed to return a verdict for the defendant."

This instruction was refused, to which refusal the defendant excepted. The court then, of its own motion, gave the jury certain instructions, and the defendant excepted to the portion thereof following:

"He [the plaintiff] is in any event to have the full value of the land they have taken for the right of way, and if the land that is left to him is injured at all, then he is entitled, in addition to that, to have the difference between the value of the whole tract and the value of what is left of it, taking the value as it was when the road was built, and the market value, irrespective of the effect on the market value by reason of the building of the road."

Exceptions were also taken by the defendant to the rejection of certain testimony offered on its behalf, and to the admission of certain testimony for the plaintiff.

On April 27, 1892, the jury rendered a verdict in favor of the plaintiff, assessing his damages at the sum of $7,500, and also returned a special finding as follows: "We, the jury, in the case of William H. Ziegler against the Spokane Falls & Northern Railway Company, defendant, find specially that the defendant has appropriated for its right of way a strip of land 25 feet in width on each side of the center line of its track, extending across the plaintiff's land described in the complaint, and no more, and that the area of plaintiff's land so appropriated is 1 $\frac{8}{10}$ acres, and no more; and the amount of damages awarded by our general verdict is computed upon the basis of the land appropriated for said right of way, being a strip 50 feet in width and containing 1 $\frac{8}{10}$ acres."

Judgment in the said amount was entered April 29, 1892.

71] *The defendant moved for a new trial, and, upon the denial of his motion, took the case on writ of error to the United States circuit court of appeals for the ninth circuit. That court affirmed the judgment of the court below, and the defendant, after having been denied a rehearing, sued out a writ of error from this court.

Messrs. **Albert Allen, A. T. Britton,** and **A. B. Browne,** for plaintiff in error.

Mr. **George Turner** for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

This action was brought by William H. Ziegler against the Spokane Falls & Northern Railway Company in the superior court for Spokane county, Washington, and was, on the petition of the railway company, removed into the circuit court of the United States for the district of Washington. The trial there resulted in a verdict and judgment in favor of Ziegler. That judgment the railway company by a writ of error took to the circuit court of appeals of the ninth circuit. 15 U. S. App. 472, 29 U. S. App. 69. The judgment of the circuit court was there affirmed. The case is before us on a writ of error to the judgment of the circuit court of appeals, sued out by the railway company.

The plaintiff in error now contends that the judgment should be reversed and the record sent back to the circuit court, with directions to remand the case to the state court whence it was taken on the petition of the plaintiff in error. The ground of this contention is that the plaintiff's statement in the state court did not disclose either that the parties were citizens of different states or a cause of action involving a right claimed under the Constitution or laws of the United States.

Whether it would be competent for the plaintiff in error, in the circumstances stated, to challenge the jurisdiction of *the circuit [72 court at this stage of the controversy we need not consider, because we think that the plaintiff's statement did disclose a cause of action arising under the laws of the United States and cognizable by the circuit court.

In his complaint the plaintiff alleged that, on May 1, 1889, he was in possession, as a preemptor under the laws of the United States, of a tract of land containing about 80 acres, and on said date had made all the improvements and had lived on the land a sufficient length of time, and had done all other acts necessary to entitle him to a patent to the same from the United States; that the defendant company, being a corporation of the territory of Washington, on said date entered upon and seized a strip of said land 50 feet in width, and appropriated it for railroad purposes without the consent of the plaintiff, and without having compensated him therefor; and that the entry upon and seizure by the defendant of the land was under and pursuant to the laws of the territory of Washington authorizing railroad companies to appropriate land for right of way for railroad tracks.

We have judicial knowledge that the authority of the territory to legislate, in respect to the right of a territorial railroad corporation to enter upon the public lands of the United States, was derived from the act of Congress entitled "An Act Granting to Railroads the Right of Way through the Public Lands of the United States," approved March 3, 1875 (18 Stat. at L. 482, chap. 152), whereby the right of way through the public lands of the United States was granted to any railroad company duly organized under the laws of any state or territory.

The plaintiff's complaint therefore discloses the case of a contest between a settler claiming title under the laws of the United States and a railroad company claiming a right under an act of Congress; and of such a case the circuit court for the district of Washington clearly had jurisdiction. *Doolan* v. *Carr*, 125 U. S.

630 [31: 845]; *Cooke* v. *Avery*, 147 U. S. 375 [37: 209].

Passing from the question of jurisdiction we come to the contention of the plaintiff in error that Ziegler, as a mere settler upon lands of the United States, although with an intention 73] *to obtain a title to the same under the pre-emption laws, did not have such a vested interest in the land as would avail against the railway company in asserting its right of way conferred by the act of Congress.

An answer to this question is furnished by the case of *Washington & I. R. Co.* v. *Osborn*, 160 U. S. 103 [40: 356], where it was held that a railroad company whose road is laid out so as, under the provisions of the act of March 3, 1875, to cross a part of the public lands, cannot take part thereof in the actual possession and occupation of a settler who is entitled to claim a pre-emption right thereto when the proper time shall come, and who has made improvements on the land so occupied by him without making proper compensation therefor.

The court based its conclusion in that case upon the language of the 3d section of the act, which is as follows: "That the legislature of the proper territory may provide for the manner in which private lands and possessory claims on the lands of the United States may be condemned, and when such provision shall not have been made, such condemnation may be made in accordance with § 3 of the act entitled 'An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean,' etc., approved July 1, 1862 (12 Stat. at L. 489, chap. 120)."

And it was held that the right of a settler in possession of unsurveyed lands of the United States, who had made improvements with the intention of procuring a title under the pre-emption laws as soon as the same should be surveyed by the government, was a possessory claim within the meaning of the statute, for which compensation must be made by a railroad company seeking to appropriate a part of it for its tracks.

The final contention on behalf of the plaintiff in error is that the trial court erred in holding and deciding that the words "possessory claims," used in said act of Congress, were intended to protect more than the improvements of a settler, and thus, in effect, holding and deciding that the settler was entitled to receive pay for the land as though he was the owner in fee.

74] *Even if it were the law, as is assumed in this contention, that the plaintiff, as the holder of a possessory claim, was not entitled to the same measure of compensation as if he had secured his patent from the United States, it would be difficult to convict the trial judge of any error in that respect. In the charge the judge instructed the jury as follows: "As I have said, the court holds the plaintiff to be the owner of the land, but I do not wish to be understood by that saying that he was then the owner in fee; that he had a title in fee or other rights than such as belonged to a settler under the pre-emption law of the United States, which gave him a possessory right and a vested interest in the property, so that no part of it could be lawfully taken from him without compensation being paid for it; and in determining the amount of damages to be awarded to him, you will take into consideration the condition the title was in at the time the road was built and award him the value of the property as you find it to be, considering the title to be involved as it was by reason of the matter being undetermined in the land department as to his right to it, and there being a contest, and that he was obstructed in obtaining his patent to it by reason of a dispute as to its right. Now, taking that into account, you will award him such amount of damages as will compensate him for so much of the land as the railroad company has appropriated for the right of way and for whatever injurious effect the road may have caused to the land which he owned, the balance of the 80-acre tract described in his complaint."

Under this instruction the railroad company would seem to have received the benefit of any distinction that could be fairly made between a possessory title and one that had matured into a patent. But upon the facts disclosed by this record, we do not think that the railroad company was entitled to the benefit of such a distinction. While it is true that, at the time when the company took possession of the plaintiff's land, the latter had not yet received his patent, but had only made the final proofs and filed the same in the land office of the United States and had tendered the purchase price thereof, and had demanded from the register and *receiver of said land office a final [75 receipt evidencing his entry of and payment for said land, yet it further appears that before the plaintiff brought this suit his purchase money had been accepted and a patent from the United States for the said tract of land had been duly executed and delivered to him. The plaintiff, then, having been in possession of the land in question, and having done and performed all that the law required to give him a right to a patent, before the railroad company seized the land, we think the grant of the patent, subsequent to such seizure, but before the bringing of the suit, operated to confer upon the plaintiff the right to demand and recover damages as the owner of the fee. The railroad company having taken possession without the consent of the owner, and not having instituted proceedings to condemn, was a trespasser, and liable to indemnify the plaintiff in respect to his possession and title, as they were shown to exist at the time the suit was brought.

To avoid possible misunderstanding, it may be observed that, as mentioned by the circuit court of appeals, this case arose under Wash. Terr. Code, § 2456, which authorized any corporation, organized for the construction of a railroad, canal, or bridge, to take lands, but required "compensation to be made to the owner thereof, irrespective of any increased value thereof by reason of the proposed improvement by such corporation." See 15 U. S. App. 478.

The judgment of the Circuit Court of Appeals is affirmed

76] EDWARD M. WILLIS *et al., Plffs. in Err.*,
v.
EASTERN TRUST & BANKING COMPANY.

(See S. C. Reporter's ed. 76-81.)

Jurisdictional amount.

A dispute as to the right of possession of property, although the value of the property is stipulated to be in excess of $5,000, does not reach the amount required for jurisdiction on appeal to this court, where the appeal was taken soon after the judgment, and the rental value appears to be $1,560 per annum.

[No. 302.]

Argued April 29, 1897. Decided May 10, 1897.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment of that court reversing the judgment in favor of defendants and rendering judgment in favor of plaintiff in an action brought by the Eastern Trust & Banking Company, plaintiff, against Willis and Johnson, defendants, of forcible detainer, to obtain possession of real estate in said District. *Dismissed.*

See same case below, 6 App. D. C. 375.

Statement by Mr. Chief Justice **Fuller:**

This was an action of forcible detainer brought September 17, 1894, by the Eastern Trust & Banking Company against Willis and Johnson, before a justice of the peace in and for the District of Columbia, to obtain possession of certain real estate in said District. The defendant filed a plea of title, whereupon the case was certified to the supreme court of the District for trial. D. C. Rev. Stat. chap. 19, §§ 677, 691.

The plaintiff, in compliance with the rules of that court, filed therein October 5, 1894, "a declaration making demand for the premises, and with a description thereof as in ejectment."

The parties submitted the case to the court for its determination without a jury upon an agreed statement of facts in writing. It therefrom appeared in substance that the Eastern Trust & Banking Company was a body corporate, organized under the laws of the state of Maine, and having its principal place of business in the city of Bangor, in that state. The American Ice Company, also a body corporate organized under the laws of the state of Maine, and doing business therein and also in the District of Columbia, on December 2, 1889, executed and delivered to the Trust Company a certain deed of trust in the nature of a mortgage, upon certain real estate described therein, a part of which was situated in the state of Maine, and the remainder in the city of Washington, to secure the payment of its bonds of *77] various denominations, aggregating $40,000, payable to the Trust Company or bearer in equal instalments of $5,000 each, in three, four, five, six, seven, eight, nine, and ten years after date, with interest at the rate of 6 per cent, evidenced by certain coupons. The deed of trust was duly recorded in the records of the District of Columbia. It bore the impress of the corporate seals of the American Ice Company and of the Trust Company, and it was admitted that the seals were affixed thereto before the execution and delivery thereof, but that the recorder of deeds failed to note the same upon the records. The bonds were executed and delivered in due form of law to the Trust Company, and by it delivered to certain parties, who took them for value in the regular course of business before maturity, and who now held and owned them, except so far as the first instalment thereof, and interest, had been paid. The instalment of bonded indebtedness which became due in 1893 was not paid, nor was the interest then falling due, nor had either of said sums or any part of them been paid or satisfied in any manner. The parties holding the bonds had not, nor any of them, waived their rights to payment in accordance with the tenor and effect of the bonds and deed of trust, by the terms of which the residue of the bonded indebtedness, to wit, the sum of $35,000, together with accrued interest thereon, was at the commencement of the suit due and payable.

On October 13, 1893, the Ice Company made an assignment of all its property for the benefit of its creditors to Johnson, who accepted the trust and entered upon its discharge. Subsequently, as such an assignee, he leased that portion of the real estate situated in Washington to Willis, who entered and took possession thereunder and retained possession at the time of the trial.

This lease was in writing and bore date January 29, 1894, and was for a period of one year from that date at a rental of $130 per month. After the default in the payment of the second instalment of bonds and of the interest had continued for a period of more than ninety days, the bondholders, or those holding more than 50 per cent of the value thereof, directed *the trustee to proceed in the execu-[78 tion of the trust in accordance with its terms and provisions, in pursuance of which direction the Trust Company on July 30, 1894, caused a thirty days' notice to quit to be served upon Johnson and Willis on the theory that they were statutory tenants by sufferance under the law, and that the instrument securing the indebtedness created the relation of landlord and tenant between the Trust Company and them; and thereafter, namely, September 17, 1894, the Trust Company caused the proper summons to be issued by a justice of the peace against Willis and Johnson, who appeared in response thereto as before stated.

After the default and in pursuance of the direction of the bondholders and of the powers conferred upon and vested in the Trust Company by the deed of trust, the Trust Company advertised the real estate for sale in accordance with the requirements of the deed of trust, and exposed the same for sale at public auction in the city of Bangor, at which sale a committee, acting for the bondholders, pur-

NOTE.—*As to jurisdiction of United States Supreme Court dependent on amount; interest added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy,*—see note to Gordon v. Ogden, 7: 592.

chased the lands embraced in the deed of trust for the benefit of the bondholders; but the terms of the sale had not yet been complied with and no deed had been made to the purchasers, because it was understood and agreed between them and the Trust Company that the Trust Company should first obtain possession of the property.

Judgment was rendered in favor of Willis and Johnson by the supreme court of the District, and, the case being carried to the court of appeals for the District of Columbia, that judgment was reversed and judgment in favor of the Trust Company directed (6 App. D. C. 375), whereupon Willis and Johnson brought the case to this court on writ of error.

Messrs. **William G. Johnson** and **Calderon Carlisle** for plaintiffs in error.

Mr. **B. F. Leighton** for defendant in error.

Mr. Chief **Justice Fuller** delivered the opinion of the court:

79]*The matter in dispute in this suit was the right of present possession of the real estate described in the declaration. Recovery of possession would not extinguish the indebtedness secured by the trust deed, nor bar the right of redemption if the alleged sale were invalid, nor would the title to the land be determined by the litigation.

In respect of procedure in the supreme court of the District, we do not understand the correctness of the observations of Cox, J., in *Jennings* v. *Webb*, 9 Mackey, 317, to be questioned, that "while our rule requires the plaintiff to file a declaration, as in ejectment, that does not convert the proceedings into an action of ejectment at all, in which the plaintiff recovers upon the strength of his title. In this proceeding, unless he establishes the relation of landlord between himself and the defendant, no matter what the form of the declaration is, he is not entitled to recover. . . . It is still a landlord and tenant proceeding."

Here Johnson, as assignee, held the title of the American Ice Company, and had no greater rights than that company had, and these were subordinate to those of the Trust Company as trustee in the deed of trust made by the American Ice Company before its assignment. The action was sustained by the court of appeals on the authority of *Loring* v. *Bartlett*, 4 App. D. C. 1, wherein it was held that "after foreclosure of a deed of trust in which there is a reseveration to the grantor of the right to the possession and enjoyment of the premises and to the receipt of the rents and profits until default made, the purchaser at the sale may maintain a landlord and tenant proceeding against the grantor under D. C. Rev. Stat. §§ 680, 681, and 684, to obtain possession of the premises. Such a reservation has the effect of a redemise of the premises to the mortgagor or grantor."

This rule was applied here as between the mortgagee and the assignee of the mortgagor after condition broken. The trust deed was, in legal effect, a mortgage with power of sale, and vested the legal title to the mortgaged property in the Trust Company, subject to be defeated by the payment of the money, and the right of possession would have vested in the *Trust Company from the date of the deed. [**80** save for the express provision whereby the Ice Company was allowed to retain the possession until default. But it was provided that, on default in the payment of the indebtedness as prescribed, it should "be lawful for the trustee to enter into or upon the premises and property hereby granted or intended so to be, and to take possession of the whole or any part thereof."

Plaintiffs in error, however, insist that the conventional relation of landlord and tenant must exist in order to bring a case within the landlord and tenant act of the District, and that no such relation was created by the deed of trust.

Under the circumstances we are unable to see how we can entertain jurisdiction. It is true that it has been stipulated that the value of the real estate exceeds $5,000, but the right of possession was the matter in dispute, and there is nothing in the record from which we can conclude that the value of that reaches the jurisdictional amount. The property was rented in January, 1894, for $1,560 per annum for one year, and it is to be assumed that the assignee obtained what it was reasonably worth. The judgment appealed from was rendered in the court of appeals June 3, 1895, and the record was filed in this court on the 22d of July succeeding. It is clear that the matter in dispute in the courts of appeals had not the value of $5,000 when the writ of error was sued out. 27 Stat. at L. 434, chap. 74, § 8.

In *Harris* v. *Barber*, 129 U. S. 366 [32: 697], which was a writ of error to reverse the judgment of the supreme court of the District of Columbia quashing a writ of certiorari to a justice of the peace, we had some difficulty in maintaining jurisdiction. But it was sustained on the grounds there stated by Mr. Justice Gray as follows: "The petition for the writ of certiorari alleges, upon the oath of the petitioner, that he is in the possession of the premises under a lease having nearly a year to run, with a privilege of extension for four years more; and that he had expended $15,000 in permanent improvements upon the leased property, of which he will be deprived if the judgment of the justice of the peace, which he alleges to be void for want of jurisdiction, is not set aside *by writ of certiorari. The reason-[**81** able inference from this is, that the possession of the premises, with the right to use these improvements, throughout the lease and the extension thereof, would be worth more than $5,000, showing that the matter in dispute is of sufficient pecuniary value to support the jurisdiction of this court."

No such inference can be drawn from anything in this record, and the result is that *the writ of error must be dismissed.*

G. G. LATTA, Exrs. of the Estate of William H. Gaines, Deceased, *et al.*, *Appts.*,
v.
VINA GRANGER.

(See S. C. Reporter's ed. 81-87.)

Power of lower court under mandate.

The reversal of a decree, amounting merely to a vacation of an accounting, so as to permit a modification thereof in specified particulars, does not give the lower court any power under the mandate to go again into questions of rental rate and value of improvements, which had been so determined that the accounting was only required to bring down to date the amounts, including subsequent taxes, if any had been paid, and interest.

[No. 303.]

Argued April 29, 1897. Decided May 10, 1897.

APPEAL from a decree of the United States Circuit Court of Appeals for the Eighth Circuit affirming a decree of the Circuit Court of the United States for the Eastern District of Arkansas restating an account on new proofs taken as to rental value and value of improvements in an action brought by W. H. Gaines *et al.*, and continued by his executor *et al.*, against Vina Granger to procure a decree that the legal title of land held by defendants was held in trust for plaintiff and for possession and an accounting. *Decree of Circuit Court of Appeals and of Circuit Court reversed*, and cause remanded with directions to enter a decree in conformity with the opinion of this court.

See same case below, 32 U. S. App. 342.

The facts are stated in the opinion.

Messrs. **G. B. Rose**, *W. E. Hemingway*, and *U. M. Rose* for appellants.

Mr. **John McClure** for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

W. H. Gaines leased a tract of ground now included in lot 16, block 68, Hot Springs, Arkansas, in 1875, for one year, with the right of renewal from year to year, until the title to the Hot Springs quarter section was settled, to Perry Huff at a rental of $100 a year, payable in monthly instalments. The lot was described in the lease as 16 feet in width and the rate was, therefore, $10 per front foot. In 1876 the United States took possession of the lot, and, it is alleged, subsequently leased it to Huff through a receiver appointed by the court of claims, though no such lease is in the record. Afterwards Huff sold all his right, title, and interest in the lot to Vina Granger and Eva M. James, who took with knowledge of the derivation of Huff's interest.

The general history of the litigation, of which this case is a branch, will be found in the *Hot Springs Cases* [*Rector* v. *United States*], 92 U. S. 698 [23: 690], and *Rector* v. *Gibbon*, 111 U. S. 276 [28: 427].

This was a bill filed May 23, 1884, in the circuit court of the United States for the eastern district of Arkansas by W. H. Gaines and wife against Perry Huff, Eva M. James, and Vina Granger for a decree that the legal title of the lot was held by defendants in trust for plaintiffs, for possession and for an accounting. The case in its progress was discontinued as against Huff and James, and executors were substituted as plaintiffs. A decree was rendered on March 2, 1887, transferring title from defendant Granger to plaintiffs, and directing defendant to make a deed accordingly; and the case was referred to a special master to ascertain and report the value of the rents of the lot since the award made by *the [83 commissioners appointed under the act of Congress of March 3, 1877 (19 Stat. at L. 377, chap. 108); the amount of taxes paid by defendant on the lot since that award; and the value of the improvements made upon the lot before the award and afterwards. This decree placed the then value of the lot at $5,500. The master filed his report April 9, 1887, in which he found the rental value of the lot without improvements to be $10 per front foot per annum, and that the frontage was 21.2 feet; that the present value of the improvements was $1,800; and the amount of taxes which had been paid.

On November 10, 1887, a final decree was rendered, overruling exceptions to the master's report and stating an account between the plaintiffs and defendant as follows: The amount due to plaintiffs for rent "according to the terms of the lease, from the date of award to the date of filing of the bill in this case and interest;" the amount due plaintiffs "since said date and until the filing of the master's report, the rental value of the property, and interest annually," and the "amount of rent to date of this decree;" and, on the other hand, the amount due defendant for taxes paid and interest; the amount of purchase money paid by her to the government for the lot and interest; and the present value of the improvements fixed at $1,800. The account, as stated, left a balance due defendant of $555.12, for which recovery was decreed; and it was further decreed that plaintiffs be put in possession. From this decree an appeal was prayed to this court and the decree reversed. *Goode* v. *Gaines*, 145 U. S. 141 [36: 654].

We reversed that decree because, in view of the circumstances detailed in the opinion, we thought that the accounting should not be carried back of the filing of the bill, May 23, 1884, except as to one item. And it was said: "We are of opinion that the accounting between the parties should be stated both as to debit and credit, from the 23d of May, 1884, with the exception of the credit for the amounts paid to the government for the lots, of which payments we regard appellees as getting the entire benefit, and that no increased rents should be allowed on account of the improvements, as *appelles are only to be held [84 to their value as of the date of the decrees. In other words, appellants should be charged with rental value from the date of the filing of the bills to the rendition of the decrees, with interest, and should be credited with taxes, etc., paid after the date of the filing of the bills, with interest, and also with the amount paid the government for the different parcels, with interest from the dates of payment, as well as with the value of the improvements, in each instance, at the time of the rendition of the decrees."

That decision was rendered in several cases considered and disposed of at the same time.

Our mandate having gone down to the circuit court "for further proceedings to be had therein in conformity to the opinion of this court," that court held that the defendant was entitled to enter upon her defense as if the whole matter was again at large. Thereupon plaintiffs made an application to this court for a writ of mandamus commanding the judge of the circuit court to carry out the decree heretofore made in the cause by this court. The mandamus was granted and the case is reported, *Gaines* v. *Rugg* [*Gaines* v. *Caldwell*], 148 U. S. 228, 240 [37:432, 436]. Mr. Justice Blatchford, delivering the opinion of the court, said: "It is, we think, very plain that so much of the decree of the circuit court of November 11, 1887, as was not disapproved by this court still stands in full force. Whatever there is to impair that decree must be sought for only in the opinion, decree, and mandate of this court. This court held that no objection could be sustained to the provisions of the decree of the circuit court as to the title. It found error only in the rules prescribed by the circuit court for the taking of the account, and the decree of that court was reversed only for the purpose of taking an account according to the principles laid down by this court. As the decree of the circuit court in regard to the title was not invalidated by the action of this court on the appeal, the circuit court had no right to set aside that decree as respected the title nearly five years after it was rendered. The decree was beyond the control of the circuit court, unless on a bill of review duly filed, [85] and the *time for filing a bill of review had long ago elapsed. The circuit court could do nothing to affect the decree, except in obedience to the mandate of this court."

After the mandamus was granted the circuit court entered the decree as ordered; and appointed another special master, directing him "to proceed to state an account between said parties according to the terms of this decree, and to that end he shall take testimony in writing of all witnesses produced, and shall report the same with all his proceedings and findings herein to this court."

The statement of the account was in itself as the case stood a mere matter of computation, and the record does not show that there had been any surrender of possession or any other act after the decree of November 10, 1897, which would affect the final result. The master, however, instead of restating the account, corrected in the particulars indicated by us, proceeded to take new proofs as to rental value and the value of the improvements; and thereupon found the value of the improvements to be $2,625, and cut down the rents to $6 per front foot. The report was excepted to, the exceptions overruled, and a decree rendered January 23, 1894, that plaintiffs pay defendants the sum of $2,316.23. From this decree plaintiffs prosecuted an appeal to the circuit court of appeals for the eighth circuit, the decree was affirmed, and the case was then brought to this court. *Gaines* v. *Granger*, 32 U. S. App. 342.

In these proceedings in the circuit court there was error and its decree must be reversed. It is true that in *Goode* v. *Gaines*, 145 U. S. 141 [36: 654], we said that defendants "should be charged with rental value from the date of the filing of the bills to the rendition of the decree, with interest," but we do not intend to be understood as holding that the rental value after that date had not been satisfactorily determined, and had in mind in that regard only the exclusion from the decree of November 10, 1887, of the amount found due plaintiffs for rent prior to that date, together with interest thereon. Nor did we intend that the finding by that decree of the then value of the improvements should be disturbed.

The reversal of that decree amounted to nothing more than *a vacating of the account- [86] ing so as to permit of a modification thereof in particulars pointed out with sufficient precision in the opinion, and it might well be held that the circuit court had no power, under our mandate, to again go into the questions of rental rate and value of improvements, for they had been determined, and an accounting was only required to bring the amounts, including subsequent taxes, if any, paid by defendant, and interest down to date.

But, apart from that, the rent prescribed by the lease was at the rate of $10 per front foot, and this did not appear from the extrinsic evidence to be unreasonable or excessive. Nor does the additional evidence, when carefully analyzed, all the evidence being taken together, compel to any other conclusion.

So that, without being absolutely controlled by the terms of the lease, and without attributing conclusive effect to the first report and the decree thereon, we remain of opinion that the rental value per annum of $10 per front foot and the sum of $1,800 as the value of the improvements should be decreed. As to this last item, the lapse of time would not increase the value, and there is no evidence in the record of additional improvements since the filing of the bill, if subsequent improvements could in any aspect be allowed for.

And it should be observed that it is clear that, under the circumstances, this is not a case for the application of the principle of the acceptance by an appellate court of the conclusions of a master, concurred in by the trial court, when depending on conflicting testimony. We cannot permit our views to be overcome by presumptions in favor of this second report and decree.

The decree will be reversed at appellees' costs and the cause remanded to the circuit court, with directions to enter a decree to the effect that all the right, title, claim, and interest of defendants in and to lot 16, block 68, in the city of Hot Springs, Arkansas, be and the same is devested out of her and vested in said plaintiffs, and that defendant convey said lot to plaintiffs, or that a master do it for her; that *plaintiffs have and recover of defendant [87] the possession of said lot 16 in block 68; and that a writ of possession issue, or that a copy of said decree be served upon her which shall operate as such writ; that an account between plaintiffs and defendant be stated, and in doing so that defendant be charged with the rental value of the lot at $10 per front foot per annum from May 23, 1884, down to date of decree, with interest on the same from the end

of each year at the rate of 6 per cent per annum; that plaintiffs be charged with all taxes paid by defendant on the lot since May 23, 1884, with interest on the same from time of payment until date of decree, at the rate of 6 per cent per annum; also with $1,800, adjudged to be the value of improvements placed by defendant on said lot; also with the sum paid by defendant to the United States for the lot and interest thereon at the rate of 6 per cent per annum from the date of payment to date of decree; and that judgment be entered for the balance; and that plaintiffs recover their costs in the court below.

Decree of the Circuit Court of Appeals reversed; decree of Circuit Court reversed, and cause remanded to that court with directions to enter a decree in conformity with this opinion.

G. G. LATTA, Exr., etc., *et al.*, *Appts.*,
v.
OTTO NEUBERT.

G. G. LATTA, Exr., etc., *et al.*, *Appts.*,
v.
CHARLOTTE COHN.

G. G. LATTA, Exr., etc., *et al.*, *Appts.*,
v.
D. C. RUGG.

G. G. LATTA, Exr., etc., *et al.*, *Appts.*,
v.
A. S. GARNETT.

G. G. LATTA, Exr., etc., *et al.*, *Appts.*,
v.
J. J. SUMPTER *et al.*

(See S. C. Reporter's ed. 87.)

[Nos. 304, 326–329.]

APPEALS from the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. **G. B. Rose**, *W. E. Hemingway*, and *U. M. Rose* for appellants.

Mr. John McClure for appellees.

THE CHIEF JUSTICE: The parties having stipulated that these cases shall abide the event of *Latta* v. *Granger*, just decided, 167 U. S. 81 [*ante*, 85], the decrees of the circuit court of appeals therein are severally reversed, and the decrees of the circuit court are also severally reversed, and the causes remanded to that court, with directions to enter decrees in conformity with the opinion in *Latta* v. *Granger*.

Ordered accordingly.

88] WABASH RAILROAD COMPANY,
Plff. in Err.,
v.
CITY OF DEFIANCE.

(See S. C. Reporter's ed. 88–104.)

Ordinance, when not a contract—effect of—ordinance to control street—legislative power of city—changing grade of street—common council—damages.

1. An ordinance of a city authorizing a railroad company to erect new bridges of a certain construction, provided it shall also build sufficient approaches and grade to the bridges and keep them in good repair, constitutes a mere license, and not a contract that the bridges or approaches shall remain any particular length of time, or that the city will not make new requirements.
2. A provision in an ordinance, that the entering by a railroad company upon the work of constructing bridges at a street crossing shall be taken as an acceptance of the terms thereof, and regarded as superseding any contract or agreement theretofore existing, does not make the ordinance a contract that the bridges so constructed shall remain forever, or waive the right to change the grade or method of crossing.
3. An ordinance to control and improve streets will override any license previously given by which the control of the street has been surrendered to any individual or corporation.
4. The legislative power vested in municipal bodies cannot be bartered away in such a manner as to disable them from the performance of their public functions.
5. The removal of obstructions in or changing the grade of a street is incidental to the power to keep the street in repair and free from nuisances, if it is necessary for the adequate exercise of that power.
6. It is within the discretion of the common council to determine whether the public exigencies require that the grade of a street be so changed as to cross a railroad at a level.
7. Failure to file any claim for damages caused by the change of grade of a street, within the time required by Ohio Rev. Stat. § 2315, will preclude any right of action for such damages.

[No. 239.]

Argued March 25, 26, 1897. Decided May 10, 1897.

IN ERROR to the Supreme Court of the State of Ohio to review a judgment of that court affirming the judgment of the State Circuit Court which affirmed the judgment of the Court of Common Pleas dismissing a suit in equity brought by the Wabash Railroad Company to enjoin the city of Defiance from proceeding with a contemplated improvement of certain streets. *Affirmed.*

See same case below, 10 Ohio C. C. 27, 52 Ohio St. 262.

Statement by Mr. Justice **Brown**:

This was a petition, in the nature of a bill in equity, originally filed in the court of common pleas for Defiance county, Ohio, to enjoin the city of Defiance from proceeding with a contemplated improvement of North Clinton street and Ralston avenue, by which those streets would be so graded as to necessitate the removal of certain bridges erected by the plaintiff over its roadway, where it crosses those streets, and also the approaches constructed by the plaintiff to those bridges.

The material facts were that, in the year 1887, the Wabash, St. Louis, & Pacific Railway Company, then operated by one McNulta as receiver, crossed two public streets or highways in that city, known as the Holgate pike and the Brunersburg road, respectively, at a grade about 18 feet below the grade of said streets, where the same crossed the railway, and that there were two overhead wooden

NOTE.—The authorities as to the *liability for the cost of changing grade at a railroad crossing* are fully reviewed in a *note* to **Kelly v. Minneapolis** (Minn.) 26 L. R. A. 33.

bridges at about that distance above the track of the railway.

On December 20, 1887, the city council of De-
89] fiance passed *an ordinance permitting this railway to erect new bridges over and across its track, where the same crossed these two highways, provided said bridges should be of good and substantial construction, placed in the center of the street, with 18-feet wide roadway, good and substantial sidewalks 8 feet wide on each side of said bridges, and with proper railings on each side of said walks, which bridges and walks were to be kept in good repair by the company. The railway was further required to allow a distance of 21 feet in the clear between the tops of its rails and the bottom of the floor beams of the bridges, and also to construct approaches at not exceeding 1½ inches to the foot grade, and to make the same solid by either stone or gravel, etc.; all to be done to the approval of the city and to be kept in repair by the company. This ordinance is printed at length in the margin.†
90] *Thereupon McNulta, acting as receiver, caused these overhead bridges to be constructed with their approaches, at a cost of more than $2,300.

The terms and conditions imposed by the ordinance seem to have been faithfully kept and performed by him and by the plaintiff, since it was placed in possession of said railway property, which was sold under a decree of the United States circuit court, to the plaintiff, as purchaser, whereby it became vested with the railway, and all its rights arising under this ordinance.

On February 7, 1893, the common council of the city passed two ordinances applicable to North Clinton street, formerly known as the Holgate pike, and Ralston avenue, formerly known as the Brunersburg road, changing the grade of that part of each of said streets where they crossed the railway track to the level of the railway, and so changing the approaches as to cause them to descend to the level of the road; and further providing that the cost and expense of such improvements should be paid out of the general fund, and levied and assessed upon the general tax list upon all real and personal property in the corporation.

Plaintiff averred, in this connection, that the sole purpose of these ordinances was to cause the overhead bridges and the approaches thereto to be destroyed and removed, and the crossing of said highways reduced to a crossing of the same grade as the railway tracks; that if the city is allowed to carry out its purpose, such crossings will be extremely dangerous to *all persons having occasion to use the [91
same, by the fact that the roads will approach the tracks at a steep, downward decline on both sides; that the railway track at these points is on a heavy grade, which renders it very difficult to control the speed of trains, and that the danger of a grade crossing will be vastly increased. Plaintiff further averred that since the year 1856 its railway track had been crossed by said highways by overhead crossings, consisting of bridges about 18 feet in the clear above the level of the tracks. "That said highways then, as now, crossed the railway track at points near together, to wit, about 196 feet, and converged so as to meet at a distance of 70 feet from the railway right of way. That the railway track at said crossings lies in a deep cut, about 11 or 12 feet below the natural surface of the ground, and is on a heavy down grade and curve, and on one of said highways buildings are so located as to almost, if not entirely, cut off the view of approaching trains from persons approaching said track from the southerly side of the same. That, if said crossings are reduced to grade, as proposed by said ordinances, the approaches to said track will be down a steep inclined plane on both sides of said track, on both said highways; so that at said crossings the said highways will be cut to a depth of about 11½ feet below the adjacent lands. That it will be almost if not quite impossible for heavily loaded teams to stop for trains when approaching said track; and that by reason of the deep cuts both of said railway and highways in which said crossings will be located and of the curve and grade of said railway at said points, the sound of any signal and the sound and sight of approaching trains will be cut off, and said crossings will be excessively difficult and dangerous to the lives of persons crossing plaintiff's track along said highways, and to the lives, limbs, and property of its passengers and patrons being carried on the trains of the

†An Ordinance Permitting Wabash, St. Louis, & Pacific Railway to Construct Bridges at Holgate Pike and Brunersburg Road.

Be it ordained, by the council of the city of Defiance, Ohio:

Sec. 1. That the Wabash, St. Louis, & Pacific Railway Company is hereby authorized to erect new bridges over and across the track of the railway of said company where the same crosses the public streets in the third ward of said city, known as the Brunersburg road and Holgate pike, provided said bridges shall be of good and substantial construction, placed in the center of said street, be 18-feet wide roadway, with good and substantial sidewalk 8 feet wide on each side of said bridges, with proper railings on each side of said walks, said bridges and sidewalks to be at all times kept in good order and repair by said company. And said railway company is hereby further authorized to construct each of said bridges of sufficient height to give a distance of 21 feet in the clear between the tops of the rail of said railway at its present grade and the bottom of the floor beams of said bridges, provided always that said company shall provide and construct good and sufficient approaches and grade to each of said bridges, and extend the same to sufficient distance to give a grade of not to exceed 1½ inches to the foot, and to conform to the width of the present street, said grade to be made firm and solid by either stone or gravel, at the option of said company, provided that if gravel be used said city will permit it to be taken from their gravel bed without charge, and to construct and keep in constant repair good and proper approaches to said sidewalks, and brought to the proper level of the present walk by broad, safe steps where the grade would be too great for a safe incline; and all to be done to the approval of the city, and all to be kept in repair to the extent of said company's right of way at all times by said company.

Sec. 2. The entering upon the work of constructing said bridges by said company shall be taken as an acceptance of the terms thereof by said company, and shall be regarded as superseding any contract or agreement heretofore existing between said company and said city as to either of said bridges.

Sec. 3. This ordinance shall take effect and be in force from and after its passage and due publication.

Done at the council chamber in regular session this 20th day of December, 1887.

Attest: Jas. A. Kitchel, City Clerk.

plaintiff, on account of unavoidable accidents and collisions there happening, and that thereby there will be cast upon the plaintiff an additional burden and liability to its said passengers and the public. That the natural con-
92] formity of the lands at said *crossing is such as to make overhead bridge crossings of said public highways over plaintiff's said track absolutely essential to the public safety."

The answer admitted most of the allegations of the petition, and averred that notice was duly published of the proposed improvements in a newspaper of general circulation in the city of Defiance, and written notice was duly served upon the plaintiff; but that the plaintiff did not, at any time, file any claim for damages by reason of such improvements, whereby it has waived the same, and is barred from claiming such damages.

Upon a hearing upon pleadings and proofs in the court of common pleas, the petition was dismissed. Plaintiff appealed to the circuit court, and applied for an interlocutory injunction, which was granted, but was subsequently dissolved upon final hearing, and the petition again dismissed. 10 Ohio C. C. 27. The case was carried by writ of error to the supreme court of the state, and the judgment of the circuit court affirmed. 52 Ohio St. 262. Whereupon plaintiff sued out a writ of error from this court.

Messrs. **Henry Newbegin and Alexander L. Smith,** for plaintiff in error:

The ordinance of December 20, 1887, passed by the city under authority conferred upon it by the state, is a law of the state.

The state of Ohio had conferred on the city of Defiance authority to pass this ordinance.

Ohio Rev. Stat. § 1692, ¶ 18, and § 2301.

This authority may be conferred by a law of the state applying generally to all municipalities of the state as well as to the city of Defiance specially.

Hamilton Gaslight & C. Co. v. *Hamilton*, 146 U. S. 258 (36: 963).

It has been repeatedly held by the courts that a city ordinance passed under authority conferred on it by the state is a law, within the meaning of U. S. Const. art. 1, § 10.

Wright v. *Nagle*, 101 U. S. 791 (25: 921); *New Orleans Waterworks Co* v. *Louisiana Sugar Ref. Co.* 125 U. S. 30 (31: 612); *Williams* v. *Bruffy*, 96 U. S. 176, 183 (24: 716, 717); *New Orleans Gaslight Co.* v. *Louisana Light & H. P. & Mfg. Co.* 115 U. S. 650 (29: 516); *New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 674 (29: 525); *Western Poving Co.* v. *Citizens' Street R. Co.* 128 Ind 525, 10 L. R. A. 770; *Indianapolis* v *Consumers' Gas Trust Co.* 140 Ind. 107, 27 L. R. A. 514; *Cleveland Gaslight & C. Co.* v. *Cleveland*, 71 Fed. Rep. 610; *Baltimore Trust & G. Co.* v. *Baltimore*, 64 Fed. Rep. 153; *Capital City Gaslight Co.* v. *Des Moines*, 72 Fed. Rep 829; *Citizens' Street R. Co.* v. *City R. Co.* 56 Fed. Rep. 746; *Westerly Waterworks* v. *Westerly*, 75 Fed. Rep. 181.

Whether we treat this ordinance of December 20, 1887, as a license to the railroad company, acted on by it, or as a contract *inter partes*, it was a contract within the provisions of § 10 of article 1 of the Constitution, and could not be abrogated by carrying into effect the ordinances of February, 1893, reducing the overhead highway crossings to grade crossings on a level with the railway track.

A parol license acted on is irrevocable.

Wilson v. *Chalfant*, 15 Ohio, 258, 85 Am. Dec. 574; *Junction R. Co.* v. *Ruggles*, 7 Ohio St. 1; *McKellip* v. *McIlhenny*, 4 Watts, 317, 28 Am. Dec. 711; *Rhodes* v. *Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Huff* v. *McCauley*, 53 Pa. 206, 91 Am. Dec. 203; *Grimshaw* v. *Belcher*, 88 Cal. 217; *Flickinger* v. *Shaw*, 87 Cal. 126, 11 L. R. A. 134; *People* v. *O'Brien*, 111 N. Y. 1, 2 L. R. A. 255; *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87 (3: 162); *Galveston* v. *Galveston City R. Co.* 46 Tex. 435; *Mansfield, C. & L. M. R. Co.* v *Stout*, 26 Ohio St. 241; *Davenport C. R. Co* v. *Davenport Gaslight Co.* 43 Iowa, 301; *Com.* v. *Essex Co.* 13 Gray, 239; *Philadelphia, W. & B. R. Co.'s Appeal*, 121 Pa. 44.

Where a grant of a franchise has been made by a municipality as agent of a state, a contract is implied not to reassert the right to what has been granted.

Port of Mobile v. *Louisville & N. R. Co.* 84 Ala. 115; *Stein* v. *Mobile*, 49 Ala 362, 20 Am. Rep. 283; *Burlington* v. *Burlington Street R. Co.* 49 Iowa, 144, 31 Am. Rep. 145; *New Jersey* v. *Wilson*, 11 U. S. 7 Cranch, 164 (3: 303); *Providence Bank* v. *Billings*, 29 U. S. 4 Pet. 514 (7: 939); *Woodruff* v. *Trapnall*, 51 U. S. 10 How. 190 (13: 383); *Proprietors of Bridges* v. *Hoboken Land & Improv. Co.* 68 U. S. 1 Wall. 116 (17: 571); *Chenango Bridge Co.* v. *Binghamton Bridge Co.* ("*The Binghamton Bridge*"), 70 U. S. 3 Wall. 51 (18: 137); *United States* v. *Quincy*, 71 U. S. 4 Wall. 535 (18: 403); *Murray* v. *Charleston*, 96 U. S. 432 (24: 760); *United States* v *New Orleans*, 103 U. S. 358 (26: 395); *St. Tammany Waterworks Co.* v. *New Orleans Waterworks Co.* 120 U. S. 64 (40: 563); *Louisville Gas Co.* v. *Citizens' Gaslight Co.* 115 U. S. 684 (29: 512); *Edwards* v. *Kearzey*, 96 U. S. 595 (24: 793); *McGahey* v. *Virginia*, 135 U. S. 662 (34: 304); *Pennoyer* v. *McConnaughy*, 140 U. S. 1 (35: 363); *Barnitz* v. *Beverly*, 163 U. S. 118 (41: 93); *Cincinnati & S. R. Co.* v. *Carthage*, 36 Ohio St. 631; *Savage* v. *Salem*, 23 Or. 381, 24 L. R A. 787; *Indianapolis* v. *Consumers' Gas Trust Co.* 140 Ind. 107, 27 L. R. A. 514.

The use that the railroad company had acquired in the said highways over its track by means of the said overhead bridges as a safe passage for the public, and thereby the prevention of accidents to its trainmen and passengers and the destruction of its property, had become a valuable franchise and property vested in the plaintiff, of which, by the enforcement of the said ordinances of 1893, the plaintiff would be deprived without compensation and without due process of law.

The company had acquired the right to use and occupy said streets for its track and the safe running of its trains thereon, and continuously from that time said bridge crossings have been maintained with the consent and acquiescence of the city down to 1893.

So that a grant of the use of said streets for the company's track will be presumed.

Gregsten v. *Chicago*, 145 Ill. 451; *Com.* v. *Essex Co.* 13 Gray, 239; *Pumpelly* v. *Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166 (20: 557).

Mr. **W. H. Hubbard,** for defendant in error:

The council is clearly granted power to establish the grade of any street or highway within the corporate limits or to change the grade so established and establish a new grade in such street or public highway, and to improve the same by making such street or highway to conform to the grade so established, by excavating or filling up the surface, as may be required.

Goodloe v. *Cincinnati*, 4 Ohio, 500, 22 Am. Dec. 764; *Smith* v. *Cincinnati*, 4 Ohio, 514; *Crawford* v. *Delaware*, 7 Ohio St. 460; *McCombs* v. *Akron*, 15 Ohio, 475; *Akron* v. *McComb*, 18 Ohio, 224, 51 Am. Dec. 453; *Cincinnati & S. G. Ave. R. Co.* v. *Cumminsville*, 14 Ohio St. 523; *Cincinnati* v. *Penny*, 21 Ohio St. 499, 8 Am. Rep. 73; *Youngstown* v. *Moore*, 30 Ohio St. 133; *Keating* v. *Cincinnati*, 38 Ohio St. 141, 43 Am. Rep. 421; *Akron* v. *Chamberlain Co.* 34 Ohio St. 328, 32 Am. Rep. 367; *Lima* v. *Cemetery Asso.* 42 Ohio St. 128, 51 Am. Rep. 809; *Cincinnati* v. *Whetstone*, 47 Ohio St. 196; *Cincinnati* v. *Sherike*, 47 Ohio St. 218.

These bridges, although constructed by the receiver, are no part of the railroad. They are part of the streets.

Westfield v. *Tioga County*, 150 Pa. 152; *Rapho & W. H. Twps.* v. *Moore*, 68 Pa. 404, 8 Am. Rep. 202; *Penn Twp.* v. *Perry County*, 78 Pa. 457; *Com.* v. *Central Bridge Corp.* 12 Gush. 243.

Contracts to violate the charter or to bargain away or restrict the free exercise of legislative discretion vested in a municipality or its officers in reference to public trusts are void.

Thomas v. *Richmond*, 79 U. S. 12 Wall. 349 (20: 453); *Jackson* v. *Bowman*, 39 Miss. 671; *Indianapolis* v. *Indianapolis Gaslight & C. Co.* 66 Ind. 396.

The powers of a municipal corporation in respect to opening, improving, and controlling its streets are held in trust for the public benefit, and cannot be surrendered by contract to private persons, or to a corporation, by resolution of the common council, or in any other manner.

2 Beach, Pub. Corp. p. 1196, § 1208.

The right of a railroad company to run its trains across a street is strictly subordinate to the public right of ordinary travel.

Houston & T. C. R. Co. v. *Carson*, 66 Tex. 345; *Davis* v. *New York*, 14 N. Y. 506, 532; *People's Pass. R. Co.* v. *Memphis City R. Co.* 77 U. S. 10 Wall. 38 (19: 844); *Elster* v. *Springfield*, 49 Ohio St. 84; *Goszler* v. *Georgetown*, 19 U. S. 6 Wheat. 593 (5: 339).

The ordinance of 1887 does not in terms establish the grade of the streets or relinquish the right of the council to grade and improve such highways, as it may at any time thereafter deem best, and it cannot be extended by implication or intendment to have such meaning or effect, but must be construed strictly for the preservation of public rights.

Mr. Justice **Brown** delivered the opinion of the court:

Plaintiff's right to an injunction was urged in the state courts upon several grounds, but the only questions presented to us are whether the ordinance of December 20, 1887, permitting the railway to construct the bridges and their approaches, constituted a contract between the railway company and the city for the perpetual maintenance of such bridges; and whether the subsequent ordinances of February 7, 1893, impaired the obligation of such contract, or deprived the plaintiff of its property, or the use and enjoyment thereof, without compensation or without due process of law.

*We have found some difficulty in evolving any contract at all from the ordinance of December 20, 1887, which, upon its face, is a permission or authority to construct these bridges under certain requirements and specifications, and to keep them in repair. It seems that, in the original construction of the railroad in 1855, a deep cut of 11 to 12 feet was made at and between these highway crossings, and in restoring the highway to a passable condition, as the company was required to do under the law of Ohio, wooden bridges were constructed over the railroad track and distant from it in the clear about 16 feet. After the construction of the railroad, and some time prior to the year 1876, this territory was brought within the limits of the village of Defiance, and remained within such limits until the village was organized as a city. [93

In 1876, the village, wishing a sidewalk or foot bridge constructed over the track of the company, entered into an agreement with the company, embodied in a village ordinance, by which the latter gave permission to the village to erect and maintain a foot bridge across its track, which the village agreed to keep and maintain forever in safe condition and good repair at its own cost. It was further agreed that the maintenance of such foot bridge or sidewalk should be subject to the inspection and approval of the railroad company's engineer, and should be built, renewed, and repaired from time to time as directed by such engineer, the village agreeing to be responsible for its safe repair and maintenance.

About the year 1880, the village was organized into a city, and in the year 1887, the railroad company, in order to prevent accidents, decided to elevate the bridges, and for that purpose applied to the city council for authority to do so. This authority was given by the ordinance of December 20, 1887.

The language of this ordinance is rather that of a license than that of a contract; the railway is authorized to erect new bridges of a certain construction, provided that the company shall also build sufficient approaches and grade to each of said bridges, and keep them in good repair. The city itself *agrees to [94 do nothing, except to permit gravel to be taken from its gravel bed, without charge, for the construction of such approaches. It does not agree that the bridges or their approaches shall remain any particular length of time, or that it shall not make new requirements as the growth of the city may seem to suggest. The only contract as to time which could possibly be extracted from this ordinance would be that the railway company, on building the bridges and approaches, should be entitled to maintain them in perpetuity. The result would be that, if the city should, in the growth

of its population, become thickly settled in the neighborhood of these bridges, they would stand forever in the way of any improvement of the streets. This proposition is clearly untenable. It is incredible, in view of the language of this ordinauce, that the city could have intended, or the railroad company expected, that the former thereby relinquished forever the right to improve or change the grade of the streets.

If it were possible that the city could make such a contract at all, it could only be done by express authority of the legislature and in language that would admit of no other interpretation. It is claimed that the construction of the sidewalks by the railroad company was a consideration, since it had been the duty of the city up to that time to keep them in repair; but it surely could not be a consideration for the perpetual maintenance of the bridges. If it were a consideration for anything it would simply be for the permission given to the railway to build the bridges—a permission obtained upon a special application of the railway company. Properly construed, this ordinance was simply a license to the company to build these bridges, and to continue them until the city council should conclude that it was for the public interest to so change the grade of the street as to make it a level crossing.

That the city, in the absence of a statute permitting it, would have no authority to enter into such a contract with the railroad company is admitted; but it is claimed that such authority is found in Ohio Rev. Stat. § 3283, which, so far as the same is material, is as follows: "If it be necessary in the location of any [95 part of a railroad to *occupy any public road, street, alley, way, or ground of any kind, or any part thereof, the municipal or other corporation, or public officers, or authorities owning or having charge thereof, and the company, *may agree upon the manner, terms, and conditions* upon which the same may be used or occupied," etc. By the next section (3284), whenever in the construction of a railroad a public road or stream of water is crossed or diverted from its location or bed, the company is required, without unnecessary delay, to place such road or stream "in such condition as not to impair its former usefulness."

Reading these two sections together, it is open to doubt whether § 3283 is not confined to cases where the railroad runs along and upon the street, road, or alley, in which case some kind of contract or agreement with the municipality would seem to be almost necessary for the mutual accommodation of the railroad and the public who desire to retain the use of the street for ordinary travel. The matter of *crossing* the street, however, is treated by § 3284 as one of the necessary incidents of railroad construction; and all that is required is that the company, after having made the crossing, shall replace the road in such condition as not to impair its usefulness. This appears to be the construction put upon these section by the Ohio courts. *Lawrence R. Co.* v. *Cobb*, 35 Ohio St. 94; *Lawrence R. Co.* v. *Williams*, 35 Ohio St. 169; *Little Miami R. Co.* v. *Green County Comrs.* 31 Ohio St. 338; *Pittsburg, Ft. W. & C. R. Co.* v. *Maurer*, 21 Ohio St. 421; *State, Little*, v. *Dayton & S. E. R. Co.* 36 Ohio St 434.

But conceding, for the purposes of this case, all that is claimed by the railroad company from its construction of § 3283, the fact still remains that the ordinance of December 20, 1887, was not adopted in pursuance of the power to contract, but in pursuance of the legislative power vested in the city by § 2640 of the Revised Statutes, which enacts: "That the council shall have care and supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds, and bridges within the corporation, and shall cause *the same to be kept open and in [96 repair and free from nuisance."

We are also pointed to § 2 of the ordinance as indicating that a contract was within the contemplation of the parties. This section is as follows:

"Sec. 2. The entering upon the work of constructing said bridges by said company shall be taken as an acceptance of the terms thereof by said company, and shall be regarded as superseding any contract or agreement heretofore existing between said company and said city as to either of said bridges."

This section, however, does not change that which, in its nature, is a license into a contract that these bridges shall remain for any particular length of time. The entering upon the work of construction might well estop the railroad company from objecting to the requirement that the bridge should be constructed in the manner specified in the ordinance; and might also estop the city from making any farther or different requirements in that connection; and to this extent there, may be said to have been a contract; but when it is claimed that the city thereby agreed that the bridges so constructed should remain forever, and that it thereby waived its rights to change the grade or the method of crossing, we are importing into the contract by construction something which is not found there; which the parties have not agreed to, and which, if the city had any power at all to stipulate, should have been expressed in the clearest language.

In the case of the *Philadelphia, W. & B. R. Co.'s Appeal*, 121 Pa. 44, relied upon by the plaintiff in error, the legislature conferred upon the mayor and council of the city of Chester express authority to grant to certain railroad companies "the use and occupation of the streets, lanes, courts, and alleys lying within 300 feet of the said railroads, . . . to be used and occupied by the said railroad companies, respectively, only so long as the said streets . . . shall remain open to public use and travel," etc. Pursuant to this authority, and to a city ordinance, a formal agreement was entered into between the city and the railroad company that a certain street should be opened to public use and travel; its *grade estab- [97 lished and fixed for the purpose of having the street cross the railroad at such a height above the track as would permit the free operation of the railroad under the street, and prevent the dangers of a level crossing. The railroad on its part contracted to build a bridge over its track. It was held that the city had power to make the contract; that the rights conferred

by the contract upon the railroad company were inviolable; that there was no question as to its performance of the contract, and the question as to the right of the municipality to grant away the control of its streets was foreign to the discussion. The city having enacted an ordinance altering the grade of the street in such manner as to cross the railroad at a level, and thereby destroy the overhead crossing, it was held that this was in violation of the contract.

There is no necessary conflict between that case and the position here assumed, as the act of the legislature gave the city express permission to grant to the companies the use and occupation of its streets, "so long as the said streets . . . shall remain open to public use and travel," and declared that such grant should be "as valid and effectual to transfer the rights and privileges therein contracted for the said railroad companies, or any of them, . . . as if made between individuals." If the court, however, is to be considered as holding that an agreement or license to construct bridges, which is silent as to time, should be construed as an agreement that they are to remain in perpetuity, we should find ourselves confronted with too many authorities to the contrary to accept it as a sound exposition of the law.

Indeed, the general principle that the legislative power of a city may control and improve its streets, and that such power, when duly exercised by ordinances, will override any license previously given by which the control of a certain street has been surrendered to any individual or corporation, is so well established, both by the cases in this court and in the courts of the several states, that a reference to the leading authorities upon the subject is sufficient. Indeed, the right of a city to improve its streets by regrad-[98 ing or *otherwise is something so essential to its growth and prosperity that the common council can no more denude itself of that right than it can of its power to legislate for the health, safety, and morals of its inhabitants.

In the early case of *Goszler* v. *Georgetown*, 19 U. S. 6 Wheat. 593 [5: 339], it was held that the power given to the corporation to grade the streets of the city was a continuing power, and the corporation might from time to time alter the grade so made. It was said by Mr. Chief Justice Marshall "that the power of graduating and leveling the streets ought not to be capriciously exercised. Like all power, it is susceptible of abuse. But it is trusted to the inhabitants themselves who elect the corporate body and who may therefore be expected to consult the interests of the town. . . . There may be circumstances to produce a general desire to vary the graduation, to bring the streets more nearly on a level, than was contemplated in the first ordinance; and if this may occur, we cannot say that the legislature could not intend to give this power of varying the graduation when the words they employ are adapted to the giving of it."

In *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635 [25: 336], which was an action to recover damages sustained by the construction of a tunnel under the Chicago river along the line of La Salle street, it was held that, as the city was authorized by law to improve the street by building a bridge over or a tunnel under the river where it crossed the street, it incurred no liability for the damages unavoidably caused to adjoining property by obstructing the street or the river, unless such liability were imposed by statute; that, if the fee of the street be in the adjoining lotowners, the state has an easement to adapt it to easy and safe passage over its entire length and breadth; and that, when making or improving the streets, in the exercise of an authority conferred by statute, the city is the agent of the state, and if it acts within that authority, and with due care, despatch, and skill, it is not at common law answerable for consequential damages.

In the recent case of *Baltimore* v. *Baltimore Trust & G. Co.* 166 U. S. 673 [41: 1160], it was held that, where the *legislature of Mary-[99 land had given the mayor and city council of Baltimore power to regulate the use of the streets, lanes, and alleys in said city, by railway and other tracks, and the city council had by ordinance authorized the railway company "to lay down and construct double iron railway tracks for the purposes of doing business . . . on Lexington street westwardly to Charles street from North street," the city council might repeal such ordinance, so far as the existence of double tracks in that portion of Lexington street lying between North and Charles streets would be inconsistent with the reasonable use of the street at that point by the public and other vehicles.

In *Brick Presby. Church* v. *New York*, 5 Cow. 538, the corporation of the city had conveyed lands for the purposes of a church and cemetery, with a covenant for quiet enjoyment, and afterwards, pursuant to a power granted by the legislature, passed a by-law prohibiting the use of these lands as a cemetery. It was held that a corporation could not by contract abridge its legislative power, and that this was not a breach of the covenant which entitled the party to damages, but was a repeal of the covenant. See also *Coates* v. *New York*, 7 Cow. 585.

The case of *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556 [38: 269], has an important bearing upon the point in issue here. In that case an act of the legislature of Connecticut, abolishing grade crossings as a menace to public safety, was held to be an exercise of the police power of the state and applicable to the charter of a railroad corporation, which was subject to alteration and amendment by the legislature. The supreme court of Connecticut held that the statute operated as an amendment to the charters of the railroad companies affected by it; that as grade crossings are in the nature of nuisances, the legislature had a right to cause them to be abated, and to require either party to pay the whole or any portion of the expense; that it was the settled policy of the state to abolish grade crossings as rapidly as could be reasonably done, and that all general laws and police regulations affecting corporations were binding upon them without their assent. This *court af-[100 firmed the ruling of the supreme court of Con-

nectlcut, saying that "the governmental power of self protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury." See also 2 Dill. Mun. Corp. §§ 685, 716; 2 Beach, Pub. Corp. §§ 1068, 1208; *Davis* v. *New York*, 14 N. Y. 506; *Milhau* v. *Sharp*, 27 N. Y. 611 [84 Am. Dec. 314]; *Coleman* v. *Second Ave. R. Co.* 38 N. Y. 201; *Detroit* v. *Ft. Wayne & B. I. R. Co.* 95 Mich. 456 [20 L. R. A. 79]; *Chicago, B. & Q. R. Co.* v. *Quincy*, 139 Ill. 355; *Roanoke Gas Co.* v. *Roanoke*, 88 Va. 810; *Louisville City R. Co.* v. *Louisville*, 8 Bush, 415.

While municipalities, when authorized so to do, doubtless have the power to make certain contracts with respect to the use of their streets, which are obligatory upon them (*New Orleans Gaslight Co* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650 [29: 516]; *New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 674 [29: 525]; *City R. Co.* v. *Citizens' Street R. Co.* 166 U. S. 557 [41: 1114]; *Indianapolis* v. *Indianapolis Gaslight & C. Co.* 66 Ind. 396; *Indianapolis* v. *Consumers' Gas Trust Co.* 140 Ind. 107 [27 L. R. A. 514]), the general rule to be extracted from the authorities is that the legislative power vested in municipal bodies is something which cannot be bartered away in such manner as to disable them from the performance of their public functions. These bodies exercise only such powers as are delegated to them by the sovereign legislative body of the state. Such powers, however, are personal to the municipalities themselves, and, being conferred for the benefit of the whole people, in the absence of authority to that effect, cannot be bestowed by contract or otherwise upon individuals or corporations in such manner as to be beyond revocation. Whatever construction be given to the ordinance of December 20, 1887, it cannot be held to stand in the way of a power to make such changes as the growth of population may seem to require.

In *Re Opening First Street*, 66 Mich. 42, it was held that the laying out and opening of streets **101**] by the *common council of the city is an exercise of legislative functions, and that any contract made by the city with an individual or corporation, by which it agrees that it will not in the future open or extend its streets in any particular place or part of the city, is an abnegation of its legislative power, unauthorized by its charter, and may be alike destructive of the convenience and prosperity of a municipality, and is void. See also *Hood* v. *Lynn*, 1 Allen, 103; *Backus* v. *Lebanon*, 11 N. H. 19 [35 Am. Dec. 466]; *Brimmer* v. *Boston*, 102 Mass. 19.

But aside from the general power of municipalities to care for and improve their streets, an express power is given by Ohio Rev. Stat. § 2640, to the common council to care for, supervise, and control "all public highways, streets, avenues, alleys, sidewalks, public grounds, and bridges within the corporation," and "to keep the same open and in repair and free from nuisance." Under a similar power granted by Congress to the corporation of the city of Washington it was held by this court, in *Smith* v. *Washington*, 61 U. S. 20 How. 135 [15: 858], that it included the power to alter, grade, or change the level of the land on which the streets by the plan of the city were laid out. It was said that although "the plaintiff may have suffered inconvenience and been put to expense in consequence of such action, yet, as the act of the defendants is not unlawful or wrongful, they are not bound to make any recompense. It is what the law styles *damnum absque injuria*. Private interests must yield to public accommodation; one cannot build his house on the top of a hill in the midst of a city and require the grade of the street to conform to his convenience at the expense of that of the public." To the same effect are *Callender* v. *Marsh*, 1 Pick. 417; *Green* v. *Reading*, 9 Watts, 382; *O'Connor* v. *Pittsburg*, 18 Pa. 187.

If the duty required by the statutes in those cases can only be adequately performed by removing obstructions in or changing the grade of streets, this must be regarded as fairly incidental to the power conferred, and individual proprietors are bound to acquiesce in the measure thus taken for the general good of the public. The Ohio courts seem also to have acted upon the same principles. [**102** Nor does the fact that the city has given its permission to a railway company to lay its rails upon or across a certain street deprive it of the power to improve and control such street, and adopt all needful rules and regulations for its use and management. *Chicago, B. & Q. R. Co.* v. *Quincy*, 136 Ill. 563.

The ordinances of February 7, 1893, were not beyond the powers of the common council with respect to the improvement of its streets. While, in 1887, overhead bridges might have seemed a better and safer plan of crossing the railway than crossing at grade, the subsequent growth of the city may have demanded a different policy in 1893. It is hardly possible that the approaches required to reach an overhead bridge, which was some 10 or 12 feet above the general level of the ground, should not have affected, to a certain extent, the value of the adjoining property as city lots; but whether this were so or not, it was purely within the discretion of the common council to determine whether the public exigencies required that the grade of the street be so changed as to cross the railroad at a level. *Dunham* v. *Hyde Park*, 75 Ill. 371. While the modern policy of railway engineering usually tends to the abolition of grade crossings, there is no hard and fast rule upon the subject, and it may well be that the exigencies of a certain street or locality may demand that travel shall descend to the level of the railway rather than ascend to a bridge built over the track. But however this may be, we are not at liberty to inquire whether the discretion vested in the common council of determining this question was wisely exercised; or what the motives were for making the change; or whether the crossing so improved was burdensome to the railroad company; or made unsafe to persons crossing the track. These were considerations which might properly be urged upon the common council as arguments against the proposed change; but it is beyond the province of the courts either to praise the wisdom or criticise the unwisdom of such action. The ques-

tion before us is simply whether the council had the power to make the change, and of this we have no doubt.

103] *Assuming, but not deciding, that the railway company was entitled to compensation for the bridge so taken or rendered useless, it appears from the record that resolutions declaring the necessity for improving these streets by changing the grade were duly published for two consecutive weeks in a newspaper published and of general circulation in the city of Defiance, and written notice of such resolutions was also duly served upon the plaintiff; and that the plaintiff did not at any time, file a claim in writing with the clerk of the city for damages by reason of such improvements, as was required by the terms of the resolution. By Ohio Rev. Stat. § 2315, persons who claim that they will sustain damages by reason of such an improvement are required to file their claim with the clerk of the corporation within two weeks after such service or the completion of the publication of the notice; and persons failing to so file their claim "shall be deemed to have waived the same, and shall be barred from filing a claim or receiving damages." The supreme court held that these statutes had been in force and acted upon for many years; that their constitutionality had never been called in question; that they were applicable to the street improvements in question, and that under them the plaintiff's claim for compensation, if it had any, was waived and barred by failing to file it within the time required. "The plaintiff," said the court, "is charged with knowledge of the law, and, in the absence of any showing to the contrary, must be presumed to have voluntarily withheld its claim for compensation and damages, and thus prevented an inquiry into and an assessment of them; and it seems clear that an owner, who has been afforded an opportunity of having compensation and damages assessed him, in the constitutional mode, for property taken or injured in the making of a street improvement, and has failed to avail himself of that opportunity, cannot, after having thus waived his right, enjoin the improvement on the ground that compensation has not been paid or tendered him."

Upon the whole, we think it clear that the common council acted within its powers in **104**] changing the grade of the street in *question, and that the plaintiff has no legal right to complain of its action. *The decree of the Supreme Court of Ohio is therefore affirmed.*

Ex parte THOMAS PHILLIPS BRYANT, *Appt.*

(See S. C. Reporter's ed. *"Bryant* v. *United States,"* 104–108.)

Extradition—evidence.

1. Evidence that three checks were missing from check books to which a bookkeeper who was assistant cashier had access, and that no corresponding memoranda were made on the stubs; that three checks of the same amount were presented to the drawee's bank by a bank at which he had a personal account which showed a credit of such checks, and were paid on the day following such credit; and that he had no authority to sign checks for his employer,—is sufficient evidence of forgery by him to justify a commissioner in committing him for extradition.
2. On the extradition of a person charged with forgery, embezzlement, and larceny, the demanding government and a commissioner need not elect the charge for which he shall be tried; but so long as he is tried upon the facts which appear in evidence before the commissioner, and upon the charges or one of the charges for which he is surrendered, it is immaterial whether the indictment against him shall contain counts for forgery, larceny, or embezzlement.

[No. 779.]

Argued April 26, 1897. Decided May 10, 1897.

ON APPEAL from a final order of the Circuit Court of the United States for the Southern District of New York dismissing writs of habeas corpus and certiorari sued out by Thomas Phillips Bryant to obtain his release from the custody of the marshal of that district and the warden of the jail of the city of New York. *Affirmed.*

Statement by **Mr. Justice Brown:**

This was an appeal from a final order of the circuit court for the southern district of New York dismissing writs of habeas corpus and certiorari sued out by the appellant to obtain his release from the custody of the marshal of that district and the warden of the jail of the city and county of New York.

The proceedings were originally instituted by a complaint made before a commissioner of the circuit court, duly authorized to act in cases of extradition, by Her Britannic Majesty's consul general at the city of New York, who charged the appellant with the crimes of forgery, larceny, embezzlement, and false entries, committed in the city of London, and demanded his extradition under article 10 of the treaty of November 10, 1842, and article 1 of the treaty supplemental thereto of March 25, 1890.

The commissioner held that the evidence clearly showed that the appellant had been guilty of a crime specifically mentioned in the treaty stipulations between the two countries, and accordingly held him to await the action of the *Secretary of State and the final war- **[105** rant of delivery. Appellant thereupon sued out from the circuit court writs of habeas corpus and certiorari; but that court, holding that there was legal evidence upon which the commissioner could properly exercise his judgment as to the guilt or innocence of the accused, dismissed the writs and remanded the prisoner to the custody of the marshal for the southern district of New York. From that order petitioner appealed to this court.

Messrs. **Lorenzo Semple** and *T. D. Semple* for appellant.

Mr. **Charles Fox** for appellee.

NOTE.—*As to extradition from another state; right to try person extradited for a different crime from that for which he was surrendered; who are fugitives from justice; character of offense; demand for arrest and delivery of fugitives; surrender of fugitives,*—see note to Cook v. Hart, 36 :934.

Mr. Justice **Brown** delivered the opinion of the court:

The question before the commissioner in this case was whether, in the language of the treaty of 1842, article 10 (8 Stat. at L. 572, 576), there was "such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed." In other words, whether, according to our laws, there was probable cause to believe him guilty of the crimes charged. U. S. Rev. Stat. § 5270; *Benson* v. *McMahon*, 127 U. S. 457, 462 [32 : 234, 236]. The question before us is even narrower than that, *viz.:* Whether there was any *legal evidence* at all upon which the commissioner could decide that there was evidence *sufficient* to justify his commitment for extradition; or, as stated in *Ornelas* v. *Ruiz*, 161 U. S. 502, 508 [40 : 787, 789], "if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offense charged is within the terms of the treaty of extradition, and the magistrate in arriving at a decision to hold the accused has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on habeas corpus." See also *In Re Oteiza y Cortes* [*Oteiza y Cortes* v. *Jacobus*], 136 U. S. 330 [34: 464].

106] *The evidence before the commissioner tended to show that Bryant was employed by the firm of Morrison & Marshall of London as bookkeeper and assistant cashier from January to October, 1896, at a salary of £104 per annum; that he had under his control the check books of the firm and the paid checks returned from the bank, although he was not authorized to sign the firm's name to checks; that the firm kept an account with the London office of the Commercial Bank of Scotland, and that such account was charged with the three following checks, *viz.:* June 23, £500; August 14, £500; September 10, £720. These checks purported to be drawn on the bank and to be signed by Morrison & Marshall, and were presented for payment by the Provincial Bank of England, and were paid and debited to Morrison & Marshall.

It further appeared that Bryant kept an account with the Provincial Bank, in which he deposited on June 22 a check for £500; on August 13 a check for £500; and on September 9, a check for £720, which were credited to his account. It appeared that the three checks paid by the Commercial Bank were abstracted from two check books which were not in use at the time, and were accessible to Bryant. No entry was made upon the counterfoils, or, as they are called in this country, the "stubs," of the check books from which they were taken; nor was any memorandum of such checks anywhere entered, nor were these checks among those received back from the bank in the ordinary way.

It further appeared that Morrison & Marshall had a sum exceeding £5,000, carried to the credit of a "suspense account" in their ledgers, with which account, however, Bryant had no authority to interfere. He did, however, bring a credit of £2,000 from such "suspense account" to a fictitious account, which he opened in the ledger in the name of T. H. North. Against this credit of £2,000 he debited two items of £780 and £1,220. The £780 was posted in the ledger from the cash book, and consisted of £280, and the £500 represented by the first check paid June 23. The £1,220 was represented by the checks paid August 14, £500, and September 10, £720. These amounts Bryant did not carry *out[**107** in the cash column of the cash book, but in order that the balances of the cash book, ledger, and banker's pass book should agree, he added the sum of £1,220 to the total at the bottom of the page, notwithstanding that amount was not in the column, nor was there any entry in the cash book relating to the £1,220, which could be posted to North's fictitious account.

Upon this evidence the appellant contended, first, that there was no testimony before the commissioner tending to show that he had been guilty of forging the three checks; second, that if it were shown that he had made false entries upon the books of Morrison & Marshall this would not constitute an offense for which he could be extradited, for the reason that when the treaty of 1842 was executed, the making of false entries was not forgery; third, that as to the additional sum of £280, which the relator was charged with embezzling, there was no evidence of criminality; fourth, that if there were evidence sufficient to hold appellant upon the charge of forgery of the three checks he could not be held as for larceny or embezzlement, and that if he were held for embezzlement from Morrison & Marshall he could not also be held for obtaining the same money from the bank upon the forged checks; fifth, that as he could only be tried for the particular offense for which he was surrendered, the demanding government and the commissioner should have elected, and if the latter deemed the evidence sufficient to commit upon the one charge, he should not have been committed upon the other.

We think there was legal evidence against the prisoner upon which the commissioner was authorized to act, and that is sufficient for the purposes of this case. If it were true that three checks were missing from the check books of Morrison & Marshall to which the prisoner had access, and no corresponding memoranda were made on the stubs; that three checks were presented to the Commercial Bank by a bank at which the appellant kept a personal account, and this account showed a credit of three checks, which upon the following day were presented and paid by the *Commercial Bank; and that the ap-[**108** pellant had no authority to sign checks for Morrison & Marshall,—the inference is at least a reasonable one that these checks were forged by the appellant. The commissioner was of opinion that, if the moneys of the firm were not actually obtained by forgery, they were obtained by embezzlement or larceny, or, at least, there was probable cause to believe that they were so obtained. So long as the prisoner is tried upon the facts which appeared in evidence before the commissioner, and upon the charges or one of the charges for which he is surrendered,

it is immaterial whether the indictment against him shall contain counts for forgery, larceny, or embezzlement. That is a matter of practice with which we have nothing to do. While the original treaty of 1842 authorized the surrender only for the crime of forgery, or the utterance of forged paper, the supplemental treaty of March 25, 1890 (26 Stat. at L. 1508), included both embezzlement and larceny.

The order of the Circuit Court is affirmed.

ENTERPRISE MINING COMPANY, *Appt.*, *v.* RICO-ASPEN CONSOLIDATED MINING COMPANY *et al.*

(See S. C. Reporter's ed. 108-116.)

Mining claim—right of owner of a tunnel—location of claim—Colorado law—adversing claim.

1. The right of the owner of a tunnel to all veins or lodes not previously known to exist, which are within 3,000 feet from its face on the line thereof, is superior to the right of one who subsequently makes a discovery and location of another claim, if the two conflict.
2. The right to a vein discovered in a tunnel dates by relation back to the time of the location of the tunnel site.
3. The location of a claim to a vein discovered in a tunnel may be made on its discovery by taking the full length of 1,500 feet allowed by U. S. Rev. Stat. § 2320, on either side of the tunnel, or any such proportion thereof on either side as the locator may desire, and is not limited to 750 feet on each side of the tunnel on account of a failure to indicate, when the tunnel was located, what particular 1,500 feet he would claim.
4. The Colorado territorial act of 1861, limiting the right of a tunnel owner to veins discovered in the tunnel, to 250 feet on each side, is, if not repealed by the Colorado legislature, superseded by the legislation of Congress in the Revised Statutes.
5. The failure of a tunnel owner to "adverse" the application for a patent for a claim located parallel to his tunnel and about 500 feet distant from it, when he does not know of any vein which will enable him to dispute the right of the other party to a patent, will not defeat his right to a vein subsequently discovered which crosses that claim.

[No. 267.]

Argued April 7, 8, 1897. Decided May 10, 1897.

NOTE.—*As to ownership of mines; United States statutes as to; right to support of surface,*—see note to Castillero v. United States, 17: 448.

As to title to water by appropriation; common-law rule; rule of mining state,s—see note to Atchison v. Peterson, 22: 414.

Mining claims; conflicting claims; location; work thereon; abandonment.

Possessory rights in mining claims may be devested by sale or gift, by forfeiture, or by abandonment. Harkrader v. Carroll, 76 Fed. Rep. 474.

The interest acquired under an order from an owner in common of mining claims to the holder of the legal title to deed to a third person his interest in such claims is not abandoned as to one of such claims by his abandonment of his rights to the other claims therein mentioned, where he never surrendered the document. Royston v. Miller, 76 Fed. Rep. 50.

The discovery which will support a valid location of a lode mining claim under the United States statutes and the Colorado statutes must be within the limits of the claim located and upon unappropriated territory, and cannot be upon an adjoining location owned in whole or in part by the claimant, although the vein, if maintaining the same strike as at the point of discovery, would pass into the claim attempted to be located. Michael v. Mills, 22 Colo. 439.

The expectation of finding paying mineral, essential to a discovery which will support a location of a mining claim under U. S. Rev. Stat. §§ 2319, 2320, is not necessarily confined to the particular seam upon which the discovery is made. McShane v. Kenkle, 18 Mont. 208, 33 L. R. A. 851.

The sufficiency of the location of a mining claim which is not located in a regular mining district is determined by the general provisions of U. S. Rev. Stat. § 2324, providing only that the location must be distinctly marked on the ground so that its boundaries can be readily traced. Howeth v. Sullenger, 113 Cal. 547.

The fact that a mining claim as located includes more than 1,500 feet in length and 600 feet in width, as prescribed by the United States Revised Statutes, renders it void only as to the excess. Howeth v. Sullenger, 113 Cal. 547.

A purchaser or grantee of a mining claim after abandonment takes no title. Harkrader v. Carroll, 76 Fed. Rep. 474.

A second location certificate of a lode mining claim relates back to the date of the original certificate and cuts off intervening claimants, where the original certificate was not void, but only lacking in technical detail, and was capable of amendment; but if the original was so defective as to absolutely fail to comply with the statutory requirements and define the claim it was void, and the second certificate cannot be considered as amendatory so as to relate back. Moyle v. Bullene, 7 Colo. App. 308.

The rights of a locator of a mining claim who fails, within the time provided by law, to institute adverse proceedings against an applicant for a patent to land including the original discovery shaft of such locator, will be conclusively presumed to be inferior to the rights of the patentee, although his location may have been prior in point of time. Girard v. Carson, 22 Colo. 345.

The purchaser of mining property acquires a vested right in the land, of which he cannot be deprived, where the contract of purchase is completed by payment of the purchase money and the issuance of the patent certificate by the authorized agent of the government, if such purchaser has complied with the law prior to the entry. Rader v. Allen, 27 Or. 344.

Rights in a patented mining claim, although it was made up of claims located long before there was any mining law enacted by Congress, must be determined by the boundary lines as defined by the patent, rather than the original lines of the several claims. Carson City Gold & S. Min. Co. v. North Star Min. Co. 73 Fed. Rep. 597.

Mining locations distinctly marked on the ground so that their boundaries can be readily traced are sufficient under U. S. Rev. Stat. § 2324, as against subsequent locators, irrespective of the posting of notices. Haws v. Victoria Copper Min. Co. 160 U. S. 303 (40: 436).

An end line may be drawn at the point where the apex of the lode crosses the side line of the surface location. Tyler Min. Co. v. Last Chance Min. Co. 71 Fed. Rep. 848.

The claimant of a quartz mining claim is not entitled to be credited with work done in attempting to find the pay chute, and for the development and

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Eighth Circuit to review a decree reversing the decree of the Circuit Court of the United States for the District of Colorado in favor of plaintiff in an action brought by the Rico Aspen Consolidated Mining Company against the Enterprise Mining Company, to restrain the defendants from entering into the territory of a mining claim and from blasting therein, etc. *Affirmed.*

See same case below, 53 Fed. Rep. 321, 32 U. S. App. 75.

Statement by Mr. Justice **Brewer:**

This case involves the construction of § 2323, Revised Statutes, which reads as follows:

109] *"Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel, on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

The facts are these:

The Group tunnel site, under which the Enterprise Mining Company, the defendant and appellant, claims the right to the ores in controversy, was located on July 25, 1887, and the certificate of location was filed in the office of the county clerk and recorder of the county in which the location was made on August 29, 1887.

The Vestal lode mining claim, under which the plaintiffs, the appellees, claim title, is based upon a discovery made on March 23, 1888. The claim was located on April 1, 1888, and the location certificate was filed for record on April 3, 1888.

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demonstration of the claim, upon his account for the annual labor required by U. S. Rev. Stat. § 2324, as amended January 22, 1880. Bishop v. Baisley, 28 Or. 119.

Entering one of the old shafts excavated prior to the location of a quartz claim, and spending an hour or so with pick and hammer in securing samples of the ore, is not such a resumption of work as will avoid the effect of a forfeiture for failure to represent the claim as required by U. S. Rev. Stat. § 2324, as amended January 22, 1880. Bishop v. Baisley, 28 Or. 119.

A mining claim is not forfeited by failure to perform the annual work required by the United States statutes while the owner was excluded from possession by another, if he commences an action of ejectment within the time limited by statute therefor. Trevaskis v. Peard, 111 Cal. 599.

A conditional abandonment of a mining claim with intention to reassert a right thereto in case of its development into paying property by a relocator cannot be recognized, and such an attempted conditional abandonment is in effect an absolute one. Trevaskis v. Peard, 111 Cal. 599.

The right of a locator of a mine to follow his ledge beyond the side lines is limited by the rights of prior locators. Tyler Min. Co. v. Last Chance Min. Co. 71 Fed. Rep. 848.

Workings nearest the surface are better guides to the course of the apex of a vein than those far below. Carson City Gold & S. Min. Co. v. North Star Min. Co. 73 Fed. Rep. 597.

The locator of a mine may follow his ledge on its dip beyond his side line, where the ledge passes through an end and side line of the location between the prolonged planes of such end line and a new end line drawn where the ledge crosses the side line. Tyler Min. Co. v. Last Chance Min. Co. 71 Fed. Rep. 848.

A trial by jury in a proceeding as to adverse mining claims under U. S. Rev. Stat. § 2326, is not made necessary by the act of Congress of March 3, 1881 (21 Stat. at L. 505, chap. 140), providing for a finding by jury on a question of title. Perego v. Dodge, 163 U. S. 160 (41: 113).

The provision of U. S. Rev. Stat. § 2323, that the owners of a tunnel diligently prosecuted shall have the right of possession of all veins or lodes within 3,000 feet from the face of the tunnel on its line, not previously known to exist, discovered therein, to the same extent as if discovered from the surface, gives the owner the inchoate right to the possession of every vein or lode within 3,000 feet from the face of the tunnel on the line thereof not known to exist when the tunnel was located and its excavation was commenced, contingent only upon the diligent prosecution of the tunnel and the subsequent discovery of the vein or lode therein. Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co. 66 Fed. Rep. 200.

The location of a mining claim is sufficiently marked on the ground to render it valid where the notice of location gives the length and breadth of the claim from the discovery monument, and three corners and the center of both end lines are marked, under U. S. Rev. Stat. § 2324, requiring the location to be distinctly marked on the ground, so that its bonndaries can be readily traced. Warnock v. DeWitt, 11 Utah, 324.

A notice of the location of a mining claim sufficiently states the date under U. S. Rev. Stat. § 2324, where a date is mentioned after the name of a county and state and before the signatures, together with the words "dated on the ground," although these words are surplusage. Preston v. Hunter, 67 Fed. Rep. 996.

That the location of a mining claim through an innocent mistake in measurement includes within the claim as marked somewhat more than the law allows does not render the location void as against one who knows from the posted notice of location that only the legal amount is claimed. Hansen v. Fletcher, 10 Utah, 266.

The side lines of a mining location become the end lines, and the end lines the side lines, where the course of the vein is across the claim instead of in the direction of its length. Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683 (39:859).

If the lode runs more nearly parallel with the end lines of a mining location than with the side lines as marked on the ground, the end lines must be considered by the court as the side lines meant by the statute relating to extralateral rights; but if the lode runs more nearly parallel with the side lines than the end lines, then the end lines as marked on the ground are considered as the end lines of the location. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. 63 Fed. Rep. 540.

The 1,500 feet along a blind vein discovered in a mining tunnel, to which the owner is entitled under U. S. Rev. Stat. § 2323, giving him possession to the same extent as if he had discovered it from the sur-

The situation of the properties is sufficiently disclosed by the following diagram:

The ore in controversy is within the limits of the tract A, B, C, D. As to this tract, the two

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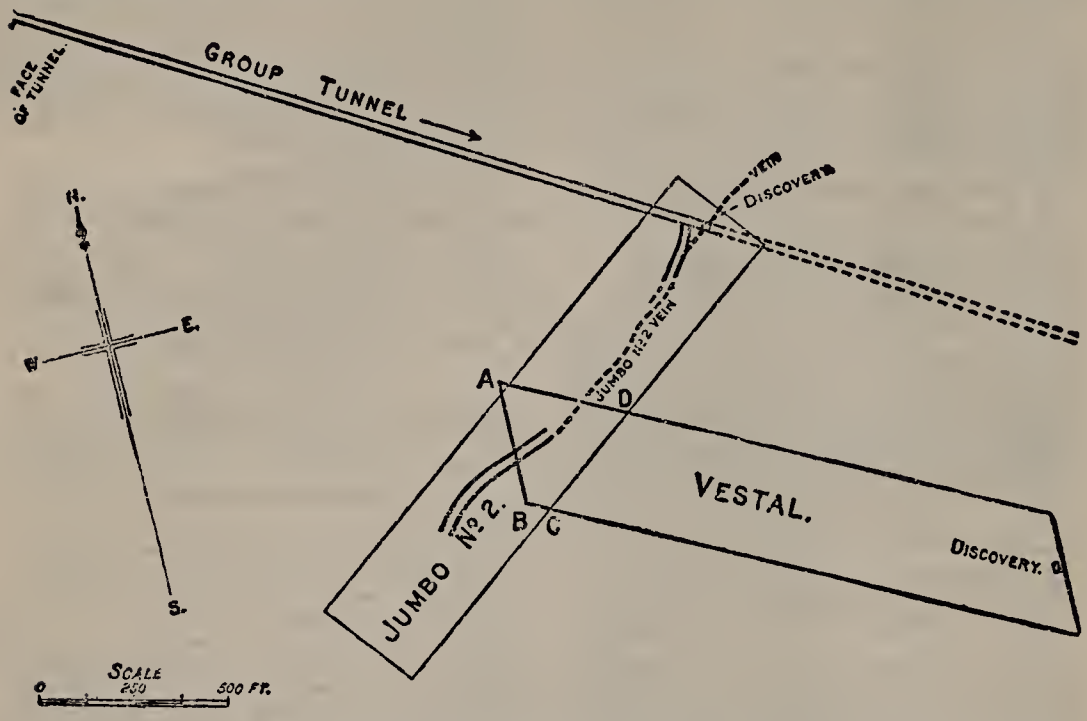

face, may be located so that the tunnel will be at one end instead of the center of such portion of the vein. Enterprise Min. Co. v. Rice-Aspen Consol. Min. Co. 66 Fed. Rep. 200.

Resumption of work on a mining claim must be with a bona fide intention of prosecuting it to prevent relocation under the provision of U. S. Rev. Stat. § 2324, for relocation where specified yearly improvements have not been made, unless the original locators, their heirs, assigns, or legal representatives, have "resumed work" on the claim. McCormick v. Baldwin, 104 Cal. 227.

The filing of an adverse claim by the owner of a mining claim is not essential to prevent the final acquisition by his co-owners of his title through the process of applying for and obtaining a United States patent in disregard of his undisputed right, under U. S. Rev. Stat. § 2325, providing that it shall be assumed that the applicant is entitled to a patent if no adverse claim shall have been filed. Brundy v. Mayfield, 15 Mont. 201.

Knowledge of the existence of the vein of a quartz lode claim at the time of an application for a placer patent embracing the soil in which such vein is located is insufficient to exempt it from the patent, under the United States statute, and the exception of the patent as to known lode claims; but knowledge that such vein contained minerals of such extent and value as to justify expenditures for the purpose of extracting them is essential. Brownfield v. Bier, 15 Mont. 403.

The right of a mine owner to follow a lode on its dip outside of his own territory is limited to the lines of the location under which such territory was patented, and cannot be extended because, under a dispute of the owners of another location upon the same vein, the ground in dispute was conveyed to him. Del Monte Min. & M. Co. v. New York & L. C. Min. Co. 66 Fed. Rep. 212.

Abandonment by the owner of a mining location as to any and all lodes within the surface boundaries of another location, recognizing a certain line as the boundary line between it, does not give the owner of the latter location the right to extend that line further than the end line as laid down in the patent. Walrath v. Champion Min. Co. 63 Fed Rep. 552.

The existence of a vein extending through a mining location must be clearly shown to give the owner the right to follow it within the surface lines of other claims. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. 63 Fed. Rep. 510.

Labor and improvements within the United States statute requiring at least $100 worth of labor to be performed or improvements made upon every unpatented mining location during each year are deemed to be done upon the location when the labor is performed or improvements made for the express purpose of working, prospecting, or developing the ground embraced in the location, although actually done without its limits. Book v. Justice Min. Co. 58 Fed. Rep. 106.

The erection upon ground of a blacksmith's shop, carpenter's shop, stable, boiler-house, track, dump, and 14 feet of a tunnel for the purpose of working and developing a mine upon another claim, cannot initiate any right to such ground as an independent mining claim. Waterloo Min. Co. v. Doe, 56 Fed. Rep. 685.

In estimating the amount of work and improvements performed with intent to acquire the right of possession to a quartz-lode mining claim, the test is the reasonable value thereof and whether the work or improvements are reasonably worth $100, and not what the contract price thereof, or the amount paid for it. Mattingly v. Lewisohn, 13 Mont. 508.

Failure of the owner of a mining claim to perform the statutory amount of work during one year does not give title to the owner of an overlapping claim to the ground covered by both claims, where the latter does not comply with the provisions of the state statutes in respect to the relocation of abandoned claims or lodes. Oscamp v. Crystal River Min. Co. 58 Fed. Rep. 208.

locations, the Vestal and Jumbo No. 2, conflict. The owners of the Vestal claim made application in 1890 for a patent. No adverse proceed-
111] ings *were instituted by the defendant, and a patent for the claim was issued on February 6, 1892. At the time of these proceedings no discovery of a vein in the tunnel had been made. But on June 15, 1892, a vein was discovered 1,920 feet from its portal at the place marked "discovery" on the diagram. Immediately thereafter the defendant caused the boundaries of the claim Jumbo No. 2 to be located upon the surface of the earth, and a certificate of location to be duly recorded, in which it claimed 51 feet along the vein to the northeasterly of the tunnel and 1,446 feet southwesterly. The position of this claim appears sufficiently on the diagram. The portion of this vein within the limits of the Vestal claim is about 750 feet from the line of the tunnel. This suit was commenced in the circuit court of the United States for the district of Colorado on September 3, 1892, and was decided by that court in favor of the plaintiffs. 53 Fed. Rep. 321. On appeal to the court of appeals this decision was reversed (32 U. S. App. 75), and the case remanded for further proceedings. Thereupon the case was brought here on a writ of certiorari.

Messrs. **Joel F. Vaile, Charles H. Toll,** *Adair Wilson, Edward O. Wolcott,* and *Henry M. Teller,* for appellant:

The tunnel owner's right to blind veins intersected by the line of his tunnel dates from the time of location and commencement of the tunnel.

Back v. *Sierra Nevada Consol. Min. Co.* 2 Idaho, 386; *Hope Min. Co.* v. *Brown*, 7 Mont. 550, 557, 11 Mont 370.

The tunnel owner cannot be deprived of his right of possession of any blind vein intersecting the line of his tunnel by any discovery or location of such vein made by others after the commencement of the tunnel, provided the work of the tunnel is being diligently prosecuted.

Cornell Tunnel Co. v. *Pell*, 4 Colo. 507, 511; *St. Louis Smelt. & Ref. Co.* v. *Kemp*, 104 U. S. 649 (26: 880).

The limitation of the tunnel claimant's right, upon veins discovered in his tunnel, to 250 feet on each side thereof, imposed by § 5 of the Colorado act of 1861, was removed by the act of Congress of May 10, 1872, and by the act of the Legislature of Colorado in 1874.

Morrison, Min. Rights, 7th ed. 157.

The tunnel claimant, upon discovering a blind lode in his tunnel, is entitled to the possession of any 1,500 feet in continuous length along such lode or vein, which includes his point of discovery in the tunnel.

Rico-Aspen Consol. Min. Co. v. *Enterprise Min. Co.* 53 Fed. Rep. 321, 324; *Glacier Mountain Silver Min. Co.* v. *Willis*, 127 U. S. 471, 481 (32: 172, 174); *Erhardt* v. *Boaro*, 113 U. S. 527 (23: 1113); *Corning Tunnel & R Co.* v. *Pell*, 3 Copp, Land Owner, 130, 131; *Hope Min. Co.* v. *Brown*, 7 Mont. 550, 557; *Ellet* v. *Campbell*, 18 Colo. 510, 523.

In this case there was no duty upon the part of the tunnel claimant to file or prosecute an adverse claim against the Vestal lode mining claim, the application for a patent for the latter claim having been initiated and prosecuted to final receiver's receipt before the discovery, in the Group tunnel, of the Jumbo No. 2 vein.

Hall v. *Equator Min. Co.* Morrison, Min. Rights, 3d ed. 382; *Branagan* v. *Dulaney*, 8 Colo. 408, 412; *Lee* v. *Stahl*, 9 Colo. 208, 210; *Morgensen* v. *Middlesex Min. & M. Co.* 11 Colo. 176, 179; *Chollar* v. *Julia*, Copp, Min. Lands. 93, 97; *Turner* v. *Sawyer*, 150 U. S. 578, 587 (37: 1189, 1191); Sickel, Min. Laws & Decisions, 252, 254; 6 U. S. Land Dec. 318.

The fact that Jumbo No. 2 vein was discovered at a point in the tunnel which was within the vertical boundary lines of the Hiawatha lode mining claim does not defeat the tunnel owner's right of possession of Jumbo No. 2 vein to the full extent of 1,500 feet.

Mr. **R. S. Morrison,** for appellees:

What is the effect of the tunnel location made, as in this instance, to segregate any part of the public domain, except its line proper, for the use of the tunnel?

In instances especially where statutes have attempted to limit the rights of a tunnel to less than 1,500 feet the location has been staked off claiming 250 or 300 feet, as the case might be.

In *Glacier Mountain Silver Min. Co.* v. *Willis*, 127 U. S. 472 (32: 173), it was 250 feet on each side.

In *Hope Min. Co.* v. *Brown*, 11 Mont. 370, it was 300 feet on each side.

In *Bodie Tunnel Co.* v. *Bechtel Min. Co.* 8 Copp, Land Owner, 173, it was 750 feet on each side.

The contemporaneous construction of the tunnel section was correct; or, if doubtful, should largely determine present construction.

The line of the tunnel meant the width of it and no more.

Corning Tunnel & R. Co. v. *Pell*, 3 Copp, Land Owner, 130; *Re Hunter*, 5 Copp, Land Owner, 34; *Re Hunter*, 5 Copp, Land Owner, 130; *Bodie Tunnel Co.* v. *Bechtel Min. Co.* 8 Copp, Land Owner, 173.

A contemporaneous construction settles ambiguities and ripens into established law.

Hahn v. *United States*, 107 U. S. 406 (27: 529); *United States* v. *Pugh*, 99 U. S. 269 (25: 323).

The Group tunnel location has not defined its 1,500 feet by notice or staking, and so cannot hold more than 750 feet on each side.

Erhardt v. *Boaro*, 113 U. S. 527 (28: 1113).

Whatever might have been the rights of the Group tunnel, it was bound to adverse or to enjoin applications for patents for lodes extralateral to its line and within the radius on which it could have asserted title.

Re Tioga Min. Co. 8 Copp, Land Owner, 88; *Bodie Tunnel Co.* v. *Bechtel Min. Co.* 8 Copp, Land Owner, 173; *Hope Min. Co.* v. *Brown*, 11 Mont. 170; *Wolfley* v. *Lebanon Min. Co.* 4 Colo. 112; *Iron Silver Min. Co.* v. *Campbell*, 135 U. S. 299 (34: 160).

This application for a patent is a proceeding *in rem* and the patent is conclusive against all the world.

420 Min. Co. v. *Bullion Min. Co.* 3 Sawy. 634, 11 Morrison, Min. Rep. 609; *Hamilton* v. *Southern Nevada Gold & S. Min. Co.* 33 Fed. Rep. 562, 15 Morrison, Min. Rep. 314.

The Jumbo No. 2 lode was located within the patent lines of the Hiawatha lode, making such Jumbo location void.

Guillim v. *Donnellan*, 115 U. S. 45 (29: 348); *Golden Terra Min. Co.* v. *Mahler*, 4 Morrison, Min. Rep 390.

The tunnel has in no event a claim to the Vestal vein as it was a known ore body discovered years before the date of the Group tunnel location.

On *Mr.* **Morrison's** brief on petition for certiorari, were also *Messrs. Charles J. Hughes, Jr.*, and *Charles S. Thomas.*

Mr. Justice **Brewer** delivered the opinion of the court:

It will be observed that so far as the mere location of the two claims, Vestal and Jumbo No. 2, the former was prior in time to the latter, and would, if there were no other facts, give priority of right to the ore within the limits of the conflicting territory. The tunnel was, however, located some eight or nine months before the discovery and location of the Vestal claim, and the statute gives to the owners **112**] of *such tunnel the right to "all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously known to exist." By virtue of this section, therefore, the right of the defendant to this vein was prior to that of the plaintiffs to the mineral in their claim. In this respect the circuit court and the court of appeals agreed. The matters now in dispute are the extent of that right and the effect of a failure to "adverse" the application for a patent.

The right to this vein discovered in the tunnel is by the statute declared to be "to the same extent as if discovered from the surface." If discovered from the surface, the discoverer might, under U. S. Rev. Stat. § 2320, claim "1,500 feet in length along the vein or lode." The clear import of the language then is to give to the tunnel owner, discovering a vein in the tunnel, a right to appropriate 1,500 feet in length of that vein. When must he indicate the particular 1,500 feet which he desires to claim? Counsel for plaintiffs contend that it should be done when in the first instance the tunnel is located, and that if no specification is then made the line of the tunnel is to be taken as dividing the extent of the claim to the vein, so that the tunnel owner would be entitled to only 750 feet on either side of the tunnel; while counsel for defendant insist that he need not do so until the actual discovery of the vein in the tunnel. We think the defendant's counsel are right. In order to make a location there must be a discovery; at least, that is the general rule laid down in the statute. Section 2320 provides: "But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." The discovery in the tunnel is like a discovery on the surface. Until one is made there is no right to locate a claim in respect to the vein, and the time to determine where and how it shall be located arises only upon the discovery—whether such discovery be made on the surface or in the tunnel. The case of *Erhardt* v. *Boaro*, 113 U. S. 527 [28: 1113], is not in point, for there the preliminary notice, which was made upon a discovery from the surface, simply claimed "1,500 feet on this mineral-bearing lode," without further specifi- **113**] cation *as to boundaries or direction. And it was held that that was equivalent to a claim for 750 feet in each direction from the discovery shaft.

It may be true, as counsel claim, that this construction of the statute gives the tunnel excavator some advantages. Surely it is not strange that Congress deemed it wise to offer some inducements for running a tunnel into the side of a mountain. At the same time it placed specific limitations on the rights which the tunnel owner could acquire. He could acquire no veins which had theretofore been discovered from the surface. His right reached only to blind veins, as they may be called, veins not known to exist, and not discovered from the surface before he commenced his tunnel. It required reasonable diligence in the prosecution of his work. It placed a limit in length, 3,000 feet, beyond which he might not go in his search for veins and acquire any rights under his tunnel location, and the veins to which he might acquire any rights were those which the tunnel itself crossed. Such is the import of the letter, to which counsel refer, from Commissioner Drummond, of date September 20, 1872. Land Office Report, 1872, p. 60; 3 Copp's Land Owner, 130. It may be also noticed that in this letter the Commissioner affirmed the right of location on either side of the tunnel, in these words: "When a lode is struck or discovered for the first time by running a tunnel, the tunnel owners have the option of recording their claim of 1,500 feet all on one side of the point of discovery or intersection, or partly on one and partly upon the other side thereof."

We hold, therefore, that the right to a vein discovered in the tunnel dates by relation back to the time of the location of the tunnel site, and also that the right of locating the claim to the vein arises upon its discovery in the tunnel, and may be exercised by locating that claim the full length of 1,500 feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire.

It was well said by the court of appeals in its opinion in this case: "The striking characteristic of this section of the act is, that it gives the right to the possession of certain *veins [**114** or lodes to the diligent owner of a tunnel before his discovery or location of any lode or vein whatever, contingent only upon his subsequent discovery of such veins in his tunnel. Veins or lodes discovered on the surface or exposed by shafts from the surface must be found before any right to them vests (act of May 10, 1872, §§ 2, 5; U. S. Rev. Stat. §§ 2320, 2324); but this section declares that the owners of a tunnel, by simply locating and diligently prosecuting it without the discovery of any vein or lode whatever, 'shall have the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface.'"

In *Hope Min. Co.* v. *Brown*, 11 Mont. 370, 383, the supreme court of that state observed: "But has he [the tunnel owner] not an inchoate right in such vein, which right is kept alive by prosecution of work on the tunnel, according to law? This seems to be implied by the last clause of the statute, that 'failure to

prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of the tunnel.' The fact that said nonaction on the part of the tunnel claimant should constitute an abandonment shows that it was the intent of Congress to reserve such lodes from the commencement of the tunnel, while it was prosecuted according to law." See also *Buck* v. *Sierra Nevada Consol. Min. Co.* 2 Idaho, 386.

The plaintiffs further contend that an act passed by the territorial legislature of Colorado in 1861 (Colo. Sess. Laws 1861, p. 166, Mills's Anno. Stat. § 3141) limits the right of the tunnel owner to veins discovered in the tunnel to 250 feet on each side of the tunnel. That section reads:

"Any person or persons engaged in working a tunnel, within the provisions of this chapter, shall be entitled to 250 feet each way from said tunnel, on each lode so discovered."

But if that section has not been in terms repealed by the legislature of Colorado, it was **115**] superseded by the legislation *of Congress, as found in the Revised Statutes. *Ellet* v. *Campbell*, 18 Colo. 510.

The remaining question is whether the failure to "adverse" the application for a patent for the Vestal claim destroyed or impaired the rights of the defendant. We think not. United States Revised Statutes, §§ 2325, 2326, contain the legislation in reference to adverse claims. These provisions are substantially that when a party makes his application for a patent, if no adverse claim is filed within sixty days from publication of notice, it shall be assumed that the applicant is entitled to a patent; that when an adverse claim is filed, "it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claims, and all proceedings . . . shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

Now, at the time the application for patent to the Vestal claim was presented and the proceedings had thereon, the defendant knew of no vein which would enable it to dispute the right of the owners of the Vestal to a patent. The Vestal claim, it will be perceived, runs parallel to the line of the tunnel, and is distant therefrom some 500 feet. The presumption, of course, would be that the vein ran lengthwise and not crosswise of the claim as located, and such a vein would not, unless it radically changed its course, cross the line of the tunnel. Whether it did or not, or whether any other vein should be found in the tunnel which should cross the territory of the Vestal, was a matter of pure speculation, and there would be no propriety in maintaining a suit to establish defendant's inchoate right and delay the Vestal claimants in securing a patent on a mere possibility which might never ripen into a fact. The obvious contemplation of the *law in respect to [**116** these adverse proceedings is that there shall be a present, tangible, and certain right, and not a mere possibility. Of course the owners of the Vestal claim had notice, from the fact of the location of the tunnel line, of the possibilities which future excavations of the tunnel might develop, and so they were not prejudiced by the failure to "adverse." And as the defendant could not, in any suit which it might institute, establish a certain adverse right, and as litigation in the courts is based upon facts, and not upon possibilities, it seems to us that nothing was to be gained by instituting adverse proceedings, and therefore nothing lost by a failure so to do.

These are all the questions in the case. We are of opinion that *the decision of the Court of Appeals is right, and it is affirmed.*

DAVID F. CAMPBELL, *Plff. in Err.*,
v.
ALFRED S. ELLET, by John A. Ellet, His Guardian.

(See S. C. Reporter's ed. 116-120.)

Right to mineral land.

The failure to mark on the surface of the ground the point of discovery and the boundaries of a tract claimed will not destroy the right of a tunnel owner to mineral veins which he has discovered in the tunnel, when he posted the proper notices at the mouth of the tunnel, and filed them in the office required by local statute.

[No. 44.]

Submitted May 4, 1896. Decided May 10, 1897.

IN ERROR to the Supreme Court of the State of Colorado to review a judgment of that court reversing a judgment of the District Court of Boulder County, Colorado, in favor of the defendant, David F. Campbell, in an action brought by Alfred S. Ellet by his guardian, for the recovery of the possession of a part of a mineral claim. *Affirmed.*

See same case below, 18 Colo. 510.

Statement by Mr. Justice **Brewer:**

On September 18, 1872, George C. Corning and other citizens of the United States located a tunnel site. They diligently prosecuted the work of excavation, expending therein $100,000.

On February 3, 1875, the Corning Tunnel Company, a corporation duly organized, was the owner of this tunnel location by sundry mesne conveyances from the locators thereof, and said tunnel company, while prosecuting the work of excavation, cut and discovered within the tunnel and upon the line thereof, at

NOTE.—*As to ownership of mines; United States statutes as to; right to support of surface,*—see note to Castillero v. United States, 17: 448.

As to title to water by appropriation; common-law rule; rule of mining states—see note to Atchison v. Peterson, 22: 414.

a distance of 594 feet from its face, a vein of mineral-bearing rock in place, which was named the Bonanza lode, and on said February
117] 3 it posted at the face *of the tunnel a plain sign and notice, giving the name of said vein, the point of discovery within the tunnel, the general course of the vein from the point of discovery, and claiming 750 feet of said vein on each side of the line of the tunnel; this Bonanza lode did not appear upon the surface of the ground, and was not known to exist prior to its discovery by the Corning Tunnel Company, as above stated.

On February 9, 1875, the tunnel company filed and caused to be recorded in the office of the clerk and recorder of the county of Boulder a location certificate of said Bonanza lode, giving the name of the lode so discovered and the company as the locator thereof, the point in the line of the tunnel at which the lode was discovered, and claiming 750 feet of the vein upon each side thereof; also stating the general course of the vein. The location certificate was as follows:

Territory of Colorado, }
County of Boulder. }

Know all men by these presents that we, the Corning Tunnel Company, claim, by right of discovery and by right of location, 1,500 feet, linear and horizontal measurement, on the Bonanza lode, along the vein thereof, with all its dips, variations, and angles, together with the amount of surface necessary for working the same and allowed by law, 750 feet of said lode so located lying and being easterly of the discovery on said lode and 750 feet being westerly of said discovery, said lode being more particularly described as follows, to wit: Beginning at a point in the Corning tunnel 594 feet from the face of said tunnel and extending from said point 750 feet easterly and 750 feet westerly. The bearing of said lode is about north 78 degrees east. This lode was discovered in the Corning tunnel and it is claimed under the provisions of § 4 of an act of Congress approved May 10, 1872, in Gold Hill mining district; said lode was discovered and was located on the 3d day of February, A. D. 1875.

(Signed) Frederick A. Squires, Pres.
Daniel A. Robinson, Sec'y.

118] *Subsequently the title to the tunnel and the lode passed to the defendant in error. After the discovery of said Bonanza lode the owners of the tunnel continuously and diligently prosecuted the work on the lode and expended each year thereon the sum of $100. On July 10, 1886, more than eleven years after the discovery of the Bonanza lode, the plaintiff in error, Campbell, and one Cyrus Taylor, with full knowledge of the tunnel claim, and of the discovery and location of the Bonanza lode aforesaid, made a location of a certain lode, called by them the J. L. Sanderson lode. This location is on the same lode and vein as that described in the Bonanza location, and the discovery cut by which it was discovered by Campbell and Taylor is within 200 feet of the tunnel line. Campbell and Taylor did everything required to be done by the statutes of the United States in discovering and marking the point of discovery of the Sanderson lode, and in marking the boundaries of the claim on the surface of the ground, and thereafter did the requisite annual labor thereon. Having made application for a patent the defendant in error filed an adverse claim and commenced a suit, as required by the statute. U. S. Rev. Stat. § 2326. This, after a trial in the district court of Boulder county, Colorado, was taken to the supreme court of the state, and by that court a judgment was entered in favor of the defendant in error, on the ground that the proceedings in respect to the tunnel, the discovery of the Bonanza lode, and the location thereof, vested in him a title to that lode to the distance of 750 feet from the line of the tunnel. 18 Colo. 510. To reverse which judgment Campbell sued out this writ of error.

Mr. **L. C. Rockwell** for plaintiff in error.
Messrs. **John F. Shafroth** and *Platt Rogers* for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

In the case just decided of *Enterprise Min. Co.* v. *Rico-Aspen Consol Min. Co.* 167 U. S. 108 [*ante*, 96],* we have considered the law in [**119**
respect to mining tunnels. Beyond what was there disposed of only a single question requires consideration, and that is, Does the failure to mark on the surface of the ground the point of discovery and the boundaries of the tract claimed destroy the right of the tunnel owner to the veins he has discovered in the tunnel?

It will be noticed that the tunnel company posted at the mouth of the tunnel a notice of its discovery of this lode, and the extent of its claim thereon, and also that it caused to be filed in the office of the recorder of the county a location certificate, as required by the local statutes. Mills's (Colo.) Anno. Stat. §§ 3150, 3151. It will also be perceived that U. S. Rev. Stat. § 2323, gives to the tunnel discoverer the right of possession of the veins. It in terms prescribes no conditions other than discovery. The words "to the same extent" obviously refer to the length along the line of the lode or vein. Such is the natural and ordinary meaning of the words, and there is nothing in the context or in the circumstances to justify a broader and different meaning. Indeed, the conditions surrounding a vein or lode discovered in a tunnel are such as to make against the idea or necessity of a surface location. We do not mean to say that there is any impropriety in such a location, the locator marking the point of discovery on the surface at the summit of a line drawn perpendicularly from the place of discovery in the tunnel, and about that point locating the lines of his claim in accordance with other provisions of the statute. It may be true, as suggested in Morrison's Mining Rights, 8th ed. p. 182, that before a patent can be secured there must be a surface location. U. S. Rev. Stat. § 2325. But the patent is not simply a grant of the vein, for, as stated in the section, "a patent for any land claimed and located for valuable deposits may be obtained in the following manner." It must also be noticed that § 2322, in respect to locators, gives them the exclusive right of possession and enjoyment of all the surface within

the lines of their locations, and all veins, lodes, and ledges the tops or apexes of which are inside such lines. So that a location gives to the 120] locator something more *than the right to the vein, which is the occasion of the location. But without determining what would be the rights acquired under a surface location based upon a discovery in a tunnel, it is enough to hold, following the plain language of the statute, that the discovery of the vein in a tunnel, worked according to the provisions of the statute, gives a right to the possession of the vein to the same length as if discovered from the surface, and that a location on the surface is not essential to a continuance of that right. We do not mean to hold that such right of possession can be maintained without compliance with the provisions of the local statutes in reference to the record of the claim, or without posting in some suitable place, conveniently near to the place of discovery, a proper notice of the extent of the claim—in other words, without any practical location. For in this case notice was posted at the mouth of the tunnel, and no more suitable place can be suggested, and a proper notice was put on record in the office named in the statute.

We are of opinion, therefore, that the question considered must be answered in the negative. *There is no error in the judgment of the Supreme Court of Colorado, and it is affirmed.*

Ex parte CHARLES JOHNSON.

(See S. C. Reporter's ed. 120–127.)

Crime in Indian territory—jurisdiction of court.

1. The illegal arrest of a prisoner for a crime committed in the Indian territory, made before September 1, 1896, under process of the United States court for that territory, will not prevent a valid indictment and trial after that date, if jurisdiction has not then been acquired by another Federal court.
2. The mere issue of a warrant which was never served is not sufficient to give jurisdiction of a crime punishable with death committed in the Indian territory, to a Federal court outside of the territory, so as to prevent the United States court in that territory from exercising the jurisdiction given it by the act of Congress of March 1, 1895, after September 1, 1896, in cases of which other courts shall not have acquired jurisdiction before that time.

[No. 13, Original.]

Submitted April 26, 1897. Decided May 10, 1897.

PETITION for a writ of habeas corpus to obtain the release of Charles Johnson from the custody of the marshal of the Southern District of the Indian Territory, who holds him under sentence of death for the crime of rape. *Denied.*

Statement by **Mr. Justice Brown:**

This was a petition for a writ of habeas corpus to obtain the release of the petitioner from the custody of the marshal of the southern district of the Indian territory, who now holds him under sentence of death for the crime of rape.

From the petition, and the return to the rule to show cause, it appears that on July 24, 1896, a warrant was issued by a commissioner for the southern district of the Indian territory to arrest Johnson upon the charge of rape, alleged to have been committed upon one Pearl McCormick on the same day; that subsequently, and on the 9th day of October, at a regular term of the United States court for that district, he was indicted, and on the 17th of October was arraigned, tried, and convicted by a jury, and is now under sentence of death.

It further appears that on July 25, the day following the commission of the offense, a warrant, issued by a commissioner for the eastern district of Texas, charging him with the same crime, was placed in the hands of the marshal for that district, who demanded of the marshal of the southern district of the Indian territory the surrender of the petitioner in obedience to said writ, but the same was refused. It does not appear when this demand was made, or whether it was before or after the 1st day of September. It further appeared that, at the time of the commission of the offense, the United States court for the eastern district of Texas was not in session, and that no term of said court was held until *the [122 3d Monday of November, after petitioner had been tried, convicted, and sentenced to death.

Upon this state of facts the petitioner claimed that the United States court for the southern district of the Indian territory had no jurisdiction of the case; but that, under the provisions of an act of Congress, cited in the opinion, the court for the eastern district of Texas retained jurisdiction of all offenses committed within the southern district of the Indian territory, where the punishment was death or imprisonment at hard labor until September 1, 1896, and that the United States court for the eastern district of Texas had sole and exclusive jurisdiction over his offense.

Mr. **John J. Weed** for petitioner.

Mr. **Holmes Conrad,** Solicitor General, for respondent.

Mr. Justice **Brown** delivered the opinion of the court:

This case raises the question whether the United States court for the southern district of the Indian territory had jurisdiction to try and condemn the petitioner under the circumstances above set forth.

The following statutes are pertinent in this connection: By the 5th section of the act "To Establish a United States Court in the Indian Territory," etc., approved March 1, 1889 (25 Stat. at L. 783, chap. 333), it is enacted "that the court hereby established shall have exclusive original

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NOTE.—*As to when habeas corpus may issue, and when not, and from what judges; what may be inquired into by writ of,* see note to United States v. Hamilton, 1: 490.

As to what question may be considered on habeas corpus, see note to *Ex parte* Carll, 27: 288.

As to suspension of writ of habeas corpus, see note to Luther v. Borden, 12: 581.

jurisdiction over *all offenses* against the laws of the United States, committed within the Indian territory as in this act defined, *not punishable by death or imprisonment at hard labor;*" by the 17th section, "that the Chickasaw nation, and the portion of the Choctaw nation" within certain described boundaries (including the *locus* of this crime), "and all that portion of the Indian territory not annexed to the district of Kansas by the act approved January 6, 1883, and not set apart and occupied by the five civilized tribes, shall, from and after the passage **123**] of *this act, be annexed to and constitute a part of the eastern judicial district of the state of Texas for judicial purposes."

The 18th section provides that sessions of said court shall be held twice in each year at Paris; "and the United States courts, herein provided to be held in Paris, shall have exclusive original jurisdiction of all offenses committed against the laws of the United States within the limits of that portion of the Indian territory attached to the eastern judicial district of the state of Texas by the provisions of this act, of which jurisdiction is not given by this act to the court herein established in the Indian territory."

Taking these sections together, it is clear that jurisdiction was vested in the new court, created by the act, over all minor offenses against the laws of the United States committed within the Indian territory; but that jurisdiction of all offenses punishable by death or by imprisonment at hard labor was conferred upon the United States court for the eastern district of Texas over that portion of the Indian territory described in § 17.

This jurisdiction was expressly continued by § 33 of the act of May 2, 1890 (26 Stat. at L. 81, chap. 182), "To Provide a Temporary Government for the Territory of Oklahoma."

On March 1, 1895, an act was passed "To Provide for the Appointment of Additional Judges of the United States Court in the Indian Territory," etc. (28 Stat. at L. 693, chap. 145). The 9th section of that act reads as follows:

"Sec. 9. That the United States court in the Indian territory shall have exclusive original jurisdiction of all offenses committed in said territory, of which the United States court in the Indian territory now has jurisdiction, and after the 1st day of September, 1896, shall have exclusive original jurisdiction of all offenses against the laws of the United States committed in said territory, *except such cases* as the United States court at Paris, Texas, Fort Smith, Arkansas, and Fort Scott, Kansas, *shall have acquired jurisdiction of before that time.* . . . All laws heretofore enacted conferring jurisdiction upon the United States courts held in Arkansas, Kansas, and Texas, outside of the limits of the Indian territory, as **124**] defined by *law, as to offenses committed in said Indian territory, as herein provided, are hereby repealed, to take effect on September 1, 1896; and the jurisdiction now conferred by law upon said courts is hereby given from and after the date aforesaid to the United States court in the Indian territory: *Provided*, That in all criminal cases where said courts outside of the Indian territory shall have on September 1, 1896, acquired jurisdiction, they shall retain jurisdiction to try and finally dispose of such cases."

The case evidently turns upon the construction of this last section. This section had three purposes: First, to enable the United States court in the Indian territory to retain the jurisdiction it then had under the 5th section of the act of March 1, 1889, of all offenses against the laws of the United States, not punishable by death or by imprisonment at hard labor; second, to give it jurisdiction after September 1, 1896, of all offenses whatever, except of such cases as the courts in Texas, Arkansas, and Kansas had acquired jurisdiction before that time; third, to repeal all laws conferring jurisdiction upon these courts after that date, and to vest jurisdiction of the same upon United States courts in the Indian territory, with a proviso repeating the exception above indicated.

Now, if the United States court for the eastern district of Texas had "acquired jurisdiction" of this case, manifestly it was entitled to try the petitioner, but otherwise not. The fact that the crime was committed on the 24th of July had no bearing upon the question, since jurisdiction was vested in the United States court in the Indian territory, not of crimes or offenses committed after September 1st, but of all offenses in that territory of which the Texas court had not acquired jurisdiction before that date. In this view the date when the crime was committed is wholly immaterial, and the case of *Caha* v. *United States*, 152 U. S. 211 [38: 415], is inapplicable. Jurisdiction is acquired under this statute, not by the commission of an offense, but by service of process upon the person. *Herndon* v. *Ridgway*, 58 U. S. 17 How. 424 [15: 100]; *Chaffee* v. *Hayward*, 61 U. S. 20 How. 208, 215 [15: 804, 852]; *Boswell* v. *Otis*, 50 U. S. 9 How. 336, 348 [13: 164, 169]; *Pennoyer* v. *Neff*, 95 U. S. 714 [24: 565]; *Mexican C. R. Co.* v. *Pinkney*, 149 U. S. 194 [37: 699]. *In **125** this connection, jurisdiction of the "case," *i. e.*, the crime, is indistinguishable from jurisdiction of the person who is charged with the crime.

We know of no reason why the rule, so frequently applied in cases of conflicting jurisdiction between Federal and state courts, should not determine this question. Ever since the case of *Ableman* v. *Booth*, 62 U. S. 21 How. 506 [16: 169], it has been the settled doctrine of this court that a court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody or possession. This rule was reaffirmed in *United States* v. *Tarble* ("*Tarble's Case*"), 80 U. S. 13 Wall. 397 [20: 597]; in *Robb* v. *Connolly*, 111 U. S. 624 [28: 542]; and *Re Spangler*, 11 Mich. 298, and with reference to personal property has been so often restated as to have become one of the maxims of the law. *Taylor* v. *Carryl*, 61 U. S. 20 How. 583 [15: 1028]; *Freeman* v. *Howe*, 65 U. S 24 How. 450 [16: 749]; *Ellis* v. *Davis*, 109 U. S. 485 [27: 1006]; *Krippendorf* v. *Hyde*, 110 U. S. 276 [28: 145]; *Covell* v. *Heyman*, 111 U. S 176 [28: 390]; *Byers* v. *McAuley*, 149 U. S. 608 [37: 867]; *Moran* v. *Sturges*, 154 U. S. 256 [38: 981]; *Ex parte Chetwood*, 165 U. S. 443 [41: 782].

The material facts of the case, upon which the petitioner relies, are: That on July 25, a warrant was issued by a United States commissioner for the eastern district of Texas, charging him with the crime for which a warrant had already been issued against him by a commissioner of the Indian territory, and upon which he seems to have been arrested by the marshal. A demand was made by the Texas marshal upon the marshal of the Indian territory, but neither the petition nor the return to the rule to show cause shows that the demand was made before September 1st. Assuming that the commissioner for the southern district of the Indian territory exceeded his authority in issuing and the marshal in executing his warrant of arrest, it does not follow that the subsequent indictment and conviction were void. If the petitioner was in the actual custody of the marshal on September 1st, his subscquent indictment and trial were valid, though in the first instance he might have been illegally arrested.

126] *Thus in *The Richmond* v. *United States*, 13 U. S. 9 Cranch, 102 [3: 670], an illegal seizure of a vessel was made in the waters of a foreign power by a vessel belonging to the navy for a violation of the embargo act, and it was held that, although the seizure within the territorial jurisdiction of a foreign power was an offense against that power, this court could take no cognizance of it, and the majority of the court was of opinion that the law did not connect that trespass with the subsequent seizure by the civil authorities under the process of the district court, so as to annul the proceedings of that court against the vessel. This ruling was approved in *The Merino*, 22 U. S. 9 Wheat. 391, 402 [6: 118, 121]. Indeed, there are many authorities which go to the extent of holding that, *in criminal cases*, a forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense and presents no valid objection to his trial in such court. *Ker* v. *Illinois*, 119 U. S. 436, 444 [30 42!, 425]; *Ex parte Scott* (1829) 9 Barn. & C. 446; *Lopez & Sattler's Case* [*Reg.* v. *Lopez*], 1 Dears. & B. C. C. 525; *State* v. *Smith* (1829) 1 Bail. L. 283 [19 Am. Dec. 679]; *State* v. *Brewster* (1835) 7 Vt. 118; *Dow's Case* (1851) 18 Pa. 37; *State* v. *Ross* (1866) 21 Iowa, 467. Although it has been frequently held that if a defendant *in a civil case* be brought within the process of the court by a trick or device, the service will be set aside and he will be discharged from custody. *Union Sugar Refinery* v. *Mathiesson*, 2 Cliff. 304; *Wells* v. *Gurney*, 8 Barn & C. 769; *Snelling* v. *Watrous*, 2 Paige, 315; *Williams* v. *Bacon*, 10 Wend. 636; *Metcalf* v. *Clark*, 41 Barb. 45; *Stein* v. *Valkenhuysen*, 3 El. Bl. & El. 65; *Williams* v. *Reed*, 29 N. J. L. 385; *Carpenter* v. *Spooner*, 2 Sandf. 717; *Pfiffner* v. *Krapfel*, 28 Iowa, 27; *Moynahan* v. *Wilson*, 2 Flipp. 130; *Small* v. *Montgomery*, 17 Fed. Rep. 865; *Kauffman* v. *Kennedy*, 25 Fed. Rep. 785. The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest.

*But in this case there was nothing of [**127** the kind. The crime was committed and the prisoner arrested within the territory, and within the local jurisdiction of the territorial court. Had he been arrested without warrant by the marshal, or even by a private individual, and detained in custody until after the 1st of September, he might then have been indicted, although, perhaps, an action might have lain against the person so arresting him for false imprisonment. If the jurisdiction of the Texas court had attached, or, in the language of the statute, had been "acquired," before September 1st, that would have been a good defense; but, as already stated, all that had been done was to issue a warrant which was never served, and there is nothing to show that a demand was made for the petitioner before the 1st of September. Whether, if such demand had been made, that would have itself vested the Texas court with priority of jurisdiction, is a question we are not called upon to discuss. It is clear that the mere issue of a warrant was not sufficient.

The petition must be denied.

BURDON CENTRAL SUGAR REFINING COMPANY *et al.*, *Appts.*,
v.
JACOB U. PAYNE *et al.*

(See S. C. Reporter's ed. 127-149.)

Pledge by Louisiana law—contract in a lease—lien, how enforced.

1. The "other obligations of the lease" in addition to the rent, for which a right of pledge on the movable effects of the lessee is given to the lessor by La. Civ. Code, art. 2705, do not include the purchase price of cane grown on other lands and sold by the lessors to the lessees by a separate and distinct contract included in the lease, which expressly provides for the termination of that contract on a certain condition before the lease terminates, although the lease includes a provision that it is an entire contract, each stipulation and obligation being a part of the consideration of every other.
2. The creation by a contract in a lease, of a lien on a sugar bounty given by act of Congress, in order to secure the price of sugar cane bought of the lessor, who raises the crop, by the lessee, who makes it into sugar, is not restricted by provisions of a state law requiring equality of distribution among creditors, because the bounty is given by United States law, which in effect makes the parties joint producers of the sugar.
3. Such lien, under the laws of Louisiana, can be enforced so as to appropriate the bounty money to the payment of the claim of the lessor, who raised the cane and sold it to the lessee, for the

NOTE.—*As to lien for purchase money*, see note to Bayley v. Greenleaf, 5: 393.

As to lien of corporation on shares, for debt due from stockholder, see note to Union Bank v. Laird, 4: 269.

As to vendor's lien, when exists: waiver and enforcement,—see note to Fisher v. Shropshire, 37: 110.

cane so sold to the exclusion of the general creditors of the lessee.

[No. 722.]

Submitted April 12, 1897. Decided May 10, 1897.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fifth Circuit certifying certain questions to this court for decision in the above-entitled case. *Questions answered.*

Statement by Mr. Chief Justice **Fuller:**

129] *The circuit court of appeals for the fifth circuit desiring the instruction of this court for the proper decision of certain questions arising in the above-entitled cause, certified the statement of facts set out in full in the margin, † and thereon propounded the following questions:

*"First. It being shown that the cane [**130** sold by appellees, J. U. Payne & Company *et al.*, to the Ferris Sugar Manufacturing Company, Limited, pursuant to the contract between the parties, was grown on lands not embraced within the *limits of the premises leased to the [**131** Ferris Sugar Manufacturing Company, Limited, are appellees, under the laws of Louisiana, considered in connection with the provisions of the contract, entitled to the lessor's privilege to secure the payment of the purchase price of such cane?

*"Second. Under the terms of the 13th [**132** article of the contract between the Paynes and the Ferrises, and to secure the payment of the price of the sugar cane sold and delivered under said contract, have the appellees, H. M.

† 1. H. M. Payne, J. U. Payne, and J. U. Payne, & Company, a commercial firm, composed of J. U. Payne, J. U. Payne, Jr., and R. W. Foster, all residents of New Orleans, La., were the owners of three contiguous plantations in St. Landry Parish, Louisiana, known as Barbreck, St. Peter's, and Anchorage.

2. On June 16, 1892, they entered into the following contract with L. Murray Ferris, and Wm. L. Ferris, of Poughkeepsie, New York, which was duly recorded:

This indenture made by H. M. Payne, J. U. Payne, and the firm of J. U. Payne & Co., all residents of the city of New Orleans, state of Louisiana, as the parties of the first part, and L. Murray Ferris and William L. Ferris, both residents of the city of Poughkeepsie, state of New York, as the parties of the second part, witnesseth: That whereas the said H. M. Payne, J. U. Payne, and the firm of J. U. Payne & Co., parties of the first part, as aforesaid, are the owners and proprietors of three certain plantations, to wit: the Barbreck, St. Peter's, and Anchorage places, their respective interest in the said three plantations being of record in the said parish; and

Whereas, the said L. Murray Ferris and William L. Ferris, parties of the second part, as aforesaid, have proposed to contract, upon the terms and conditions hereinafter provided, for a lease of the Barbreck sugar house, and the purchase of the crops of the three aforesaid plantations:

Now, therefore, the said parties of the first part, each for and as regards his respective interest in the said plantations, and the said parties of the second part jointly and severally, hereby contract, obligate, and bind themselves as follows, to wit:

Article first. The parties of the first part grant to the parties of the second part, upon the terms and conditions hereafter provided, a lease for a period of ten years, of the sugar house situated on the Barbreck plantation, together with all the machinery and appurtenances thereto belonging, it being understood and agreed that this lease shall cover and include all the present inclosure around the Barbreck sugar house and so much in addition towards the Anchorage plantation as may be necessary to provide space for handling cars, and, further, the land between the cane yard and the bayou, except the public highway, which shall be used in common by the parties hereto, provided that the lease shall not include any cabins or dwelling houses which may be situated on the aforesaid premises, the parties of the first part reserving to themselves the right to remove any and all such cabins or dwelling houses off the said premises which the parties of the second part shall have the right at their option to require.

And it is agreed and understood that the lease shall further cover and include the right to make such additions, alterations, or modifications, to or in said sugar house, as the parties of the second part may desire to make, using, at their option, all the brick and other material now on the aforesaid premises, the right being further reserved to the said parties of the second part to drain the aforesaid leased premises into the regular plantation ditches and drains.

But the parties of the second part hereby covenant and bind themselves to make, at least, and, in any event, such additions and alterations to and in said sugar house, as will enable it conveniently and in suitable time to take off the crops of the Barbreck, St. Peter's, and Anchorage plantations.

Article second. The consideration of the aforesaid lease shall be the sum of twenty thousand dollars ($20,000) or two thousand dollars ($2.000) per annum, which the parties of the second part bind and obligate themselves to pay in semi-annual instalments of one thousand dollars ($1,000) each, the first instalment to be due and payable on the 1st day of January, 1893, and the others every six months thereafter.

And it is understood and agreed that while all the terms and stipulations of this contract shall be absolutely and irrevocably binding from the date of its execution, the rent, as above stipulated, shall not begin to run until the 1st day of October, 1892.

Article third. It is further understood and agreed that there shall be built immediately, or as soon as practicable after the execution hereof, a tramway and bridge from the Barbreck sugar house through the St. Peter's plantation, on the Barbreck side of the bayou, to the boundary line of the Prosser plantation, for the purpose of conveying the crops of the said plantation to the sugar house.

The parties of the first part contract and agree on their part to grade the beds of the said tramways and to haul all the necessary materials for their construction, the parties of the second part covenanting and agreeing on their part to furnish all the material and to complete the tramways and build the bridges, after the grading and hauling aforesaid shall have been done.

And, after the first crop season after the execution hereof, the parties of the second part bind and obligate themselves to build, on the same terms and conditions as are provided above, a branch tramway from the main tramway on the Barbreck plantation, hereinabove provided for, across the St. Peter's bridge and through the St. Peter's field on that side of the bayou up to the line of the Morgan railroad. And the parties of the second part shall have the privilege of carrying the tramways entirely through all or either of the said three plantations, so as to be able to extend them beyond.

Article fourth. The parties of the second part shall further have the right of way for a railroad to connect the Barbreck sugar house with the Morgan railroad, including the consent of the parties of the first part to their building a railroad bridge across the bayou at the grade level of the Barbreck cane yard, and the further right to construct and operate telegraph and telephone lines along all the aforesaid tramways and railroad.

The parties of the second part shall further have, during the lease, a full and complete right of way over the road connecting the Barbreck sugar house and the railroad depot, and the further right to establish and operate during the lease at some suitable place on one of the three aforesaid plantations, a kiln for burning brick.

Article fifth. But it is distinctly understood and agreed that the aforesaid tramways and railroad must be so constructed as not to interfere with the drainage facilities of the aforesaid three plantations or either of them.

And as the courses of the aforesaid tramways and railroad are not definitely fixed herein, it is further understood and agreed that as soon as the said courses shall have been mutually agreed upon

133] Payne, J. U. *Payne, and the members of the firm of J. U. Payne & Company, an equitable lien upon the bounty money collected from the United States by the receiver in this suit?

"Third. If the second question shall be an- 134] swered in the *affirmative, can such equitable lien, under the laws of Louisiana, be so enforced in the present suit as to appropriate the bounty money to the payment of the claim of the Paynes, to the exclusion of the general creditors of the Ferris Sugar Manufacturing Company?"

Messrs. **J. D. Rouse, William Grant,** and **Walter H. Saunders** for appellants.

Messrs. **Chas. E. Fenner, James David Coleman,** and *Frank McGloin* for appellees.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

*By article 3183 of the Civil Code of [137 Louisiana, it is provided: "The property of the debtor is the common pledge of his creditors, and the proceeds of its sale must be distributed among them ratably, unless there exist among the creditors *some lawful causes of pref- [138 erence;" by article 3184: "Lawful causes of preference are privilege and mortgages;" by article 3185: "Privilege can be claimed only for those debts to which it is expressly granted in this Code;" by article 3186: "Privilege is a right,

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and the tramways and railroad built, they shall *ipso facto* become the courses contemplated herein, and neither of the parties hereto shall have the right to change the same, or either of them, without the other's consent.

Article sixth. The parties of the first and second part hereto further covenant and agree mutually to sell and purchase respectively upon the following terms and conditions, all the cane which may be grown on the three aforesaid plantations, *viz.*: the Barbreck, St. Peter's, and Anchorage plantations, except such as may be needed each season as seed for the following year.

Article seventh. The parties of the first part shall cultivate the plantations in case, or so much thereof as would be justified by usual and improved agricultural methods.

Article eighth. The cane shall be delivered at the sugar house or at the tramways, at the option of the parties of the first part, to cars furnished by the parties of the second part, the said cars to be loaded to their full capacity by the parties of the first part.

Article ninth. The parties of the first part shall have the absolute right to deliver, on and after the 15th day of October of each season, and the parties of the second part shall be bound and obligated to accept, unless hereinafter provided to the contrary, so much cane each working day as shall represent the average amount necessary to be delivered per day, to complete the delivery by the 25th day of December following, the said average to be based upon the number of working days between the 15th of October and the 25th of December and the total estimated tonnage of the three plantations.

The said estimate shall be made on the 1st day of each October by the parties of the first part, and shall be submitted in writing to the parties of the second part, who shall have the right to make a personal inspection of the crop; and, in case of a disagreement between the parties hereto as to the tonnage, they shall agree upon an umpire, whose decision and estimate shall be final and binding on all parties hereto.

Article tenth. The parties of the second part shall not be bound to accept cane frozen standing more than eight days after a freeze, but windrowed cane uninjured by freeze shall be paid for on the same basis as uninjured standing cane.

And all cane must be cut as close to the ground as practicable and not above the first red joint; and it must be delivered promptly after cutting, freed from trash, as is customary in Louisiana. Nor shall the parties of the second part be bound to accept any cane the juice of which shall test less than 9 per cent sucrose.

Article eleventh. The price to be paid by the parties of the second part shall be graduated according to the percentage of the sucrose content of the juice of the cane, as expressed at the mill and the average market price as determined by the New Orleans quotations of prime yellow clarified sugar, during each delivery week, plus the bounty, this price to be estimated on a basis of $1 per ton for cane when the sucrose content of the juice is 11 per cent and the average market price of prime yellow clarified sugar plus the bounty is 5½ cents per pound, or 6.6 cents for every 1 per cent of sucrose in the juice, thus:

11 per cent x 6.6 x 5½, equals $1.

Article twelfth. The parties of the first part shall have the right to appoint a representative, who shall have access to the mill at all times, for the purpose of testing the juice or for any other purpose, legitimately and reasonably pertaining to the interests of the said parties of the first part under this contract.

The juice shall be tested daily or as often as either party may desire, and immediately or as soon as practicable after it is expressed. And in case more than one determination is made during a day, the average result shall be taken as the basis of payment for that day. And in case of disagreement between the parties hereto as to the percentage of sucrose content, Dr. W. C. Stubbs, of New Orleans, shall be the umpire, and his decision and figures shall be binding.

Article thirteenth. The price of cane as above determined shall be paid as follows:

Two and 75-100 dollars per ton shall be paid every Monday for the cane delivered during the preceding week, until the delivery is completed. The balance, if any, per ton, shall operate as a lien and privilege to the full extent of such balance on the first bounty money received by the parties of the second part on sugar produced from cane ground at the Barbreck sugar house, and the said parties of the second part covenant and agree to consecrate solely to the payment of such balance all bounty payments so received by them, until the whole of the said balance shall have been paid.

Article fourteenth. But, whereas, there is recorded against the premises hereinabove leased, a mortgage to secure the payment at maturity, of four promissory notes, each note being for the sum of $4,166.66 and bearing interest at the rate of 4 per cent per annum from the 1st day of January, 1890, until they respectively mature; and

Whereas, the said notes mature on the 1st of January, 1893, the 1st of January, 1894, the 1st of January, 1895, and the 1st of January, 1896, respectively:

Now, therefore, in order to secure the parties of the second part in the quiet enjoyment of the said leased premises and the prompt payment of the said notes, principal and interest, as they respectively mature;

It is understood and agreed that the parties of the second part shall have the right and privilege of reserving each season until all the aforesaid notes shall have been paid, the rent which may be due under the terms of this contract on the 1st day of January of each season, and in addition, so many of the cash weekly payments for cane, hereinabove provided for, next preceding the 1st day of January of the said season, as will, together with the rent as aforesaid, aggregate the amount, principal and interest, of the note falling due on the 1st of January of that season.

The amount so reserved shall be held by the said parties of the second part in trust for parties of the first part, and in case the said note is not promptly paid at maturity by the parties of the first part, then, for their own protection, the parties of the second part shall have the right to apply the amount reserved as above provided, to the payment of the note, principal and interest, charging the amount so applied to the account of the parties of the first part.

But, if the parties of the first part shall promptly pay at maturity the note falling due on the 1st of January of any season then in that event the amount reserved, as above provided, by the parties of the second part for the payment of that note, shall immediately become due and payable to the parties of the first part.

which the nature of a debt gives to a creditor." Article 2705 provides: "The lessor has, for the payment of his rent, and other obligations of the lease, a right of pledge on the movable effects of the lessee, which are found on the property leased." . . . And by article 3263 this privilege is made superior to the privilege of a vendor.

Judge Parlange, holding the circuit court, was of opinion that under the terms of the 139] contract the purchase price of the *cane delivered by the sellers, the lessors, to the purchasers, the lessees, was secured by the lessors' privilege, because under the contract the obligation to pay the price of the cane was one of the essential obligations of the lease, and therefore covered by the words "other obligations of the lease."

Counsel's contention is that by reason of these words the privilege extends to every obligation created by a contract of lease, and *Warfield* v. *Oliver*, 23 La. Ann. 612; *Fox* v. *McKee*, 31 La. Ann. 67; and *Henderson* v. *Meyers*, 45 La. Ann. 791,—are cited as maintaining that view. It the first of these cases, it was held that the obligation resulting from a clause in a lease providing that the lessee should repair and keep in repair the leased premises was secured by the lessor's privilege. In the two other cases, it was decided that when a contract of lease provided for an attorney's fee in the event of suit to recover the rent, the amount of the stipulated fee was also so secured. But it may be observed that repairs to be made to leased property are in their very nature incidental to a lease of the property, and that such a stipulation as to an attorney's fee is a mere accessory to the rent itself.

It is further contended that the Code Napoleon and the Louisiana Code on the subject of

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The parties of the first part further covenant and agree to remove all other liens and privileges on the leased premises and to keep the same free from all other liens and privileges during the term of this lease.

Article fifteenth. In the event of a temporary closing and shutting down of the mill, as the result of fire, explosion, breakage, or other purely fortuitous cause, the parties of the second part shall not be bound to receive cane during such time, and shall not be liable in damages to the parties of the first part for such nonreceipt, but during such temporary shutting down of the mill the parties of the first part shall have the right to dispose of so much cane as the parties of the second part would otherwise have been compelled, under the terms of this contract, to receive, in any way they may see fit, and they shall furthermore have the right to use for such purpose, free of charge, all the tramways, cars, and other transportation facilities of the parties of the second part.

And the parties of the second part stipulate and agree to use every reasonable effort to repair and make all such delays as short as possible.

Article sixteenth. In case of total loss of the sugar house, mill, and machinery, by fire or otherwise, this contract may be terminated, at the option of the parties of the second part.

Article seventeenth. It is agreed and understood that the value of the Barbreck sugar house, machinery, and appurtenances, as they stand at the date of this contract, shall be estimated by three appraisers to be appointed as follows: One by each of the parties hereto, and the third by these two.

And the parties of the second part covenant and agree to take out thereon, in the name and for the benefit of the parties of the first part, and to keep in force during the term of this contract, a policy of insurance against fire, for the full value as above determined, provided, that this valuation shall not exceed the sum of $10,000, and to pay the premium on the said policy for the benefit of the parties of the first part, during the term of this contract.

Article eighteenth. The parties of the second part further covenant and agree to pay during the term of this contract any and all extra taxes which may result from increased assessment of the leased property on account of the improvements put upon it by the said parties of the second part.

Article nineteenth. On the termination of this contract, by limitation or as otherwise provided therein, the parties of the second part shall have the right to remove and take away all the improvements, of whatever kind or description, including tramways, which they may have put upon the leased premises, on condition, however, of paying, before such removal, to the parties of the first part an amount which shall represent the depreciation in value of the sugar house, machinery, and appurtenances belonging to the said parties, as a means of manufacturing sugar from cane, the present value to be that determined by the appraisement hereinabove provided for, and the value at the termination of this contract to be determined by a similar appraisement, it being understood and agreed that the latter appraisement shall be made solely with reference to the relative efficiency and value of the said sugar house, machinery, and appurtenances for the manufacture of sugar from cane, without regard to the profits of the industry or the depreciation in value of as the result of the introduction of new and improved machinery or methods of manufacture.

Article twentieth. The parties of the first part agree to keep all such books and records as are required by the United States government in relation to the bounty, and to furnish to the parties of the second part all the details which may be necessary to enable them to effectuate their bounty rights.

Article twenty-first. Nothing in this contract shall be construed as to authorize the establishment or conduct of a store of any sort or description upon the leased premises, by the parties of the second part or others.

Article twenty-second. It is further mutually understood and agreed that in case the bounty now paid upon sugar by the United States government is removed during the term of this contract, then, and in that event, either of the parties hereto may at their option terminate the contract, but as regards the parties of the first part, it is understood and agreed that this right of terminating the contract shall extend only so far as their obligation to cultivate and deliver cane is concerned, the right and option being reserved to the parties of the second part, in the event of an exercise by the parties of the first part of their right of termination under this section, to continue the lease as herein stipulated upon the same terms and conditions, except as hereinabove provided.

Article twenty-third. And whereas, the parties hereto recognize that despite the genuine and earnest efforts of the parties of the second part to construct and put in operation the contemplated mill in time for the next grinding season, after the execution hereof, such a consummation may be rendered practically impossible by events absolutely beyond the control of the said parties hereto, it is therefore understood and agreed that if by reason of such unforeseen events it shall become practically impossible to construct and put into operation the said contemplated mill in time for the next grinding season after the execution hereof, then, and in that event, the said parties of the second part shall be bound to receive under the terms and conditions of this contract, during said next grinding season, only the cane grown on the Barbreck plantation, and the parties of the first part shall have the right to dispose of the St. Peter's and Anchorage crops during said season, in any way they may see fit, with the privilege of using for such purpose, free of charge, any and all the transportation facilities of the parties of the second part.

But nothing in this section shall be so construed as to relieve the parties of the second part from their obligation under this contract to purchase the crops of the three aforesaid plantations in case of their failure to construct and put in operation the said contemplated mill in time for the next grinding season, if such failure shall result from the financial inability of the said parties of the second part to meet their engagements or from a want of exercise by them of all due caution, prudence, and foresight to that end.

Article twenty-fourth. It is further understood and agreed that the parties of the second part shall

the lessor's privilege are substantially alike, and that the French commentators and the decisions of the French courts support the proposition that the lessor's privilege secures not only the rent but also advances made during the course of the lease for the execution of the lease; that the meaning of the Louisiana law should be regarded as settled by this construction; and that as the price of the cane delivered under this contract would be secured by the privilege of the lessor under the law of France, the same conclusion follows here.

Article 2102 of the Code Napoleon provides that the lessor shall have a privilege for "the repairs which the tenant is bound to make, (*réparations locatives,*) and for everything that concerns the execution of the lease." Many French commentators are referred to as establishing that under this provision the privilege of the lessor extends to and secures advances made by him to a lessee, and they undoubtedly maintain that *under the French law the [140 amount due for raw material delivered by a lessor to the lessee of a manufacturing establishment for the purpose of being worked at the factory, under the terms of the lease, would be secured by the lessor's privilege.

29 Laurent, Droit Civil Francais, 4th ed. 1887, §§ 407 and 408, states the principle thus: "By execution of the lease we understand all the obligations which the law or the contract imposes on the lessee; those which the law establishes are considered as agreed between the parties; all, therefore, concern the execution of the contract. . . . Are advances which the lessor makes under the con-

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have the right and privilege of subrogating to their rights and liabilities under this contract at any time during the term thereof a corporation duly organized, provided it be satisfactorily shown that the said corporation be legally organized and competent to contract, that it is the absolute owner and proprietor of the property, machinery, rights, and effects of every kind and description which shall have belonged to the parties of the second part hereto, and shall be situated upon the three aforesaid plantations or either of them, and that the said property, machinery, rights, and effects are free from any and all liens and encumbrances except the lien of the lessors under this contract, and on this condition, the parties of the first part covenant and bind themselves to accept the aforesaid corporation as the substitute of the parties of the second part hereto and to release the said parties from any and all subsequent liability hereunder.

Article twenty-fifth. It is finally understood and agreed that this is an entire contract, each stipulation and obligation herein being a part of the consideration for every other.

In witness whereof, the aforesaid parties have hereunto affixed their hands on this 16th day of June, 1892.

(Signed) H. M. Payne.
J. U. Payne.
J. U. Payne & Co.

(Signed) L. Murray Ferris.
Wm. L. Ferris.

3. Under article twenty-four (24) of said contract, the said L. Murray Ferris and Wm. L. Ferris transferred all their rights and liabilities, under said contract, to the Ferris Sugar Manufacturing Company, Limited, a corporation organized under the laws of Louisiana.

4. The McKinley tariff act, passed October 1, 1890, which provided for a bounty to sugar producers, was repealed on August 28, 1894, and on September 3, 1894, it was stipulated between the parties to said contract that the provisions of articles eleven and thirteen thereof should be extended so as to apply to any bounty that might thereafter be granted by Congress to sugar produced from the crop of 1894.

5. The Ferris Sugar Manufacturing Company, Limited, operated the Barbreck sugar house under the terms of said contract from October, 1894, to January 4, 1895, and the said parties of the first part, J. U. Payne & Company *et al.*, delivered to the said Ferris Sugar Manufacturing Company during that season, under said contract, ten thousand, three hundred and seventy-seven (10,377) tons of cane grown upon premises other than those leased to said Ferris Company, for which the said Ferris Company owed a balance on the purchase price of four thousand, five hundred and sixty-four and 73-100 dollars ($4,564.73) on the contract basis of $2.75 a ton, and a further sum of six thousand, five hundred and seventy-nine and 30-100 dollars ($6,579.30) in the event that the bounty should be collected.

6. In the fall of 1894 the Ferris Sugar Manufacturing Company, Limited, became heavily involved in financial difficulties, and prior to this a number of creditors, among them the Reading Iron Works Company and John H. Murphy, recorded vendors' privileges upon the machinery sold by them to the said Ferris Sugar Manufacturing Company, Limited, and erected by it in the said Barbreck sugar house.

7. On January 4, 1895, the Burdon Central Sugar Refining Company, Limited, a corporation organized under the laws of New York and an unsecured creditor of the Ferris Company to the extent of forty thousand, four hundred and four and 74-100 dollars ($40,404.74), its entire debt, filed a bill in equity in the circuit court of the United States for the eastern district of Louisiana, alleging that the Ferris Sugar Manufacturing Company, Limited, was heavily indebted and insolvent, and that its assets would be sacrificed by numerous creditors who were about to bring suit. The bill prayed for the appointment of a receiver to take charge of all the assets of said company. On the same day the defendant company filed an answer, with a resolution of its board of directors annexed authorizing such action, admitting all the facts charged in the bill, and uniting in the prayer for a receiver. A receiver was thereupon appointed.

8. On March 25th, 1895, H. M. Payne, J. U. Payne, and J. U. Payne & Company filed a petition of intervention in this suit, stating, among other things not relevant to this certificate, the said balance of $4,564.73 and of $6,579.30 due them for cane delivered to the said Ferris Sugar Manufacturing Company, Limited, and claiming that both sums were secured by a lessor's privilege on the property of the defendant company at the Barbreck sugar house, and that the latter sum, namely, $6,579.30, was also secured by an equitable lien on any bounty that might thereafter be collected by the receiver. The receiver and the Ferris Company filed an answer to this petition, admitting the correctness of the amounts claimed, but denying that they were secured as averred. The Burdon Central Sugar Refining Company adopted the answer of the receiver. Issue was joined by replication and the matters in issue were referred to a master to report upon the law and the facts. The master allowed the amounts claimed by interveners, but rejected their claims both to a lessor's privilege to secure these amounts and to an equitable lien on the bounty. Upon exceptions to the master's report the court decreed that interveners were entitled to a lessor's privilege upon the movable effects of said Ferris Company and of third persons upon leased premises to secure both said sums due for the unpaid price of the sugar cane, in addition to an equitable lien on the bounty to secure the said sum of $6,578.30, in preference to all other creditors of the said Ferris Sugar Manufacturing Company, Limited.

9. From this decree the Burdon Central Sugar Refining Company, complainants, the Reading Iron Company, and John H. Murphy, interveners in this suit, as creditors of the Ferris Sugar Manufacturing Company, Limited, for large amounts, took an appeal and made the following assignment of errors:

First: Said court erred in decreeing that said interveners, J. U. Payne *et al.*, are entitled to a privilege and right of pledge as lessors upon the movable effects of the defendant on the leased premises to secure the sums due said interveners for the cane sold and delivered by them to said defendant amounting to $4,564.73 and $6,579.30.

Second: Said court erred in decreeing that said interveners are entitled to an equitable lien on the bounties which may be collected on sugars made from cane belonging to said interveners and taken off by the defendant or its receiver.

tract of lease to the lessees secured by his privilege? The affirmative is adopted by jurisprudence. It is incontestable when the advances concern the lease. that is to say, the rights and obligations which result from it. In this case, both the letter and spirit of the law are applicable. But if a loan of money were made to the lessee, in the contract of lease, without there being any relation betwcen the loan and the lease, this would not be an advance; it would be an ordinary loan, and the law gives no privilege for such a loan. Jurisprudence adopts this view; for if it grants a privilege to the lessor for the advance which he makes, it is because these advances concern the lease. The owner of an iron furnace stipulates to furnish to the lessee of his furnace the wood necessary to operate it; it has been adjudged that such an advance is privileged. Such is also the case when the lessor furnishes beets to the lessee of a sugar factory. The lessor furnishes 10,000 francs to the lessee of a mill as a fund to be used in operating it. The advance being intended to operate the mill, therefore its object was the execution of the lease, and the claim is privileged."

The only decision of the French courts cited in argument is referred to by Laurent, and is the case of *Vanderaghen* c. *Decocq*, decided 18th of April, 1850, by the court of appeals of Douai (not by the court of cassation as inadvertently stated by counsel), and reported in 1 Journal du Palais, 1851, p. 395.

The following statement made by the court [141] of original *jurisdiction was adopted by the court of appeals in affirming the judgment:

"Considering that, as regards the claim of 6,800 francs for rentals the privilege of Decocq is not contested by the defendant and is besides expressly established by art. 2102 of the Civil Code; that according to ¶ 1 of that article, the same privilege takes effect for repairs chargeable to the tenant and for everything that concerns the execution of the lease; that it is by virtue of a clause of the lease and for the execution of that clause and in order to insure the operation of the factory leased, that the Decocqs have delivered and furnished to Blanquart beets to value of 8,086 francs; that article 9 and following of said lease require them to plant beets on 53 hectares and 19 acres and to furnish and deliver to the factory the entire product of the crop at the price of 16 francs per 1,000 kilos. of beets and under a penalty of 150 francs damages for each 35 acres of beets not delivered; that all the authors and jurisprudence grant the privilege of art. 2102 to the lessor, who has made advances and furnished commodities, as in this case, by virtue of a clause of the lease and for the execution of the lease; it is held that under the terms of art. 2102, the claim of Decocq is privileged as well for the beets furnished as for rentals."

Whether the language of the Louisiana Code, "every obligation of the lease," may not justly be held to be narrower than the words "everything that concerns the execution of the lease," as found in the Code Napoleon, and, therefore, whether the latter would secure by the lessor's privilege an advance made by the lessor, which would not be so secured under the Louisiana law, we need not discuss, for even conceding that the two Codes are alike, and that the provisions of both support the theory relied on, yet we think that under the provisions of this contract the price of the cane was not secured by the lessor's privilege. The test applied by the French writers to ascertain whether the particular obligation is secured by the lessor's privilege is whether the obligation created by a particular clause in a contract of lease is really a part of the contract of lease proper, or an obligation necessary *for its execution. [142] Thus Laurent, as we have just seen, says: "But if a loan of money were made to the lessee, in the contract of lease, without there being any relation between the loan and the lease, this would not be an advance: it would be an ordinary loan, and the law gives no privilege for such a loan."

And the conclusion of the court of appeals of Douai, in the case cited, rested on the fact that the particular contract there considered made the price of the beets a part of the contract of lease, and intended for the execution of the lease.

It is clear, then, that though we concede the view of the Louisiana law contended for by appellee, the question still remains: Did the obligation to pay for the cane as stipulated in this contract make such obligation a part of the lease itself, or did the duty to pay under the contract result not from the lease but from another and distinct contract, namely, one of sale, not contemplated by the parties to be considered as a part of the lease as such, and, therefore, not secured by the lessor's privilege? The learned district judge proceeded on the ground that there was an identity between the French and the Louisiana law; that the interpretation of the one was persuasive in respect of the other; and that under both laws the privilege claimed should be allowed; but to reach this result he also held that the contract was brought within this view of the law because the sale of the cane as between the parties to the contract was "an esseutial consideration of the lease, both on the part of the lessors and lessees."

We should remember that the contract must be so construed as to give meaning to all its provisions, and that that interpretation would be incorrect which would obliterate one portion of the contract in order to enforce another part thereof. Civil Code, art. 1951. And that as privileges under the law of Louisiana are in derogation of common right, they cannot rest on implication, and can only result from express terms or from clear and irresistible intendment. *Shaw* v. *Grant*, 13 La. Ann. 52; *Louisiana Citizens' Bank* v. *Maureau*, 37 La. Ann. 857.

In *Case* v. *Taylor*, 23 La. Ann. 497, the supreme court of *Louisiana said: "It mat- [143] ters not what name the parties have given to the instrument, its character is determined by its constituent elements." Article 2063 of the Civil Code (an article not found in the French Code) provides: "A *conjunctive* obligation is one in which the several objects in it are connected by a copulative, or in any other manner which shows that all of them are severally comprised in the contract. This contract creates as many different obligations as there are different objects; and the debtor, when he wishes to discharge himself, may force the

creditor to receive them separately;" and article 1883, that "every contract has for its object something which one or both of the parties oblige themselves to give, or to do, or not to do."

The writing before us embodies, in fact, two contracts, a contract of lease and a contract of sale. If we were compelled to treat it as a single indivisible contract, what would be its proper denomination? The sale of the cane was manifestly more important to Payne & Company than the lease of the sugar house. By the contract they severed their lands into two parcels, leasing, for a time and price fixed, one part thereof with the sugar house, and retaining the remainder, which they were to cultivate, and the crop upon which the Ferrises agreed to purchase. Apparently the lease was the inducement to the sale rather than the sale the inducement to the lease. So that if there was a loss of identity, which form of contract absorbed the other? We do not think, however, the effect of the document was to fuse the two into one, but that a contract of sale and a contract of lease were both provided for. The preamble recites: "Whereas the said L. Murray Ferris and William L. Ferris, parties of the second part, as aforesaid, have proposed to contract, upon the terms and conditions hereinafter provided, *for a lease* of the Barbreck sugar house and *the purchase* of the crops of the three aforesaid plantations." And articles 1 to 5 regulate, in substance, the relations between the parties as landlord and tenant, while articles 6 to 13 govern the sale of the crops.

Article 6 says: "The parties of the first and [144] second part *hereto further covenant and agree mutually *to sell and purchase respectively* upon the following terms and conditions, all the cane which may be grown on the three aforesaid plantations, *viz.*. The Barbreck, St. Peter's, and Anchorage plantations, except such as may be needed each season as seed for the following year." Article 11: "The price to be paid by the parties of the second part shall be graduated according to the percentage of the sucrose content of the juice of the cane," etc.

Article 13: "The price of cane as above determined shall be paid as follows: Two and $\frac{75}{100}$ dollars per ton shall be paid every Monday, for the cane delivered during the preceding week, until the delivery is completed. The balance, if any, per ton, shall operate as a lien and privilege to the full extent of such balance on the first bounty money received by the parties of the second part on sugar produced from cane ground at the Barbreck sugar house," etc.

We do not see how it can be successfully denied that there was a contract of sale as well as a contract of lease, and, this being the fact, it is impossible to so read the writing as to destroy the one in order to give effect to the other. And, in interpreting the contracts, if all the obligations which they created, excepting those essentially necessary to the existence of the contract of sale, should be attributed to and treated as obligations of the lease, this would not make the duty to pay for the cane an obligation of the lease, because price is of the essence of the contract of sale under the law of Louisiana, and without price there can be no sale. Civil Code, art. 2439. This conclusion is strengthened when we consider that the contracting parties themselves sedulously separated the obligation to pay the price of the cane from the other obligations by stipulating that the price should be secured by a privilege and lien entirely independent of the lease. Thereby the duty to pay for the cane was treated as resulting from a sale and secured by a privilege specially provided for upon the bounty money, which is inconsistent with the view that the contracting parties contemplated that the duty to pay for the cane resulted, not from a sale, but purely from a lease. It is true *that the mere taking of security for the [145] obligations of the lease would not import that the lessor's privilege created by law in favor of these obligations was abrogated, yet when the necessary effect of the contract under consideration is to separate the duty to pay for the cane from the obligations of the lease as such, and to secure it separately, the stipulation as to security is entitled to great weight as tending to show that the parties regarded the obligations of the lease as one thing, and the obligation to pay the price separately secured as another.

Privilege, says the Code, is the right "which the nature of the debt gives to the creditor." Now the stipulation was that the price of the cane should be secured by a *privilege on the bounty money*, and this clearly justifies the assumption that the parties proceeded on the theory that the price of the cane arose from a different consideration and created a different obligation from the obligations created by the lease.

Again, the 22d article of the contract expressly provided for the continuance of the lease at the option of the lessee, the manufacturing company, even after the lessors had been discharged from all obligation to cultivate or deliver cane to the company. That article is:

"It is further mutually understood and agreed that in case the bounty now paid upon sugar by the United States government is removed during the term of this contract, then, and in that event, either of the parties hereto may at their option terminate the contract, but as regards the parties of the first part, it is understood and agreed that this right of terminating the contract shall extend only so far as their obligation to cultivate and deliver cane is concerned, the right and option being reserved to the parties of the second part, in the event of an exercise by the parties of the first part of their right of termination under this section, to continue the lease as herein stipulated under the same terms and conditions, except as hereinabove provided."

How can it be concluded that the cultivation, delivery, and sale of the cane on the one hand, and the payment of the price therefor on the other, was an essential and necessary part of the continuance of the contract of lease, when the contracting *parties themselves [146] declared that, although all obligation to cultivate and deliver cane and to pay for the same should be dispensed with, the lease itself might continue to exist for its full term? And it may be observed, in this connection, that the contingency as to the bounty had happened

before any delivery whatever had been made under the contract. If, in the year following, the vendor had exercised his option to cease delivering cane, and the vendee had continued to lease, could it have been said that there was no lease because the obligation to deliver cane had disappeared, when the contract itself provided that this should not be the case? As the contract of lease provided for the erection by the lessor of new machinery in the sugar house, and therefore must be considered to have contemplated a debt as arising from its execution, it appears to us that it was the plain duty of the lessors, if their intention was that the purchase price of the cane should be an obligation of the lease secured by a lessor's privilege, to have so stipulated in unambiguous terms. And, as this was not done, but on the contrary, as the obligation to pay for the cane was stated in the contract as arising from the sale, and was separated from the obligations of the lease by the reservation of a privilege and lien on the bounty money, the rule of strict interpretation precludes us from so reading the contract as to enlarge its terms to import a privilege not necessarily resulting therefrom.

Nor do we think that the 25th article, providing that "this is an entire contract, each stipulation and obligation herein being a part of the consideration for every other," tends to impair the conclusions we have indicated. The parties treated the written agreement as embodying both a sale and a lease as independent contracts. Code, art. 1769. The contract of lease is essentially commutative (Code, art. 2669), and article 1768 of the Code defines such contracts thus: "Commutative contracts are those in which what is done, given, or promised by one party, is considered as equivalent to, or a consideration for, what is done, given, or promised by the other." It was because the parties considered the agreement as embodying independent stipulations that the [147]*provision before quoted was inserted, for it would otherwise have been superfluous; while considering them as independent contracts, the stipulation making them interdependent created the right to rescind the one in case of the violation of the other.

We hold, then, that the price of the cane delivered under the contract was not secured by the lessors' privilege, and that the first question must be answered in the negative.

2. The 13th article of the contract reads as follows:

"The price of cane as above determined shall be paid as follows: Two and $\frac{75}{100}$ dollars per ton shall be paid every Monday, for the cane delivered during the preceding week, until the delivery is completed. The balance, if any, per ton, shall operate as a lien and privilege to the full extent of such balance on the first bounty money received by the parties of the second part on sugar produced from cane ground at the Barbreck sugar house, and the said parties of the second part covenant and agree to consecrate solely to the payment of such balance all bounty payments so received by them, until the whole of the said balance shall have been paid."

If it was within the power of the contracting parties to create an equitable lien upon the bounty collected, the terms of the contract effectuated that purpose. *Walker* v. *Brown*, 165 U. S. 654 [41: 865] and cases cited.

The right of the parties, however, by the contract to create an equitable lien, and the power of a court of equity to enforce such lien, is denied upon the ground that, as by the provisions of the law of Louisiana equality of distribution is the rule among creditors, and preferences can only result from privileges and mortgages, and as the subject-matter from which the lien here arose was not one of the cases to which the law of Louisiana gives a privilege, therefore an equitable lien could not be created by contract or enforced in violation of the terms of the statutes of Louisiana. But, without passing on the correctness of this proposition, we think it has no relation to the matter under consideration. The bounty on sugar was derived wholly from the act of Congress of October 1, 1890, providing therefor (26 Stat. at L. 567, chap. 1244), and the act of *March 2, 1895, making a partial allow-[148 ance for the repealed bounty (28 Stat. at L. 910, chap. 189). *United States* v. *Realty Co.* 163 U. S. 427 [41: 215]. The bounty was given by the terms of the act of 1890, not to the manufacturer of sugar manufactured within the United States, but to the producer of such sugar from "beets, sorghum, and sugar cane grown within the United States." In this way the law in conferring a bounty created a link between the manufacturer of the sugar and the grower of the beets, sorghum, or cane from which it was manufactured. And this connection between the manufacturer and the grower being created by the act of Congress in conferring the bounty only for sugar manufactured from cane grown within the United States, the relation between the grower and the manufacturer was one arising from the laws of the United States, and not from the local law of the state of Louisiana. As a transfer of the claim against the United States derived from the bounty could not have been given by the manufacturer who received the cane of the grower without a violation of U. S. Rev. Stat. § 3477, the contention of appellants denies to the grower of cane on its delivery to a manufacturer any security whatever; but this would be incompatible with the purposes and objects of the acts of Congress, and would cause the statutes of Louisiana to operate upon, and in a measure render nugatory, laws of the United States The parties to the contract had in view in making it the necessary relation between them accorded by the act of Congress, for the contract stipulated that the parties of the first part should "keep all such books and records as are required by the United States government in relation to the bounty, and to furnish to the parties of the second part all the details which may be necessary to enable them to effectuate their bounty rights." The right to collect the bounty having arisen from a law of the United States, and the provisions of that law creating a necessary relation between the grower and the manufacturer, making them in effect joint producers of the sugar, the right to the equitable lien stipulated by the contract was not controlled by the provisions of the local law of Louisiana, even although as a *general rule,— [149 and in regard to this we express no opinion,— the effect of that law would be to deprive con-

tracting parties, except when expressly allowed, of the right to contract for an equitable lien; and to deny to courts of equity the power to enforce the same.

These considerations lead to an affirmative answer to the second and third questions.

The first question is answered in the negative, and the second and third questions in the affirmative, and it will be so certified.

LONDON ASSURANCE, *Appt.*,
v.
COMPANHIA DE MOAGENS DO BARREIRO.

(See S. C. Reporter's ed. 149-175.)

Marine insurance—when vessel is in collision—impairment of seaworthiness—construction of policy—according to law of place of performance—particular average—salvage loss—sufficiency of libel—rule of damages.

1. Vessels may be in collision within the meaning of an insurance policy, although but one of them is in motion while the other is at a wharf fully loaded and ready to proceed upon her voyage.
2. An impairment of the seaworthiness of a vessel by contact with another is not necessary to constitute the affair a collision within the meaning of an insurance policy, when as a result of the impact cracks are made from ¼ inch to 1½ inches wide for a distance of 11 feet in the iron plating of the vessel's bulwarks.
3. A vessel is "in collision" within the meaning of an insurance policy when the circumstances can be fairly described, within the ordinary use of language, as amounting to a collision.
4. In case of doubt as to the true construction to be given the language of an insurance policy, the court should lean against the construction which would limit the liability of the insurer.
5. A policy of marine insurance made in Philadelphia by agents of an English insurance company, which by its terms is to be performed in England, although it insures a cargo from New York to Lisbon, Portugal, is to be interpreted according to English law.
6. The clause "free of particular average unless the vessel be . . . in collision," as construed in England, makes an insurer liable, if the vessel is once in collision during the adventure after the goods are on board, for any loss covered by the general words in the policy, although it is not the result of the collision, and but for the collision would have been within the exception contained in the memorandum, and free from particular average as therein provided.

NOTE.—*As to marine insurance: what is a total loss*, see note to Great Western Ins. Co. v. Fogarty 22: 216.

As to seaworthiness, implied warranty of—see note to Work v. Leathers, 24: 1012.

As to reinsurance, see note to Sun Mut. Ins. Co. v. Ocean Ins. Co. 27: 337.

As to measure of damages for collision, see notes to Smith v. Condry, 11: 35, and The Amiable Nancy, 4: 456.

Marine insurance: construction of phrase "perils of the seas" in policy: damages from collision; what damages and expenses the policy covers: seaworthiness; right to abandon; acceptance of an abandonment; adjustment of loss.

Part of a ship's cargo was destroyed, and the ship was injured; the master returned to the port of departure, and restored the sound part of the cargo to the shipper, as it could not be forwarded at a lower rate of freight; and it was held that the insurer of the freight was liable for the loss of freight on the part of the cargo destroyed alone. M'Gaw v. Ocean Ins. Co. 23 Pick. 405.

A collision between two ships on the high seas, whether it results from accident or negligence, is in all cases to be deemed a peril of the seas within the meaning of a policy of insurance. Hale v. Washington Ins. Co. 2 Story, 176.

To make the insurer liable the injury must have been occasioned by a storm or accident that would injure a seaworthy vessel. Flemming v. Marine Ins. Co. 4 Whart. 59.

To lash a flat boat, descending the Mississippi laden with produce, to a steamboat to be towed, is a departure from and a violation of the contract of insurance. Stewart v. Tennessee Marine & F. Ins. Co. 1 Humph. 242.

But, if after a collision with a steamboat, which is a peril insured against, the master, believing the danger or immediate loss to be imminent, lashes his boat to the steamboat to be towed to the nearest landing, though this enhance the danger, and contribute to a loss, if honestly intended by the master, the underwriters will be liable, the master in such case being agent of all concerned. Stewart v. Tennessee Marine & F. Ins. Co. 1 Humph. 242.

All expenses resulting as a direct and immediate consequence of a peril insured against are covered by the policy. Hale v. Washington Ins. Co. 2 Story, 176.

Where the ship Columbia, through the negligence or fault of her mate and crew, came into collision with the bark Ritchie, by which both vessels sustained damage, and the master of the Columbia, in behalf of his owners, paid to the owners of the Ritchie a certain sum by way of compromise, for the damage sustained by the latter vessel, it was held that the underwriters on the Columbia were liable for the sum so paid, as well for the damage, as for the repairs and losses by the collision to the Columbia. Hale v. Washington Ins. Co. 2 Story, 176.

Where a bottomry bond, executed at Hamburg, was given at a premium of 12½ per cent, and the bottomry holder agreed to give it up if the sum advanced and common interest were promptly paid, and the agent of the bottomry holder received a draft from the owners at Hamburg for the amount and common interest, and charged a commission for indorsing the draft, and the bond was thus taken up, it was held that the underwriters were liable for the interest and commission and bound to pay them as a part of the loss, since they thereby obtained the benefit of the surrender of the 12½ per cent premium, and they were not entitled to the benefit without partaking of the burden. Peters v. Warren Ins. Co. 1 Story, 463.

Insurance was made on freight on a voyage to and from New Orleans to Havre. The vessel was compelled to put back to New Orleans, in consequence of an accident. The cargo, consisting principally of cotton, was so much damaged that it would require several months to repack it in a condition to be reshipped, and it was sold by consent of the masters and shippers, and the vessel, having taken another cargo on board, proceeded on a different voyage. *Held*, that the underwriters were not liable. Jordan v. Warren Ins. Co. 1 Story, 342.

The insurer is liable for the labor of persons hired to assist the master and crew, that being a

7. The breaking up of a voyage at a port of refuge, so as to make the loss adjustable as a salvage loss when a cargo of wheat has been damaged, is justified by the fact that the condition of affairs at the port of destination is very peculiar because of a duty upon imported wheat which apparently applies to damaged as well as to sound wheat, and the fact that damaged grain is unsalable there and in many instances is not permitted by the authorities to be landed, although the wheat may have a market value in the ports of other countries which are not subject to the same conditions.

8. A claim for a salvage loss on a cargo is substantially made by a libel alleging an abandonment by the owner, which the insurer did not accept, at a port of refuge, and claiming the right to recover the difference between the amount realized upon a sale at that place and the value stated in the policy, together with claims for general average and special charges.

9. Loss of the whole cargo, which is partly damaged, should be adjusted as a salvage loss at the difference between the valuation in the policy and the sum realized by the sale, when the whole cargo is sold at a port of refuge for the benefit of all concerned and for the purpose of preventing greater loss, if the adventure has been practically frustrated and is justifiably abandoned.

[No. 280.]

Argued April 20, 21, 1897. Decided May 10, 1897.

CERTIORARI to the United States Circuit Court of Appeals for the Third Circuit to review a judgment of that court affirming the judgment of the United States District Court for the Eastern District of Pennsylvania in favor of the libellants, the Companhia de Moagens do Barreiro, against the London Assurance, for the recovery, upon a marine insurance policy, of the amount of loss sustained by the libellants by injury and destruction of part of a cargo of wheat of the libellants. *Affirmed.*

See same case below, 56 Fed. Rep. 44, 28 U. S. App. 439.

Statement by Mr. Justice **Peckham:**

The respondents herein duly filed their libel in admiralty against the appellant, the London Assurance, in the United States district court for the eastern district of Pennsylvania, in a cause of marine insurance, to recover upon a policy of insurance issued by the company upon some 33,000 (being part of a cargo of about 80,000) bushels of wheat, of which the respondents were the owners, the 33,000 bushels being valued in the policy at $40,887. The policy was dated December 8, 1890, was issued for $20 000, and covered the wheat when shipped on board the steamer Liscard, at New York, bound for Lisbon, Portugal. There was another policy upon the same wheat as that cov-

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general average. Giles v. Eagle Ins. Co. 2 Met. 140.

Where, by perils insured against, a vessel receives a strain irremediable without rebuilding her, the insurer is liable to the extent of the diminution of her value, in addition to the expense of the repairs made, though the vessel is made seaworthy by such repairs, and is afterwards insured at the same valuation as before the injury. Giles v. Eagle Ins. Co. 2 Met. 140.

The wages of the crew while a steamboat is detained by accident are no charge on the insurers. Jolly v. Ohio Ins. Co. Wright (Ohio) 539.

If a vessel in the course of her voyage put into a port where repairs can be made and afterwards sail therefrom with a defect in her bottom, produced during the voyage by the perils of the seas, and which causes her to founder, the insurers are liable for the loss, unless the captain had reasonable cause to suspect the existence of the defect when the vessel was in such port, or had reasonable cause to believe that she could not proceed safely home, without having the same repaired. Starbuck v. New England Marine Ins. Co. 19 Pick. 198.

A schooner sailing up the Potomac, not in charge of a licensed pilot, but of her mate, a skilful man, is not thereby unseaworthy. Keeler v. Fireman's Ins. Co. 3 Hill, 250.

In the insurance of a vessel, on time, the warranty of seaworthiness is complied with if the vessel be in an unexceptionable condition at the commencement of the risk; and her being subsequently injured and not properly refitted at an intermediate port does not discharge the insurer from subsequent loss not occasioned by the omission. American Ins. Co. v. Ogden, 20 Wend. 287.

Where a vessel, the day after her departure from port, springs a leak, which so increases as to render it necessary to abandon the voyage, without having encountered any gale or sustained any damage from the dangers of the sea, she must be presumed to have been unseaworthy at the time she sailed, and the insurers are discharged. Wallace v. DePau, 1 Brev. 252, 11 Am. Dec. 662.

Where a collision between two ships accidentally took place, within the dominions of a foreign power, and, by the laws of that foreign power all damages occasioned thereby were to be borne equally by the two vessels, it was held that such a collision was a peril of the seas, within the meaning of the common policy of insurance, and that the underwriters were liable, not only for the direct damage done to the ship insured by them, but also for the charge apportioned on such ship, as her contributory share towards the common loss, not as a general average, but as properly a part of the partial loss occasioned by the collision. Peters v. Warren Ins. Co. 3 Sumn. 389.

The mere fact shown by the assured that the goods after arrival were found damaged by sea water is not evidence of a loss by the peril of the sea. Fleming v. Marine Ins. Co. 3 Watts & S. 144, 38 Am. Dec. 747.

Mere taking possession of a vessel for the sake of repairing and restoring her to be insured, and doing so within a reasonable time, will not be an acceptance of an abandonment. Reynolds v. Ocean Ins. Co. 22 Pick. 191, 1 Met. 160, 33 Am. Dec. 727; Commonwealth Ins. Co. v. Chase, 20 Pick. 142; Weed v. Lincoln & K. Ins. Co. 6 Mass. 479, 4 Am. Dec. 163.

But if there is unreasonable delay in repairing and offering to restore her it will amount to an acceptance. People v. Suffolk Ins. Co. 7 Pick. 254; Reynolds v. Ocean Ins. Co. 22 Pick. 191, 33 Am. Dec. 727.

So, too, of unreasonable delay in removing a stranded vessel after taking possession. Reynolds v. Ocean Ins. Co. 1 Met. 160.

So, too, unreasonable deficiencies in the repairs. Reynolds v. Ocean Ins. Co. 22 Pick. 191, 33 Am. Dec. 727.

If the insured, at the time of the offer to restore, make no objection to the sufficiency of the repairs, he will be precluded from setting them up to invalidate the tender, but he may have an action therefor. Reynolds v. Ocean Ins. Co. 22 Pick. 191, 33 Am. Dec. 727.

A purchase by the insurers from persons to whom a stranded vessel had been sold by the master (which sale was ratified by the owners), and taking possession but not restoring her, held not to constitute an acceptance of the abandonment as the in-

ered by the policy in suit, issued by another company, for $20,887, the total of the two making up the value of the wheat as mentioned in the policy. The policy now before the court contained the usual language as to the adventures and perils the assurers were contented to bear, among them being "perils of the seas, . . . and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise or any part thereof." As representing the policy, the insurers issued what is termed "its certificate" or "memorandum," wherein it was stated that the certificate "represents and takes the place of the policy, and conveys all the rights of the original policy holder (for the purpose of collecting any loss or claims) as fully as if the property was covered by a special policy, direct to the holder of this
151] certificate." *It certified that on the 8th of December, 1890, the corporation insured under policy No. 427, for Lawrence Johnson & Co. (who were the agents for the libellants), $20,000 in gold on 33,000 bushels of wheat, valued at $40,887, shipped on board the steamship Liscard, at and from New York to Lisbon, Portugal. In the body of the certificate and directly under the subject of the insurance (33,000 bushels of wheat), stamped in red ink, are the words:

"Free of particular average unless the Vessel be sunk, burned, stranded, or in collision."

On the face of the certificate, and on the right-hand side thereof, and at a right angle with the body of the certificate, the following language is printed:

"It is hereby Understood and Agreed that in all cases of loss or damage to the interest insured under this Certificate, the same shall be reported to the Corporation in London as soon as known or expected, and be paid in Sterling at the offices of the Corporation, No. 7 Royal Exchange, London, at the rate of four dollars and ninety five cents ($4.95-100) Gold to the Pound Sterling. Claims to be adjusted according to the usages of Lloyds, but subject to the conditions of the Policy and Contract of Insurance."

Immediately underneath and also printed in red ink is the following:

"NOTICE: To conform with the Revenue Laws of Great Britain, in order to collect a claim under this Certificate, it must be stamped within ten days after its receipt in the United Kingdom."

The certificate is signed by the agents of the company at the Philadelphia agency.

The cargo was received on board the steamship in New York harbor, and the loading of the vessel had been completed and she was

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surers held under a distinct right. Badger v. Ocean Ins. Co. 23 Pick. 347.

Where the acts of the insured amount to an acceptance their intent is immaterial. Reynolds v. Ocean Ins. Co. 22 Pick. 191, 33 Am. Dec. 727; Badger v. Ocean Ins. Co. 23 Pick. 347, 355.

In case of jettison of goods their value is generally to be estimated at their prime cost or original value, or if the vessel has arrived at her port of destination, at their value at such port. Rogers v. Mechanics' Ins. Co. 2 Story, 173.

In case of repairs of the damage done a ship by the perils insured against the customary deduction of one third new for old is applicable only to the labor and materials employed in the repairs and to the new articles purchased in lieu of those which are lost or destroyed; and it does not apply to either incidental expenses having no connection with the repairs, or new articles furnished and from which the assured can possibly derive no enhanced value or benefit beyond his loss, such as steamboat towage, boat hire, etc. Potter v. Ocean Ins. Co. 3 Sumn. 27.

Where a ship is abandoned for a total loss, the master cannot sell the cargo and invest the proceeds in other goods, unless he be justified by necessity or by a high degree of expediency. But if he do make such a sale and investment when they are unnecessary or inexpedient, yet if the parties interested receive the property without objection and adopt the acts of the master, they must bear all proper charges thereupon. If, however, they receive the property, reserving their rights and waiving no objections, and it do not yield a profit beyond the fair value of the property shipped, they are liable for no charges upon it, but if it do yield such a profit, and the master act without fraud he is entitled to be paid a reasonable compensation and his reasonable expenses, not exceeding such profit. Lawrence v. New Bedford Commercial Ins. Co. 2 Story, 471.

The insurer having a claim on the insured on a bottomry bond has a right to deduct the amount of his claim from a loss on the policy. Wiggin v. American Ins. Co. 18 Pick. 158.

In determining whether the injury sustained exceeds half the amount insured, items properly of general average and expenses to ascertain the extent of the loss should not be included. Hall v. Ocean Ins. Co. 21 Pick. 472.

The rule to deduct from the cost of repairs one third for the difference between new and old materials applies even when the ship is new. Orrok v. Commonwealth Ins. Co. 21 Pick. 456, 32 Am. Dec. 271.

And where the loss is a technical total loss. Deblois v. Ocean Ins. Co. 16 Pick. 303, 28 Am. Dec. 245.

One third for the expense of labor, as well as materials for repairs, is to be deducted. Hall v. Ocean Ins. Co. 21 Pick. 472.

In case of partial loss it is an invariable rule that the loss must be calculated according to the prime cost, adding all duties and expenses and the premium of insurance. Bailey v. South Carolina Ins. Co. 3 Brev. 354.

In an action on a valued policy to recover for a partial loss, the measure of damages is the difference between the appraisement of the damaged article and that stipulated in the policy, with all necessary damages. And such appraisement should be made by persons of competent knowledge of the value of the article insured. Natchez Ins. Co. v. Buckner, 4 How. (Miss.) 63.

In estimating the damage to goods in case of a partial loss it is competent to prove the appraisement, the sale at auction of the goods damaged, the value of sound goods, and the custom of merchants in relation to the sale. Stanton v. Natchez Ins. Co. 5 How. (Miss.) 744.

The premium for an insurance is considered as part of the value insured, and, in case of an open policy, is to be added to cost and charges of the goods, to ascertain their value. And where a policy stipulates that, in case of loss, the insurance shall abate so much per cent, it is to be calculated upon the amount of the loss, not on the value of the cargo or of all the goods covered by the policy. Louisville Marine & F. Ins. Co. v. Bland, 9 Dana, 143.

The revocation of an abandonment before accepted by the underwriters may be inferred if the acts and inference of the assured with the use

ready on December 12, 1890, to proceed on her voyage: the lines had been cast off and the steamer would have then left the dock, but that at the last moment some little derangement to her machinery occurred and she was temporarily delayed in order to remedy the difficulty, which was accomplished in a very
152] short time—some few *hours. While thus fully loaded and in readiness to proceed on her voyage a collision occurred, which is thus described by the chief officer and entered in the log book by him:

"At 8:15 P. M. a lighter, being towed out of the dock by the tug George Carnie, ran into us breaking two plates in the bulwarks, bending stanchions, starting main rail, etc. Anchor watch kept all night."

The two plates referred to were of iron ½ inch thick. The damage to the ship was surveyed before she left New York by one of Lloyds' surveyors, who made a written report in regard to it. The break in the bulwarks caused by the collision was on the port side of the steamer about abreast of her mainmast. As described by a witness: "The break was of an irregular shape and 11 feet 6 inches long, where the measurements followed in the line of the break. The break was a continuous one in two of the iron plates of the bulwarks." It began a little above a fore and aft line, half way between the deck and the top of the bulwarks, and descended to about 8 inches above the deck at its lowest point. For the first 2 feet, beginning from the forward end of the break, it showed an opening of from ½ inch to 1 inch; for the next 3 feet the break was open 1½ inches; for the next 4 feet the break was open from ½ to 1½ inches, and the after end of the break for

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and management of the subject insured be such as satisfactorily to show that he intended to act as owner, and not for the benefit of the underwriters. This intention is a question of fact for the jury. Columbian Ins. Co. v. Ashby, 29 U. S. 4 Pet. 139 (7: 809).

The right of the insured to abandon and recover for a total loss depends upon the state of the facts at the time of the offer to abandon, and not upon the information received. Marshall v Delaware Ins. Co. 8 U. S. 4 Cranch, 202 (2: 596); Rhinelander v. Insurance Co. of Pennsylvania, 8 U. S. 4 Cranch, 29 (2: 540); Bradlie v. Maryland Ins. Co. 37 U. S. 12 Pet. 378 (9: 1123).

A technical loss must continue to the time of abandonment. Olivera v. Union Ins. Co. 16 U. S. 3 Wheat. 183 (4: 365).

The mere retardation of the voyage by any of the perils insured against, not producing a total incapacity of the ship eventually to perform the voyage, cannot be admitted to constitute a technical total loss which will authorize an abandonment. Smith v. Universal Ins. Co. 19 U. S. 6 Wheat. 176 (5: 235).

If the ship can be repaired and is repaired, and is thus capable of performing the voyage, there is no ground of abandonment founded upon the consideration that the voyage may not be worth pursuing for the interest of the shipowner, or that the cargo has been injured so that it is not worth transporting farther on the voyage; for the loss of the cargo for the voyage has nothing to do with an insurance upon the ship for the voyage. Bradlie v. Maryland Ins. Co. 37 U. S. 12 Wheat. 378 (9: 1123).

It is not error for a court to refuse to charge a jury that the plaintiff had no right to abandon the voyage when it was proved that the abandonment had been accepted by the defendant. New Orleans Ins. Asso. v. Piaggio, 83 U. S. 16 Wall. 378 (21: 358).

An offered abandonment may be accepted, even when the assured has no right to abandon. Phœnix Ins. Co. v. Copelin, 76 U. S. 9 Wall. 461 (19: 739).

If the abandonment be legal it puts the underwriters completely in the place of the assured and they become legally entitled to all that can be saved. Chesapeake Ins. Co. v. Stark, 10 U. S. 6 Cranch, 268 (3: 220); Comegys v. Vasse, 26 U. S. 1 Pet. 193 (7: 108); Columbian Ins. Co. v. Ashby, 29 U. S. 4 Pet. 139 (7: 809); Delaware Mut. S. Ins. Co. v. Gossler, 96 U. S. 645 (24: 863).

By an abandonment the insurer can have no greater right than the insured. Delaware Mut. S. Ins. Co. v. Gossler, 96 U. S. 645 (24: 863.)

Abandonment of a vessel by its owners to underwriters will not affect by estoppel or ratification a previous unauthorized sale by the master. If circumstances justified the sale no abandonment was necessary. Ward v. Peck, 59 U. S. 18 How. 267 (15: 383).

Every ship must, at the commencement of the voyage, possess the qualities of seaworthiness; but a policy on the ship "at and from a port" will attach, though the vessel be undergoing repairs at a port. Orient Mut. Ins. Co. v. Wright, 64 U. S. 23 How. 401 (16: 524); Sun Mut. Ins. Co. v. Wright, 64 U. S. 23 How. 412 (16: 529).

A loss by collision, without any fault on either side, is a loss by the perils of the sea, within the protection of the policy of insurance, and the underwriters are liable for the injury and repairs to the vessel. Peters v. Warren Ins. Co. 39 U. S. 14 Pet. 99 (10: 371).

A jettison by peril of the sea is a loss by peril of the sea. Lawrence v. Minturn, 58 U. S. 17 How. 100 (15: 58).

Under a marine insurance policy insuring against the usual perils, including barratry, the underwriters are not liable to repay to the insured damages paid by him to the owners of another vessel and cargo suffered in a collision occasioned by the negligence of the master or mariners of the vessel insured. General Mut. Ins. Co. v. Sherwood, 55 U. S. 14 How. 351 (14: 452).

A loss the proximate cause of which was a peril insured against is within the protection of a marine policy, notwithstanding it may have been occasioned remotely by the negligence of the master and mariners. Orient Mut. Ins. Co. v. Adams, 123 U. S. 67 (31: 63).

Where a vessel is insured against perils of the lake excepting certain excluded causes if it is lost from perils not arising from one of the excluded causes the company is liable. Union Ins. Co. v. Smith, 124 U. S. 405 (31: 497).

The master's misconduct, unless affected by fraud or design, will not defeat recovery on a marine policy. Orient Mut. Ins. Co. v. Adams, 123 U. S. 67 (31: 63).

Collision or stranding is a peril of the seas; and a policy of insurance against the peril of the seas covers a loss by stranding or collision, although arising from the negligence of the master or crew. Liverpool & G. W. Steam Co. v. Phenix Ins. Co. ("The Montana"), 129 U. S. 397 (32: 788).

The warranty of seaworthiness in a time policy is complied with if the vessel be seaworthy at the commencement of the risk. Union Ins. Co. v. Smith, 124 U. S. 405 (31: 497).

The right to abandon a vessel, under the contract, is to be determined from the facts as they existed on the day of abandonment. Orient Mut. Ins. Co. v. Adams, 123 U. S. 67 (31: 63).

If the loss was the result of a peril not insured against there was no right to abandon. Richlieu & O. Nav. Co. v. Boston M. Ins. Co. 136 U. S. 408 (34: 398).

1 foot and 6 inches was open but slightly. A spur extended from about the middle of the break upwards for 1 foot."

Another witness said: "The broken plates showed signs at the time I examined them of having been pressed, driven, or pounded together in such a way as to reduce the size of the opening, and the carpenter of the ship stated to me at the time that such had been in fact done. The collision break was in the bulwarks of the vessel, and, in my opinion, as the deck of that ship is arranged, the bulwarks form an important and essential part of the hull of the steamer. In some cases the bulwarks are dispensed with and an open rail used, but those are cases of flush-deck vessels, the entire length of whose deck stands well **153**]out of the water. Such *vessels have, as a rule, but a comparatively small portion of their houses, engine rooms, galleys, etc., above deck, but in the case of a vessel like the Liscard, where all her houses are upon the deck, and her main deck is, comparatively speaking, low, and I mean low as compared with the upper deck of flush deck vessels, the bulwarks form an important part of and a protection to the ship in keeping the water off the decks and protecting the houses and seamen. . . . Among other things, a large quantity of water in a gale accompanied by high seas would go through the break in the steamer's bulwarks which I inspected, and with the break open to the extent shown in the survey and drawing made by Mr. Candage, many seas which would not be high enough to go over the rail would send a large quantity of water through this break, and if the storm were extraordinary severe would overtax the capacity of the scuppers to relieve the deck. Except in such case of extraordinary weather the break would be unimportant; it would not render the ship unseaworthy."

Other witnesses called by the company gave their opinion that the bulwarks were sometimes a detriment to the ship in relation to her safety, as they kept the water on the deck longer than would be the case in their absence, and sometimes that might be a very serious occurrence.

There seemed to be a general agreement, however, among the witnesses, that in steamers built as the Liscard was the bulwarks were necessary in heavy weather for the safety of the crew that was working her. The bulwarks are a part of the hull of the vessel, and are built by the shipwright in constructing the hull, and are a part of the design of the vessel when she is modeled. In the class of vessels to which the Liscard belonged the testimony seems to show that the bulwarks are indispensable.

A claim for damages to the amount of $250 was made by the captain of the Liscard and paid by the offending vessel.

The steamer was detained by reason of the collision, and sailed a couple of days thereafter. She encountered very heavy gales soon after leaving port; the seas continuously swept **154**]*over her, and finally started the seams in her decks, washed off the tarpaulins which had been placed over the hatches and battened down, and resulted in great damage to the wheat from the sea water pouring over it through the deck seams and hatches of the ship. Her seams opened on account of the excessive straining of the ship, caused by the heavy gales of wind. Some of the water that came on her decks came through the cracks in the plates constituting a portion of the bulwarks already mentioned. After experiencing very heavy weather for a number of days, the high-pressure engine became disabled, and, proceeding then with the low-pressure engine, the captain decided to make for the nearest port, which was Boston. When they arrived at that port and examined the machinery, it was found that the high-pressure piston had been bent, and the bending was caused by the excessive straining of the ship, caused by her laboring and rolling in the seas. Upon his arrival in Boston the captain requested a survey to be made, which was done, and the cargo taken out and a written report and recommendation made. It was found that the wheat had been damaged by sea water in all the holds of the ship, and after considerable negotiation between the agents of the ship, the owners of the cargo, and the insurers an agreement was made for the breaking up of the voyage at Boston, and part freight on the cargo was paid the steamer with the written assent of the insurance company.

The cargo was sold for the benefit of all concerned, and a claim made upon the insurers under the policy, who denied any liability whatever. The owners of the wheat thereupon filed their libel in admiralty in the district court to recover for the loss sustained by reason of the facts above mentioned. The district court gave judgment in favor of the owners of the wheat (56 Fed. Rep. 44), and referred it to a commissioner to assess the damages, who adopted a rule for the adjustment of the loss, which is referred to in the following opinion. The company appealed to the United States circuit court of appeals for the third circuit, which court affirmed the judgment of the district court. 28 U. S. App. 439. The insurance *company then applied to[**155** this court and obtained a writ of certiorari to review the judgment.

Messrs. **W. W. Macfarland** and *William Parkin*, for appellant:

Damage to cargo caused by a sea peril in the course of a voyage cannot, for the purpose of delecting the memorandum, be attributed to a collision while the ship is still at her wharf, and before breaking ground for the voyage.

Thames & M. Marine Ins. Co. v. *Pitts* [1893] 1 Q. B. 477; Arnould, Marine Ins. 6th ed. 650, 651; Phillips, Ins. ¶ 695.

The warranty of seaworthiness for the voyage must be satisfied at the time of sailing with the cargo. It is not sufficient that the ship was fit for the voyage while the cargo was being taken in if she became unfit before she started. The warranty in truth appears to be a double one in that the ship shall be fit to receive the cargo when receiving it and fit to sail at the time of sailing.

Carver, Carriage by Sea, 22.

The rule is inexorable, the warranty extends to defects the most obscure and not discoverable by any degree of diligence.

The Caledonia, 157 U. S. 124 (39: 644).

The rule as to stranding laid down in *Burnett* v. *Kensington*, 7 Durn. & E. *211, is wholly irrelevant in any view of the case.

1 Parsons, Marine Ins. 630, 631; 3 Kent, Com. 10th ed. 403, 406.

The claim of the libellants is for particular average or partial loss, but in the adjustment the court treated the case as one of total loss with salvage; this was erroneous.

McArthur, Marine Ins. 2d ed. 263.

The rule of liability in cases of particular average is to take the difference in the market price at which the goods would have sold, arriving sound, and the price at which they actually sell, and the ratio or percentage of deterioration having been thus found it is to be applied to the value of the policy to arrive at the amount payable by the underwriters.

McArthur, Marine Ins. 246-248; *Lewis* v. *Rucker*, 2 Burr. 1167; *Johnson* v. *Sheddon*, 2 East, 581; Phillips, Ins. ¶¶ 1456-1460; 2 Parsons, Marine Ins. 404, 409.

Particular average must be adjusted at the place where the voyage is terminated and the interests separated according to the actual facts then and there existing.

McArthur, Marine Ins. 257; Phillips, Ins. ¶ 1467; *Macy* v. *China Mut. Ins. Co.* 135 Mass. 328.

The loss took its character from the facts then and there existing, and they presented a case of particular average as alleged by the libellants in the statement of their claim before the commissioner, and it should have been so treated.

Shapley v. *Tappan*, 9 Mass. 20.

In this case, from beginning to end, the libellants asserted and exercised all the rights of owners, and in that capacity made the agreement to terminate the voyage at Boston, and they adopted all the antecedent acts of the shipowners.

Columbian Ins. Co. v. *Ashby*, 29 U. S. 4 Pet. 139 (7: 809); 2 Parsons, Marine Ins. 192, 193; McArthur, Marine Ins. 155-158.

The intention to revoke the notice of abandonment is a conclusion of law from the admitted facts and if there were any grounds for doubt on this point they would be removed by the explicit election of the libellants to define their claim as one for particular average, and this election is conclusive.

Pitman v. *Universal Marine Ins. Co.* L. R. 9 Q. B. Div. 195; *Morean* v. *United States Ins. Co.* 3 Wash. C. C. 256.

The insurer is never, in any case, further concerned with the state of the market than as it affords a criterion of the percentage of deterioration when there is a suitable market.

Baily, Perils of the Sea, 33, 34; McArthur, Marine Ins. 250; Phillips, Ins. ¶ 1457.

Market value is not the only standard for determining the amount of loss for which an insurer is liable, and it is not adopted when the insured article was not destined for a market, or where there is none by which the loss could be properly ascertained. In such cases the actual loss of the insured is ascertained by the best means available.

Dyer v. *National Steam Nav. Co.* 14 Blatchf. 483; *Harris* v. *Panama R. Co.* 58 N. Y. 660; *African S. S. Co.* v. *Swanzy*, 2 Kay & J. 660; *Grainger* v. *Martin*, 4 Best & S. 9; Sedgw. Damages, § 243.

Charges under the sue and labor clause were erroneously allowed.

Hugg v. *Augusta Ins. & B. Co.* 48 U. S. 7 How. 595 (12: 834); *Marcardier* v. *Chesapeake Ins. Co.* 12 U. S. 8 Cranch, 39 (3: 481); *Morean* v. *United States Ins. Co.* 14 U. S. 1 Wheat. 219 (4: 75); *Robinson* v. *Com.* 3 Sumn. 220; 2 Parsons, Marine Ins. 111; Phillips, Ins. ¶¶ 1615, 1767; Arnould, Marine Ins. 1013.

Mr. **John F. Lewis,** for appellee:

Taking the ground in a place where it is not in the ordinary course of navigation is a stranding, even though done intentionally.

Letchford v. *Oldham*, L. R. 5 Q. B. Div. 542.

A ship in danger of sinking in deep water was hauled on the beach, and this was held a stranding.

Barrow v. *Bell*, 4 Barn. & C. 736.

Where a vessel was towed by salvors to a bank which was not in the course of her voyage, but was a bank used for vessels to anchor at and take the ground, it was held a stranding.

De Mattos v. *Saunders*, L. R. 7 C. P. 570.

The literal meaning of the word "stranded" is cast upon the strand or shore, and is sufficiently obvious.

Rayner v. *Godmond*, 5 Barn. & Ald. 225; *Cocoran* v. *Gurney*, 1 El. & Bl. 463; *Wells* v. *Hopwood*, 3 Barn. & Ad. 20; *Bishop* v. *Pentland*, 7 Barn. & C. 219; *Carruthers* v. *Sydebotham*, 4 Maule & S. 77.

A vessel is said to be injured by collision when violently rubbed by a third vessel.

The Pilot, 1 Biss. 164; *Sills* v. *Brown*, 9 Car. & P. 601.

The contract is one of indemnity and the policy being general in terms all losses are to be paid unless brought within the terms of the exception.

Orient Mut. Ins. Co. v. *Wright*, 68 U. S. 1 Wall. 462 (17: 505); *First Nat. Bank* v. *Hartford F. Ins. Co.* 95 U. S. 679 (24: 565); *Palmer* v. *Warren Ins. Co.* 1 Story, 364.

The complicated "percentage rule," contended for by the appellant, does not apply to a sale of cargo in a port of distress.

Lowndes, Marine Ins. § 259; Arnould, Marine Ins. p. 936; Stevens, Average, 79-82; Phillips, Ins. 1480.

Both parties to a policy of insurance are presumed to be acquainted with the laws and customs of the country to which the insured merchandise is to be sent.

Morean v. *United States Ins. Co.* 14 U. S. 1 Wheat. 231 (4: 78).

There may be a loss of the goods by a loss of the voyage in which the goods are being transported.

Anderson v. *Wallis*, 2 Maule & S. 240; *Barker* v. *Blakes*, 9 East, 283; *Rodocanachi* v. *Elliott*, 2 Asp. Mar. L. Cas N. S. 402.

A salvage loss is that kind of a loss which it is presumed would, but for certain services rendered and exertions made, have become a total loss.

Stevens, Average, 4th ed. 82.

After the underwriter refused to act in the protection of the property the responsibility of

the assured is simply for any want upon his part of proper diligence in saving the goods, and the proper standard of diligence is "such a line of conduct as a prudent man of intelligence would have observed in taking care of his own property similarly situated."

Smyrl v. *Niolon*, 2 Bail. L. 421.

The expenses of discharging damaged grain at a port of refuge for the separation of the injured from the ruined and the cost of reconditioning the portion capable of such treatment, and all expenses incidental thereto, are recoverable under the sue and labor clause.

Lowndes, General Average, 238; *Meyer* v. *Rolli*, 3 Asp. Mar. L. Cas. 324; *Kidston* v. *Empire Marine Ins. Co.* L. R. 1 C. P. 535; Lowndes, Marine Ins. 205; McArthur, Marine Ins. 268.

Mr. Justice **Peckham** delivered the opinion of the court:

Two questions arise in this case in regard to the liability of the insurers upon the policy in suit; the one being whether what took place before the vessel left her berth in New York amounted to a collision within the meaning of the policy; the other being whether, in case there was a collision, the company is liable for a subsequent loss which did not in any way occur by reason or arise out of the collision.

As to the first, we think that the vessel was "in collision" within the meaning of the language used in the certificate which represented and took the place of the policy. It was not necessary that the vessel should itself be in motion at the time of the collision. If while anchored in the harbor a vessel is run into by another vessel, it would certainly be said that the two vessels had been in collision, although one was at anchor and the other was in motion. We see no distinction, so far as this question is concerned, between a vessel at anchor and one at the wharf fully loaded and in entire readiness to proceed upon her voyage, with steam up and simply awaiting the regulation of some insignificant matter about the machinery before moving out. If, while so stationary (at anchor or at wharf), the vessel is run into by another, we should certainly, in the ordinary use of language, say that she had been in collision. How important or material were the results of the collision in regard to the condition in which the vessel was left, would be a matter of further and more detailed description. The ordinary meaning of the words [156] "in collision," when applied to a vessel, does not require that the result of the impact shall be so far reaching as to impair her seaworthiness. Very serious results, in the matter of expense of repairing, at least, might follow from the impact, wherein the seaworthiness of the vessel would not be at all impaired, and yet no one would doubt that, within the ordinary meaning of the words, such a ship had been in collision.

It is impossible, as we think, to give a certain and definite meaning to the words "in collision," or to so limit their meaning as to plainly describe in advance that which shall and that which shall not amount to a collision, within the meaning of this policy. The difficulty of limitation or description is much the same in kind as that pertaining to another expression in the same memorandum in regard to when a vessel is "burned." It is, however, obvious that a vessel would be said to have been in collision when the effect upon the vessel, or the evidence of such collision, might be very much less than would be necessary to exist in a case of fire before one would describe a vessel as a *burned* vessel. In the case of *The Glenlivet* [1893], Prob. 164, same case on appeal [1894], Prob. 48, the question arose as to whether the vessel was "burned" within the meaning of this language in the memorandum. There had been a fire on three several occasions among the coals in the bunkers of the ship, and some small damage to the ship by fire took place on two voyages, and the question was whether, under the circumstances, the ship was burnt within the meaning of the memorandum. Lord Justice Smith, in the court of appeals, in the course of his judgment, said:

"Suppose the cabin curtains were burnt, he should have told the jury that that did not constitute a 'burnt' ship; but suppose the after part of the ship was burnt altogether, and the fore part was not burnt at all, I think he should have told them that they might, if they liked, find that was a 'burnt' ship, although there was only a partial burning. It seems to me impossible to lay down absolutely in the affirmative or the negative as to whether a partial burning does constitute a 'burnt' ship or not within this policy; it *may or may not, according [157] to the actual facts appertaining to the partial burning."

Further on in the course of his judgment, in speaking in regard to the directions to be given to the jury, he said:

"My own view is that you would have to tell the jury what I have already said about partial burning, and then you would have to tell them that a partial burning may, under some circumstances, constitute a 'burnt' ship, and may not under other circumstances, and having given that direction you would have to ask them, Has the fire been such as to bring the ship to such a condition that you consider her a 'burnt' ship within the ordinary meaning of the English language? This, in my judgment, is the nearest direction which can be given as to what is meant by a 'burnt' ship in the memorandum; it is not possible to lay down any hard and fast rule upon the subject."

Lord Justice Davey said:

"Counsel for the plaintiffs says that the clause applies if a fire breaks out in any part of a ship or stores, although it is got under before any great amount of damage is done to the ship. I cannot bring myself to think that any person would, either in the accurate use of language or in ordinary parlance, say that in such a case as that the ship has been 'burnt.'"

The learned judge also said: "I think that it is really a question to be answered by the jury, Has the ship in the circumstances of this case been burnt?"

The English court took the view that as to a burnt vessel, it must be such a burning as would constitute the vessel a burnt vessel within the ordinary meaning of the English language. The language is used in regard to the vessel as a whole. "The company is to be free from average unless the ship be burnt." That language would seem clearly to indicate

some essential burning of the vessel itself and not such a case, as put by one of the judges, of the burning of the cabin curtains. The case is referred to for the purpose of showing that the English court held the expression was to be defined according to the ordinary meaning of
158] the English language. *This leaves each case to be decided with reference to its own peculiar facts.

We perceive the same difficulties which confronted the English court, in the case mentioned, in defining and in accurately and precisely limiting the meaning to be given to the words "in collision," and we agree with those judges that the words contained in the memorandum are intended to be used, as Davey, Lord Justice, said, "in accordance with the ordinary use of language," or, as said by Lord Justice Smith, "within the ordinary meaning of the English language." Taking the meaning of the words in that sense, while we cannot state in advance and in all cases what shall amount to a collision, but must leave each case for determination upon its own facts, yet it seems to us there can be no doubt that the vessel in this case had been in collision, although her seaworthiness was not impaired in the slightest degree as a result thereof. Being run into by another vessel, as a result of which cracks were made from ¼ inch to 1¼ inches wide in the iron plating of her bulwarks (which were ½ inch thick) for a distance of 11 feet, certainly shows a somewhat serious impact—what would be called in plain English a collision; it shows that there was no mere "grazing," but that a force sufficient to crack iron ½ inch thick was exerted upon the hull of this steamship, and that it was sufficiently serious in its nature to cause the captain to have an examination of it made and a claim for damages asserted, resulting in the delay of the vessel in proceeding on her voyage of two days, and the payment of $250 as damages occasioned by such collision. In the ordinary use of the English language, would it not be proper and appropriate to describe the results to the steamship as arising from a collision? We think it would.

So in relation to the use of the word "stranded" in the same memorandum. It is said that if a ship "touches and goes" she is not stranded (*McDougle* v. *Royal Exchange Assur. Co.* 4 Campb. 283), but if she "touches and sticks" she is. That is, in places in which she, in the ordinary course of her navigation, is not suffered to touch. A distinction between
159]* what is regarded as a stranding and what is held not to be a stranding has been in many cases held to be a very narrow one.

In the above-cited case, decided in 1815, where a ship in the course of her voyage in going out of the harbor of New Grimsby, with a pilot on board, struck upon a rock about a cable and a half's length from the shore, and remained there on her beam end for a minute and a half, Lord Ellenborough held that it was not a stranding, and added: "There has been a curiosity in the cases about stranding not creditable to the law. A little common sense may dispose of them more satisfactorily."

Taking what seems to us to be the common-sense view we should say that this steamer had, as a matter of fact, been in collision, although the consequences of the collision were not serious enough to affect the seaworthiness of the steamship. It is enough if within the ordinary use of language the circumstances could be fairly described as amounting to a collision. We think this is the case here. If anything more than that is required, if it must be a collision of so serious a nature as to impair the seaworthiness of the vessel, or such as might naturally lead to further injury to the ship or cargo, it is at once seen how large and broad is the field of investigation in order to determine whether the vessel has in fact been in collision within the meaning of the policy. If this be its true meaning, it is neither fairly nor reasonably expressed by the words used. It leaves open for construction in each case a question that may require long and expensive investigation to determine whether it be covered by or is outside of the policy. If the company by the use of the expression found in the policy leaves it a matter of doubt as to the true construction to be given the language, the court should lean against the construction which would limit the liability of the company. *First Nat. Bank* v. *Hartford F. Ins. Co.* 95 U. S. 673 [24: 563].

In the case cited, Mr. Justice Harlan, in delivering the opinion of the court, uses this language at page 679 [565]: "The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we *shall assume, both of]
160 protecting the company against fraud and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

If a serious collision only were meant, the company could say so. We do not think it did intend to so limit the meaning of the words. We solve the problem, therefore, in regard to the construction to be given to the language used in the policy by holding that within the fair meaning of that language the steamship was in collision after the risk had attached under the policy.

The next question is whether the subsequent damage to the wheat caused by the perils of the sea and in nowise resulting from the collision can be recovered from the insurers under this policy?

Under the circumstances, we think that this contract of insurance is to be interpreted according to the English law. The appellant is an English company. It made the contract in Philadelphia by its agents, and that contract by its terms was to be performed in England. The parties to it understood and agreed that in case of loss or damage to the interest insured under the certificate, the same was to be reported to the corporation at London and be paid in sterling at its office in the Royal Exchange in the city of London, and the claims were to be adjusted according to the usages of Lloyds, but subject to the conditions of the policy and contract of insurance.

Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and inter-

pretation. Story in his work on Conflict of Laws, § 280, says: "But where the contract is, either expressly or tacitly, to be performed in any other place there the general rule is in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance. This would seem a result of natural justice. . . . The rule was fully recognized and acted on in a recent case by the Supreme **161**]Court of the United States, *where the court said that the general principle, in relation to contracts made in one place to be executed in another, was well settled; that they are to be governed by the law of the place of performance."

The case referred to in the above section is *Andrews* v. *Pond*, 38 U. S. 13 Pet. 65 [10: 61], in which Mr. Chief Justice Taney, in delivering the opinion of the court, said: "The general principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury."

In *Bell* v. *Bruen*, 42 U. S. 1 How. 169 [11: 89], a letter of guaranty was written in the United States and addressed to a house in England, and this court held that "it was an engagement to be executed in England, and must be considered and have effect according to the laws of that country,"—citing *Bank of United States* v. *Daniel*, 37 U. S. 12 Pet. 54, 55 [9: 997, 998].

In *Scudder* v. *Union Nat. Bank*, 91 U. S. 406 [23: 245], the broad statement of the foregoing cases was somewhat narrowed, and it was stated that the law prevailing at the place of performance of the contract regulated matters connected with its performance, and that matters bearing upon the execution, interpretation, and validity of the contract were determined by the law of the place where it was made. Even upon that limitation of the doctrine, we think, the interpretation of the contract was intended by the parties to depend upon the principles of English law as they obtained and were recognized in England by the usages prevailing at Lloyds. This is what the parties expressly stipulated for, and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by, so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own. See *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* ("*The Montana*") 129 U. S. 397, 446, 453 [32: 788, 791, 796].

It appears in evidence also that there were **162**]in use two *well-known forms of particular average clauses by maritime insurance companies, one or the other being usually stamped on the insurance certificates. One clause reads, "free of particular average *unless caused* by standing sinking, burning, or collision;" the other clause reads, as in this case, "free of particular average unless the vessel be stranded, sunk, burned, or in collision." The clause in use in this certificate was termed the English clause. Many agents of English companies offered either clause, and the form in use in this case was regarded as a better clause for the insured than the "caused by" clause. It did not appear, however, that the London Assurance Company used any other than the clause found in the memorandum in this case.

Referring, then, to the English law upon the question as to the meaning of this language, the English courts many years ago decided it, and that decision has been adhered to ever since. The English courts have held, and do now hold, that the expression, "free of particular average unless the vessel be stranded," meant that if a loss occurred during the adventure, although from a cause not related in any way to the stranding of the ship, the insurers were liable upon the general language of the policy.

Lord Mansfield, in one or two decisions at *nisi prius*, had stated that it meant that the loss should arise out of the stranding. These cases were subsequently referred to in the leading case in the King's bench, of *Burnett* v. *Kensington*, decided in 1797, and reported in 7 Durn. & E. *211. The case was as much considered as almost any in the books. It was four times tried, and upon the last occasion of its appearance in the court in banc judgments were delivered by Lord Chief Justice Kenyon, Mr. Justice Ashhurst, Mr. Justice Grose, and Mr. Justice Lawrence. The Chief Justice referred to the case of *Cantillon* v. *London Assurance Co.*, tried in 1754, where the jury was formed of merchants and the trial was presided over by Lord Chief Justice Ryder. In that case it was held that if the ship stranded the insurer was let in to claim his whole partial average loss without regard to the fact that the loss was not occasioned by the stranding. It was said that the great insurance companies in London altered *the form of their policies[**163** in consequence of the decision in the *Cantillon Case*. Subsequently the words were restored. The Chief Justice, in the course of his judgment in the *Burnett Case*, continued: "If it had been intended that the underwriters should only be answerable for the damage that arises in consequence of the stranding, a small variation of expression would have removed all difficulty; they would have said, 'unless for losses arising by stranding.'" And he held, and the court agreed with him, that the meaning of the memorandum "free from average unless general, or unless the ship be stranded," was that in case the ship were stranded the insurers were to be answerable for the average loss, although the loss did not occur in the slightest degree by reason of the stranding.

Mr. Justice Ashhurst stated that the memorandum was certainly couched in doubtful words, and that it was difficult to determine when the ship was stranded, or whether or not the damage to the cargo arose from the stranding, or how much the damage was owing to that cause, and he said that "it seems as if this memorandum were introduced to avoid that inquiry, and that when the ship had been stranded the underwriters consent to ascribe the loss to that cause. . . . Those authorities having decided the point, there is now not only no reason to overset them but a very

strong reason to induce us to support them, namely, that this construction of the policy will tend to prevent litigation."

Mr. Justice Grose said: "And that brings it to the true construction of the memorandum and of the exception to it, whether the underwriters be or be not liable for an average loss when there is a stranding, though no part of the loss arises from the stranding of the ship. I have had great difficulties in bringing my mind to decide this, because the consequence of considering this as an exception to the memorandum, as the words import, is this, that if a ship be stranded and the cargo suffers no damage whatever, and afterwards the ship meets with bad weather and the cargo sustains an average loss of 90 per cent, the underwriters are answerable for the whole of that average loss 164] when it is admitted that *no part of it happened in consequence of the stranding. . . . If we were to determine that the assured could only recover for the loss that happened by the stranding, it would introduce all that doubt and difficulty that the memorandum intended to remove. Therefore it seems to me best to decide this case on the plain import of the words, notwithstanding the absurdity which I at first pointed out will follow. Besides, if the parties had intended that the insurers should not be liable to the average loss unless part of the loss happened by the stranding, they would have added words to this effect, 'unless part of the loss happen by the stranding;' and the omission of such words strongly induces me to determine strictly according to the words that are inserted in the memorandum."

Mr. Justice Lawrence said that "in a case where the words of the policy are inaccurate, and where there are inconveniences attending each construction, if the case has ever been decided, I think that we ought to be guided by it." He then refers to the case of *Wilson* v. *Smith*, 3 Burr. 1550-1556, in the King's bench, in which Lord Mansfield considered that the loss must arise by reason of the stranding, and he said that Lord Mansfield in that case went beyond the facts of the case then before the court. Continuing his judgment, he referred to the case already mentioned of *Cantillon* v. *London Assurance Co.* in which the point had been decided, and he said in conclusion: "Therefore as the very question has once been decided, I think it ought to govern our decision in this case, especially as the question arises on the construction of an instrument so inaccurately penned as a policy of assurance."

It thus appears that the learned judges of the court of King's bench a hundred years ago deliberately decided that the damage need not be the result of the stranding of a vessel. It also appears from the report of the case that they were fully alive to what Mr. Justice Grose called the absurd result of the construction in one aspect of the case, and, while appreciating the fact, they held that, taking all things into consideration, the true meaning of the language 165] of the memorandum *permitted a recovery, provided there were a stranding, though the loss was not occasioned by it.

Although the original language of the memorandum confined the exception to a stranding of the ship, it was afterwards extended so as to read, "free of particular average unless the vessel be sunk, burned, stranded, or in collision." The same rule applies to all, and if the vessel be either sunk, burned, stranded, or in collision, it is sufficient to render the insurer liable, although the loss does not result therefrom.

In *Harman* v. *Vaux*, 3 Campb. 429, Lord Ellenborough held that the stranding is a condition precedent, and when that is fulfilled the warranty against particular average ceased to have operation.

In *Barrow* v. *Bell*, 4 Barn. & C. 736, decided in 1825, the insurer was held liable, although the cargo was not injured by the stranding, the injury having resulted from striking upon an anchor in the harbor. Abbott, Chief Justice, Bayley, Holroyd, and Littledale, Justices, held the case of *Burnett* v. *Kensington*, above cited, as entirely controlling, and that the insurers were liable.

In *Kingsford* v. *Marshall*, 8 Bing. 458, decided in 1832, although the court held that in that case there was no stranding, yet Tindal, Chief Justice, recognized the general rule, and said: "The question is whether, as the goods insured fall within those in the memorandum enumerated, the present case is taken out of the exception contained in such memorandum by reason of the ship being stranded; inasmuch as it has long been settled that the words 'if the ship be stranded' are words of condition, and that if such condition happens it destroys the exception and lets in the general words of the policy. . . . For if the ship was *stranded* in *Dunkirk* harbor, an average loss upon the whole would be equally recoverable, though it had happened from perils of the sea at any former time or any other place in the course of the voyage insured." And he referred to *Burnett* v. *Kensington* as authority.

In *Thames & M. Marine Ins. Co.* v. *Pitts* [1893], 1 Q. B. 476, the court in giving judgment said: "It is clear*law that it is immaterial whether the actual mischief can be traced 166 to the stranding. . . . If the stranding takes place within the time contemplated by the parties, the insured can recover in respect of a particular average, whether the damage can be traced to the particular stranding or not. This proposition is not only in accordance with common sense, but is abundantly supported by authority." And he quotes from the judgment of Tindal, Chief Justice, in *Roux* v. *Salvador*, 1 Bing. N. C. 526, in which the Chief Justice said: "The general principle laid down in *Burnett* v. *Kensington*, that if the ship be stranded the insurer is liable for any average damage, though quite unconnected with the stranding, is not disputed; the policy, after the stranding, must be construed as if no such warranty had been written on the face of it."

In the *Thames & M. Marine Ins. Co.'s Case*, *supra*, however, the court decided that where the stranding took place before the cargo was laid and the risk commenced, and the loss occurred after the loading, that the insurer was not liable. In other words, the court held that the stranding must take place in the course of the adventure, and that where it occurred before the goods were loaded and when the cargo was not at risk in the ship, the insurer was not liable.

In *The Glenlivet*, [1894], Prob. 48, the rule as

stated by the former cases is recognized, but the court held that the clause referring to a burnt ship meant that the injury by fire was such as to constitute a substantial burning of the ship as a whole.

The English text-writers on marine insurance recognize the rule to be as above stated. See 1 Marshall, Ins. 2d Am. from 2d London ed. 222, 234; Lowndes, Marine Ins. §§ 317, 319; McArthur, Marine Ins. 245.

It is further urged in argument that such a collision as occurred in this case ought not to be held as included in the words of the memorandum, because, if it were, the greater and more serious the collision might be, extending possibly so far as to render the vessel unseaworthy, the more certainly it would appear that the company would be liable for the sub-
167]sequent *loss, and hence the underwriter might be held for a loss happening by reason of the unseaworthiness of the vessel existing at the time she commenced her voyage, which would overturn the well-settled rule in such case. The answer to this argument is that the warranty that the ship is seaworthy applies to every insurance for a voyage, including insurance on cargo, notwithstanding the owner of the cargo has no power to make the ship seaworthy. The warranty is absolute, and a breach of this implied condition makes the policy wholly void, so that it is immaterial whether the loss claimed was in any way connected with the unseaworthiness or totally independent of it. Lowndes, Marine Ins. § 170; McArthur, Marine Ins. 24; Marshall, Ins. 153, 160.

From this review of the authorities in England, there can be no doubt that if a ship be once in collision during the adventure, after the goods are on board, the insurers are by the law of England liable for a loss covered by the general words in the policy although such loss is not the result of the original collision, and but for the collision would have been within the exception contained in the memorandum, and free from particular average as therein provided. It is not material now to inquire as to the course of reasoning by which this construction of the language of the memorandum was reached. Having decided, more than a hundred years ago, what the meaning was, that meaning has been continuously attributed to the memorandum by the English courts up to the present time. The fact that the underwriters still continue its use, under such circumstances, shows that they have adopted this construction, and that they intend this meaning. Any additional exception which they have placed in the memorandum since the first decision, and which forms a part of the original exception, must be given the same meaning. Originally, the exception contained only the word "stranding," but subsequently, and at different times, the words "burned, sunk, or in collision" were added to it, and they must all be given the same construction, as an exception, that has been given to the word
168]"stranding," and, if any of them *occur, the memorandum is struck out and the general words of the policy come in force. The question of whether the law of this country does or does not accord with the law of England in this matter does not arise in this case, and we express no opinion upon that question.

Our conclusion is that the underwriters are liable for the loss, under proper rules of adjustment.

The remaining question relates to the correctness of the method for the adjustment of the loss which has been adopted by the courts below. This depends upon the special facts, which will now be referred to in some detail. The cargo consisted of about 80,000 bushels of wheat, all owned by the libellants. Of that total, the underwriters named in this action had insured 33,000 bushels, as already stated. After the arrival of the vessel at the port of Boston, in distress, the wheat was discharged into lighters for examination. A formal survey was made, and the wheat was found badly damaged by sea water, and unfit for reshipment in its then condition. The owners of the cargo gave notice of abandonment to the underwriters, which was not accepted by them, and the care of the cargo was assumed by the owners. A second survey was made on the 16th of January, 1891, and after it was made it was recommended that none of the grain be reshipped in its then condition, and it was also recommended that, as there were no facilities for reconditioning the grain at the port of Boston, it ought to be promptly sold for the benefit of all concerned. Nevertheless arrangements were entered into with persons at Boston, and such of the grain as was capable of being so treated was cleaned, separated, and generally reconditioned, so far as possible, and a survey made on the 21st of February showed that as the result of this treatment the wheat had been considerably improved and saved from further deterioration, making it of greater market value than before the treatment. On February 28 another and last survey was held on the cargo, from which it appeared that about 50,000 bushels were in fair merchantable condition, though slightly damp and having a slight smell. About 17,000 bushels were slightly damp and had a smell caused by slight mixture of *damaged grains. The opinion[**169** of the surveyor was that "constant care is required to keep the property from further deterioration; therefore, should a shipment to Lisbon be contemplated, would advise that the above mentioned lots be kept in separate holds or bins while in transit, and think by so doing would carry to Lisbon without further deterioration."

From the time of the arrival of the ship at Boston negotiations had been carried on between the agents of the libellants and the agents of the ship, and also with the insurers, for breaking up the voyage at Boston, on the theory that the disaster which had overtaken the vessel had so damaged the cargo with reference to the port of destination that the venture was practically frustrated, and that it would cost more to carry the grain to Lisbon after being reconditioned and paying all the charges upon the cargo than the whole grain would be worth upon its arrival. The agents of the ship had been disinclined to permit the voyage to be broken up without full payment of freight. On February 20, 1891, all the underwriters on the cargo, including this com-

pany, agreed in writing that the payment of a certain amount of freight on the damaged cargo and the acceptance and sale of the cargo by the owners should be without prejudice to any of the rights or claims the shippers of the cargo might have against the insurers, and should not be considered a waiver or acceptance of an abandonment, nor should it prejudice any defense that the insurers of the cargo might have under their contract of insurance. It was also agreed that the amount of the freight agreed upon was to be a recoverable item in any claim except for general average; but that, notwithstanding, the cargo owners might demand its allowance in general average. On the 27th of February, 1891, the agents of the ship entered into an agreement with the agents of the owners of the cargo to surrender the cargo to its owners free from liens in consideration of the payment of $3,600 as full freight on the cargo. Some other conditions were imposed not material.

It also appears that the condition of affairs in relation to the shipment of wheat to Portugal was very peculiar. There was a very high duty on wheat imported into that country, which 170] *apparently applied as well to damaged as to sound wheat. Damaged grain was unsalable there, and in many cases the authorities have not permitted it to be landed. It was difficult to establish a market price in Portugal, because but little wheat was sold there in open market, most of it being imported by millers to be ground into flour, and millers were only allowed to import and grind a certain fixed quantity of foreign wheat. Other ports of Europe, such as Liverpool and Antwerp, to which some of this wheat was subsequently shipped by its purchasers, were not subject to the same conditions. In them it seems that damaged grain might be disposed of and that it possessed a market value.

Of the wheat covered by the policy issued by this particular company there were sold at Boston for the benefit of all concerned, 32,740 8-60 bushels, the net proceeds of which amounted to $28,554.15, which, being deducted from the value of the 33,000 bushels, as named in the policy, $40,887, left $12,332.85 as the amount of the loss claimed by the libellants, as covered by the two policies upon this particular wheat, about one half of which was claimed under the policy in suit, to which were added several other charges, and then some deductions were made, making the total amount of the claim against this company $10,451.34.

The commissioner to whom it was referred by the district court to assess the damages sustained by the libellants held upon the facts given in evidence before him (most of which are above set forth) that it was proper to break up the voyage and sell the cargo in Boston, and that it was also proper to adjust the loss by deducting the amount for which the wheat sold at Boston from the value as named in the policy, and held the insurers liable for the difference, and added other items not necessary at this time to state in detail. The commissioner treated the loss as one which is technically called a salvage loss. He found that while it was not certain that the whole cargo after being reconditioned would have been seriously deteriorated or have been wholly spoiled in a physical sense if reshipped to Lisbon, because it had been greatly improved by the reconditioning process, and possibly *might have[171 arrived without further serious deterioration, yet in consideration of the facts applicable to this case, including all the circumstances surrounding it and above stated, the cargo should in fact be regarded as wholly spoiled in that practically it would have been almost valueless at Lisbon owing to the peculiar laws governing that port; and he adds: "Taking the decisions of the cases and the definitions of the text writers together, a fair statement of the law applicable to this case would seem to be that the whole cargo having been necessarily sold in Boston for the benefit of all concerned, the underwriters are liable for the differences between the sums realized at the sale and the valuations in the policies."

The insurance company claims, if liable at all, that its liability should be adjusted with reference to the rules which obtain in cases of a particular average loss; that although in most cases that kind of a loss is adjusted at the port of destination, yet as in this case the wheat was sold in Boston at the urgent request of its owners, and the voyage broken up at that port, Boston should therefore be treated the same as if the policy had named that place as the port of destination instead of Lisbon, for all purposes of the risk, and in such case, where the port of destination has been reached and only a part of the cargo is damaged, the rule of adjustment must be that which obtains in the case of a particular average loss.

The rule for computing a technical particular average loss has been in existence for over a hundred years and is well known and understood. The case of *Lewis* v. *Rucker*, 2 Burr. 1167, was decided by the court of King's bench, Lord Mansfield delivering the judgment, in 1761, and the case of *Johnson* v. *Sheddon*, 2 East, 581, was decided by the same court in a judgment delivered by Mr. Justice Lawrence. Those cases hold that the damaged goods upon reaching their destination must be at once sold for the best price that can be had. It is then to be determined what the goods would have been worth in the same market had they been sound, and the difference between the sound value and the proceeds of *the sale of the[172 damaged article gives the ratio of deterioration, and the underwriter is to pay this ratio or percentage of loss on the policy value. See 2 Marshall, Ins. 2d Am. from 2d London ed. 625; Lowndes, Marine Ins. § 269 *et seq.*; McArthur, Marine Ins. 207.

The company also insists that the libellants at the time they filed their libel, did not claim as for a constructive total loss, or, in other words, did not claim a salvage loss, but that in their libel they described their loss as a partial one, and the company says that it was upon such issue that the question was tried before the commissioner, and that it appeared from the evidence taken before him that it was a case for the application of the strict technical rule adopted in the adjustment of a particular average loss.

We think there is no substantial ground for the contention that the libellants had not claimed a salvage loss in their libel. It is true that in the 4th clause of the libel filed by

the libellants, they describe the loss for which the company were bound to pay as a partial as well as a total loss, but in the 3d paragraph they allege an abandonment by them after the damage to the wheat and its arrival at the port of Boston, and the refusal to accept such abandonment by the company, and in the 6th paragraph of the libel they claim the right to recover the difference between the amount realized upon the sale of the wheat and the value of the wheat as stated in the policy, which they allege amounts to the sum of $10,451.34, together with claims for general average and special charges as therein stated. This is, in substance, a claim as for a salvage loss. In their claim before the commissioner the libellants also showed their purpose to obtain damages upon the same theory.

In regard to these conflicting claims as to the proper theory upon which the loss should be adjusted, we think, under the peculiar facts of this case, that the method adopted by the commissioner was proper. It is not denied that if a ship at an intermediate port sells a part of her cargo which has been so injured by perils insured against as that it is unfit to be carried farther, it may be sold at that port 173] and the loss be adjusted *as a salvage loss; that is, the value of the goods stated in the policy is to be paid after deducting the amount realized on the sale of the damaged goods.

The case here presented, however, is one where the whole cargo has been sold by the assured, the cargo owner, in an intermediate port (where the voyage was broken up by common consent), and where the sale was for the benefit and with the consent of all concerned, and for the purpose of preventing greater loss. Boston cannot and ought not to be regarded as the port of destination, for any purpose. It was a port of refuge, where the whole cargo was sold instead of but a part, and it was sold in order to make the loss as small as possible. Under such circumstances is the rule of adjustment to be the same as where a part of the cargo has been damaged and necessarily sold at an intermediate port, or must the loss be adjusted by reference to the rule adopted in cases of particular average?

The voyage, it must be recollected, was not broken up or the cargo delivered to its owners for their sole benefit. Very probably they were the prime movers in proceedings for its sale, that is, in obtaining the consent of all parties interested in the cargo for its sale at Boston, but it is evident that the sale was in fact made for the mutual benefit of all. The peculiar law in relation to the importation of damaged wheat into Portugal and the seeming certainty that to carry it there under the circumstances would result in a greater loss to the insurers than to sell the wheat in Boston, render it quite clear that it was to the interest of the insurers, as well as the owners, to terminate the voyage and sell the wheat for the benefit of all concerned at Boston.

Under these facts, it would seem to be true that this cargo, being partly damaged, was necessarily sold at the port of refuge, and that in making such sale the insurers sustained no damage, but, on the contrary, received benefits. In this state of the case we see no reason why the sale of the whole cargo should not be made upon the same principles that obtain in case of the sale at a port of refuge of that portion of the cargo which has been damaged and is unfit for transportation to *the port of 174] destination. In other words, we think a loss under such facts should be adjusted as a salvage loss. The court below, speaking by Acheson, Circuit Judge, in this case said:

"We have carefully examined the evidence and the legal authorities cited, and are not convinced that the commissioner erred either in his findings of fact, or in his method of estimating the loss on the cargo. The breaking up of the voyage and the sale of the cargo at the port of distress were not for the benefit of the insured solely. What was thus done was really for the advantage of all persons interested, including the underwriters. As we have already seen, the wheat was all more or less damaged. Now, it appears that the condition of affairs in Portugal with respect to the importation of wheat is peculiar, and that damaged grain is unsalable there. The finding of the commissioner is, that the Liscard's wheat would have been almost valueless at Lisbon. The evidence certainly warrants the conclusion that the loss to the appellant would have been greater had the cargo gone on to Lisbon. We agree with the commissioner and the court below in the view that the adventure was practically frustrated, and hence justifiably abandoned; and that, under the special circumstances, the sale of the wheat at Boston may fairly be considered to have been made from necessity for the benefit of all concerned. Mr. Parsons (2 Marine Ins. 411) says that if a ship at an intermediate port finds a part of its cargo so injured by sea damage that it is unfit to be carried on, it may be sold at that port, and the loss adjusted as a salvage loss. . . . Mr. Phillips (2 Insurance, § 1480) says, speaking of an adjustment as upon a salvage loss: 'The underwriter is liable for such an adjustment of a particular average only in cases where the sale at an intermediate port is obviously expedient, and made on account of damage by the perils insured against; where, if the subject were forwarded to the port of destination, it would be greatly diminished in value or be of no value, on arriving there.' We think that the present case falls within the rule even as thus laid down, and that the appellant is justly chargeable with the difference between the valuation in the *policy and 175] the sum realized by the sale, and that the adjustment upon that basis was correct."

We agree with the views thus expressed and hold that the method of adjustment pursued by the commissioner, and affirmed by both courts below, was, under the special circumstances of this case, a proper and correct one.

We have examined the other objections taken by the commissioner's report, and are of opinion that they are not well founded.

The decree must be affirmed.

H. M. LEVY, *Plff. in Err.*,
v.
SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT 9 Thereof, Honorable J. V. Coffey, Judge.

(See S. C. Reporter's ed. 175-178.)

Federal question.

The alleged unconstitutionality of a state statute will not sustain a writ of error from this court to a state court, where the plaintiff in error in the state court alleged its repugnancy merely to the Constitution of the state, and did not claim that it was repugnant to the Constitution of the United States, or specially set up or claim in that court any right, title, privilege, or immunity under the Constitution of the United States.

[No. 294.]

Argued April 26, 1897. Decided May 10, 1897.

IN ERROR to the Supreme Court of the State of California to review an order of that court denying a writ of prohibition against the Superior Court of San Francisco and the Judge thereof to command that Court and Judge to refrain from trying or examining further into certain issues and allegations in a proceeding pending therein relating to the estate of a deceased person. *Dismissed for want of jurisdiction.*

See same case below, 105 Cal. 600.

The facts are stated in the opinion.

Mr. **William A. Maury** for plaintiff in error.

No brief filed by counsel for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff in error filed in the supreme court of the state of California a petition, praying, for the reasons therein stated, that a writ of prohibition be granted against the superior court of the city and county of San Francisco and the judge thereof, commanding that court and judge to refrain from trying or examining further into the allegations and issues of fact in a certain pending proceeding therein **176**]*relating to the estate of Morris Hoeflich, deceased. An alternative writ of prohibition having been issued in accordance with the prayer of the petition, the defendants filed an answer as well as a demurrer upon the ground that the facts stated in the petition did not entitle the plaintiff to a writ of prohibition.

Upon final hearing the writ was denied. From that order the present writ of error was prosecuted.

From the opinion of the supreme court of California it appears that the proceedings in the superior court of San Francisco, which were called in question by the application for the writ of prohibition, were taken under and in pursuance to Cal. Code Civ Proc. §§ 1459, 1460. The opinion says: "Petitioner contends that these provisions of the Code are unconstitutional and void, and that the proceeding in the superior court is therefore without warrant of law. His position is that they are obnoxious to several features of the Constitution of the state and more particularly to art. 1, § 3, which provides that 'no person shall . . . be compelled in any criminal case to be a witness against himself;' and to § 19 of the same article, which provides that 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated.'

"These two provisions of the Constitution are of well-understood significance; they involve like principles, and in considering the objection made, may be regarded as one.

"The argument of petitioner is that the sections of the Code referred to are distinctly penal in character, and contemplate a proceeding which is in its essential nature criminal, within the meaning of the above provisions of the Constitution; that, being a criminal proceeding, petitioner is protected by the Constitution from being compelled to testify against himself or submit his books and papers in evidence.

"There is no question that if the petitioner's premises are correct his conclusion follows necessarily. But his construction of the provisions in question cannot be sustained. These provisions have received a construction at the hands of this *court directly at variance[**177** with that put upon them by petitioner. Cal. Code Civ. Proc. §§ 1458, 1461, were, prior to the adoption of the Codes, a part of the old probate act, as §§ 116, 119; they are a part of the same article and relate to the same subject which is expressed in the title as 'embezzlement and surrender of property of the estate.'" 105 Cal. 600.

It appears also from the opinion of the supreme court of the state that the petitioner relied largely in support of his position upon *Boyd* v. *United States*, 116 U. S. 616 [29: 746], and *Counselman* v. *Hitchcock*, 142 U. S. 547, [35: 1110, 3 Inters. Com. Rep. 816].

This writ of error must be dismissed for want of jurisdiction in this court to re-examine the final judgment of the supreme court of California. The plaintiff claimed, in the state court, that certain provisions of the state enactment referred to were repugnant to the Constitution of California. But he did not, in the state court, draw in question any statute of the state upon the ground that it was repugnant to the Constitution of the United States, nor specially set up or claim in that court any right, title, privilege, or immunity under the Constitution of the United States. U. S. Rev. Stat. § 709. He insists in this court that the enforcement of the above statutory provisions was a denial of the equal protection of the laws—a denial forbidden by the 14th Amendment of the Constitution of the United States. But the record does not show that he made any such claim in the state court. The reference in the opinion of that court to the cases of *Boyd* v. *United States* and *Counselman* v. *Hitchcock* was for the purpose of ascertaining the proper construction of certain provisions of the Constitution of California, not as defining rights asserted by the plaintiff under the Constitution of the United States. From the

NOTE.—*As to what questions the United States Supreme Court will review on writ of error; bill of exceptions,*—see note to Barrow v. Hill, 14: 48.

pleadings in the cause the state court had no reason to suppose that the plaintiff specially claimed that the statute in question deprived him of any right secured by the Constitution of the United States. We said in *F. G. Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, [41:1149] that "the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from inference, but only from aver-
178] ments so *distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." See also *Louisville & N. Railroad Co.* v. *Louisville*, 166 U. S. 709, [41: 1173] If the plaintiff intended to claim that the statute in question was repugnant to the Constitution of the United States, he should have so declared.

Writ of error dismissed.

JOHN H. STONE, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporters' ed. 178-196.)

Action for conversion of personal property is transitory—acquittal on indictment, when not a defense—timber cut on line of railroad—right of settler to cut—verdict on Sunday.

1. An action the gravamen of which is the conversion of lumber and railroad ties manufactured out of trees, although there is an averment of plaintiff's ownership of the lands from which the trees were cut, and in which a judgment is asked, not for the trespass, but for the value of the personal property so converted, is a transitory action which can be brought in any jurisdiction in which the defendant can be found and served with process.
2. An acquittal of a defendant on an indictment for cutting or removing timber from lands of the United States is not a defense to an action against him by the United States for conversion of the timber.
3. Timber 50 miles from the line of a railroad, although that is the nearest point where available timber can be found, is not on lands "adjacent to the line of said road," within the meaning of the act of Congress of March 3, 1875, permitting the railroad company to take timber from the lands adjacent for the construction of the railroad.
4. Timber and trees standing and growing on land the title to which is in the government cannot without license or authority of law be lawfully cut, even by a bona fide settler who intends to perfect his right to the land, until he has perfected his claim, except so far as the cutting is necessary and reasonable to prepare for cultivation so much of the lands as he intends to cultivate.
5. A general verdict is not a nullity by reason of its being received or recorded on Sunday, even if the court may have improperly delivered to the jury special questions to be answered by them.

[No. 265.]

Submitted April 2, 1897. Decided May 10, 1897.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment of that court affirming the judgment of the District Court of the United States for the District of Washington, Eastern Division, in favor of the United States, plaintiff, against John H. Stone, for the value of lumber and railroad ties manufactured from trees unlawfully cut by defendant from lands in Idaho belonging to the United States. *Affirmed.*

See same case below, 29 U. S. App. 32.

The facts are stated in the opinion.

Messrs. **John R. McBride** and **C. W. Bunn**, for plaintiff in error:

Trespass is a local action and the same must be laid in the district where the lands lie upon which the trespass is alleged to have been committed.

United States v. *Schuler*, 6 McLean, 28; *McKenna* v. *Fisk*, 42 U. S. 1 How. 241 (11: 117); *Northern Indiana R. Co.* v. *Michigan C. R. Co.* 56 U. S. 15 How. 233 (14: 674); *Huntington* v. *Attrill*, 146 U. S. 669 (36: 1128); *Ellenwood* v. *Marietta Chair Co.* 158 U. S. 107, 108 (39: 913, 919); *Cragin* v. *Lovell*, 88 N. Y. 258; *Dodge* v. *Colby*, 108 N. Y. 445; *Eames* v. *Prentice*, 8 Cush. 337; *Warren* v. *Webb*, 1 Taunt. 379; *Watts* v. *Kinney*, 6 Hill, 87.

The language of the Constitution is: "No fact tried by a jury shall be otherwise re-examined than according to the rules of the common law." Judge Story observes, in *Parsons* v. *Bedford*, 28 U. S. 3 Pet. 447, 448 (7:737), that "the only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or he award of a *venire facias de novo* by an appellate court."

New York v. *United States*, 76 U. S. 9 Wall. 278 (19: 661).

The facts as to those being public lands, that the plaintiff was owner of the timber, and that the defendant cut and converted it, and its value, were all as fully involved in the criminal proceeding as in this one, and to permit the plaintiff to put them in issue, as was done in that trial, and upon a failure to recover re-examine them in another form of action, is to violate fundamental principles.

Coffey v. *United States*, 116 U. S. 442 (29: 686); *United States* v. *One Distillery*, 43 Fed. Rep. 846, 852.

Lands surveyed are as completely withdrawn from location as lands patented.

Jackson, Anderson, v. *Clark*, 26 U. S. 1 Pet. 636, 637 (7: 294).

As between third parties and the claimant, under the laws of the United States, the subsequent claimant is without legal standing

Lessieur v. *Price*, 53 U. S. 12 How. 76, 77 (13: 90); *Chapman* v. *School Dist. No. 1*, Deady, 113; *Gibson* v. *Chouteau*, 60 U. S. 13 Wall. 92 (20: 534); *Belk* v. *Meagher*, 104 U. S. 284 (26: 737).

The land cannot be entered upon by any other. It will not pass by any but specific grant exercised by the act of sovereign power, and, save that the title may be lost by failure to comply with the subsequent requirements of the law, the settler has a perfect title in equity.

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785

Wilcox v. *Jackson*, 38 U. S. 13 Pet. 498 (10: 264); *Witherspoon* v. *Duncan*, 71 U. S. 4 Wall. 210 (18: 339); *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 357 (33: 363); *Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 629 (28: 1122).

Where the negative allegation involves a charge of criminal neglect of duty, whether official or otherwise, or fraud, or the wrongful violation of actual lawful possession of property, the party making the allegation must prove it.

Kline v. *Baker*, 106 Mass. 61; *Phelps* v. *Cutler*, 4 Gray, 137.

The "primary purpose" of the honest settler is to obtain this timber. But for it the land would be perhaps comparatively worthless.

Lytle v. *Arkansas*, 50 U. S. 9 How. 333 (13: 160).

In its anxiety to preserve the timber lands from fraudulent and piratical spoliation, the court has, we insist, gone entirely beyond the law and limited the privileges of the settler in a way the law will not sustain.

United States v. *Gear*, 44 U. S. 3 How. 121 (11: 523); *United States* v. *Briggs*, 50 U. S. 9 How. 351 (13: 170); *Ward* v. *Andrews*, 2 Chitty, 636.

Chief Justice Parker, in *Pearce* v. *Atwood*, 13 Mass. 347, said: "By the common law of England, it is certain that Sunday is *dies non juridicus*, and that any order, sentence, decree, or judgment of any court rendered on that day would be void."

Van Vechten v. *Paddock*, 12 Johns. 181, 7 Am. Dec. 303; *Butler* v. *Kelsey*, 15 Johns. 178; *Story* v. *Elliot*, 8 Cow. 27.

Mr. **Holmes Conrad,** Solicitor General, for defendant in error:

The district court of the United States for the district of Washington had jurisdiction of this case.

Ellenwood v. *Marietta Chair Co.* 158 U. S. 107 (39: 914); *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44 (22: 551); *Northern P. R. Co.* v. *Lewis*, 162 U. S. 366 (40: 1002); *Moody* v. *Whitney*, 34 Me. 563; *Whidden* v. *Seelye*, 40 Me. 247, 63 Am. Dec. 661; *Moores* v. *Wait*, 3 Wend. 104.

The judgment in the criminal action is not a bar to this suit.

Cromwell v. *Sac County*, 94 U. S. 351 (24: 195); *Taylor* v. *Castle*, 42 Cal. 371.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought in the district court of the United States for the district of Washington, eastern division, to recover the reasonable value of certain timber and railroad ties manufactured from trees alleged to have been unlawfully cut by the defendant Stone from certain lands in Idaho of which, it was averred, the United States was the owner.

The answer put the United States upon proof of all the material allegations of the complaint.

But the defendant made two special defenses—

1. That at a term of the United States district court for the district of Idaho, held in April, 1891, the trespasses and wrongs complained of were presented by the United States to the grand jury for investigation, and such proceedings were then and there taken that the grand jury returned into court true bills of indictment, in which each and all of the wrongs and trespasses complained of herein were included; that the defendant was charged thereby with the commission of an offense against the statutes, forbidding the cutting or removal of timber from the lands of the United States; that on all the charges involving the acts of the defendant as set forth in the complaint filed herein, he was tried and acquitted and discharged therefrom by the judgment of that court; and that judgment was duly entered against the government, "the issues therein being the same as are now presented in this action, and were each and all determined and adjudged in this defendant's behalf." The defendant therefore alleged that the issues tendered by the plaintiff herein have been heard, tried, and adjudged for defendant and against the plaintiff by a court of competent jurisdiction, and that such judgment and determination precluded the maintenance of this suit.

*2. That between the dates mentioned[180 in the complaint, to wit, between the months of August, 1888, and November, 1890, he had contracts with various customers for supplies of railroad ties and timber for the manufacture of lumber at points along the line of the Northern Pacific Railroad Company in the state of Washington, and adjacent to the region mentioned in the complaint; that he procured his supplies of timber for the purposes aforesaid from lands embraced in the grant made by acts of Congress passed to aid in the construction of the Northern Pacific Railroad, and by contracts with that company; and that at no time did he cut timber on any lands except such as belonged to that company; that during said time he purchased from other parties, who delivered ties and timber suited for lumber on the railroad, both ties and timber not cut by himself, for which he paid the market price, and which were either cut from the railroad lands or were lawfully cut by the parties who sold and delivered them to him; that no part or portion thereof were cut or taken from lands of the United States, or were unlawfully cut or taken from any lands; that the railroad ties so purchased from other parties, and which were not cut by himself from the lands of the railroad company, were for the use of and were used in the construction of the Spokane & Palouse Railway Company and the Central Washington Railway Company's Railroads, respectively, both corporations being organized and constructing their roads under and in compliance with grants made by the act of Congress of March 3, 1875 (18 Stat. at L. 482, chap. 152), authorizing the use of timber, etc., for construction to be taken from the public lands of the United States; and that the taking for such purpose was not unlawful, but was by authority of law.

The defense based on the criminal prosecution in the United States district court in Idaho was adjudged on demurrer to be insufficient in law.

The United States also brought an action against John H. Stone, Edward Noonan, and W. G. Kegler, as partners doing business under the name of the Spokane Fuel Company, to recover the value of 3,545 cords of wood

[181]alleged to have been *made from trees unlawfully cut from the public lands of the United States in the same state, and to have been unlawfully converted and disposed of by the defendants to their own use. Noonan answered denying each and every allegation of the complaint. Stone answered separately, and alleged that "he was indicted upon a charge of cutting timber unlawfully from the same lands and premises, upon which the alleged trespasses complained of in this action are founded, at the April term, 1891, of the United States district court for the district of Idaho; that he was thereafter arrested on that indictment and appeared in said court; that such proceedings were afterwards had, a judgment was duly given and rendered in favor of the defendant, and he has been fully acquitted and discharged of said offense and of said trespass thereby." That judgment was pleaded in full discharge of the plaintiff's cause of action and in bar of all right of action on account thereof. As further special defense, Stone denied that the defendants were or had ever been partners in any business. The defense based upon the indictment, trial, and judgment referred to was on demurrer adjudged to be insufficient in law. Stone then filed an answer denying each and every allegation of the complaint. Noonan denied all the allegations of the complaint. Kegler was not served with process and did not appear.

The two actions were tried before the same jury, having been previously consolidated by order of court. In the first case there was a verdict and judgment in favor of the United States against Stone for $19,000. In that case the jury, in answer to special questions propounded by the court, stated that Stone had received saw logs unlawfully taken from the lands described in the complaint, and that $15,000 were awarded as damages on that account. They also stated, in response to a special question put by the court, that Stone had received railroad ties unlawfully taken from the lands, and that $4,000 were awarded on that account. In the case against Stone, Noonan, and Kegler, as partners, there was a verdict against Stone for $3,000, but the judgment was arrested and the verdict set aside.

[182]*The judgment against Stone for $19,000 was affirmed by the circuit court of appeals. 29 U. S. App. 32.

1. It is contended in behalf of Stone that as the lands from which the trees were alleged to have been unlawfully cut are in Idaho, the action is local to that state, and the district court of the United States for the district of Washington was without jurisdiction. *Ellenwood* v. *Marietta Chair Co.* 158 U. S. 105 [39:913], is cited as an authority for this proposition. But that case proceeded upon the theory that the allegations of the petition, at the time it was tried, presented a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the property was incidental only, and, therefore, that the entire cause of action was local. In the present case the petition, it is true, avers that the United States was the owner of the lands from which the trees were cut, but the gravamen of the action was the conversion of the lumber and the railroad ties manufactured out of such trees, and a judgment was asked, not for the trespass, but for the value of the personal property so converted by the defendant. The description in the petition of the lands and the averment of ownership in the United States were intended to show the right of the government to claim the value of the personal property manufactured from the trees illegally taken from its lands. Although the government's denial of the ownership of the land made it necessary for it to prove its ownership, the action in its essential features related to personal property, was of a transitory nature, and could be brought in any jurisdiction in which the defendant could be found and served with process. And a suit could have been brought to recover the property wherever it could be found. In *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44, 64 [22:551, 556], it was said: "The title to the land remaining in the state, the lumber cut upon the land belonged to the state. Whilst the timber was standing it constituted a part of the realty; being severed from the soil its character was changed; it became personalty, but its title was not affected; it continued as previously the property of the owner of the land, and could be pursued wherever it was carried. All the remedies were open to the owner which the law affords *in other cases of the wrongful re-[183 moval or conversion of personal property." If a suit like this cannot be maintained, then persons depredating on the public lands may escape civil liability by simply removing from the state in which the depredation occurred; whereby the government would be compelled to rely altogether upon a criminal prosecution in which it could not succeed except by proving the guilt of the defendant beyond all reasonable doubt.

2. The indictment against Stone in the circuit court of the United States for the district of Idaho charged that he unlawfully, wilfully, and feloniously cut and removed and caused and procured to be cut and removed from the lands described 50,000 timber trees growing on such lands, such trees being the property of the United States. It was based upon U. S. Rev. Stat. § 2461, which provides: "Sec. 2461. If any person shall cut, or cause or procure to be cut, or aid, assist, or be employed in cutting, or shall wantonly destroy, or cause or procure to be wantonly destroyed, or aid, assist, or be employed in wantonly destroying, any live oak or red cedar trees, or other timber standing, growing, or being on any lands of the United States, which, in pursuance of any law passed, or hereafter to be passed, have been reserved or purchased for the use of the United States, for supplying or furnishing therefrom timber for the navy of the United States; or if any person shall remove, or cause or procure to be removed, or aid, or assist, or be employed in removing from any such lands which have been reserved or purchased, any live oak or red cedar trees, or other timber, unless duly authorized so to do, by order, in writing, of a competent officer, and for the use of the navy of the United States; or if any person shall cut, or cause or procure to be cut, or aid, or assist, or be employed in cutting any live oak or red cedar trees or other timber on, or shall remove, or cause or procure

to be removed, or aid, or assist, or be employed in removing, any live oak or red cedar trees or other timber from any other lands of the United States, acquired or hereafter to be acquired, with the intent to export, dispose of, use, or employ the same in any manner whatsoever, other **184**]than for the use of the navy *of the United States,—every such person shall pay a fine not less than triple the value of the trees or timber so cut, destroyed, or removed, and shall be imprisoned not exceeding twelve months."

Did the court below err in adjudging that the defense in this action based upon an acquittal of the criminal charge was insufficient in law?

In our opinion the record of the criminal proceedings in the court in Idaho was not evidence to establish or disprove any of the material facts involved in the civil action.

In support of the contrary view counsel have cited *Coffey* v. *United States*, 116 U. S. 436, 443, 444 [29: 684, 687]. That was a libel on behalf of the government, in the circuit court of the United States for the district of Kentucky, against certain personal property as being *forfeited* to the United States *on account of the violation of certain statutes*. It contained three counts based, respectively, on U. S. Rev. Stat. title, *Distilled Spirits*, §§ 3257, 3450 3453. Coffey filed a claim to most of that property, as well as an answer to the information, in which he denied the allegations of each count. He made defense also on these specific grounds: That before the institution of the proceedings for forfeiture of the personal property, a criminal information was filed against him in the same court, the counts of which information were based upon U. S. Rev. Stat. §§ 3256, 3257, 3296, 3450, 3453, or on some one or more of them; that such counts contained the same charges, in substance and effect, and embraced the same matters, things, and frauds, that were set out and charged in the libel against the personal property therein described; and that upon the trial of the criminal information he was found not guilty, and by the judgment of the court was acquitted of the charges of fraud and attempts at fraud therein alleged, which were the same frauds as were alleged in the libel. To this part of the answer a demurrer was sustained upon the ground that the facts stated were not sufficient to constitute a defense. But this court held that as the demurrer to the answer admitted that the fraudulent acts and attempts to defraud, alleged in the criminal information and covered by the verdict and **185**]*judgment in the criminal case, embraced all the acts, attempts, and intents averred in the libel for the forfeiture of Coffey's personal property, the judgment of acquittal in the criminal case was a bar to the proceeding by libel. This court said: "Where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt; and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States in the suit *in rem*. Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant. When an acquittal in a criminal prosecution in behalf of the government is pleaded or offered in evidence, by the same defendant, in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same; and often for the additional reason that a certain intent must be proved to support the indictment, which need not be proved to support the civil action. But upon this record, as we have already seen, the parties and the matter in issue are the same."

After referring to the case of *Gelston* v. *Hoyt*, 16 U. S. 3 Wheat. 246 (4: 381),—in which it was adjudged that a sentence of acquittal, accompanied by a denial of a certificate of probable cause, in a proceeding by a libel against a vessel for an alleged offense, was conclusive *evidence that no forfeiture was [**186** incurred, and that the same question could not be re-examined in an action of trespass against the collector and surveyor for seizing the vessel,—the court said: "This doctrine is peculiarly applicable to a case like the present, where, in both proceedings, criminal and civil, the United States is the party on one side and this claimant the party on the other. The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts. This is a necessary result of the rules laid down in the unanimous opinion of the judges in the case of *Rex* v. *Duchess of Kingston*, 20 How. St. Tr. 355, 358, and which were formulated thus: The judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, between the parties, upon the same matter, directly in question in another court; and the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question in another court for a different purpose. In the present case the court is the same court, and had jurisdiction, and the judgment was directly on the point now involved and between the same parties."

We are of opinion that the present case is

not covered by the decision in *Coffey* v. *United States*, 116 U. S. 436, 443, 441 [29: 684, 687]. The judgment in that case was placed distinctly upon the ground that the facts ascertained in the criminal case, as between the United States and the claimant, could not be "again litigated between them, *as the basis of any statutory punishment* denounced as a consequence of the existence of the facts." In the *Coffey Case* there was no claim of the United States to property, except as the result of forfeiture. In support of its conclusion, the 187]court *referred to *United States* v. *McKee*, 4 Dill. 128, observing that the decision in that case was put on the ground "that the defendant could not be twice *punished* for the same crime, and that the former conviction and judgment was a bar to the suit *for the penalty*."

The present action is unlike that against Coffey. This is not a suit to recover a penalty, to impose a punishment, or to declare a forfeiture. The only relief sought here is a judgment for the value of property wrongfully converted by the defendant. The proceeding by libel against Coffey, although civil in form, was penal in its nature, because it sought to have an adjudication of the forfeiture of his property for acts prohibited. It was, as we have seen, a case in which a punishment, denounced by statute, was sought to be inflicted as a consequence of the existence of facts that were in issue and had been finally determined against the United States in a criminal proceeding. The nature of the proceeding against Coffey, and the scope of the decision in that case, were recognized in *Boyd* v. *United States*, 116 U. S. 616, 634 [29: 746, 752], where the court said: "As showing the close relation between civil and criminal proceedings on the same statute in such cases, we may refer to the recent case of *Coffey* v. *United States*, in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the *forfeiture* of goods, arising upon the same acts. As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the 4th Amendment of the Constitution, and of that portion of the 5th Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the 5th Amendment to the Constitution, and is the equivalent of a search and seizure, and unreasonable search and seizure, within the mean 188]ing of *the 4th Amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose." Again in *Lees* v. *United States*, 150 U. S. 476, 480 [37: 1150, 1151], which was an action to recover a penalty for importing an alien under contract to perform labor, this court said: "This, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself."

In the present case the action against Stone is purely civil. It depends entirely upon the ownership of certain personal property. The rule established in *Coffey's Case* can have no application in a civil case not involving any question of criminal intent or of forfeiture for prohibited acts, but turning wholly upon an issue as to the ownership of property. In the criminal case the government sought to punish a criminal offense, while in the civil case it only seeks in its capacity as owner of property, illegally converted, to recover its value. In the criminal case his acquittal may have been due to the fact that the government failed to show, beyond a reasonable doubt, the existence of some fact essential to establish the offense charged, while the same evidence in a civil action brought to recover the value of the property illegally converted might have been sufficient to entitle the government to a verdict. Not only was a greater degree of proof requisite to support the indictment than is sufficient to sustain a civil action, but an essential fact had to be proved in the criminal case, which was not necessary to be proved in the present suit. In order to convict the defendant upon the indictment for unlawfully, wilfully, and feloniously cutting and removing timber from lands of the United States, it was necessary to prove a criminal intent on his part, or, at least, that he knew the timber to be the property of the United States. *Reg.* v. *Cohen*, 8 Cox, C. C. 41; *Reg.* v. *James*, 8 Car. & P. 131; *United States* v. *Pearce*, 2 McLean, 14; *Cutter* v. *State*, 36 N. J. L. 125, 126. But the present action for the conversion of the timber would be supported by proof that it was in fact the property *of the United States, whether the de- 189 fendant knew that fact or not *Bolles Woodenware Co.* v. *United States*, 106 U. S. 432 [27: 230]. An honest mistake of the defendant as to his title in the property would be a defense to the indictment, but not to the civil action. Broom, Legal Maxims, 5th ed. 366, 367. It cannot be said that any fact was conclusively established in the criminal case, except that the defendant was not guilty of the public offense with which he was charged. We cannot agree that the failure or inability of the United States to prove in the criminal case that the defendant had been guilty of a crime, either forfeited its right of property in the timber or its right in this civil action, upon a preponderance of proof, to recover the value of such property.

2. As heretofore stated, the two actions were consolidated by an order of the trial court. After twelve jurors were selected (the challenges for cause having been determined) the court directed the respective parties to proceed with their peremptory challenges. Thereupon Stone and Noonan, claiming that they were entitled to challenge peremptorily, in each case, three jurors, and announcing that they desired to challenge Giffin in the case against Stone, Noonan, and Kegler, peremptorily challenged him as a juror, although they had already challenged three jurors in the consolidated cases. The court denied the challenge, and the defendants excepted. This ruling of

the court is now assigned for error. But there is no merit in the objection. The case here is the one against Stone alone. In that case the defendant had the benefit of the three peremptory challenges made before the challenge of Giffin. In the other case the judgment was arrested and the verdict was set aside. If the court committed any error in not allowing the challenge of Giffin in the case against Stone, Noonan, and Kegler, that error did not prejudice Stone in the present case.

4. By the act of March 3, 1875 (18 Stat. at L. 482, chap. 152), Congress granted the right of way through the public lands of the United States to any railroad company duly organized under the laws of any territory, except in the District of Columbia, or by the Congress of the 190] United States, which shall have *filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of 100 feet on each side of the central line of the road; "also the right to take from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad."

At the trial the defendant offered as evidence "the appointment of the plaintiff in error, John H. Stone, as agent for the Central Washington Railroad Company and of the Spokane & Palouse Railway Company, claiming that said corporations having been organized under the laws of the territory of Washington and having filed their articles of incorporation and proofs of organization with the Department of the Interior, which has approved the same, were authorized by the laws of the United States to take the timber included in this action, and such taking by them through their agent was not unlawful, the proof showing "that the ties which are sued for in this action were used by the said railroad companies in the construction of their said roads." This evidence was excluded and its exclusion is assigned for error. It appears from the record, as stated in the opinion of the circuit court of appeals, that no timber fit for ties was found along the line of either of these roads; that both of them penetrated a barren region almost entirely destitute of timber, and that the timber was cut from lands along the line of the Northern Pacific Railroad about 50 miles distant from the eastern end of the other roads, which was the nearest point where available timber could be found.

The trial court, in its charge, thus interpreted the above act of 1875: "The act of Congress under which this claim is made does not undertake to provide the materials necessary for the building of railroads. It does not provide that, if there is not any timber convenient, or within a convenient distance to the building and construction of a new railroad, the railroad company has a right to require the United States to provide them with material, or go upon distant lands and procure the material that they require. That is not the scope of the law, and so I have decided that 'adjacent lands' means 191] *lands in proximity to, contiguous to, or near to the road, and that lands so far distant from the railroad and mentioned as the lands in Kootenai county, Idaho, where it is claimed that railroad ties were cut, were not adjacent lands within the meaning of the law." That takes the whole question and the whole subject-matter of that claim from your consideration, and releases you from any consideration in regard to it.

We concur with the circuit court of appeals in adjudging this to be a sound interpretation of the act of 1875. It is substantially the view expressed in *Denver & R. G. R. Co.* v. *United States*, 34 Fed. Rep. 838, 841, in which Mr. Justice Brewer said: "I certainly do not agree with the idea, which seems to be expressed elsewhere, that the proximity of the lands is immaterial, or that Congress intended to grant anything like a general right to take timber from public land where it was most convenient. The grant was limited to adjacent lands, and I do not appreciate the logic which concludes that, if there be no timber on adjacent lands, the grant reaches out and justifies the taking of timber from distant lands,—lands 50 or 100 miles away." Under this interpretation of the act of Congress, and under the facts of this case, it is clear that the timber was not taken from lands which, within the true meaning of that act, were adjacent to either of the roads in the construction of which it was used.

5. One of the principal matters contested at the trial was whether the lands were public lands of the United States in any sense that would entitle the government to claim that it owned the timber taken from them. The defendant introduced evidence to show that certain individuals had acquired the lands under the laws of the United States, and were in the exercise of their rights when cutting timber from them.

Upon this general subject the court instructed the jury, in substance, that the United States was the primary source of title to all of the lands in the state of Idaho, and where individuals have acquired ownership they have done so by grant or conveyance from the government; that in a case where there was no evidence of transfer from the United States of *title it is to be taken that the title is still 192] in the United States; that as to all the lands in which the title is in the government the timber and trees standing and growing on them are part of the land, the title of the United States to the trees being the same as its title to the soil; that when trees on such lands are cut down without authority of law the right of property in the timber after it is severed from the realty still remains in the government, and if anyone without license from the government or without authority of law takes the timber from the land he commits a trespass against the government; that no person can acquire title to the timber so cut by buying it from an individual, unless it appears that that individual in cutting and removing it from the lands had license or lawful authority to do so; that under the laws in force during the time referred to in the pleadings and evidence, any person desiring any part of the lands known as public lands must prove that it was for his own exclusive use and benefit and for the purpose of residing upon and cultivating it, thus carrying into effect the policy of the government in giving public lands to the people who need them and would cultivate and use them so as to cause the greatest bene-

fit to the country; that any settler going upon a tract of land with that intention goes by invitation of the government, and with the authority to improve the land and make it fit for use; that he is authorized to cut down the timber which he finds standing there (if it encumbers the ground) so far as was necessary to do so in order to make the land fit for cultivation; that any timber that he does so cut down in good faith and for the purpose of improving the land, he being a bona fide settler intending to acquire title in accordance with the laws, is not the property of the United States, but becomes his property after being so cut down, and that he may burn it up or he may sell it for money, and if he sells it under the conditions named the man who buys it from him gets a good title, and is not required to pay the United States for it afterwards; that the converse of that proposition was true, and where a man cuts timber off the public lands, unless he is a bona fide settler intending to acquire **193**] title to the lands by *obedience to the laws of the United States, he does so unlawfully, and does not make himself the owner of the timber by cutting it; and that even a settler who takes up a claim on public lands intending to perfect his right to it has no right, until he has perfected his claim, to cut the timber, except so far as it is necessary and reasonable to prepare so much of the lands for cultivation as he intends to cultivate.

The court proceeded in its charge: "A man of limited means who goes upon a claim and is able during the first year to cultivate only a few acres is only authorized to cut the timber off the few acres that he intends to cultivate and is able to cultivate. If he cuts down the timber of 40 acres, it should be pursuant to a definite plan that the plow shall follow the axe, and that the entire 40 acres shall be put to use for the purpose of cultivation or in such manner as a farmer makes use of land that is tillable land. The balance of the timber on the 160 acres, if it is a timbered claim, a claim covered with timber, should remain as a preserve, a timber preserve, for the future benefit of the land, and should be removed only so fast as the settler finds necessary to remove it in order to put in cultivation the lands he means to cultivate and intends to cultivate in good faith. But a man whose primary purpose is to cut the timber on a piece of land is no more authorized to go and cut that timber by reason of his having filed in the land office a declaration of his intention to take the land under the pre-emption law, than if he goes and cuts it without filing any declaration. Unless the declaration is an honest declaration and is supported by compliance with the requirements of the law, by making a home upon the land, actually living upon it and actually proceeding in the regular way by regular process of improving the land and putting it in cultivation, and until he has perfected his right by full compliance with the law, he has no right to cut down and sell the timber on other portions of the land which he is not intending to immediately put into cultivation. . . . As between the government and the settler, the title to the land until the conditions of the law are **194**] fulfilled remains in the United States, *but in the meantime if the settler is engaged in improving the land as required by law, and disposes of any surplus timber without intent to defraud the government, and the purchaser buys the timber under the belief that there is no intent or purpose to defraud the government, the sale is lawful and the purchaser is protected. The fact that claimants to lands under the homestead and pre-emption laws after occupation for a time abandon the lands is not alone proof that they intended to defraud the government, although in the meantime they have cut and sold the timber from the lands during the occupation, but the jury should judge of the intent of the parties so acting by all the circumstances surrounding each case, and if these circumstances satisfy the jury that the claimants of the land were acting in good faith at the time they sold the timber, and the purchaser had no reasonable grounds to believe otherwise, then such sale would be lawful."

It is not, in our judgment, necessary to add anything to this clear and satisfactory statement of the law as applicable to the matters referred to by the trial court. They are in accord with the views of this court as expressed in *Shiver* v. *United States*, 159 U. S. 491, 497, 498 [40: 231, 232, 233]. See also *United States* v. *Cook*, 86 U. S. 19 Wall. 591 [22: 210]. The objections made at the trial (and repeated here) to what was said to the jury on this part of the case were not well taken. They could not be sustained without encouraging depredations upon the public lands under the guise of establishing settlements upon them in accordance with the liberal policy of the government.

6. The only other question that we deem necessary to consider is that presented by the assignment of error, which states that the court erred "in giving any instructions to the jury on Sunday, because it had no power to do any judicial act save to receive the verdict and discharge the jury, and all such instructions given to the jury were without authority."

The facts upon which this assignment was made were these: The jury retired on Saturday, April 22, 1893, to consider of their verdict. On the succeeding day, Sunday, in conformity *with the order of the judge, without any [**195** request by the jury and without any consent asked or given by the defendant, they came into court, both parties being present by counsel. The court then read the special questions to which reference has been made in the statement of this case, and requested the jury to answer them in addition to their general verdict. Although asked by counsel to do so, the court declined to instruct the jury upon matters covered by its charge of the previous day. A juror having inquired whether the jury were allowed to sign a verdict on Sunday, the court replied: "Yes; and when you have come to an agreement, send for me and I will receive your verdict." The verdict was returned into open court on the same day. On the succeeding day the defendant asked to have the benefit of an exception to the jury having been sent out and to the receiving of the verdict on Sunday. The court did not directly allow the exception, but expressed its willingness to sign a bill of exceptions, reciting facts as they occurred. The judgment on the verdict for

$19,000 was entered on the Friday succeeding the day on which the verdict was returned.

There is no statute of the United States making Sunday *dies non juridicus*. But by the statutes of the state of Washington, where this case was tried, it is provided that the common law, so far as was not inconsistent with the Constitution and laws of the United States, or the state of Washington, nor incompatible with the institutions and conditions of society in that state, shall be the rule of decision in all its courts. 2 Hill's (Wash.) Gen. Stat. and Codes, § 108. This statute is applicable in the courts of the United States sitting in the state of Washington, and furnishes a rule of decision in trials at common law in cases where it applies. U. S. Rev. Stat. § 721. Tested by the principles of the common law, Was the judgment under review void because the verdict of the jury was received by the court on Sunday? Whatever may be said as to the right of the court on Sunday to have delivered to the jury the special questions to be answered by them, the general verdict was not a nullity by reason [196] of its being *received or recorded on Sunday. While many cases hold that a *judgment* entered on Sunday is absolutely void, the receiving and entering of a verdict cannot be questioned upon the ground that those things occurred on Sunday. It was substantially so held in *Ball* v. *United States*, 140 U. S. 131 [35: 383], citing *Mackalley's Case*, 5 Coke, 111; *Swann* v. *Broome*, 3 Burr. 1595; *Baxter* v. *People*, 3 Gilm. 368, 386; and *Chapman* v. *State*, 5 Blackf. 111. See also *Pearce* v. *Atwood*, 13 Mass. 347; *Frost* v. *Hull*, 4 N. H. 153, 156; *Nabers* v. *State*, 6 Ala. 200, 201; *Story* v. *Elliott*, 8 Cow. 27 [18 Am. Dec. 423]; *Ex parte White*, 15 Nev. 146; *Hoghtaling* v. *Osborn*, 15 Johns. 119.

Having noticed all the matters in the record that we deem important, and perceiving no error of law to the prejudice of the substantial rights of the defendant, *the judgment is affirmed.*

TWIN CITY NATIONAL BANK OF NEW BRIGHTON, *Plff. in Err.*,

v.

ENOS H. NEBEKER.

(See S. C. Reporter's ed. "*Twin City Bank* v. *Nebeker*," 196–204.)

National currency act, not a revenue bill.

An act of Congress providing a national currency secured by a pledge of bonds of the United States, and which in the furtherance of that object, and also to meet the expenses attending the execution of the act, imposed a tax on the notes in circulation of the banking associations organized under the statute, is not a revenue bill which under the Constitution must originate in the House of Representatives.

[No. 202.]

Argued and Submitted April 21, 1897. Decided May 10, 1897.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment affirming a judgment of the Supreme Court of that District in favor of defendant in an action brought by Twin City National Bank, plaintiff, to recover moneys alleged to have been paid under protest to Enos H. Nebeker, Treasurer of the United States. *Affirmed.*

See same case below, 22 Wash. L. Rep. 256.

The facts are stated in the opinion.

Mr. **John J. Crawford** for plaintiff in error.

Mr. Holmes Conrad, Solicitor General, for defendant in error.

The court declined to hear the counsel for defendant in error.

*Mr. Justice **Harlan** delivered the [197 opinion of the court:

This was an action by the plaintiff in error to recover from the defendant in error the sum of $73.08 alleged to have been paid by the former under protest to the latter, who was at the time Treasurer of the United States, in order to procure the release of certain bonds, the property of the bank, which bonds, the declaration alleged, were illegally and wrongfully withheld from the plaintiff by the defendant.

The plaintiff went into liquidation in the manner provided by law on the 23d of June, 1891, and on the 25th of August, 1891, deposited in the Treasury of the United States lawful money to redeem its outstanding notes, as required by U. S. Rev. Stat. § 5222. After making such deposit, the bank demanded the bonds which had been deposited by it to secure its circulating notes, and of which defendant had possession as Treasurer of the United States. The defendant refused to deliver them, unless the bank would make a return of the average amount of its notes in circulation for the period from January 1, 1891, to the date when the deposit of money was made, *viz.*, the 25th of August, 1891, and pay a tax thereon. The bank then made a return of the average amount of its notes in circulation for the period from January 1, to June 30, 1891, and paid to the defendant $56.25, protesting that he had no authority to demand the tax, and delivered to him a protest in writing setting forth that in making the return and in paying the tax it did not admit the validity of the tax or defendant's authority to exact or collect it, but made the return and payment solely for the purpose of procuring the possession of the United States bonds belonging to it, which defendant had refused to release until such return and payment were made, and further protesting that it was not liable to the tax or any part of it. The bank's agent then made another demand upon defendant for the bonds; but he refused to deliver them until a return should be made of the average amount of its notes in circulation for the period from July 1, to August 25, 1891, and a tax paid *thereon. [198 Its agent then delivered such return to defendant and paid him $16.83, at the same time delivering a written protest in the same form as the one above mentioned. These transactions were with the defendant himself, and the money was paid to him in person.

The journals of the House of Representatives and Senate of the United States for the first

NOTE.—*As to construction of statutes; journals of the legislature; views of individual members; motive of legislature; fraud in passage,*—see note to Blake v. National City Bank, 23: 119.

session of the 38th Congress were put in evidence by plaintiff. The bank claims that these journals show that the national bank act originated as a bill in the House of Representatives; that when it passed the House it contained no provision for a tax upon the national banks, or upon any corporation, or upon any individual, or upon any property, nor any provisions whatever for raising revenue; and that all the provisions that appear to authorize the Treasurer of the United States to collect any tax on the circulating notes of national banks originated in the Senate by way of amendment to the House bill.

A witness on behalf of the defendant testified, against the objection of plaintiff, that the money paid by it to him was covered into the Treasury, and applied to the payment of the semi-annual duty or tax due from the bank. But it did not appear whether this was done before or after the present action was brought.

At the close of the evidence counsel for the bank moved the court to direct the jury to return a verdict in its favor, which motion the court overruled, and counsel for the bank excepted. On motion of the defendant the court instructed the jury to return a verdict for him. To that ruling of the court counsel for plaintiff excepted.

Such is the case which the bank insists is made by the record.

The taxing provisions contained in the national bank act are found in its 41st section. That section is as follows:

"The plates and special dies to be procured by the Comptroller of the Currency for the printing of such circulating notes shall remain under his control and direction, and the expenses necessarily incurred in executing the provisions of this act respecting the procuring of [199] such notes, and all other *expenses of the bureau, shall be paid out of the proceeds of the taxes or duties now or hereafter to be assessed on the circulation, and collected from associations organized under this act. And in lieu of all existing taxes, every association shall pay to the Treasurer of the United States, in the months of January and July, a duty of ½ of 1 per cent each half year from and after the 1st day of January, 1864, upon the average amount of its notes in circulation, and a duty of ½ of 1 per cent each half year upon the average amount of its deposits, and a duty of ½ of 1 per cent each half year, as aforesaid, on the average amount of its capital stock beyond the amount invested in United States bonds; and in case of default in the payment thereof by any association, the duties aforesaid may be collected in the manner provided for the collection of United States duties of other corporations, or the Treasurer may reserve the amount of said duties out of the interest, as it may become due, on the bonds deposited with him by such defaulting association. And it shall be the duty of each association, within ten days from the 1st days of January and July of each year, to make a return, under the oath of its president or cashier, to the Treasurer of the United States, in such form as he may prescribe, of the average amount of its notes in circulation, and of the average amount of its deposits, and of the average amount of its capital stock, beyond the amount invested in United States bonds, for the six months next preceding said 1st days of January and July as aforesaid, and in default of such return, and for each default thereof, each defaulting association shall forfeit and pay to the United States the sum of $200, to be collected either out of the interest as it may become due such association on the bonds deposited with the Treasurer, or, at his option, in the manner in which penalties are to be collected of other corporations under the laws of the United States; and in case of such default the amount of the duties to be paid by such association shall be assessed upon the amount of notes delivered to such association by the Comptroller of the Currency, and upon the highest amount of its deposits and capital *stock, to be as [200] certained in such other manner as the Treasurer may deem best: *Provided*, That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state: *Provided, further*, That the tax so imposed under the laws of any state upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located: *Provided, also*, That nothing in this act shall exempt the real estate of associations from either state, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed." 13 Stat. at L. 99, 111, chap. 106.

The provision relating to taxation which, it is alleged, was inserted by way of amendment in the Senate, appears as U. S. Rev. Stat. § 5214. Other provisions of the act of 1864 are reproduced in U. S. Rev. Stat. §§ 5217, 5218.

By § 5222 of the Revised Statutes it is provided: "Within six months from the date of the vote to go into liquidation, the association shall deposit with the Treasurer of the United States lawful money of the United States sufficient to redeem all its outstanding circulation. The treasurer shall execute duplicate receipts for money thus deposited, and deliver one to the association and the other to the Comptroller of the Currency, stating the amount received by him, and the purpose for which it has been received; and the money shall be paid into the Treasury of the United States and placed to the credit of such association upon redemption account."

In *Field* v. *Clark*, 143 U. S. 649, 672 [36: 294, 303],—in which the constitutionality of the act of Congress of October 1, 1890 (26 Stat. at L. 567, chap. 1244), was questioned upon the ground that a *certain provision which [201 was in it upon its final passage was omitted when the bill was signed by the Speaker of the House of Representatives and the President of the Senate,—this court said: "The signing by the Speaker of the House of Representatives and by the President of the Senate, in open session, of an enrolled bill, is an official attesta-

tion by the two Houses of such bill as one that has passed Congress. It is a declaration by the two Houses, through their presiding officers, to the President, that a bill thus attested has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable. As the President has no authority to approve a bill not passed by Congress, an enrolled act in the custody of the Secretary of State and having the official attestations of the Speaker of the House of Representatives, of the President of the Senate, and of the President of the United States, carries on its face a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Congress. The respect due to coequal and independent departments requires the judicial department to act upon that assurance and to accept, as having passed Congress, all bills authenticated in the manner stated, leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."

Referring to the above case it was said in *Harwood* v. *Wentworth*, 162 U. S. 547, 560 [40: 1069, 1073], that if the principle announced in *Field* v. *Clark* involved any danger to the public, it was competent for Congress to meet it by declaring under what circumstances, or by what kind of evidence, an enrolled act of Congress or of a territorial legislature, authenticated as required by law, and in the hands of the officer or department to whose custody it was committed **202**] by statute, may be shown *not to be in the form in which it was when passed by Congress or by the territorial legislature.

The contention in this case is that the section of the act of June 3, 1864, providing a national currency secured by a pledge of United States bonds, and for the circulation and redemption thereof, so far as it imposed a tax upon the average amount of the notes of a national banking association in circulation, was a revenue bill within the clause of the Constitution declaring that "all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills," art. 1, § 7; that it appeared from the official journals of the two Houses of Congress that while the act of 1864 originated in the House of Representatives, the provision imposing this tax was not in the bill as it passed that body, but originated in the Senate by amendment, and, being accepted by the House, became a part of the statute; that such tax was therefore unconstitutional and void, and that consequently the statute did not justify the action of the defendant.

The case is not one that requires either an extended examination of precedents, or a full discussion as to the meaning of the words in the Constitution, "bills for raising revenue." What bills belong to that class is a question of such magnitude and importance that it is the part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject. It is sufficient in the present case to say that an act of Congress providing a national currency secured by a pledge of bonds of the United States, and which, in the furtherance of that object, and also to meet the expenses attending the execution of the act, imposed a tax on the notes in circulation of the banking associations organized under the statute, is clearly not a revenue bill which the Constitution declares must originate in the House of Representatives. Mr. Justice Story has well said that the practical construction of the Constitution and the history of the origin of the constitutional provision in question proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create *revenue. 1 Story, Const. § 880. The [**203** main purpose that Congress had in view was to provide a national currency based upon United States bonds, and to that end it was deemed wise to impose the tax in question. The tax was a means of effectually accomplishing the great object of giving to the people a currency that would rest, primarily, upon the honor of the United States, and be available in every part of the country. There was no purpose by the act or by any of its provisions to raise revenue to be applied in meeting the expenses or obligations of the government.

This interpretation of the statute renders it unnecessary to consider whether, for the decision of the question before us, the journals of the two Houses of Congress can be referred to for the purpose of determining whether an act, duly attested by the official signatures of the president of the Senate and speaker of the House of Representatives, and the President, and which is of record in the State Department as an act passed by Congress, originated in the one body or the other. And for the reasons stated, it is not necessary to inquire whether, in any view of the case, the defendant would have been personally liable for the tax collected by him pursuant to the act of Congress, and subsequently covered into the Treasury.

Judgment affirmed.

Mr. Justice White concurs in the result.

LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT
v.
JAMES N. HUSTON.

(See S. C. Reporter's ed. "*Lumberman's Bank* v. *Huston*," 203, 204.)

Twin City National Bank v. *Nebeker*, *ante*, 134, followed.

[No. 203.]

Argued April 21, 1897. Decided May 10, 1897.

IN ERROR to the Court of Appeals of the District of Columbia, to review a judgment affirming a judgment of the Supreme Court of that District in favor of the defendant James N. Huston, in an action brought by the Lumberman's National Bank for the conversion of certain money of the plaintiff. *Affirmed.*

Mr. **John J. Crawford** for plaintiff in error.

Mr. **Holmes Conrad,** Solicitor General, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The most favorable view of this case for the plaintiff in error is to regard it as presenting **204**] the same question that was *determined in *Twin City Nat. Bank* v. *Nebeker*, just decided [*ante*, 134]. For the reasons stated in the opinion in that case *the judgment is affirmed.*

Mr. Justice **White** concurs in the result.

J. E. TINDAL and J. R. Boyles, *Plffs. in Err.*,
v.
EDWARD B. WESLEY.

(See S. C. Reporter's ed. 204–224.)

Right to possession of land—purchase not fraudulent — action against officers, when not against the state—judgment, when not conclusive.

1. The right to possession of land under legal title passed by a valid deed from the commissioners of the sinking fund of South Carolina, containing no reservation of possession, is not impaired by the circumstance that the grantee bought it without intending to pay the deferred instalments of the purchase price in money, but intended to insist upon paying them in revenue bond scrip.

2. The purchase of land from the state, with the concealed purpose of tendering in payment some revenue bond scrip in order to have judicial determination of the question of its validity, is not in any legal sense a fraud which will justify the state officers in withholding possession from the grantee after they convey to him the legal title.

3. An action brought against individuals to recover the possession of land of which they have actual possession and control is not to be deemed an action against the state, within the meaning of the 11th Amendment of the Federal Constitution, simply because those individuals claim to be in rightful possession as officers or agents of the state, and assert title and right of possession in the state.

4. A judgment for the possession of real property, rendered against an individual claiming to hold as a state officer, is not conclusive against the state when that is not a party to the suit.

[No. 231.]

Argued March 25, 1897. Decided May 10, 1897.

WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the District of South Carolina in favor of the plaintiff, Edward B. Wesley, against the defendants Tindal and Boyles, for the recovery of the possession of certain real property in the city of Columbia, South Carolina. *Affirmed.*

See same case below, 25 U. S. App. 124.

The facts are stated in the opinion.

Messrs. **William A. Barber,** *Samuel W. Melton*, and *Henry N. Obear* for plaintiffs in error.

Mr. **William H. Lyles** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

Wesley, a citizen of New York, brought this action in the circuit court of the United States against Tindal and Boyles, citizens of South Carolina, to recover the possession of certain real property in the city of Columbia, South Carolina, with damages for withholding such possession, as well as the value of the use and occupation of the premises.

The complaint alleged that on the 16th day of February, 1892, the plaintiff purchased from the commissioners of the sinking fund of South Carolina two certain parcels of land in the city of Columbia in that state, on one of which is a building known as Agricultural Hall—the lots being the same conveyed to the state by deed of J. B. Johnston, dated April 9, 1883, and duly recorded;

That on the day of the purchase, the premises, by the direction and appointment of the plaintiff, were conveyed by the commissioners to J. W. Alexander, to hold the same "in trust for the use of the plaintiff, his heirs and assigns, forever, and to permit the plaintiff to have and possess the same and to enjoy the profits, and in trust to convey the same to the plaintiff, his heirs and assigns, or such persons as he might direct and appoint;"

That upon the request of the plaintiff, J. W. Alexander, by deed dated the 11th day of February, 1893, conveyed the premises in fee simple to the plaintiff;

*That the plaintiff, "being so possessed [**206** thereof, the defendants, on the 20th day of February, 1892, wrongfully entered into said premises and ousted the plaintiff, and that the defendants are, and ever since the said 20th day of February, 1892, have been, in possession of said premises, and have been and still are withholding the same from the plaintiff, although plaintiff has demanded from the defendants the possession thereof, to the damage of the plaintiff $10,000;" and

That the value of the use and occupation of the premises was at least $2,500 per annum.

The plaintiff demanded judgment against the defendants for the possession of the premises; for $10,000, as damages for withholding the same; for the value of the use and occupation of the premises after February 20, 1892, at the rate of $2,500 per annum, and for the costs and disbursements of the action.

NOTE.—*As to when a judgment at law in ejectment will be enjoined by a bill in equity*, see note to Davis v. Tileston, 12: 366.

That court will not restore possession on payment of the rent, see note to Smith v. Trabue, 9: 30.

As to requisites of adverse possession, see notes to Ricard v. Williams, 5: 398, and Ewing v. Burnet, 9: 624.

As to fraud and undue influence in avoidance of deed or will, see note to Harding v. Handy, 6: 429.

As to fraud as a plea to judgment of another state, see note to Christmas v. Russell, 18: 475.

The defendant Tindal answered, and for his first defense denied each and every allegation of the complaint. For a second defense he alleged that on the 20th day of February, 1892, he was, and thereafter continued to be, and was at the beginning of this action, the secretary of state of South Carolina; that the premises described in the complaint on the above date were, and thereafter continued to be, and now are, the property of the state, in its possession, and in actual public use; and that he "has no right, title, interest, or estate to or in the said premises, of any kind whatever, but that in pursuance of law the same is in the custody of this defendant as said secretary of state."

The defendant Boyles made the same defenses as his codefendant Tindal, and further alleged that he had "no right, title, interest, or estate of any kind to or in the said premises, but that by the employment of the said J. E. Tindal as secretary of state, this defendant has been and now is engaged, on behalf of the said state, in watching, guarding, and taking care of the said premises."

The jury found for the plaintiff the possession of the land described in the complaint, and [207] judgment for such possession *was entered in his favor. This was followed by an execution commanding the United States marshal or his deputies to deliver possession of the property to the plaintiff.

That judgment was affirmed by the circuit court of appeals. *Tindal* v. *Wesley*, 25 U. S. App. 124. The case is in this court upon writ of certiorari directed to that court.

1. The bill of exceptions shows that W. H. Lyles was a witness on behalf of the plaintiff, and while under cross-examination gave the following testimony:

"*Q.* You and Mr. Muller went out of the state treasurer's office and almost immediately returned. Now what occurred between the state treasurer on the one hand and Mr. Muller and yourself on the other? *A.* We returned within five minutes. I think within two minutes. We called the state treasurer's attention to the fact that the bond, which had been delivered by us for Alexander, contained a clause which authorized him to anticipate of it at any time, and we told him, on behalf of Mr. Alexander, we desired to pay that bond and mortgage immediately. We then drew out the revenue bond scrip, known as the Blue Ridge Railroad scrip, which we counted out to the amount of a few cents or dollars in excess of the amount due on the bond and mortgage from its date up to the date of this transaction, and we told Dr. Bates we tendered him that in payment of the bond and mortgage. We demanded no receipt, we demanded nothing. *Q.* And it was refused? *A.* Yes, the advertisement was not referred to. *Q.* Was it not the purpose of the transaction to create an issue in the United States court, in order to test the validity of the revenue bond scrip; was not that the object of the purchase? *A.* The object of the purchase from the beginning was to create an issue as to the validity of the revenue bond scrip, but as to the United States circuit court we were not —— *Q.* Then when you bought it you did not intend to pay for it in good money? *A.* We did, and considered the scrip as good money. *Q.* When you made the purchase, you made it with a view of compelling the state to take the deferred payment of it in revenue bond scrip? *A.* Yes. *Q.* *Did you happen to know whether the [208] revenue bond scrip had any value in the market? *A.* I don't know. *Q.* It has not? *A.* I don't know that it has. *Q.* Very little if any? *A.* Yes. *Q.* You know Alexander? *A.* Yes, I have never seen him personally. *Q.* Do you know him as a poor man? *A.* Yes. *Q.* He and Mr. Wesley had no use for this property that you know of except to create the issue to which you have referred? *A.* That was the sole object for which it was purchased. Mr. Wesley regarded the property as worth the money, and even if he had to pay he would not lose the money. *Q.* Mr. Wesley holds a large block of revenue bond scrip? *A.* Yes."

The court excluded this testimony and the defendants duly excepted to its ruling. That ruling is the subject of one of the assignments of error.

It is claimed that the excluded testimony tended to show that Alexander and Wesley intended, from the outset, to make the payment of the deferred instalments of purchase money in "revenue bond scrip, known as Blue Ridge Railroad scrip;" that by the terms of the contract the purchaser was entitled to anticipate the payment of the deferred purchase money; and that as soon as Alexander received the alleged conveyance from the commissioners of the sinking fund he attempted to discharge the bond and mortgage given to secure the unpaid purchase money by tendering in payment "revenue bond scrip." But all this was immaterial under the issue in this case as to the right of possession of the premises. If the legal title passed by a valid deed from the commissioners of the sinking fund then the right of the grantee to possession was not impaired by the circumstance that he intended to insist upon paying the deferred instalments of purchase money in revenue bond scrip. Whether he was entitled to make payment in such scrip was a question to be finally determined when suit was brought to foreclose the mortgage given to secure the payment of the balance of the purchase price. But the possibility or even certainty that such a dispute would arise constituted no reason for refusing possession if the conveyance to Alexander was valid and passed the legal title, *without any reservation by the grantors [209] of the right to retain possession until the whole purchase price was paid.

Throughout the argument of counsel for defendants it is assumed that the purpose on the part of both Alexander and Wesley to tender revenue bond scrip in payment of the deferred instalments was, in itself, a fraud that entitled the commissioners of the sinking fund to withhold possession after conveying the legal title. We cannot concur in this view. If under the law of the state the scrip referred to could be used in meeting any obligations due to it, how could it be regarded as a fraud to do what the law allowed to be done? Nor was it, in any legal sense, a fraud for Alexander or Wesley to form the purpose of tendering such scrip in payment in order that there might be a judicial determination of the

question of its validity. If the deed had been obtained under assurances that the deferred instalments of purchase price should be paid in money, and not in revenue bond scrip, it may be that the commissioners, in a proper proceeding, could have obtained a rescission of the contract. But upon that point it is unnecessary to express an opinion, as no such case is presented by the record. The case here is one in which the excluded testimony does not tend to show anything more than that Alexander and, perhaps Wesley, did not, during the negotiations for the property or before the deed was obtained, disclose to the commissioners their purpose to use revenue bond scrip, if it could be done, in paying the deferred instalments of purchase money.

The plaintiff insists that the question of fraud or no fraud in the alleged purchase from the commissioners of the sinking fund is not a question in which the defendants have any concern, and could only be raised by the state in a proceeding to which it was a party. We need not stop to consider this question, because we are of opinion that in no view of the case arising upon this record was error committed in excluding so much of the testimony of Lyles as is set forth in the bill of exceptions.

2. At the close of the testimony in the circuit court the defendants raised the question [210] whether this suit was not, in *effect, one against the state, of which the court was prohibited from taking cognizance by the clause of the Constitution declaring that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." 11th Amend. The circuit court held that the suit was not one against the state, and that view was approved by the circuit court of appeals.

It is not claimed, nor could it be claimed, that the commissioners of the sinking fund were without authority to sell the lands in controversy. By an act of the general assembly of the state, approved December 24, 1890, the commissioners were authorized to sell and convey all the right, title, and interest of the state (the same being a title in fee simple) in the building in the city of Columbia, with the lot on which it stands, known as Agricultural Hall; and by the general statutes of South Carolina it was made their duty to sell and convey, for and in behalf of the state, all such real and personal property of the state as was not in actual public use, the sales to be made from time to time, in such manner, and upon such terms, as they may deem most advantageous to the state. S. C. Acts 1890, p. 707; S. C. Gen. Stat. 1882, chap. 5, p. 28, § 63; 1 S. C. Rev. Stat. p. 35, § 85. It is true that by an act approved December 24, 1892, the above act of December 24, 1890, was repealed so far as it authorized and provided for the sale of the lot and building known as Agricultural Hall and the appropriation of the proceeds to Clemson College, and it was provided that if that property had not then been sold and conveyed it should remain unsold, and if sold that the proceeds of sale should be covered into the treasury for the benefit of the state. S. C. Acts 1892, p. 88. But, as already stated, the sale and conveyance by the commissioners occurred before the passage of the repealing act, and were therefore not affected by it.

The parties stipulated that the testimony to be printed in the record should be the evidence given by W. H. Lyles, W. T. C. Bates, and J. E. Tindal. But no part of the testimony *is made a part of the record by a bill of [211] exceptions, except the above questions and answers in the testimony of Lyles. It must therefore be assumed from the record that the plaintiff prior to the bringing of this action had acquired from the commissioners the legal title to the premises in dispute, and was entitled to possession. The bill of exceptions presents no question as to the genuineness or the execution and delivery of the deed to Alexander conveying the premises in trust for Wesley; and in support of the verdict it must be taken that the conveyance referred to in the complaint as having been made by the commissioners of the sinking fund to Alexander was, in fact, properly executed and delivered to the grantee, and that, as alleged in the complaint, Alexander conveyed to Wesley in 1893.

But it appears from the statutes of South Carolina that the secretary of state has charge of all the property of the state, the care and custody of which is not otherwise provided for by law. S. C. Gen. Stat. 1882, chap. 5, p. 27, § 60; 1 S. C. Rev. Stat. p. 34, § 82. He admits in his answer that the property in controversy is in his custody. Boyles, under the employment of the secretary of state, watches, guards, and takes care of it. They are, therefore, in possession within the meaning of the general rule that ejectment will not lie against a person out of possession. Tyler, Ejectment, 411; *Pope* v. *Pendergrast*, 1 A. K. Marsh. 122. The defendants are the actual occupants of the premises. The contention, therefore, of the plaintiffs in error, is that the circuit court erred in not holding, as it was asked to do, that they having no personal interest in the property and being only custodians of it on behalf of the state, a suit to dispossess them and to give possession to the plaintiff was, in effect, a suit against the state.

Of course, it was competent for the defendants to prove that the lots in question belonged to the state, and in that way defeat the present action. So it would have been competent for the state, if it claimed the property, to have intervened, and, submitting to the jurisdiction of the court, to have obtained a judicial determination of the claim asserted for it by the defendants. But it did not intervene. It refused to *do so. It appears from *South Carolina* [212] v. *Wesley*, 155 U. S. 542, 545 [39: 254, 255], that the state, by its attorney general, suggested to the court that these lands were held, occupied, and possessed by the state through and by its officer and agent, and were used for public purposes; and "without submitting the right of the state to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject in controversy," it moved that the proceedings be dismissed. That motion was overruled and a writ of error

sued out by the state was dismissed, the Chief Justice observing: "The state does not complain that it was refused leave to intervene, but that the circuit court, without the intervention of the state, refused merely upon suggestion to dismiss the complaint against the defendants who were sued as individuals. The state was not a party to the record in the circuit court and did not become a party by intervention, *pro interesse suo* or otherwise, but expressly refused to submit its rights to the jurisdiction of the court. This being so, the motion to dismiss may well be sustained on that ground. *United States* v. *Lee*, 106 U. S. 196, 197 [27: 171, 173]; *Georgia* v. *Jesup*, 106 U. S. 458 [27: 216]."

So that the question is directly presented, whether an action brought against individuals to recover the possession of land of which they have actual possession and control is to be deemed an action against the state within the meaning of the Constitution, simply because those individuals claim to be in rightful possession as officers or agents of the state, and assert title and right of possession in the state. Can the court, in such an action, decline to inquire whether the plaintiff is, in law, entitled to possession, and whether the individual defendants have any right, in law, to withhold possession? And if the court finds, upon due inquiry, that the plaintiff is entitled to possession, and that the assertion by the defendants of right of possession and title in the state is without legal foundation, may it not, as between the plaintiff and the defendants, adjudge that the plaintiff recover possession?

We are of opinion that the principles announced by this court in cases heretofore decided furnish an answer to these questions.

213] *The leading case upon the subject is *United States* v. *Lee*, 106 U. S. 196 [27: 171]. It is true that the question there presented was whether the suit was one against the United States within the recognized rule that the government without its consent cannot be sued directly in any court by original process as a defendant. But it cannot be doubted that the question whether a particular suit is one against the state, within the meaning of the Constitution, must depend upon the same principles that determine whether a particular suit is one against the United States.

What was the case of *United States* v. *Lee*? By direction of the Executive Department of the government proceeding, as was supposed, under legislative authority, Kaufman and Strong, as officers and agents of the United States, held possession of certain real estate in Virginia known as Arlington, and constituting a national cemetery in which were interred the remains of Union soldiers. An action was brought by Lee in a circuit court of the United States against Kaufman and Strong to recover possession. The action proceeded upon the ground that the legal title and right of possession were in the plaintiff. The Attorney General of the United States, without submitting the rights of the government to the jurisdiction of the court, suggested in writing that the property in dispute was held, occupied, and possessed by the United States as a military station, through its officers and agents having actual possession for the government, but without any personal interest in it; and, therefore, that the court had no jurisdiction of the subject of the controversy. Upon these grounds he moved that all further proceedings be stayed and dismissed. The motion was denied. The same question was raised by the answers of Kaufman and Strong. There was a verdict and judgment against the defendants.

Although the result of the trial of that case was to show that the plaintiff had title to the premises, and that what was set up by the defendants on behalf of the United States was no title at all, it was contended that the court could render no judgment against the defendants. That there may be no doubt as to what was determined, we give the language of the *court stating the question presented for [**214** its consideration: "The case before us is a suit against Strong and Kaufman, as individuals, to recover possession of property. The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of this suggestion, should proceed no further; and in this case, as in that (*United States* v. *Peters*, 9 U. S. 5 Cranch, 115 [3: 53]), after a judicial inquiry had made it clear that the property belonged to plaintiff, and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States."

After a full examination of the principles upon which rested the exemption of government from suit by individuals, and observing that in view of the essential differences between the American and English governments, in respect of the source and depositaries of power, the decisions of the English courts on this subject were entitled to but little weight, this court, speaking by Mr. Justice Miller, said that an "examination of the cases in this court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, and that in many others where the record shows that the case as tried below actually and clearly presented that defense, it was neither urged by counsel nor considered by the court here, though, if it had been a good defense, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly disposed of the case. And we see no escape from the conclusion that during all this period the court has held the principle to be unsound, and in the class of cases like the present, represented by *Wilcox* v. *Jackson*, *M'Connell*, 38 U. S. 13 Pet. 498 [10: 264]; *Brown* v. *Huger*, 62 U. S. 21 How. 305 [16: 125]; and *Grisar* v. *McDowell*, 73 U. S. 6 Wall. 363 [18: 863],—it was not thought necessary to re-examine a *proposition so often and so [**215** clearly overruled in previous well-considered decisions;" and

That, "conceding that the property in controversy in this case is devoted to a proper public use, and that this has been done by those

having authority to establish a cemetery and a fort, the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and without any compensation. Undoubtedly those provisions of the Constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them. The instances in which the life and liberty of the citizen have been protected by the judicial writ of habeas corpus are too familiar to need citation, and many of these cases, indeed almost all of them, are those in which life or liberty was invaded by persons assuming to act under the authority of the government. *Ex parte Milligan*, 71 U. S. 4 Wall. 2 [18: 281]. If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law, and devoted to public use without just compensation?"

Upon the general proposition that the possession by officers, on behalf of the United States, of property claimed by a citizen, is sufficient of itself to protect those officers against suit by that citizen to recover possession, the court said: "Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The [216] *position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Chief Justice Marshall says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion. But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation? In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit, and a cause of action cognizable in the court – a *case* within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court, that the plaintiff may be able to prove the right which he asserts in his declaration. What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate and converted one part of it into a military fort and another into a cemetery." Assuming, upon the record before the court, that the President had no lawful authority to place officers of the government in possession of the property in question, and that Congress could not give him any such authority except upon making just compensation, the court said: "The defense stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no *such power is given, but it is ab- [217 solutely prohibited, both to the executive and the legislative, to deprive anyone of life, liberty, or property without due process of law, or to take private property without just compensation. These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that Constitution. As we have already said, the writ of habeas corpus has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority on the part of the executive and the legislative branches of the government. See *Ex parte Milligan*, 71 U. S. 4 Wall. 2 [18:281]." *Kilbourn* v. *Thompson*, 103 U. S. 168 [26:377]. "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." Again: "Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without any process of law, and without any compensation, because the President has ordered it and his officers are in possession? If such be the law of this country it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights. It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, Stop here,

I hold by order of the President, and the pro-
218] gress of justice must be stayed. *That, though the nature of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the government to which by the Constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen."

We have made these extracts from the opinion of the court in the *Lee Case* because the reasons there assigned for the conclusion reached control the determination of the present case. If a suit by an individual against individuals to recover the possession of property is not a suit against the United States merely by reason of possession being held by the defendants as agents of the United States and under title asserted to be in the government, we cannot perceive how the present suit can be regarded as one against the state merely because the defendants assert a right of possession in the state through them as its officers and agents.

The essential principles of the *Lee Case* have not been departed from by this court, but have been recognized and enforced in recent cases.

In *Cunningham* v. *Macon & B. R. Co.* 109 U. S. 446, 452 [27: 992, 994], the court, referring to the cases in which an individual, sued for tort committed upon person or property, defends upon the ground that he acted as an officer of the government, and in which he must show that his authority was sufficient in law to protect him, said: "To this class belongs also the recent case of *United States* v. *Lee*, 106 U. S. 196 [27: 171], for the action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment. And the defendants Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defense. The judgment in that case did not
219] conclude the United States, as the *opinion carefully stated, but held the officers liable as unauthorized trespassers, and turned them out of their unlawful possession."

Stanley v. *Schwalby*, 147 U. S. 508, 518 [37: 259, 263], was an action of trespass to try title brought in a state court against individuals to recover possession of certain lands. The defendants asserted a right of possession in themselves as officers of the United States which, they alleged, had title and right of possession. Referring to the cases in which an individual was sued in tort for some act injurious to another in regard to person or property, in which the defense was that he acted under the orders of the government, this court, speaking by the Chief Justice, said: "In these cases he is not sued as an officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defense he must show that his authority was sufficient in law to protect him. In this class is included *United States* v. *Lee*, 106 U. S. 196 [27: 171], where the action of ejectment was held to be in its essential character an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment, and the defendants Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defense." See also *Stanley* v. *Schwalby*, 162 U. S. 255, 271 [40: 960, 966]; *Belknap* v. *Schild*, 161 U. S. 10 [40: 599].

The cases in this court in which it has been necessary to consider the meaning and scope of the 11th Amendment are quite numerous. In *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10 [35: 363, 365], the opinion in which case was delivered by Mr. Justice Lamar, the cases previously decided were examined, and were held to belong to two classes. The first class, he said, "is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to *specifically perform its contracts*"—citing *Ex parte Ayers*, 123 U. S. 443 [31: 216]; *Louisiana* v. *Jumel*, 107 U. S. 711 [27: 448]; *Antoni* v. *Greenhow*, 107 U. S. 769 [27: 468]; *Cunningham* v. *Macon & B. R. Co.* 109 U. S. 446 [27: 992]; and *Hagood* v. *Southern*, 117 U. S. 52 [29: 805]. *The other class, the court said, "is where
220] a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial, is not, within the meaning of the 11th Amendment, an action against the state," —citing *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738 [6: 204]; *Davis* v. *Gray*, 83 U. S. 16 Wall. 203 [21: 447]; *Tomlinson* v. *Branch*, 82 U. S. 15 Wall. 460 [21: 189]; *Litchfield* v. *Webster County*, 101 U. S. 773 [25: 925]; *Allen* v. *Baltimore & O. R. Co.* 114 U. S. 311 [29: 200]; *Louisiana Board of Liquidation* v. *McComb*, 92 U. S. 531 [23: 623]; *Poindexter* v. *Greenhow* ("*Virginia Coupon Cases*"), 114 U. 270 [29: 185].

And in *Ex parte Tyler*, 149 U. S. 164, 190 [37: 689, 697], the Chief Justice, referring to the review in *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10 [35: 363, 365], of previous cases, said: "The result was correctly stated to be that where a suit is brought against defendants who claim to act as officers of a state, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the state; or for compensation for damages; or, in a proper case, for an injunc-

tion to prevent such wrong and injury; or for a mandamus in a like case to enforce the performance of a plain legal duty, purely ministerial,—such suit is not, within the meaning of the Amendment, an action against the state." In the recent case of *Scott* v. *Donald*, 165 U. S. 58, 69 [41; 632, 633], the principle was again announced, Mr. Justice Shiras delivering the opinion, that a suit against individuals, "who claim to act as officers of a state, and, under color of an unconstitutional statute, commit 221] *acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the state, or for compensation for damages, . . . is not, within the meaning of the Amendment, an action against the state."

The adjudged cases in principle determine the one before us. The settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the state simply because the defendant holding possession happens to be an officer of the state and asserts that he is lawfully in possession on its behalf. We may repeat here what was said by Chief Justice Marshall, delivering the unanimous judgment of this court in *United States* v. *Peters*, 9 U. S. 5 Cranch, 115, 139 [3: 53, 60]: "It certainly can never be alleged that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title." Whether the one or the other party is entitled in law to possession is a judicial, not an executive or legislative, question. It does not cease to be a judicial question because the defendant claims that the right of possession is in the government of which he is an officer or agent. The case here is not one in which judgment is asked against the defendants as officers of the state, nor one in which the plaintiff seeks to compel the specific performance by the state of any contract alleged to have been made by it, nor to enforce the discharge by the defendants of any specific duty enjoined by the state. Nor is it one, like *Cunningham* v. *Macon & B. R. Co.* 109 U. S. 446 [27: 992], above cited, in which the plaintiff seeks to enforce a lien upon real estate in the actual possession of and claimed by the state, where a decree of sale would be fruitless, as no title could be given to the purchaser without the presence of the state as a party to the proceeding. It is a suit against individuals—a case in which the plaintiff seeks merely the possession of certain real estate once belonging to the state, but which the complaint alleges has become his property, and which, according to the verdict of the jury and the judgment of the court thereon, must, 222] on this record, *be taken to belong absolutely to him. The withholding of such possession by defendants is consequently a wrong, but a wrong which, according to the view of counsel, cannot be remedied if the defendants chose to *assert* that the state, by them as its agents, is in rightful possession. The doors of the courts of justice are thus closed against one legally entitled to possession, by the mere assertion of the defendants that they are entitled to possession for the state. But the 11th Amendment gives no immunity to officers or agents of a state in withholding the property of a citizen without authority of law. And when such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff. If a suit against officers of a state to enjoin them from enforcing an unconstitutional statute, whereby the plaintiff's property will be injured, or to recover damages for taking under a void statute the property of the citizen, be not one against the state, it is impossible to see how a suit against the same individuals to recover the possession of property belonging to the plaintiff and illegally withheld by the defendants can be deemed a suit against the state. Any other view leads to this result: That if a state, by its officers, acting under a void statute, should seize for public use the property of a citizen, without making or securing just compensation for him, and thus violate the constitutional provision declaring that no state shall deprive any person of property without due process of law (*Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 236, 241 [41 : 979]), the citizen is remediless so long as the state, by its agents, chooses to hold his property; for, according to the contention of the defendants, if such agents are sued as individuals, wrongfully in possession, they can bring about the dismissal of the suit by simply informing the court of the official character in which they hold the property thus illegally appropriated. It is true that even in such a case the citizen may, if he choose, rely upon the good faith of the state in the matter of compensation But he is not compelled to part with his property for public use except upon the terms prescribed *by the su- [223 preme law of the land, namely, upon just compensation made or secured.

It is said that the judgment in this case may conclude the state. Not so. It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is without legal foundation. The state not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the state to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim. It was insisted in *United States* v. *Lee*, in support of the contention there made, that a judgment in favor of Lee against the persons who, as agents of the United States, held possession of Arlington, would be in effect a judgment against the United States. But this court said: "Another consideration is, that since the United States cannot be made a defendant to a suit concern-

ing its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, as is decided by this court in the case of *Carr* v. *United States*, 98 U. S. 433 [25: 209], already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff and the present plaintiff as defendant, the title

224] of the *United States could be judicially determined. Or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the Constitution." 106 U. S. 222 [27: 182].

We are of opinion that this suit is not one against the state within the meaning of the 11th Amendment; and as the record before us shows that the plaintiff owns the premises and is entitled to possession as against the defendants, *the judgment must be affirmed.*

UNITED STATES, *Appt.*,
v.
AMERICAN BELL TELEPHONE COMPANY and Emile Berliner.

(See S. C. Reporter's ed. 224-270.)

Patent not invalidated by delay in its issue—cancelation for fraud—action of officials—review of judgment of Patent Office—rules governing the suit—patent covered by prior patent—error of judgment.

1. Thirteen years' delay of the application in the Patent Office does not invalidate the Berliner patent, 463,569, where the proof shows that the applicant did not induce the delay, but, on the contrary, urgently requested action upon it, and that the delay was due, not only to the pressure of business in the office, but in part to the pendency of the protracted litigation over telephone patents and interferences, or probable interferences, with other applications.
2. Proof of fraud for which a patent for an invention will be canceled must be clear, convincing, and satisfactory, and not a bare preponderance of evidence which leaves the issue in doubt.
3. An applicant for a patent who complies with the terms and conditions prescribed will not suffer or lose rights by reason of any delay on the part of the officials in acting upon his application, whether the delay is reasonable or unreasonable, unless it has been brought about through his corruption of the officials, or through his inducement, or at his instance.
4. The judgment of the Patent Office that a patent issued by it does not cover the same invention as that covered by a subsequent patent cannot be reviewed in a suit to set aside the subsequent patent.
5. When the government brings a suit to set aside a patent, simply to help an individual, and has no proprietary or pecuniary interest in the result, and is not seeking to discharge its obligations to the public, it is subject to the rules governing like suits between private litigants.
6. The invalidity of a patent because the invention is covered by a prior patent is not ground for a suit in equity to set aside the patent, since it constitutes a good defense to the patent in any action, and rests upon matters of record in the Patent Office.
7. Mere error of judgment on the part of patent officials in granting a patent cannot be collaterally attacked by suit to set aside the patent.

[No. 344.]

Argued November 9, 10, 11, 1896. Decided May 10, 1897.

APPEAL from a decree of the United States Circuit Court of Appeals for the First Circuit reversing the decree of the Circuit Court of the United States in and for the District of Massachusetts, and dismissing a suit in equity brought by the United States against the

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NOTE.—*As to when assignee may sue for infringement; when patentee must; when they must join,*—see note to Wilson v. Rousseau, 11: 1141.

As to notes given for patent rights; purchaser before maturity,—see note to Mandeville v. Welch, 5: 87.

That prior use or sale of invention renders patent void, see note to French v. Carter, 84: 664.

As to assignments of patents, their construction and effect; licenses to use patents; royalties,—see note to Dalzell v. Dueber Watch Case Mfg. Co. 37: 749.

As to anticipation of patents; prior patents and publications; application and issue; claims and specifications,—see note to Leggett v. Standard Oil Co. 37: 737.

As to patentability of inventions; patentable subject-matter; utility; what constitutes invention; patentable novelty; combinations; foreign patents and their effects,—see note to Grant v. Walter, 37: 553.

As to reissued patents for inventions, when valid; effect of reissue; laches,—see note to National Meter Co v. Yonkers Water Comrs. 37: 644.

As to what constitutes infringement of patent; similarity of devices; designs; combinations; machines; construction of patent,—see note to Royer v. Coupe, 36: 1073.

As to patents for designs, when valid, see note to Smith v. Whitman Saddle Co. 37: 606.

For what patents are granted; when declared void,—see note to Evans v. Eaton, 4: 433.

As to patentability of inventions, see notes to Thompson v. Boisseller, 29: 76, and Corning v. Burden, 14: 683.

As to abandonment of invention, see note to Pennock v. Dialogue, 7: 327.

As to distinction between inventions of mechanism, articles, or products and processes; when latter patented,—see note to Corning v. Burden, 14: 683.

As to including process and product in same patent; separate patents therefor,—see note to Evans v. Eaton, 4: 433.

As to what reissue may cover, see note to O'Reilly v. Morse, 14: 601.

As to assignment before issuing and reissuing patent; recording; when assignment transfers extended terms,—see note to Gayler v. Wilder, 13: 504.

As to damages for infringement of patent; treble damages,—see note to Hogg v. Emerson, 13: 824.

American Bell Telephone Company *et al.*, to cancel a patent, No. 463,569, issued to the Telephone Company as assignee of Emile Berliner. *Affirmed.*

See same case below, 65 Fed. Rep. 86, 33 U. S. App. 236, 68 Fed. Rep. 542; also on motion to dismiss, 159 U. S. 548 [40: 255].

Statement by Mr. Justice **Brewer:**

On February 1, 1893, the United States filed in the circuit court of the United States in and for the district of Massachusetts a bill in equity against the American Bell Telephone Company and Emile Berliner, praying a decree to set aside and cancel patent No. 463,569, issued on November 17, 1891, to the telephone company as assignee of Berliner. Upon amended pleadings and proofs the circuit court on January 3, 1895 (65 Fed. Rep. 86), entered a decree as prayed for. On appeal to the court of appeals for the first circuit, this decree was on May 18, 1895, reversed, and a decree entered directing a dismissal of the bill. 33 U. S. App. 236. Thereupon the United States took an appeal to this court. A motion was made to dismiss the appeal for want of jurisdiction, which was denied (159 U. S. 548 [40:255]), and the case was argued upon the merits.

As stated by counsel for the appellant, four grounds for relief were presented and discussed in the circuit court. Those grounds are:

"1. That the delay of the application in the office for thirteen years was, under the circumstances alleged in the bill, unlawful and fraudulent.

"2. That a patent, issued November 2, 1880, upon a division of the original application, 227] covers the same invention *as that covered by the patent in suit, and exhausted the power of the commissioner as to that invention.

"3. That the patent is not for the same invention which was described in the application as filed.

"4. That, taking the application to date from the time when it was made by amendment to cover the invention described and claimed in the patent as issued, it was barred by public use for more than two years."

By that court only the first two were considered, and the argument in the court of appeals was confined to those questions.

Messrs. **Judson Harmon,** Attorney General, **Robert S. Taylor, Causten Browne,** and **Charles H. Aldrich,** for appellant:

The bill sets up a number of grounds upon each of which it is charged that the patent was illegally issued and was void. Of those, four have been discussed in the case, and will be presented here.

1. That the delay of the application in the office for thirteen years was, under the circumstances alleged in the bill, unlawful and fraudulent.

2. That a patent, issued November 2, 1880, upon a division of the original application covers the same invention as that covered by the patent in suit, and exhausted the power of the Commissioner as to that invention.

3. That the patent is not for the same invention which was described in the application as filed.

4. That, taking the application to date from the time when it was made by amendment to cover the invention described and claimed in the patent as issued, it was barred by public use for more than two years.

The delay in the office is the great fact in the case. It determined the bringing of the suit, stands in the forefront of the bill, was the principal question argued in both courts below, and occupies the chief space in the decisions rendered. It is not set up as laches, nor as a ground of forfeiture under any provision of the law or rule of the Patent Office, but as a course of conduct in the nature of fraud on the public. The effect of this delay as a question of law is the first point to be considered. The facts necessary to present the question may be stated very briefly as follows:—

In 1878 the Bell Company, under patents to Bell and others, was just entering upon that splendid exploitation of the art of telephony which has since challenged the admiration of the world. The transmission of speech in that way requires, as we have seen, the use of two instruments,—the transmitter, into which the speaker talks, and the receiver, at which the hearer listens. Mr. Bell's patent of 1876 described, as already stated, an instrument which could be used interchangeably for either of these purposes. In 1878 Mr. Edison and Mr. Blake produced transmitters, both unlike Bell's and differing from each other in detail, but operating on the same general principle. They both belonged to the class of transmitters called microphones, the distinguishing feature of which is that the undulations of the electrical current, by means of which the sonorous vibrations of the air in the transmitter are caused to be reproduced in the receiver, are caused by variations of pressure between two electrodes remaining constantly in contact, which variations of pressure are caused by the vibrations of the diaphragm of the transmitter in the manner described in Berliner's specification. The Bell Company acquired the title to both these inventions, the latter immediately upon its production, and the former in 1879; and afterwards used the microphone exclusively, or practically so, in all its great and expanding business. No other transmitter yet produced compares with it in practical utility and value.

In November, 1891, the public were astonished to learn that a patent had just been issued to the Bell Company, covering in the broadest possible terms the identical microphone transmitter for which they had been paying rentals for thirteen years, under which new patent it would be entitled to exact a continuance of the same rentals for the same instrument for seventeen years longer.

An examination of the files in the Patent Office, then for the first time accessible to the public, showed that the application for this patent had been filed by Emile Berliner, June 4, 1877, and had become the property of the Bell Company in 1878, and had been controlled by that company to the time of its issue. It was the extraordinary delay in the issue of the patent, the application being all the time under the control of the Bell Company, coupled with the manifest interest of that company to prolong its monopoly by means of that delay, and the evidence found in the record that it had

yielded to that temptation, and the wrong done to the public by the issue of the patent after such delay, that led to the bringing of the suit. With these facts were also alleged in the bill all others of which counsel had information at the time it was drawn, which appeared to impugn the validity of the patent.

Was this long delay in the issue of the patent an injury to the public? Was it a violation of any duty imposed by law, either statutory or unwritten? These questions must be answered by reference to the nature of a patent for invention, and the rights, duties, and obligations of the parties to it.

A patent is a grant upon a consideration. It is in substance a contract. The essence of the contract is that the inventor shall first have the exclusive enjoyment of the invention for a stated period, and that after that the public shall have it. The contract is executed on the part of the public by the issue of the patent; on the part of the inventor by placing on the records of the Patent Office such full and complete description of the invention as will enable the people to use it when his monopoly expires.

The thing which the public pay for in submitting to the monopoly created by a patent is the free enjoyment of the invention after the patent expires. If this means anything, it is the use of the machine or thing or process in which the invention is embodied, not the possession of a piece of paper, nor to have accessible the scientific or other information contained in the specification. To deny to the public this free use of the invention to which it has become entitled under the contract is to take away from it a thing of value which it has bought and paid for.

A second patent covering the same thing has this effect. It deprives the public of the consideration which it was to receive for being excluded from the free use of the thing during the life of the first patent.

Nevertheless, as our patent laws stand, this may sometimes occur. A single machine or thing may have embodied in it more than one invention. These inventions may be the work of different inventors, or of the same inventor at different times, and each entitled to a patent,—the one as justly and clearly as the other. And the patents so issued at different times may each confer a monopoly of the use of the thing. In such a case the people are excluded from the free use of the thing until the expiration of both patents.

In the present case Mr. Bell's patent of 1876 covered broadly the process of transmitting sound by means of an undulatory electric current, as distinguished from an interrupted or broken current, no matter how produced. His patent showed a transmitter capable of producing such a current, but so feebly that its use was limited to short distances. Afterwards Mr. Berliner discovered, we will say, that the undulatory current necessary to transmit speech can be produced by another form of transmitter,—one operating by variation of pressure between its electrodes at their point of contact. But as the only function of the instrument was to produce an undulatory current, and as the use of that current, however produced, was covered by Mr. Bell's invention, it follows that the instrument was subject to two independent monopolies.

Later, we will say, Mr. Edison discovered that the use of carbon as the material for the construction of the electrodes of the Berliner transmitter gave to that instrument a greatly increased power and reach of operation. Later still, Mr. Blake devised a particular combination of carbon and metallic electrodes, with mechanism for their mounting, which secured an improved ease and permanence of adjustment and superior adaptation to common use. Mr. Bell hit upon the true principle, in relation to the kind of current to be employed, and was justly entitled to a patent for it, although the range of his transmitter may have been but a few hundred feet. Mr. Berliner, we will say, hit upon the true principle underlying the operation of the microphone, and was entitled to his patent, although the mechanism he used in the embodiment of his thought was so unstable in its adjustment as to make it of uncertain value. The inventions of Mr. Edison and Mr. Blake completed the instrument, and made possible the talking telephone in every man's house, the city exchange, and the long-distance line from city to city.

It thus happened that the Blake transmitter introduced into public use by the Bell Company in 1878, and familiar to us all, was the embodiment in one piece of mechanism, and its use of four distinct inventions made by four different men. That company was the owner of all the inventions. For Mr. Bell's invention it held patents issued in 1876 and 1877; for Mr. Blake's patents were issued in 1881; and for the others, applications were on file subject to its control.

Mr. Bell's invention was one of the first rank—nothing less than the discovery of a new law of nature. Mr. Berliner's invention was a beautiful intellectual conception of a mode of operation. Mr. Edison's was the discovery of a new property of carbon. Mr. Blake's was an ingenious and a practical utilization of the three. Mr. Bell's invention lies at the foundation of the art of telephony. Mr. Edison's and Mr. Blake's have done more to make the art of practical value than all others following Bell.

We assume that it was not possible to take out patents for all these inventions at the same time. And so far as that was not possible, the overlapping and prolongation of the monopolies created by the patents in the use of the carbon microphone could not be avoided without denying to some one or more of the inventors his right under the law. But does it follow that the Bell Company was entitled of right to hold control of the microphone under the broad claims of the Bell patent and the construction and combination claims of the Blake patents, and nurse the applications for the other inventions in the office, taking out a patent on Berliner's just in time to overlap Bell's and on Edison's in time to overlap Berliner's, and so secure a monopoly on the same transmitter used in the same way to produce the same result for three times the period fixed by the statute for the duration of a patent?

It needs no lawyer's argument to make mani-

fest the inherent moral wrongfulness of such a proceeding towards the public. Every right-minded man will feel it instinctively. Would it be a legal wrong?

It is assumed in this case that such a result would be contrary to the spirit and intent of the patent law. That is one of the postulates of the bill. The statute deals in terms with one invention and one patent at a time. It is its plain purpose that the patentee shall enjoy first his monopoly in the thing in which his invention is embodied, the machine, instrument, manufacture, or process which can be sold, rented, or used with pecuniary profit,—and that at the expiration of the term of the patent the public shall enter freely into the same enjoyment of that same thing. It does not affect the validity of this assumption that, in the practical administration of the business, the prolongation of monopolies in the way pointed out may occur sometimes and to some extent. They are the unintended results of the operation of the law, contrary to its general spirit and intent.

Whether such results were not foreseen by Congress, or, being foreseen, were regarded as unavoidable, does not matter. The fact that the machinery of the law is not always adequate to the perfect attainment of its intent is no reason why the intent shall be denied or disregarded.

That is to say, if, under the circumstances of a particular case, the public cannot have the free enjoyment of an invention upon the expiration of a patent which has given the exclusive enjoyment of it to a patentee, because rights have supervened under another patent, the intent of the law still requires that such deprivation shall be for the shortest time consistent with the rights of the second patentee.

And if the first and second patentees are the same person, this intent of the law lays on him an equitable obligation to see to it that his second patent shall not operate as a breach of the contract embodied in his first patent to any extent which he can avoid.

Hence a man who is enjoying a monopoly of a thing under one patent and is at the same time prosecuting an application for another patent which will give him a monopoly of the same thing for a further period, is bound to speed his application.

That obligation is an entirely different thing from the duty of applicants generally to use diligence. It is a special equitable obligation growing out of the special circumstances under which that application is prosecuted. It has no relation whatever to the regulations and rules provided for the transaction of business between applicants and the office. It arises independently of the statutes and the rules. It would exist exactly as it exists now if there were neither statutes nor rules fixing any limitation of time in respect to the filing of an application, or the steps to be taken in its prosecution.

To put the very case assumed in the last sentence, let us suppose that the patent statute consisted of one section authorizing the Commissioner to grant a patent for a term of seventeen years upon a verified application, but containing no other limitation of time as to any part of the business. A citizen holding one patent makes application for another covering the same thing in some other aspect, say as to its construction, material, or mode of operation. His application is allowed, and wants only the payment of a final fee to be issued. The clerk in whose custody it is sticks it in a pigeon-hole, and there it remains for ten years, at the end of which time the patent issues. The public, in the mean time, know nothing of the second application, and pay the tribute exacted under the first patent, in the expectation of the free use of the thing therein described at its expiration. The applicant knows all the facts, and, for the express purpose of procuring a prolongation of his monopoly, lets his application sleep in its pigeonhole year after year, taking out a patent upon it just in time to overlap the first patent.

This is this case stripped bare. The court of appeals for the first circuit held that the eye of a chancellor can see nothing wrong in such a transaction. We say that such a proceeding would be a violation of the spirit and intent of the law, a fraud upon it, a prostitution of it; and all this notwithstanding it would fulfil every vowel and consonant of its letter.

All these propositions seem to us to have a just foundation in the essential nature of the transaction between a patentee and the public. They are the equitable incidents of the contract or grant, or whatever it may be called. They flow naturally and logically from a fair consideration of the purpose, spirit, and intent of the patent statutes.

But they may be rested equally well upon a deeper and broader foundation. When a man goes into the Patent Office as an applicant he does not leave behind him the equitable obligations toward his fellows which attach to him in other relations of life. They follow him there, and he is answerable there as elsewhere for the just discharge of them. Among the maxims which define those obligations, none is of higher authority or wider application than that golden rule of the law, *Sic utere tuo ut non alienum lædas*. Let every man use his own so as not to interfere in any way or degree which he can avoid with the enjoyment by his neighbor of that which is his.

In buying and prosecuting Berliner's application the Bell Company was pursuing its lawful right; but it was bound to pursue that right in such a manner as not to trespass upon the rights of others, or subject others to injury in any way or degree which it was possible to avoid. This duty it could only discharge by speeding its application and so reducing as far as possible that prolongation of its monopoly of the microphone which must result from the grant of its patent.

We shall be told that there is no precedent for this suit. But there is certainly a precedent for the repeal of a patent obtained by fraud upon the commissioner, and through him upon the public, which is the ultimate subject of and sufferer from the fraud: and the real question is whether such circumstances as we have alleged to be the circumstances of the obtaining of this Berliner patent constitute a fraud upon the public.

We need not look for any precedent of such a question as that. Fraud is never-ending in the variety of its forms. And the crowning

honor of equity is that no form imposes upon it when the substance of the transaction is fraudulent. Some of the greatest judgments in the history of the law have been those in which its capacity for extension by construction to meet new forms of wrong has been asserted, illustrated, and applied.

The wrong here alleged is a new one. But it wants for its correction no newly made law, only another—scarcely a new—application of old and settled principles. In the nature of things, there must always be around the area of the familiar and specifically settled law a zone of debatable ground. Within this territory the real battles of the law are fought and its great decisions made, the question always being, Do the old principles by fair and logical interpretation and extension cover the new case?

The court of appeals did not recognize any obligation of diligence resting on the applicant except that of compliance with statutory provisions, official regulations, and formal official demands and that is no obligation of diligence at all

The judgment of the court of appeals proceeds upon the assumption that the Bell Company was "under no obligation touching the delay:" that it had a right to acquiesce in the delays of the officials having the application in charge, and was not bound to do anything to prevent such delays. This we deny, and the question goes to the root of the case.

There is in every case where the invention has gone into use for profit, not only the statutory obligation to apply for a patent within two years, but, having done so, a further obligation to prosecute that application diligently, and obtain it as soon as it may reasonably be done.

The reason of the requirement that he shall apply within two years after the invention has been openly used for profit is that public policy forbids him to get his monopoly twice, first as pioneer, and afterwards as patentee.

Pennock v. *Dialogue*, 27 U. S. 2 Pet. 18 (7:333); *Woodbury Patent Planing Mach. Co.* v. *Keith*, 101 U. S. 479 (25:939). The case of *Miller* v. *Bridgeport Brass Co.* 104 U. S. 354 (26:783) and all the line of cases following it, rest upon the principle invoked in this case.

One purpose of the statute is, that the claims of a patent shall distinctly mark the extent of the patentee's monopoly. That purpose is liable to be defeated if he may broaden his claims at will after the grant of the patent. Another purpose of the statute is that the public shall come into the enjoyment of an invention as soon as a patent which has covered it expires. That purpose is liable to be defeated if the patentee may file another application covering the same thing, and delay its issue at will.

There is a class of decisions outside the field of the patent law to which this case has a logical, though in some respects a remote, relationship. We refer to those decisions which deal with the duties of men who have voluntarily placed themselves in situations in which the pursuit of their own interests draws them into antagonism to the interests of others over which they have control. The most familiar illustration of this situation is that of a trustee dealing in his own interest with the business of his *cestui que trust*. Such relationship not only puts upon the trustee a duty of the highest obligation, but puts upon him a burden of the gravest character when his proceedings become the subject of legal investigation. When a trustee kept his own affairs free from entanglement with those of his *cestui que trust*, he is entitled to the full benefit of the presumption that his purpose has been to discharge his duty honestly and faithfully. But when it appears that he has dealt with the trust fund or property in his own interest, and with a result of profit to himself and loss to his *cestui*, a very different case is presented, and very different presumptions obtain.

Emphatic objection was taken to this line of argument upon the hearing below. There was even a sort of complaint entered against the law itself in the remark of counsel in argument that "there has been manifest in late years a tendency in the law to transform all obligations into trusts," in criticism of which was cited a paragraph from the opinion of Lord Westbury in *Knox* v. *Gye*, L. R. 5 H. L. 656, quoting Lord Mansfield's famous epigram, that "nothing in law is so apt to mislead as a metaphor."

That the tendency complained of exists is true. But it is not because the courts have been misled by metaphors. It is because they are progressively holding men to higher and higher ethical standards. There is no noun in the language which broadly and aptly designates one who owes a legal duty to another. The word "trustee" comes nearest to it. And where the duty grows out of the possession or control of property, the analogy is so close that it is not misleading, but helpful. In some cases in which the word is used, we might doubtless have a better one, which illustrates the remark of DeTocqueville that it is easier to invent new things than new names for them.

That the Bell Company occupied the relation of trustee toward the public in any technical sense is not claimed. But it had valuable rights of the public within its control. As the owner of the Berliner application, it was intending to, and upon the hypothesis upon which we are now proceeding was entitled to, take out a patent which would exclude the public from the free use of the microphone after the time arrived when it would otherwise be entitled to it. The control of the application was largely in its own hands. It could speed it or delay it. To the extent to which it could thus determine the date of issue of its patent, it had the right—the property right—of the public under its control. Such control was intrusted to it by the law for the benefit of the public as well as itself. Its duty lay in one direction, its interest in the other. It is to this extent that we suggest an anology between the situation of the Bell Company and that of a trustee who has profited at the expense of his *cestui que trust*. And to this extent the analogy is fair and the precedents are helpful.

In the same category belong many cases falling under the head of public policy, also cases holding men to fair dealing in relations of mutual confidence, employer and employee, principal and agent, fellow stockholders in a corporation, fellow property owners in a city,

fellow subscribers to a paper, and the like. We need not cite them. Their general scope and character are familiar,

The great question is, Was there a duty? The appellees say, in answer to the charge of delay in the bill, that the patent was issued in accordance with the statute and rules. We reply that that was not enough; that over and above the mint, anise, and cumin of the law lay the weightier obligation of justice toward all; that a binding duty *dehors* the letter of the law was violated. The appellees rejoin that no such obligation existed. So the court of appeals held.

Ought the fact that the terms of the statute and the rules were complied with to close the inquiry? Does the law know no obligations respecting statutory proceedings except statutory obligations? Is all that a man can make out of the government, or out of the people through the government, lawful game so long as he keeps the letter of the law?

These questions reach far beyond the confines of this case. How to keep the letter of the law is one of the fine arts of our time. The promotors of trusts, combines, and all the countless schemes organized for the plunder of society are adepts in that art. Such an issue ought not to be decided against the people until all precedents and analogies have been searched and all fair reasonings tested.

The existence of a duty once established, all else follows easily. The measure of the diligence which it requires grows out of the circumstances. The importance of the interests involved, and the gravity of the consequences likely to occur from the neglect of it, enter into it, as in every case where diligence is an element of duty towards others.

The proofs, all from the defendants' witnesses, establish beyond doubt that after Berliner's application was ready for issue on June 9, 1882, it was suspended to await the trial and decision of the suit against the People's Telephone Company, by an agreement to which the Commissioner of Patents, the Bell Company, and Drawbaugh were all parties.

This agreement was unlawful.

The Commissioner had no right to enter into or act upon such an arrangement as this.

The Commissioner is not bound to give any hearing to anyone not himself an applicant, in opposition to the grant of a patent to another; he has a right to seek information wherever he can find it and receive any communication which may be offered to him by anyone respecting a pending application.

It is in harmony with the theory and practice of judicial investigations generally that such an examination should begin with affidavits. And if there are no antagonistic interests behind the affidavits, there may be no objection to finding the fact on affidavits alone. But it will sometimes happen, in the nature of things, that the grant of a patent will be opposed by parties hostile in interest to the applicant. In such a case, it would be unjust to conclude the applicant's case against him on *ex parte* affidavits. He should not only have the right to offer opposing evidence in some form, but he should have the right, by cross-examination of the opposing witnesses, to sift the facts alleged, and expose, if he can, the presence of the virus of hostile interest in their testimony.

In *Ex parte Alteneck*, Com. Dec. 1883, p. 139, 23 Pat. Off. Gaz. 269, decided by the supreme court of the District of Columbia in 1882, this question arose, and the decision made has been the recognized law of the Patent Office ever since. There the office had finally rejected the applicant on the ground of two years' public use of the invention prior to the filing of his application, evidenced by *ex parte* affidavits. This action was disapproved by the court.

In obedience to its decision, the Commissioner of Patents on February 6, 1883, ordered the institution of public-use proceedings, referring the question to the examiner of interferences, and specifying particularly how he should proceed. Com. Dec. 1883, p. 33 (23 Pat. Off. Gaz. 2233). The question was then taken on appeal to the Secretary of the Interior, who, on April 17, 1883, rendered an opinion affirming the action of the Commissioner. Com. Dec. 1883, p. 114 (23 Pat. Off. Gaz. 2233).

The practice thus inaugurated was followed in *Ex parte Barricklo*, Com. Dec. 1887, p. 9 (38 Pat. Off. Gaz. 417), and same case, Com. Dec. 1886, p. 39 (37 Pat. Off. Gaz. 672), and *Ex parte Finch*, Com. Dec. 1887, p. 99 (40 Pat. Off. Gaz. 1027). It has been recognized by Congress by small annual appropriations of money to defray the expense of such investigations and the defense of suits brought against the Commissioner since 1884.

This practice is equally applicable to prior inventions.

It will be said that these proceedings would have involved more delay than to await the decision of the court in the infringement case. To which it may be replied, first, that one was a lawful course, the other an unlawful course; one led certainly to a decision of the questions at issue, the other offered no assurance of any decision of them at any time; one was an assumption by the Commissioner of his proper duty, the other a renunciation of it. In the face of these distinctions, the probable consumption of time was not a thing to be considered.

In the second place, it is not true that these proceedings would probably have consumed more time than the case in court, but the contrary.

In *Bates* v. *Coe*, 98 U. S. 31 (25: 68), decided in 1878, the court (p. 46 [73]) points out that, under the patent act (meaning the Revised Statutes), the defendant may prove in defense that the patented invention had been in public use or on sale for more than two years before the alleged inventor filed his application for a patent, and the provision in that event is, that if the issue be found for the party setting up defense, the judgment or decree shall be in his favor.

Manning v. *Cape Ann Isinglass & G. Co.* 108 U. S. 462 (27: 793).

U. S. Rev. Stat. § 4886, does not allow the issue when the invention has been in public use for more than two years prior to the application, either with or without the consent or allowance of the inventor.

The assumption on which the office proceeded, that Berliner's application must await

the final disposition of Drawbaugh's application, whatever happened, was without foundation in the statute or rules or common sense.

Ex parte Lombard, 43 Pat. Off. Gaz. 1347; *Ex parte Atwood*, 44 Pat. Off. Gaz. 341.

The history of the Berliner application shows that in its treatment of it the office proceeded upon two unlawful assumptions. The first was that an applicant whose application is ready for issue, except for a possible threatened interference, must wait until the antagonizing application is either found allowable and ready for the interference, or finally ejected from the office, no matter how long that may be. This assumption was utterly without authority of law. The second assumption was that the judicial determination of the question of Drawbaugh's invention, in the suit between the owners of the application, was not enough to warrant action by the office. These two false assumptions were distinct and independent errors on the part of the office.

Johnson Co. v. *Wharton*, 152 U. S. 256, 260, 261 (38: 432, 434).

Berliner patent in suit is void because of Berliner patent of November 2, 1880.

Miller v. *Eagle Mfg. Co.* 151 U. S. 186 (38: 121).

When a claim is explicit, the court cannot alter or enlarge it.

Keystone Bridge Co. v. *Phœnix Iron Co.* 95 U. S. 278 (24: 346).

The question is to be determined by comparison of the patents. Can the patent in suit and claim 4 of the patent of 1880 validly coexist?

Miller v. *Eagle Mfg. Co.* 151 U. S. 186 (38: 121).

Assuming the soundness of these reasonings, and that the patent in suit would have to be held void in an infringement case, on the authority of *Miller* v. *Eagle Mfg. Co. supra*, the question remains whether the same invalidity is ground of repeal at the suit of the United States. We maintain that it is, upon the authority of *United States* v. *American Bell Teleph. Co.* 128 U. S. 315 (32: 450).

Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are sometimes issued unadvisedly and by mistake, when the office has no authority in law to grant them.

Stone v. *United States*, 69 U. S. 2 Wall. 525 (17: 767).

If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue as to individuals; and if the government is the party injured this is the proper course.

Moore v. *Robbins*, 96 U. S. 530 (24: 848).

The right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief.

United States v. *San Jacinto Tin Co.* 125 U. S. 273 (31: 747).

The Supreme Court in *United States* v. *American Bell Teleph. Co.* 128 U. S. 315 (32: 450), holds that for various causes other than fraud the Federal courts may annul.

Orchard v. *Alexander*, 157 U. S. 385 (39: 742).

Messrs. James McNaught, Joseph D. Redding, and *Myron Francis Hill*, by leave of the court, filed a brief for the Standard Telephone Company, in support of position of appellant.

Messrs. **Joseph H. Choate, Frederick P. Fish,** *James J. Storrow, W. W. Swan*, and *W. K. Richardson*, for appellees:

A whole course of legislation and decisions confirm the rule that the applicant is not responsible for the delays of the Patent Office.

To make the applicant responsible for alleged slowness of the office in the performance of its duties is contrary to the whole thought of the Patent Office system.

A solemn grant, made by the proper officers, will not be disturbed unless some recognized ground for equitable interference be shown; and therefore, in order to bring this case under *United States* v. *American Bell Teleph. Co.* 128 U. S. 315 (32: 450), the bill labors to state a case of fraud.

Not only were all these charges of fraud so utterly without foundation that they have all been abandoned; not only would the plaintiff's own files or the slightest inquiry of its own officers have shown them to be false, but the attorney general was so thoroughly warned of their falsity beforehand that he had no justification for making them without an exhaustive inquiry and abundant proof.

The description of two inventions in the same art, written in each of two simultaneously pending applications, does not prevent the issue of one of those applications as a patent with claims for one invention and the issue of the other as a patent with claims for the other.

Berliner's invention did not lie in any novelty of apparatus, but in the mode of operation, and in the principles of electricity here first utilized.

All this was long known in the Patent Office and elsewhere and while it would prevent a patent on mere structure, and led the office to refuse it to two applicants, it does not detract from the patentability of the real discovery and invention which lies in the novel nature of the operation, employing electrical laws never before so utilized, any more than it does from its intellectual merit or from its practical utility.

Telephone Cases, 126 U. S. 540 (31: 991); *Otto* v. *Linford*, 46 L. T. 39; *Le Roy* v. *Tatham*, 55 U. S. 14 How. 156 (14: 367); *Ansonia Brass & C. Co.* v. *Electrical Supply Co.* 144 U. S. 11, 17 (36: 327, 329); *Lovell Mfg. Co.* v. *Cary*, 147 U. S. 637 (37: 312); *Heald* v. *Rice*, 104 U. S. 737, 756 (26: 910, 917); *Clough* v. *Gilbert & B. Mfg. Co.* 106 U. S. 166, 172 (27: 134, 136); *Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139 (38: 103); *American Bell Teleph. Co.* v. *Dolbear*, 17 Fed. Rep. 604, 126 U. S. 540 (31: 991); *Adams* v. *Joliet Mfg. Co.* 3 Bann. & Ard. Pat. Cas. 1; *Union Sugar Refinery* v. *Matthiessen*, 2 Fish. Pat. Cas. 600; *Stainthorp* v. *Humiston*, 4 Fish. Pat. Cas. 107; *Byerly* v. *Cleveland Linseed Oil Works*, 31 Fed. Rep. 73; *Harwood* v. *Great Northern R. Co.* 2 Best & S. 193, 11 H. L. Cas. 654; *Kay* v. *Marshall*, 2 Webster, Pat.

Cas. 79; *Penn* v. *Bibby*, L. R. 2 Ch. 127; *Perrie* v. *York St. Flax Spinning Co.* 1 Ir. Rep. 417; Goodeve, Pat. Cas. 346.

Clearly, fraud cannot be predicated of a grant so made after full argument and full and careful decision; and a grantor has no equity to apply for its cancelation upon grounds already considered and deliberately passed upon by the grantor itself before the grant. Every authority, both as to suits between private persons and suits by a government, is against it.

It is proved and admitted that Berliner made two inventions. He was therefore entitled to two patents. The receiver invention came out in 1880; the other, on the transmitter, is the patent in suit, issued in 1891. And the only question is whether his 1880 patent should be construed as to be also a patent for the transmitter invention so as to destroy a patent for the latter.

Now every punishment and every remedy, applied either by the courts or by Congress, has been to punish the applicant for delays by him in his own action when action by the office had cast on him the turn for the next action. Nobody ever suggested the preposterous and unjust rule that his interests were to be forfeited to the public because of delays by the officials, under the artificial pretense that he made them his own by not preventing them. On the contrary, the courts have again and again applied the rule of *Polk* v. *Wendal*, 13 U. S. 9 Cranch, 99 (3: 669) and *Barden* v. *Northern P. R. Co.* 154 U. S. 288 (38: 992), that the public must bear the consequences of the neglects of its own servants, because the public alone can prevent them by better laws or better appointments.

It was early held that gross delays by an applicant to act after a rejection had cast the next step on him might be held to be proof of abandonment. But it was also decided that his patent could not be invalidated by "delay caused by the conduct of the commissioner," or delay due to "difficulties arising either from the obtuseness of officers or accidental but unavoidable delays of public tribunals."

Rich v. *Lippincott*, 2 Fish. Pat. Cas. 1; *Adams* v. *Jones*, 1 Fish. Pat. Cas. 527; *Woodbury Patent Planing Mach. Co.* v. *Keith*, 101 U. S. 480 (25: 939).

What length of inaction would be fatal when the next step was cast on the applicant was not settled. In *Smith* v. *Goodyear Dental Vulcanite Co.* 93 U. S. 486, 500 (23: 952, 956), this court held eight years not fatal. In *Woodbury Patent Planing Mach. Co.* v. *Keith*, 101 U. S. 480 (25: 939), it said that "a long period of years," "many years," would be fatal. In *United States Rifle & C. Co.* v. *Whitney Arms Co.* 118 U. S. 22 (30: 53), it held eight years fatal.

Congress, in statute of 1870, enacted that an application should be deemed abandoned upon two years' delay; and this is the present statute.

Ex parte Reynolds, Com. Dec. 1883, p. 56; *Ex parte Root*, Com. Dec. 1887, pp. 81, 82; *Gandy* v. *Marble*, 122 U. S. 432 (30: 1223). In *M'Millin* v. *Barclay*, 5 Fish. Pat. Cas. 189, and *McMillan* v. *Rees*, 5 Bann. & Ard. Pat. Cas 269, 1 Fed. Rep. 722, McKennan, J., held that the statute explicitly gave to the commissioner the power to relieve against delays exceeding two years, and that his decision was conclusive.

Western Electric Co. v. *Sperry Electric Co.* 58 Fed. Rep. 186, 65 Pat. Off. Gaz. 597, Affirmed on Rehearing 59 Fed. Rep. 295, decides the same question the same way.

The grant itself raises the legal presumption that the preceding steps taken were the proper ones, and the patent recites, in terms, that they were.

United States v. *Maxwell Land-Grant Co.* 121 U. S. 325 (30: 949); *Colorado Coal & I. Co.* v. *United States*, 123 U. S. 307, 317 (31: 182, 187); *United States* v. *Iron Silver Min. Co.* 128 U. S. 673 (32: 571).

The Supreme Court has decided that, as against persons dealing with the United States, "regulations within the authority thus given are regulations prescribed by law."

Aldridge v. *Williams*, 44 U. S. 3 How. 9 (11: 469); *Grat'ot* v. *United States*. 45 U. S. 4 How. 80 (11: 884); *Ex parte Reed*, 100 U. S. 13 (25: 538); *Smith* v. *Whitney*, 116 U. S. 167 (29: 601).

Such regulations cannot be questioned or defined because they may be thought unwise or mistaken.

United States v. *Eliason*, 41 U. S. 16 Pet. 291, 302 (10: 968, 972); *Polk* v. *Wendal*, 13 U. S. 9 Cranch, 99 (3: 669); *United States* v. *Arredondo*, 31 U. S. 6 Pet. 691 (8: 547).

As to irregularities committed by the officers of government prior to the grant, the government, and not the individual, must bear the consequences resulting from them.

United States v. *California & O. Land Co.* 148 U. S. 31 (37: 356).

The burden is on this plaintiff to prove its case. The burden does not shift because the allegation takes a negative form; nor can it even be sustained and shifted to the defendant by proof which would create a suspicion of wrong.

United States v. *Budd*, 144 U. S. 154 (36: 384).

To raise a suspicion, however strong, of the fraud and wrongdoing of its own officers, is not enough to justify the government in casting upon the defendants the burden of establishing their title.

United States v. *Hancock*, 133 U. S. 193 (33: 601); *United States* v. *Budd*, 144 U. S. 154 (36: 384).

The burden of proving a negative rests upon the complaining party, where the negative involves a charge of fraud against the party whose conduct is complained of, for which it is sought to defeat an estate.

Smith v. *Whitman*, 6 Allen, 564; *Clifton* v. *United States*, 45 U. S. 4 How. 242 (11: 957); *Gay* v. *Parpart*, 106 U. S. 679, 685 (27: 256, 259); *Allison* v. *The James Martin*, 5 Hughes, 448, 455; *Standard Measuring Mach. Co.* v. *Teague*, 15 Fed. Rep. 390; *McDonough* v. *O'Niel*, 113 Mass. 92; *Cheney* v. *Gleason*, 125 Mass. 166, 176.

When the grantor is bound to examine, or professes to examine, the grant cannot be set aside for error in his conclusions.

Farnsworth v. *Duffner*, 142 U. S. 43 (35: 931).

If a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his

agents he cannot be heard to say that he was deceived by the vendor's representations.

Slaughter v. *Gearson*, 80 U. S. 13 Wall. 379, 383 (20: 627, 628); *Grymes* v. *Sanders*, 93 U. S. 55 (23: 798) *Ming* v. *Woofolk*, 116 U. S. 599, 602 (29: 740, 741); *Atlantic Delaine Co.* v. *James*, 94 U. S. 207 (24: 112); *Southern Development Co.* v. *Silva*, 125 U. S. 247, 249, 259 (31: 678, 680, 683).

It is not even enough to prove that dishonest acts were committed in the department by the applicant.

Quinby v. *Conlan*, 104 U. S. 426 (26: 802); *Steel* v. *St. Louis Smelt. & Ref. Co.* 106 U. S. 447 (27: 226); *Lee* v. *Johnson*, 116 U. S. 48 (29: 570).

It must appear that they affected its determination which otherwise would have been in favor of the plaintiff.

It is sometimes said, in a loose way, that everyone holds a fiduciary relation towards those who are affected by his acts. Nothing is more false. The obligation to act with honesty is indeed universal; but that is very different from the obligation to be the guardian of other's interests, which is the obligation of a trustee.

Butterworth v. *United States, Hoe*, 112 U. S. 50 (28: 656); *Grant* v. *Raymond*, 31 U. S. 6 Pet. 218 (8: 376); *Knox* v. *Gye*, L. R. 5 H. L. 656.

In *Philadelphia, W. & B. R. Co.* v. *Howard*, 54 U. S. 13 How. 307, 335–337 (14: 157, 169, 170), this court held that a party was estopped to rest in a second case upon grounds inconsistent with those on which he had rested in the first. Nor will equity listen to a party who so conducts himself.

No matter what be the cause of action, if the court finds that the case is such, and is so presented, that the decision turns upon a particular proposition of fact, and it actually decides that proposition as the basis of its judgment, that proposition is decided forever between those parties and for all purposes.

Cromwell v. *Sac County*, 94 U. S. 351, 353, 354 (24: 195, 198, 200); *Campbell* v. *Rankin*, 99 U. S. 261, 263 (25: 435, 436); *Milne* v. *Deen*, 121 U. S. 525, 533 (30: 980, 982); *Bissell* v. *Spring Valley Twp.* 124 U. S. 225, 231 (31: 411, 414); *Southern Minnesota R. Extension Co.* v. *St. Paul & S. C. R. Co.* 55 Fed. Rep. 690; *Lovell* v. *Cragin*, 136 U. S. 130 (34: 372); *Bayard* v. *United States, White*, 127 U. S. 246 (32: 116).

There was a circuit court decision against the Drawbaugh Company, but it has been (or was about to be) appealed, with a supersedeas, and therefore it was not technically pleadable as a bar.

The Galileo, 29 Fed. Rep. 538, 539; *Day* v. *De Jonge*, 66 Mich. 550; *Souter* v. *Baymore*, 7 Pa. 415, 47 Am. Dec. 518; *Sharon* v. *Hill*, 26 Fed. Rep. 337.

Where a hostile claim is filed the commissioner can never issue a patent in disregard of it.

Ex parte Smoot, Com. Dec. 1877, p. 51; *Hull* v. *Commissioner of Patents*, 8 Pat. Off. Gaz 46, 2 McArth. 190; *Sargent's Case*, Com. Dec. 1877, p. 125; *Lawe et's Case*, Com. Dec 1879, p. 346; *Appleby* v. *Morgan*, Com. Dec. 1879, p. 116; *Ex parte Osgood*, Com. Dec. 1885, p. 113; *Stone* v. *Greaves*, Com. Dec. 1880, p. 70.

The commissioner cannot deny the right of appeal because he believes that the appeal is frivolous.

Pitney v. *Smith*, Com. Dec. 1889, p. 193.

The United States in seeking to cancel a patent occupies no better position than does any other grantor suing in equity for the cancelation of his deed, and must invoke the same and only the same rules of law for his relief.

United States v. *San Jacinto Tin Co.* 125 U. S. 273 (31: 747); *United States* v. *Iron Silver Min. Co.* 128 U. S. 673 (32: 571); *United States* v. *Hughes*, 52 U. S. 11 How. 552 (13: 809); *Atlantic Delaine Co.* v. *James*, 94 U. S. 207 (24: 112); *Colorado Coal & I. Co.* v. *United States*, 123 U. S. 307 (31: 182); *United States* v. *Marshall Silver Min. Co.* 129 U. S. 579 (32: 734); *United States* v. *Hancock*, 133 U. S. 193 (33: 601); *United States* v. *Des Moines Nav. & R. Co.* 142 U. S. 510 (35: 1099); *United States* v. *American Bell Teleph. Co.* 128 U. S. 315 (32: 450).

Congress may intrust to officers of the executive branch such powers of decision as must precede or accompany a final act which is executive in its nature; and their decisions within the scope of such powers are absolutely conclusive as the decisions of a court.

Ekiu v. *United States*, 142 U. S. 651 (35: 1146); *Fong Yue Ting* v. *United States*, 149 U. S. 698 (37: 905); *Lem Moon Sing* v. *United States*, 158 U. S. 538 (39: 1082); *Wong Wing* v. *United States*, 163 U. S. 228 (41: 140); *Martin* v. *Mott*, 25 U. S. 12 Wheat. 19 (6: 537); *Mullan* v. *United States*, 140 U. S. 240 (35: 489); *Butterworth* v. *United States, Hoe*, 112 U. S. 50 (28: 656).

The action of the Patent Office is judicial in its character and all the preceding principles apply to it.

There is one feature of the Patent Office system which brings out very forcibly the judicial character of its action in those matters which, such as the conduct of procedure, are left to its discretion, and which illustrates how contrary to legal thought it would be for a court to re-examine them, find them unwise, and on that ground cancel a patent.

Butterworth v. *United States, Hoe*, 112 U. S. 50 (28: 656); *Gaines* v. *Thompson*, 74 U. S. 7 Wall. 347 (19: 62); *Holloway* v. *Whitley*, 71 U. S. 4 Wall. 522 (18: 335); *United States, International Contracting Co.*, v. *Lamont*, 155 U. S. 303 (39: 160).

No man can have two patents for one invention; and he cannot make into two inventions that which in actual fact is one, by drawing upon it two claims differing in breadth. But if he has made two inventions, successively, constituting successive steps in the same art or type of machine, he has the same right to patent them that independent inventors would have; and the two inventions do not become one because one man made both, nor even if they can be or are by him incorporated into one complex machine.

Ex parte Emerson, Com. Dec. 1880, p. 143; *Ex parte Van Matteson*, Com. Dec. 1883, p. 52; *Ex parte Herr*, Com. Dec. 1887, p. 105; *Ex parte Roberts*, Com. Dec. 1887, p. 61; *Ex parte Smith*, Com. Dec. 1888, p. 131; *Ex parte Holt*, Com. Dec 1884, p. 43.

This bill cannot stand as a representative bill. It is essential in such a bill that the plaintiff

on the record shall so represent all the persons interested that a decision denying the right the plaintiff alleges and affirming the right the defendant asserts and exercises shall bind all those other persons.

Smith v. *Wormsledt*, 57 U. S. 16 How. 288 (14: 942); *Orton* v. *Smith*, 59 U. S. 18 How. 263 (15: 394); *Kerrison* v. *Stewart*, 93 U. S. 155 (23: 843); *Downs* v. *Hubbard* ("*Craig* v. *Leitensdorfer*"), 123 U. S. 189 (31: 114); *Vetterlein* v. *Barnes*, 124 U. S. 160 (31: 400); *Weale* v. *West-Middlesex Waterworks Co.* 1 Jac. & W. 358; *Adair* v. *New River Co.* 11 Ves. Jr. 429.

The Berliner patent in suit (1801) is not rendered invalid by the Berliner patent of 1880, because they are not patents for the same invention, either in fact or in law.

Miller v. *Eagle Mfg. Co.* 151 U. S. 196 (38: 121); *Otto* v. *Linford*, 46 L. T. 39.

If you have a new principle or a new idea as regards any art or manufacture, and then show a mode of carrying that into practice, you may patent that, though you could not patent the idea alone, and very likely could not patent the machine alone, because the machine alone would not be new.

Le Roy v. *Tatham*, 55 U. S. 14 How. 156 (14: 367).

The combination, as machinery, may be old, may have been long used, of itself what no one could claim as his invention, and may not be the subject of a patent. What is claimed is, that it never had been before applied or used in the way and for the purpose they had used and applied it.

O'Reilly v. *Morse*, 56 U. S. 15 How. 62 (14: 601); *Ansonia Brass & C. Co.* v. *Electrical Supply Co.* 144 U. S. 11 (36: 327); *Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139 (38: 103); *Adams* v. *Joliet Mfg. Co.* 3 Bann. & Ard. 1, 4; *Clough* v. *Gilbert & B. Mfg. Co.* 106 U. S. 166 (27: 134); *Union Sugar Refinery* v. *Matthiessen*, 2 Fish. Pat. Cas. 600; *Howard* v. *Great Northern R. Co.* 2 Best & S. 193; *Kay* v. *Marshall*, 2 Webster, Pat. Cas. 79.

Courts construe patents, if possible, so as to conform to the real inventions which the inventor has made, and which entitled him to the patent in controversy. Upon a charge of double-patenting, it will read the patents in the historical order of the several inventions, irrespective of the date of issue; and if, so read, they conform to what the inventor successively did, at successive periods, they will be upheld.

Grant v. *Raymond*, 31 U. S. 6 Pet. 218 (8: 376); *Topliff* v. *Topliff*, 145 U. S. 156 (36: 658); *Washburn & M. Mfg. Co.* v. *Beat 'em All Barbed Wire Co.* (*The Barbed Wire Patent*), 143 U. S. 275 (36: 154); *Electric Accumulator Co.* v. *Brush Electric Co.* 1 U. S. App. 320, 52 Fed. Rep. 130, 61 Pat. Off. Gaz. 886; *O'Reilly* v. *Morse*, 56 U. S. 15 How. 122 (14: 627).

Cases showing that a patent for a combination and a patent for one element are not patents for the same invention:

Schumacher v. *Cornell*, 96 U. S. 549 (24: 676); *Brown* v. *Guild* ("*The Cornplanter Patent*"), 90 U. S. 23 Wall. 181 (23: 161); *Rowell* v. *Lindsay*, 113 U. S. 97 (28: 906); *Electric R. Signal Co.* v. *Hall R. Signal Co.* 114 U. S. 97 (29: 99); *Cantrell* v. *Wallick*, 116 U. S. 689 (29: 1017); *McCreary* v. *Pennsylvania Canal Co.* 141 U. S. 459 (35: 817); *James* v. *Campbell*, 104 U. S. 356 (26: 786).

A description without claim in one patent does not prevent a claim in a later patent, if the application for this second be filed before the first issues.

Sargent v. *Hall Safe & L. Co.* 114 U. S. 63, 85 (29: 67, 76); *Béné* v. *Jeantet*, 129 U. S. 683, 686 (32: 803, 804); *Wollensak* v. *Sargent*, 151 U. S. 221, 225 (38: 137, 140); *Electric Gaslighting Co.* v. *Fuller*, 59 Fed. Rep 1003, 1004.

There may be as many patents as there are inventions, and one inventor who has made many inventions is not to be prejudiced by the fertility of his genius.

James v. *Campbell*, 104 U. S. 356 (26: 786); *Singer* v. *Braunsdorf*, 7 Blatchf. 521; *Holmes Electric Protective Co.* v. *Metropolitan Burglar Alarm Co.* 33 Fed. Rep. 254; *Suffolk Mfg. Co.* v. *Hayden*, 70 U. S. 3 Wall. 315 (18: 76); *Sickels* v. *Falls Co.* 4 Blatchf. 508; *Sickels* v. *Evans*, 2 Cliff. 203.

Mr. Justice **Brewer** delivered the opinion of the court:

This is a suit by the United States to set aside a patent for an invention as wrongfully issued. It is, we believe, the first *case in [238 this court in which upon proofs such an application has been presented. The right of the United States to maintain such a suit was affirmed in *United States* v. *American Bell Teleph. Co.* 128 U. S. 315 [32:450]. The question now is whether upon the facts disclosed in this record the relief prayed for ought to be awarded. It becomes, therefore, a matter of moment to determine under what circumstances and upon what conditions the United States are entitled to have a patent issued in due course of law set aside and canceled.

Many cases have come to this court, in which patents for lands have been sought to be set aside, and the rules controlling such suits have been frequently considered. Such decisions will naturally throw light upon the question here presented, though before adverting to them it may be well to note the difference between patents for land and patents for inventions. While the same term is used, the same grantor is in each, and, although each vests in the patentee certain rights, yet they are not in all things alike. The patent for land is a conveyance to an individual of that which is the absolute property of the government and to which, but for the conveyance, the individual would have no right or title. It is a transfer of tangible property; of property in existence before the right is conveyed; of property which the government has the full right to dispose of as it sees fit, and may retain to itself or convey to one individual or another; and it creates a title which lasts for all time. On the other hand, the patent for an invention is not a conveyance of something which the government owns. It does not convey that which, but for the conveyance, the government could use and dispose of as it sees fit, and to which no one save the government has any right or title except for the conveyance. But for the patent the thing patented is open to the use of anyone. Were it not for this patent anyone would have the right to manufacture and use the Berliner transmitter. It was not something which belonged to the government before Berliner in-

vented it. It was open to the manufacture and use of anyone, and anyone who knew how could contrive, manufacture, and use the instrument. It conveyed to Berliner, so far as **239**] *respects rights in the instrument itself, nothing that he did not have theretofore. The only effect of it was to restrain others from manufacturing and using that which he invented. After his invention he could have kept the discovery secret to himself. He need not have disclosed it to anyone. But in order to induce him to make that invention public, to give all a share in the benefits resulting from such an invention, Congress, by its legislation, made in pursuance of the Constitution, has guaranteed to him an exclusive right to it for a limited time; and the purpose of the patent is to protect him in this monopoly, not to give him a use which, save for the patent, he did not have before, but only to separate to him an exclusive use. The government parted with nothing by the patent. It lost no property. Its possessions were not diminished. The patentee, so far as a personal use is concerned, received nothing which he did not have without the patent, and the monopoly which he did receive was only for a few years. So the government may well insist that it has higher rights in a suit to set aside a patent for land than it has in a suit to set aside a patent for an invention. There are weightier reasons why the government should not be permanently deprived of its property, through fraudulent representations or other wrongful means, than there are for questioning the validity of a temporary monopoly or depriving an individual of the exclusive use for a limited time of that whose actual use he claims to have made possible, and which, after such time, will be open and free to all. Bearing in mind this distinction, let us inquire upon what conditions the government may maintain a suit to set aside a patent for land.

These suits may be conveniently grouped in three classes: First, where, the government being the only party interested, the patent is charged to have been obtained by fraud in representations or conduct. Second, where the land by appropriate reservation is not subject to patent, but is, nevertheless, erroneously patented. Third, where the land, though subject to patent in the ordinary administration of the land office, is patented to the wrong person either through fraud or by reason of mistake or **240**] inadvertence. In the first class are *the following cases: *United States* v. *Hughes*, 52 U. S. 11 How. 552 [13: 809]; *United States* v. *Throckmorton*, 98 U. S. 61 [25: 93]; *United States* v. *Atherton*, 102 U. S. 372 [26: 213]; *Moffat* v. *United States*, 112 U. S. 24 [28: 623]; *United States* v. *Minor*, 114 U. S. 233 [29: 110]; *Maxwell Land Grant Case* [*United States* v. *Maxwell Land Grant Co.*], 121 U. S. 325 [30: 949]; *Colorado Coal & I. Co.* v. *United States*, 123 U. S. 307 [31: 182]; *United States* v. *San Jacinto Tin Co.* 125 U. S. 273 [31: 747]; *United States* v. *Iron Silver Min. Co.* 128 U. S. 673 [32: 571]; *United States* v. *Hancock*, 133 U. S. 193 [33: 601]; *United States* v. *Trinidad Coal & C. Co.* 137 U. S. 160 [34: 640]; *United States* v. *Budd*, 144 U. S. 154 [36: 384]; *San Pedro & C. Del A. Co.* v. *United States*, 146 U. S. 120 [36: 912].—In the second are these: *Stone* v. *United States*, 69 U. S. 2 Wall. 525 [17: 765]; *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733 [23: 634]; *Western P. R. Co.* v. *United States*, 107 U. S. 526 [27: 621]; *Western P. R. Co.* v. *United States*, 108 U. S. 510 [27: 806]; *Mullan* v. *United States*, 118 U. S. 271 [30: 170].—And in the third the following: *Hughes* v. *United States*, 71 U. S. 4 Wall. 232 [18: 303]; *United States* v. *Beebe*, 127 U. S. 338 [32: 121]; *United States* v. *Marshall Silver Min. Co.* 129 U. S. 579 [32: 734]; *United States* v. *Missouri, K. & T. R. Co.* 141 U. S. 358 [35: 766]; *United States* v. *Southern P. R. Co.* 146 U. S. 570 [36: 1091].

The second and third classes are not paralleled in this case, for it is not claimed that there was no invention, or that the patent issued to the wrong party. The decisions in those classes need not be considered. The first class comprises all cases in which the land, though subject to patent and therefore within the jurisdiction of the Land Department, was charged to have been patented in consequence of fraudulent representations or conduct on the part of the patentee. The representations may have been as to the matter of right or the matter of quantity. The patentee may have been entitled to no land, or to less, or a different tract than that patented. In any event, fraud was the basis of the relief sought; and as fraud, actual or constructive, in the issue of the patent is the burden of this suit, we will quote from the opinions in some of these cases. In the *Maxwell Land Grant Case* Mr. Justice Miller, delivering the opinion of the court, said (p. 381 [959]):

"We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul, or to correct a *written in- **241** strument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect,

and that amount of it which produces conviction, shall make such an attempt successful."

In *Colorado Coal & I. Co.* v. *United States*, Mr. Justice Matthews, after quoting part of the foregoing, adds (p. 317 [187]):

"It thus appears that the title of the defendants rests upon the strongest presumptions of fact, which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing, and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the government. Neither is it relieved of this obligation by the negative nature of the proposition **242]** it is bound to establish. It is, *indeed, sometimes said that a negative is incapable of proof, but this is not a maxim of the law. In the language of an eminent text-writer: 'When the negative ceases to be a simple one —when it is qualified by time, place, or circumstance—much of this objection is removed; and proof of a negative may very reasonably be required when the qualifying circumstances are the direct matter in issue, or the affirmative is either probable in itself, or supported by a presumption, or peculiar means of proof are in the hands of the party asserting the negative.'"

Then, after quotations from many authorities, the learned Justice closes the discussion with these words from 1 Greenl. Ev. § 80:

"So, where the negative allegation involves a charge of criminal neglect of duty, whether official or otherwise, or fraud, or the wrongful violation of actual lawful possession of property, the party making the allegation must prove it; for in these cases the presumption of law, which is always in favor of innocence and quiet possession, is in favor of the party charged."

In *United States* v. *Marshall Silver Min. Co.* Mr. Justice Miller again refers to this matter, saying (p. 589 [738]):

"The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the Land Department before its issue, nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent is procured."

With these declarations of the law controlling such cases we proceed to consider that which, according to the brief of counsel for the government, is the principal matter in this case. We quote their words:

"The delay in the office is the great fact in the case. It determined the bringing of the suit, stands in the forefront of the bill, was the principal question argued in both courts below, and occupies the chief space in the decisions rendered. It is not set up as laches, nor as a ground of forfeiture under any provision of the law or rule of the Patent Office, but as a course of conduct in the nature of fraud on the public."

243] *What was the delay in this case? The application by Berliner was made on June 4, 1877, he having filed a caveat on April 14, 1877. In 1878, and prior to October 23, the telephone company purchased Berliner's invention, and on November 17, 1891, a patent was issued to the telephone company as assignee of Berliner. The application was, therefore, pending in the department fourteen years, during thirteen of which the invention was the property of the telephone company. The effect of this, it is said, is to prolong for all practical purposes the telephone monopoly during the lifetime of this patent, and in this way: On March 7, 1876, patent No. 174,465 was issued to Alexander Graham Bell, in which patent, as alleged in the bill and admitted in the answer, were described and claimed "a method of and apparatus for transmitting sound by means of an undulatory current of electricity." This was the original telephone patent. And it signified that Bell invented the telephone. That patent has expired and all the monopoly which attaches to it alone has ceased, and the right to use that invention has become public property. But while he invented the telephone, the apparatus he devised was inefficient for public uses. Berliner invented something by which, taken in connection with Edison's and Blake's inventions, Bell's undulatory current could be made practically available for carrying on conversation at long distances. In other words, the telephone, as we use it,—that which has become such an important factor in the commercial and social life of to-day,—does not embody simply the invention of Bell, but also those of Edison, Blake, and Berliner. So that while the public has to-day, by reason of the expiration of the Bell patent, the right to use as it pleases his invention, such right is a barren one, and the telephone monopoly is practically extended to the termination of the Berliner patent. And this extension of the time of the monopoly has been accomplished by means of the delay in the issue of the Berliner patent, the long pendency of the application in the Patent Office. In order that the contention of the government may be clearly presented, and in view of the importance of this question, we may properly quote at some length from the brief of counsel:

*"In the present case Mr. Bell's patent **[244** of 1876 covered broadly the process of transmitting sound by means of an undulatory electric current, as distinguished from an interrupted or broken current, no matter how produced. His patent showed a transmitter capable of producing such a current, but so feebly that its use was limited to short distances. Afterwards Mr. Berliner discovered, we will say, that the undulatory current necessary to transmit speech can be produced by means of another form of transmitter,—one operating by variation of pressure between its electrodes at their point of contact. But as the only function of the instrument was to produce an undulatory current, and as the use of that current, however produced, was covered by Mr. Bell's invention, it follows that the instrument was subject to two independent monopolies.

"Later, we will say, Mr. Edison discovered that the use of carbon as the material for the construction of the electrodes of the Berliner transmitter gave to that instrument a greatly increased power and reach of operation. Later still Mr. Blake devised a particular combination of carbon and metallic electrodes, with

mechanism for their mounting, which secured an improved ease and permanence of adjustment and superior adaptation to common use. Mr. Bell hit upon the true principle, in relation to the kind of current to be employed, and was justly entitled to a patent for it, although the range of his transmitter may have been but a few hundred feet. Mr. Berliner, we will say, hit upon the true principle underlying the operation of the microphone, and was entitled to his patent, although the mechanism he used in the embodiment of his thought was so unstable in its adjustment as to make it of uncertain value. The inventions of Mr. Edison and Mr. Blake completed the instrument, and made possible the talking telephone in every man's house, the city exchange, and the long-distance line from city to city.

"It thus happened that the Blake transmitter introduced into public use by the Bell Company in 1878, and familiar to us all, was the embodiment in one piece of mechanism and its use of four distinct inventions made **245**] by four different men. *That company was the owner of all the inventions. For Mr. Bell's invention it held patents issued in 1876 and 1877; for Mr. Blake's patents were issued in 1881; and for the others, applications were on file subject to its control.

"Mr. Bell's invention was one of the first rank,—nothing less than the discovery of a new law of nature. Mr. Berliner's invention was a beautiful intellectual conception of a mode of operation. Mr. Edison's was the discovery of a new property of carbon. Mr. Blake's was an ingenious and a practical utilization of the three. Mr. Bell's invention lies at the foundation of the art of telephony. Mr. Edison's and Mr. Blake's have done more to make the art of practical value than all others following Mr. Bell.

"We assume that it was not possible to take out patents for all these inventions at the same time. And so far as that was not possible, the overlapping and prolongation of the monopolies created by the patents in the use of the carbon microphone could not be avoided without denying to some one or more of the inventors his rights under the law. But does it follow that the Bell Company was entitled of right to hold control of the microphone under the broad claims of the Bell patent and the construction and combination claims of the Blake patents, and nurse the applications for the other inventions in the office, taking out a patent on Berliner's just in time to overlap Bell's, and on Edison's in time to overlap Berliner, and so secure a monopoly on the same transmitter used in the same way to produce the same result for three times the period fixed by the statute for the duration of a patent?

"It needs no lawyer's argument to make manifest the inherent moral wrongfulness of such a proceeding toward the public. Every right-minded man will feel it instinctively. Would it be a legal wrong?"

After discussing the injury to the public which results from the conduct described, they add:

"Hence, a man who is enjoying a monopoly of a thing under one patent, and is at the same time prosecuting an application for another patent which will give him a monopoly of the *same thing for a further period, is **[246** bound to speed his application."

It will be perceived that it is conceded that some delay is unavoidable. In the very nature of things that is so. It is not possible that an application for a patent can be considered and determined on the instant. So it is not the fact, but the excessiveness, of the delay of which complaint is made. The mere fact of delay does not, therefore, operate to deprive the inventor of his legal rights. Before he can be punished it must be shown that he has been guilty of a wrong,—that he has caused the delay. It matters not whether the delay be reasonable or unreasonable, for a brief time or for many years, if the applicant is not responsible for it. Whatever may be the injury to the public, if the delay is caused solely through the negligence or inattention of the tribunal before which the application is pending, it is something for which the applicant is not responsible, and which does not affect his legal rights. There is often great delay in suits in the courts. Cases not infrequently are argued before the highest courts and not decided by them for weeks and sometimes for years. Whatever effect such delay may have upon the interests of others or upon the public, so long as it results from the mere nonaction of the courts, the rights of the suitor are unaffected. He cannot be punished on account of the delay of the tribunal before which he is presenting his suit.

Neither can a party pursuing a strictly legal remedy be adjudged in the wrong if he acts within the time allowed, and pursues the method prescribed by the statute. If the statute gives him five years within which to bring an action on a note he cannot be denied relief simply because he waits four years and eleven months. If he has two years after a judgment against him within which to take an appeal he may wait until the last day of the two years. Under U. S. Rev. Stat. § 4886, an inventor has two years from the time his invention is disclosed to the public within which to make his application, and unless an abandonment is shown during that time he is entitled to a patent, and the patent runs as any other patent for seventeen years from its date. He *cannot be deprived of this right by proof **[247** that if he had filed his application immediately after the invention the patent would have been issued two years earlier than it was, and the public therefore would have come into possession of the free use of the invention two years sooner. The statute has given this right, and no consideration of public benefit can take it from him. His right exists because Congress has declared that it should. It will not do to say that because Congress has declared that seventeen years is the life of a patent, seventeen years is the limit of the possible monopoly; for the same legislation that gives seventeen years as the life of a patent gives two years within which an application for a patent may be made, and during that time, as well as while the application is pending in the department, the applicant has practically, if not legally, an exclusive use. A party seeking a right under the patent statutes may avail himself of all their provisions, and the courts may not

deny him the benefit of a single one. These are questions, not of natural, but of purely statutory, right. Congress, instead of fixing seventeen, had the power to fix thirty, years as the life of a patent. No court can disregard any statutory provisions in respect to these matters on the ground that in its judgment they are unwise or prejudicial to the interests of the public.

And in this connection it is also well to notice these facts: U. S. Rev. Stat. § 4888, requires an inventor to make appplication in writing to the Commissioner of Patents. That and the two or three suceeeding sections prescribe what the application shall state, and by what it shall be accompanied. Section 4893 provides that on the filing of the application and the payment of fees "the Commissioner of Patents shall cause an examination to be made of the alleged new invention or discovery; and if on such examination it shall appear that the claimant is justly entitled to a patent under the law, and that the same is sufficiently useful and important, the Commissioner shall issue a patent therefor." Section 4894 reads:

"All applications for patents shall be completed and prepared for examination within two years after the filing of the application, and in default thereof, or upon failure of the [248] *applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

Certain rules of procedure have been prescribed by the Commissioner of Patents, and a certain routine of practice has become established in that department. Now, all these matters of statutory enactment, rules of procedure, and routine of practice, are things over which an applicant has no control. When he has once filed his application, complying with the statutory requirements, then the Patent Office takes possession of the matter. It determines when and how it will act, and the applicant can only ask and wait.

And why should he be called upon to do more? He comes before the tribunal which the government has established and presents his application. Why should the validity of the grant which that tribunal finally makes depend in any degree upon the number of times he has repeated his application? The true rule is that if application has been made and the applicant has once called for action, he cannot be deprived of any benefits which flow from the ultimate action of the tribunal, although that tribunal may unnecessarily, negligently, or even wantonly, if that supposition were admissible, delay its judgment. If the public is interested in prompt action, if the government which represents the public thinks that more speed on the part of any of its tribunals is essential, it is the government which is called upon to act, and the applicant may with propriety wait until either the tribunal has acted or until the government, having regard for the public interest, has interfered to compel action. Accepting the statement of counsel as to the facts to be corrected in all its fullness, consider what would have been the ruling of a court if an application had been made to it based upon those facts. Suppose the applicant had presented its petition for a mandamus to compel prompt action on the part of the patent officials and said, "I have applied for and am entitled to a patent. It will be issued after a while without any judicial *compulsion. I can make [249 large profits if the Patent Office will be dilatory, and yet I ask a mandamus to compel its immediate action," would not the ruling have been, "By your own showing you are entitled to no relief; you have no cause of complaint; it is the government, representing the public, which alone can complain." And if it could obtain no assistance by a suit in advance, can it be punished indirectly by being deprived of that which was finally awarded to it?

Much is said in the briefs and in the arguments about the practical continuance of the telephone monopoly. It is well to understand exactly what is meant thereby. No one questions that the Bell patent has expired, and that all of his invention is free to the use of the public. It is not denied that Berliner's invention is something independent and distinct from the Bell invention. It is the combination of these inventions with those of Blake and Edison which make the instrument in commercial use, and because this is the most serviceable it is the one that the public insists upon having. But each invention has independent rights. It loses nothing because when united with another it results in an instrument more valuable than either alone will give. Suppose that at the expiration of this Berliner patent some new invention shall be made by which, in connection with those already free to the public, an instrument can be manufactured far surpassing in utility that used to-day, and the Bell Company shall purchase that invention, the public, which always insists on having the best and most serviceable, will undoubtedly take the new instrument, and in that way it may happen that what is called the telephone monopoly is practically still further continued. But surely that does not abridge the legal rights of anyone. The inventor of the latest addition is entitled to full protection, and if the telephone company buys that invention it is entitled to all the rights which the inventor had. All that the patent law requires is that when a patent expires the invention covered by that patent shall be free to everyone, and not that the public has the right to the use of any other invention, the patent for which has not expired, and which adds to the utility and advantage of *the [250 instrument made as the result of the combined inventions.

Counsel seems to argue that one who has made an invention and thereupon applies for a patent therefor occupies, as it were, the position of a quasi trustee for the public; that he is under a sort of moral obligation to see that the public acquires the right to the free use of that invention as soon as is conveniently possible. We dissent entirely from the thought thus urged. The inventor is one who has discovered something of value. It is his absolute property. He may withhold the knowledge of it from the public, and he may insist upon

all the advantages and benefits which the statutes promise to him who discloses to the public his invention. He does not make the law. He does not determine the measure of his rights. The legislative body, representing the people, has declared what the public will give for the free use of that invention. He cannot be heard in the courts to say that it is of such value that he is entitled to a larger and longer monopoly; that he is not fully compensated for the great benefit which his invention has bestowed by the pecuniary receipts during seventeen years. No representative of the public is at liberty to negotiate with him for a new and independent contract as to the terms and conditions upon which he will give up his invention. He must come under the dominion of the statute, and take that which the public has proffered its willingness to give. As the lawmaking power has prescribed what the public will give, specified the terms and conditions of purchase, indicated the time and methods of determining the right of compensation, he on his part has an absolute legal right to avail himself of the provisions thus made. It is not of course doubted that the courts in construing the patent as all other statutes, must have regard to the spirit as well as the letter. That simply requires that courts, shall ascertain their true meaning, but when that is ascertained the applicant for a patent is entitled to all the benefits which those statutes thus construed give.

What are the evidences of wrong in this matter of delay? It may have been caused either [251] by the negligent or wrongful *action of the officers of the department, and without any connivance, assistance, or concurrence on the part of the applicant, or it may have been brought about by the applicant, either through its corruption of the public officers, or through other misconduct on its part. If the fault is wholly that of the department, the applicant ought not to suffer therefor. While, on the other hand, if its conduct has been wrongful, it may and ought to suffer. There is no presumption against the applicant. If a tribunal charged with official action delays such action, whatever of presumption surrounds the delay attaches to the tribunal, and no evidence of wrong being given, the presumption would be that the delay was at the instance of the tribunal and not caused by the applicant. The government, therefore, in order to make out its case, must affirmatively show that the delay has been caused in some way by the conduct of the applicant, and before its patent can be set aside the government must, in accordance with the rules laid down in respect to land patents, establish that fact clearly. It may not rest on mere inferences, mere suggestions, but must prove the wrong in such a manner as to satisfy the judgment before it can destroy that which its own agents have created. We reiterate what was said by Mr. Justice Miller, for the court, in the *Maxwell Land Grant Case*, that a suit between individuals to set aside an instrument for fraud can only be sustained when the testimony in respect to the fraud is clear, unequivocal, and convincing, and cannot be done upon a bare preponderance of evidence which leaves the issue in doubt; and that if this be the settled rule in respect to suits between individuals it is much more so when the government attempts to set aside its solemn patent. And we may here again repeat that if this is true when the suit is to set aside a patent for land, which conveys for all time the title, *a fortiori* it must be true when the suit is one to set aside a patent for an invention which only grants a temporary right.

What evidence has the government produced? We premise by saying that there is not a scintilla of testimony as to any corruption of the officers of the department by the defendants, or any attempt at such corruption. Counsel do not *put the finger on a single fact tending [252] to show that any money was ever paid to any official of the Patent Office, or that any undue influence was ever attempted to be exerted upon or improper suggestion made to any one. So far as the record discloses, there never was an intimation made to a single official that he could profit in any way by a moment's delay. All thought of wrong in this respect may therefore be put aside. If there was no corruption on the part of the defendants, what did they do that calls for condemnation? And we turn to the brief of the learned counsel for the government to see what evidences of wrong they have found in the record. After noting that their inquiry begins at June 9, 1882, thus impliedly conceding that there is no reason to question the delay up to that time (a period of five years), they call attention to the subsequent correspondence between the solicitor in charge of the application and the officials of the department, which, so far as is material, is as follows:

"On June 9, 1882, the examiner wrote to the solicitor as follows:

" 'As at present advised it is believed that the claims presented may be allowed, but final action in this case must be suspended in view of probable interferences with other pending applications, which will be declared as soon as practicable.'

"On October 8, 1883, sixteen months later, the solicitor wrote as follows:

" 'In June, 1882, I received an official letter dated the 9th of that month, saying that "the claims presented may be allowed, but final action is suspended in view of probable interferences." Since then I have been awaiting the official action. I beg to call attention to the case and ask that it may receive action.'

"October 23, 1883, the examiner, as follows:

" 'In response to applicant's letter filed October 9, 1883, it is stated that further action in this case on the part of the office must be still further postponed until the conditions of interfering applications will permit the declaration of interference, which seem, unavoidable.'

*"On February 19, 1886, two years and [253] four months later, the solicitor as follows:

" 'The specification is hereby amended as follows: Erase amendment O, filed December 16, 1881. Erase claims 3, 7, 8, 10, and 11, and change number of claims 4, 5, 6, 7, and 9 to 3, 4, 5, 6, and 76.'

"This amendment contained nothing material to the present discussion.

"March 17, 1886, the examiner, as follows:

" 'In response to amendment of February 19, 1886, applicant is advised that the broad claims involving the idea of a variable pressure

contact telephone will probably be involved in an interference with a pending application or applications of another applicant, and that said applicant has been advised that he must show that the office action taken in the matter of his application is not a sufficient answer thereto on or before April 1, 1886. In the meanwhile this application will be suspended from further action.'

"August 13, 1886, five months later, the solicitor:

" 'I desire to be informed of the present status of this case, and to be advised if the office is awaiting any action on the part of the applicant. It is desired that no rights should be lost by inaction.'

"August 19, 1886, the examiner, as follows:

" 'In response to applicant's letter of the 13th inst., he is hereby advised that the delay in this case is a matter over which he has no control, except it be, perhaps, in the matter of urging an early interference. The interference will be declared as soon as the other applicants are in condition, if it be decided that they are entitled to the same. The office is awaiting no action on the part of the applicant, and the delay is through no fault of his.' "

After these quotations, counsel observe as follows:

"These perfunctory exchanges of compliments between the solicitor and the examiner occupied the entire time from June 9, 1882, to March 16, 1888, five years, nine months, and seven days. In all that time not a demand for [254] action, not a hint *even of dissatisfaction, appears in the record. We have quoted it all. Of course, this appearance of willing acquiescence is not conclusive. The examiner's letters indicate an obstacle in the way; some portending interference or interferences, always coming yet never arriving. But the supine submission of the company to such extraordinary delay, for such a cause, is the first item of the proof. If it had been possessed of a real purpose to have its patent as soon as possible, if it had been losing millions per annum for want of it, as the people are losing millions because of it, would it not have found some way to force this invisible foe into the field, or at least leave on the record some trace of its mighty effort to burst the bands of official routine which prevented it from finding and fighting him?"

This presents the burden of the case on the part of the government. It amounts to only this: The defendant company was not active, but passive. If millions were to be added to its profit by active effort it would have been importunate and have secured this patent long before it did. As millions came to it by reason of its being passive, it ought to suffer for its omission to be importunate. It must keep coming before the Commissioner, like the widow before the unjust judge in the parable, until it compels the declaration, "though I fear not God nor regard man, yet, because this widow troubleth me, I will avenge her, lest by her continual coming she weary me." But is this the rule to measure the conduct of those who apply for official action? What is the amount of the importunity which will afford protection to the grant finally obtained? How frequent must the demand be? It is easy to say that the applications of this defendant, coming only at the interval of months and years, were, taken with the replies of the Patent Office, mere "perfunctory exchanges of compliments," but this does not change the fact that action was asked and repeatedly asked; that no request was made for delay, no intimation that it was desired or would be acceptable.

In this connection may well be noticed the letter of the solicitor, in March, 1881, to the Commissioner, in which he urged the modification of Rule No. 94 in respect to interferences, *and this in order to hasten the issue of [255] the patent. In this letter, besides pointing out how the rule as it then existed would tend to delay, he adds these statements:

"So far as my client is concerned, I have to submit that it is of the utmost importance that the interference be declared forthwith. . . .

"The indefinite suspension of the interference would only create harassing and oppressive claims after the public had become possessed of the invention without hindrance or objection on the part of the inventor, and it is but just to say that neither of the interfering applicants could with any degree of propriety claim to be the inventor and expect that such notice on his part would be treated by the public with any degree of respect. Patents issued as the result of long pending interferences are always looked upon as odious monopolies because of the manner in which they are enforced at the time when the public were already possessed of the invention. . . . An early decision upon the question submitted is earnestly requested."

It may be added that the modification was made in October, 1881.

In respect to this letter, and especially the second paragraph, quoted above, counsel for the government say:

"In the argument below, counsel appeared to think that once was enough, and that they stood as a perpetual exhortation to duty to the examiner and all his successors, as though they had been nailed on his office door. But they were not even in the file of the Berliner case. Examiner Freeman, whose report was indorsed on the letter, went out of office in 1883. If anyone ever saw it after that until it was exhumed for the purpose of this case, the fact does not appear in the record."

But is the applicant to be condemned because, having once made an urgent request for action and pointed out reasons therefor, it was not continually repeating that request, because it did not see that such request was placed on the files of this particular application, or, as intimated in the words of counsel, nailed on the doors of the Patent Office?

*It is, of course, easy to say that these [256] applications, these suggestions and requests, meant nothing; that they were a mere blind; but something more than assertion of counsel is necessary to destroy their significance, or to establish collusion between the applicant and the officials of the department. But the case does not stand upon the fact that the formal communications from the solicitor in charge of this application were few in number. While in every one in which the matter was referred

to there was a request for action, it also appears from the testimony of Messrs. Freeman, Lyons, and Kintner, who were the examiners in charge during the major portion of the time in dispute, that the representatives of the Bell Company were urgent in pushing the Berliner application. For instance, Examiner Lyons testified:

"They were urgent and persistent beyond toleration. Hardly a day passed without somebody representing the interests of the Bell Telephone Company coming to our room and urging the allowance of the Berliner case, or the declaration of interferences. I myself was waylaid in the halls of the Patent Office, and on more than one occasion did I sneak into the room to avoid being bored by Mr. Charlie Hedrick, the assistant of Mr. Pollok. Mr. Pollok himself, also, although less frequently, came to the room, and later on, notably toward the end of 1884, and in the spring and summer of 1885, Mr. W. W. Swan was a frequent visitor in the electrical division."

And Examiner Kintner (who was in office from May, 1883, to April, 1887) in reply to a question as to what Mr. Swan, one of the representatives of the telephone company, did in respect to the application, said:

"I had a great many interviews with him in the matter of both the Edison and the Berliner applications under consideration, and he was very persistent in urging the passage of both applications to patent; in fact, to such an extent that his persistency annoyed me not a little."

Another matter referred to by counsel is what they call the "tacit understanding." The facts are these: One Daniel Drawbaugh claimed to have invented the telephone prior to [257]*Bell. He assigned his inventions to the People's Telephone Company, between whom and the defendant company a heated and protracted litigation arose. Now, it is said that there was an agreement, or, at least, a tacit understanding, between the officials of the Patent Office, the People's Company, and the defendant company that the proceedings in the Patent Office in respect to the Berliner application should wait the determination of the litigation between the two telephone companies. It is insisted that the officials had no right to enter into such an agreement; that it was unlawful in its character. Assuming that this is so, still the fact appears that the proposition therefor came from the representatives of the Drawbaugh interest, that it was deemed by the officers of the Patent Office to be for the best interests of all, and that it was simply assented to by the defendant. Nowhere does it appear that the defendant urged, or even suggested, the propriety of such a delay. For the present we do not consider the wisdom or the rightfulness of the course pursued. All that we desire to notice is that it was not at the instance of the defendant.

It is further said that, even if there were at first any excuse for such "tacit understanding," and the Patent Office properly delayed action on this application until after the litigation between Drawbaugh and Bell had ended, a judgment therein was rendered in the circuit court in 1884; and that then the office should have proceeded promptly, and that there was no excuse for waiting until the decision of the appeal by this court in 1888; and least of all for any delay after that final decision by this court.

Summing up their argument on this branch of the case counsel say:

"The review of the history of the Berliner application which we have now completed shows that in its treatment of it the office proceeded upon two unlawful assumptions.

"The first was that an applicant, whose application is ready for issue except for a possible threatened interference, must wait until the antagoniziug application is either found allowable and ready for the interference, or finally ejected from *the office, no mat- [258 ter how long that may be. This assumption governed the action of the examiners from 1883 to the issue of the patent. . . .

"The second assumption was that the judicial determination of the question of Drawbaugh's invention, in the suit between the owners of the applications, was not enough to warrant action by the office. Examiner Kintner took the ground, in conversation with Mr. Swan,—never on the record,—that the decision of the circuit court was not enough for him; that the case might be appealed, and he would act only on the decision of the supreme court. But when that came, it received no more consideration than had been given to that of the circuit court."

Were it conceded that these two assumptions were "false assumptions," as counsel call them, what are they but errors of judgment on the part of the patent officials as to the course of procedure; and can it be possible that an applicant for a right, who has under the statute no choice of tribunals or course of procedure, but is compelled to apply to one tribunal which has exclusive jurisdiction in the matter, and must abide by its rulings as to procedure, can be held to have forfeited his right simply because of errors of judgment by such tribunal as to the procedure? The statement of the question seems to us to carry its own answer. It is true counsel follow this declaration of the errors on the part of the office in the matter of procedure with the further statement:

"The guilty party is the Bell Company. It had a full and perfect inside view of the whole situation from the beginning. Its attorneys were wiser in these things than the commissioners or the examiners. They shrewdly availed themselves of every unauthorized usage, mistaken assumption, ignorant misconception, or supposed obstacle, by means of which the issue of the patent could be delayed without apparent responsibility on their part. In view of the duty which vested upon the company to speed the application, that was fraud, not less but more reprehensible because it was not of the common and gross kind, but so refined and acute that its garb of professed innocence has deceived even the court of appeals."

*The difficulty with this charge of [259 wrong is that it is not proved. It assumes the existence of a knowledge which no one had; of an intention which is not shown. It treats every written communication from the solicitor in charge of the application, calling for action, as a pretense, and all the oral and urgent ap-

peals for promptness as in fact mere invitations to delay. It not only rejects the testimony which is given, both oral and written, as false, but asks that it be held to prove just the reverse.

Indeed, the case which the counsel present to us may be summed up in these words: The application for this patent was duly filed. The Patent Office after the filing had full jurisdiction over the procedure; the applicant had no control over its action. We have been unable to offer a syllable of testimony tending to show that the applicant ever in any way corrupted or attempted to corrupt any of the officials of the department. We have been unable to show that any delay or postponement was made at the instance or on the suggestion of the applicant. Every communication that it made during those years carried with it a request for action, yet because the delay has resulted in enlarged profits to the applicant, and the fact that it would so result ought to have been known to it, it must be assumed that in some way it did cause the delay, and having so caused the delay ought to suffer therefor. There is seldom presented a case in which there is such an absolute and total failure of proof of wrong.

The defendant company might safely have left the case here, but it has not been content to rest the controversy with the failure on the part of the government to show any wrong. It has not been content to accept the Scotch verdict of "not proved." It has called as witnesses the examiners who were in charge of this application, and taken their testimony as to what did in fact take place, and as to how and why the long delay occurred. Whatever judgment may be pronounced upon the wisdom of the course pursued by these officials, or the sufficiency of the reasons given by them therefor, there is no ground for controverting that they acted in good faith. The case is not one of arbitrary, peremptory postponement and delay.

260] *They supposed they were acting in compliance with the rules of the Patent Office and out of proper regard for the rights of conflicting interests. No just estimate can be placed upon the propriety of their conduct without taking into consideration the whole subject of telephonic inventions and litigation. As heretofore stated, and as is well known, Bell claimed to be the pioneer in this matter of telephonic communication. His claim was disputed, and out of that dispute came the most important, the most protracted litigation which has arisen under the patent system in this country. For years this litigation was pending in the trial courts, subsequently brought to this court, and finally decided in 1888. So great was this litigation, so immense the volume of testimony, and so important the rights involved, that it is the only case in the history of this court to which an entire volume of our reports is devoted. (126 U. S. [31: 863]). The argument was protracted through weeks, and the case was held under consideration for a year, and finally decided by a closely divided court. Is it strange that, when the primary right was being so vigorously contested, and was so much a matter of doubt, when (as appears from the testimony in this case) the judgment of the law department of the government was adverse to the claims of Bell, and to the validity of the patent which he had obtained,—is it strange, we ask, in view of these facts, that the disposition of the apparently minor matter should be held in abeyance in the Patent Office until a final decision of the primary right?

Neither can any just estimate be placed upon their conduct without taking into account the volume of business, and the pressure on account thereof, in the Patent Office. Beyond the fact, which is a matter of common knowledge, that thousands of applications are filed and thousands of patents granted each year, the record discloses something as to the multitude of applications for patents for telephones and telephonic devices which were pending during these years. Mr. Townsend, who was an examiner up to November 15, 1880, while unable to state the number of applications, was able to say that he had examined over 120 that went to *patent. This, it will [261 be remembered, was in the early days of telephonic investigation and invention. It appears also from a communication made by the Commissioner of Patents to the Secretary of the Interior, on December 13, 1892, advising against this suit, that at that time a gentleman, who is called in the letter the "relator," had pending in the Patent Office 152 applications for patents on telephones and telephone systems. These facts may be only sidelights, but they show that the examiners and other officials in the Patent Office had something else to do besides considering this application.

Of course, it is easy to say that the Patent Office could have disposed of this application more promptly than it did; that it ought to have done so, and that, in view of the termination of the great litigation favorable to the claims of Bell, its delay has resulted in large pecuniary benefits to the defendant. But a wisdom born after the event is the cheapest of all wisdom. Anybody could have discovered America after 1492. The question is not, whether a better judgment on the part of the patent officials would have disposed of this application long before it was, is not indeed whether there was any error of judgment, but whether they acted wrongfully and their action was induced by or at the instance of the defendant.

One thing more deserves notice. The argument of the counsel for the government proceeds all along on the assumption of the superior knowledge of the representatives of the defendant company; that they saw the end from the beginning; that they knew that their client had an invention which was patentable and that they would ultimately obtain a patent therefor, and also that Bell was and would finally be adjudged the primary inventor of the telephone, and that, possessed of all this knowledge, they planned the delay in securing the Berliner patent in order that thereby they might extend to the termination of its life the telephone monopoly. But what an assumption this is and how illy justified by the facts! The very process and termination of the Bell-Drawbaugh litigation demonstrates the doubtfulness of the question there in issue, and is absolute evidence that there was up to the close *of that litigation an uncertainty as to the [262 result. Equally uncertain was the outcome of

the Berliner application. Indeed, there is an uncertainty as to every application. No one can foretell what will be the judgment of the Patent Office upon the questions of novelty and utility. And in respect to this Berliner application the matters which are subsequently to be considered attest that there was more than ordinary doubt as to the outcome. On account of those matters it is earnestly contended that there was no merit in the application, and that it ought to have been denied. Further than that, they knew that the officials of the Patent Office were subject to change,—as in fact they were changed during the pendency of these proceedings,—and even if they had any direct intimations from the first examiner or the first commissioner, there was no certainty that a subsequent examiner and subsequent commissioner would entertain the same views. If the Bell-Drawbaugh litigation had terminated the other way and a different opinion on the part of a single member of this court would have changed this result, or if when the time came the Commissioner of the Patent Office had decided against the Berliner application, and his decision been sustained on appeal to the supreme court of the District of Columbia, then all this brilliant scheme of realizing millions would have vanished into thin air. If they were possessed of the wisdom which the government attributes to them, the representatives of the Bell Company must have realized that the certainty which attends a final decision and the issue of a patent was something worth striving for, and not lightly to be ignored. And if this underlying assumption has so little foundation, what shall be said of an inference and an imputation unsupported by evidence and based upon that assumption?

Our conclusions on this branch of the case are: First, that before the government is entitled to a decree canceling a patent for an invention on the ground that it had been fraudulently and wrongfully obtained, it must, as in the case of a like suit to set aside a patent for land, establish the fraud and the wrong by testimony which is clear, convincing, and satisfactory. Second, that Congress has established **263**] a department *with officials selected by the government, to whom all applications for patents must be made; has prescribed the terms and conditions of such applications, and intrusted the entire management of affairs of the department to those officials; that when an applicant for a patent complies with the terms and conditions prescribed and files his application with the officers of the department he must abide their action, and cannot be held to suffer or lose rights by reason of any delay on the part of those officials, whether reasonable or unreasonable, unless such delay has been brought about through his corruption of the officials, or through his inducement, or at his instance. Proof that they were in fault, that they acted unwisely, unreasonably, and even that they were culpably dilatory, casts no blame on him and abridges none of his rights. Third, the evidence in this case does not in the least degree tend to show any corruption by the applicant of any of the officials of the department, or any undue or improper influence exerted or attempted to be exerted by it upon them, and, on the other hand, does affirmatively show that it urged promptness on the part of the officials of the department, and that the delay was the result of the actions of those officials. And, fourth, if the circumstances do not make it clear that this delay on the part of the officials was wholly justified they do show that it was not wholly unwarranted, and that there were reasons for the action of such officials, which at least deserve consideration and cannot be condemned as trivial.

The three remaining grounds of relief asserted by the government may be considered together. Defendants contend that as the last two, although urged in the circuit court, were not presented to the court of appeals (referring for this fact to the opinion of the latter court and also a notice which was contained in the brief of counsel for the government), we are precluded from noticing them, citing as authority *Bell* v. *Bruen*, 42 U. S. 1 How. 169 [11: 89]; *Alviso* v. *United States*, 75 U. S. 8 Wall. 337 [19: 305]; *First Nat. Bank* v. *Kentucky*, 76 U. S. 9 Wall. 353 [19: 701]; *Rogers* v. *Ritter*, 79 U. S. 12 Wall. 317 [20: 417]; *Klein* v. *Russell*, 86 U. S. 19 Wall. 433 [22: 116]; *Wood County Supers.* v. *Lackawanna Iron & C. Co.* 93 U. S. 619 [23: 989]; *Wilson* v. *McNamee*, 102 U. S. 572 [26: 234]; *Wood* v. *Weimar*, 104 U. S 786 [26: 779]; *Topliff* v. *Topliff*, 145 U. S. 156 [36: 658]; *McGahan* v. *National Bank of Rondout*, 156 U. S. 218 [39: 403], and *Carr* v. *Fife*, 156 U. S. 494 [39: 508]. — *in which cases, with more or less particularity, the proposition is announced that this court will not consider questions not presented to and passed upon by the lower court. We deem it unnecessary to determine how far that rule is applicable in this case, for the reasons which compel us to deny relief on the first of these grounds are, when applied to the facts developed by the testimony, equally potent as to the others. That ground, as stated, is "that a patent issued November 2, 1880, upon a division of the original application covers the same invention as that covered by the patent in suit and exhausted the power of the Commissioner as to that invention." The patent of 1880 is for a receiver; that of 1891 for a transmitter. It is claimed that the two instruments are alike in form and alike in function, save as they are operated at different ends of the telephone wire. The transmitter can be placed at the other end of the wire, and then becomes a receiver and so *vice versa*. Popularly speaking, it may be said that the transmitter takes the varying sounds of the human voice and passes them on to the telephone wire, to be borne along thereon by the undulatory electric current until they reach the receiver, which takes and passes them to the human ear. In a sense the receiver is also a transmitter, for it passes the sounds from the wire to the ear. We agree with the court of appeals that it is unnecessary to determine whether there are two separate inventions in the transmitter and the receiver, or whether the patent of 1891 is for an invention which was covered by the patent of 1880. The judgment of the Patent Office, the tribunal established by Congress to determine such questions, was adverse to the contention of the government, and such judgment cannot be reviewed in this suit.

[**264**

Suits may be maintained by the government in its own courts to set aside one of its patents not only when it has a proprietary and pecuniary interest in the result, but also when it is necessary in order to enable it to discharge its obligations to the public, and, sometimes, when the purpose and effect are simply to enforce the rights of an individual. In 265] *the former cases it has all the privileges and rights of a sovereign. The statutes of limitations do not run against it. The laches of its own officials does not debar its right. *Van Brocklin* v. *Tennessee* [*Van Brocklin* v. *Anderson*], 117 U. S. 151 [29: 845]; *United States* v. *Nashville, C. & St. L. R. Co.* 118 U. S. 120 [30: 81]; *United States* v. *Insley*, 130 U. S. 263 [32: 968]. But when it has no proprietary or pecuniary result in the setting aside of the patent; is not seeking to discharge its obligations to the public; when it has brought the suit simply to help an individual; making itself, as it were, the instrument by which the right of that individual against the patentee can be established, then it becomes subject to the rules governing like suits between private litigants. As said in *United States* v. *Beebe*, 127 U. S. 338, 347 [32: 121, 125]:

"We are of the opinion that when the government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the government designed for the protection of the rights of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by the other party, nor stop the court from examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants." See also *United States* v. *Des Moines Nav. & R. Co.* 142 U. S. 510 [35: 1099]; *Curtner* v. *United States*, 149 U. S. 662 [37: 890].

Now, in the case at bar, the United States has no proprietary or pecuniary interest. The result, if favorable to it, would put no money in its treasury or property in its possession. It has a standing in court either in the discharge of its obligation to protect the public against a monopoly it has wrongfully created, or simply because it owes a duty to other patentees to secure to them the full enjoyment 266] of the rights which it *has conferred by its patents to them. Perhaps both of these objects were in view. In so far as the latter was and is the purpose of this suit it brings it within the rule laid down in *United States* v. *Beebe*, *supra*. Doubtless the removal from the public of the burden of a monopoly charged to have been wrongfully created was also one of the objects, and perhaps the principal object. *United States* v. *American Bell Teleph. Co.* 159 U. S. 548 [40: 255]. To what extent this may relieve the government as suitor from all the rules governing the suits of private individuals need not be specifically determined here.

One of the familiar rules of equity, reinforced by statute (U. S. Rev. Stat. § 723) is that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." The objection to the validity of this patent on the ground that it was already covered by the patent of 1880 is a defense which, under the statutes (U. S. Rev. Stat. § 4920), is open to every individual charged by the patentee with infringement, whether the proceeding against him be an action at law or a suit in equity. The government, therefore, if seeking simply to protect the right of an individual, ought not to be permitted to maintain a suit in equity to cancel that against which the individual has a perfect legal defense available in any action brought by or against him. The query is pressed whether the same rule would not also apply where the government is only seeking to protect the public at large, for the public is but the aggregation of all the individuals, and if each of them has a perfect defense to the patent, so all together have. Again, and as an illustration perhaps of the extent of the rule referred to, it has often been held that while one having the title to and possession of a tract of land can maintain a suit in equity to cancel a deed or other instrument which is a cloud upon the title, such suit cannot be sustained if the deed or instrument is void upon its face, its invalidity resting upon matters of record, and not affected by any lapse of time or statute of limitations. In other words, the deed or instrument is not considered a *cloud if it can never be used to destroy [267 his title or disturb his possession. The objection to this patent on the ground stated is an objection resting upon matters of record—of record in the Patent Office; not dependent on oral testimony nor subject to change, and in no way affected by lapse of time. Within the scope of this specific application of the general rule it would seem that equity has no jurisdiction, either at the suit of the government or of an individual, to formally cancel that which by record and unfailing evidence is, as claimed, absolutely void.

But, further, Congress has established the Patent Office, and thereby created a tribunal to pass upon all questions of novelty and utility. It has given to that office exclusive jurisdiction in the first instance, and has specifically provided under what circumstances its decisions may be reviewed, either collaterally or by appeal. As said in *Butterworth* v. *United States, Hoe*, 112 U. S. 50, 67 [28: 656, 662]: "That it was intended that the Commissioner of Patents, in issuing or withholding patents, in reissues, interferences and extensions, should exercise quasi-judicial functions, is apparent from the nature of the examinations and decisions he is required to make, and the modes provided by law, according to which, exclusively, they may be reviewed."

U. S. Rev. Stat. §§ 4911, 4914 grant appeals in certain cases to the supreme court of the District of Columbia. It is true those sections do not authorize appeals on behalf of

the government, but the failure so to do may be evidence that Congress thought the government ought not to interfere, and because it believed it had made ample provision for securing the rights of all without the intervention of the government. U. S. Rev. Stat. § 4915, authorizes a suit in equity on behalf of an applicant for a patent whose application has been refused. *Morgan* v. *Daniels*, 153 U. S. 120 [38: 657], presented a controversy under that section, and in the opinion on page 124 [659], we said: "It is a controversy between two individuals over a question of fact which has once been settled by a special tribunal, intrusted with full power in the premises. As such it might be well argued, were **268**] it not for the terms of this *statute, that the decision of the Patent Office was a finality upon every matter of fact."

It is true that all these sections refer to proceedings between individuals, but the government is as much bound by the laws of Congress as an individual, and when Congress has created a tribunal to which it has given exclusive determination in the first instance of certain questions of fact and has specifically provided under what circumstances that determination may be reviewed by the courts, the argument is a forcible one that such determination should be held conclusive upon the government, subject to the same limitations as apply in suits between individuals.

There is nothing in *United States* v. *American Bell Teleph. Co.* 128 U. S. 315 [32: 450], and *United States* v. *American Bell Teleph. Co.* 159 U. S. 548 [40: 255], to conflict with the views above expressed. In the former case the question presented was whether the government could maintain a bill to set aside a patent for an invention on the ground of fraud in its issue, and among the objections urged was the fact that Congress had, in U. S. Rev. Stat. § 4920, made specific provision for certain defenses in suits by an infringer. It was held that the government could maintain such a bill, and that these special statutory provisions did not defeat its right, the court summing up the discussion in these words (p. 373 [464]):

"The argument need not be further extended. There is nothing in these provisions expressing an intention of limiting the power of the government of the United States to get rid of a patent obtained from it by fraud and deceit. And although the legislature may have given to private individuals a more limited form of relief, by way of defense to an action by the patentee, we think the argument that this was intended to supersede the affirmative relief to which the United States is entitled, to obtain a cancelation or vacation of an instrument obtained from it by fraud, an instrument which affects the whole public whose protection from such a fraud is eminently the duty of the United States, is not sound."

In the latter case, which is the one now before **269**] us, there *was decided a motion to dismiss for want of jurisdiction in this court of an appeal from the decision of the court of appeals, and it was adjudged that this court had jurisdiction. It is true, at the close of the opinion is found this general statement as to the power to maintain such a suit (p. 555 [258]):

"In *United States* v. *American Bell Teleph. Co. supra*, it was decided that where a patent for a grant of any kind issued by the United States has been obtained by fraud, by mistake, or by accident, a suit by the United States against the patentee is the proper remedy for relief, and that in this country, where there is no kingly prerogative, but where patents for lands and inventions are issued by the authority of the government, and by officers appointed for that purpose, who may have been imposed upon by fraud or deceit, or may have erred as to their power, or made mistakes in the instrument itself, the appropriate remedy is by proceedings by the United States against the patentee."

But while there was thus rightfully affirmed the power of the government to proceed by suit in equity against one who had wrongfully obtained a patent for land or for an invention, there was no attempt to define the character of the fraud, or deceit, or mistake, or the extent of the error as to power which must be established before a decree could be entered canceling the patent. It was not affirmed that proof of any fraud, or deceit, or the existence of any error on the part of the officers as to the extent of their power, or that any mistake in the instrument was sufficient to justify a decree of cancelation. Least of all was it intended to be affirmed that the courts of the United States, sitting as courts of equity, could entertain jurisdiction of a suit by the United States to set aside a patent for an invention on the mere ground of error of judgment on the part of the patent officials. That would be an attempt on the part of the courts in collateral attack to exercise an appellate jurisdiction over the decisions of the Patent Office, although no appellate jurisdiction has been by the statutes conferred. We are of opinion, therefore, that the question, as stated, is not open for consideration in *this case. **[270**

We see no error in the decision of the Court of Appeals, and its decree dismissing the bill is affirmed.

Mr. Justice **Harlan** dissented.

Mr. Justice **Gray** and Mr. Justice **Brown** were not present at the argument, and took no part in the decision.

STATE OF INDIANA, *Complainant*,
v.
STATE OF KENTUCKY.

(See S. C. Reporter's ed. 270-274.)

Boundary between Kentucky and Indiana.

Decree confirming the report of commissioners to run the boundary line between Kentucky and Indiana.

[No. 2, Original.]

Submitted May 24. 1897. Decided May 24, 1897.

NOTE.—*As to boundaries of state, judicial settlement of*, see note to Nebraska v. Iowa, 36: 798.

ON REPORT of Amos Stickney *et al.*, commissioners, to ascertain and run the boundary line between the states of Indiana and Kentucky. Confirmed, and compensation of the commissioners and their expenses fixed and allowed, etc.

The facts are stated in the decree.

See same case, 136 U. S. 479 (34: 329), 159 U. S. 275 (40: 149), 163 U. S. 520 (41: 250).

Mr. Chief Justice **Fuller** announced the decree of the court:

This cause coming on to be heard on the report of Amos Stickney, Gustavus V. Menzies, and Gaston M. Alves, commissioners, hereinbefore appointed to ascertain and run the boundary line between the states of Kentucky and Indiana, and continued by the decree of this court herein entered May 18, 1896, for the purpose of permanently marking said line as set forth in their then report which was approved by this court on that date, and to make report thereon to this court; which report now made is as follows:

To the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States:

The undersigned commissioners, appointed by this honorable court, in the above-entitled cause, respectfully report that, pursuant to the order made in said cause at the October term, 1895, continuing the commission for the purpose therein stated, they gave notice for bids for the stone monuments and iron posts and setting of the same to mark the boundary line as established by the order of this court. The commission met at the customhouse in the city [271 of Evansville, Indiana, on the *9th day of April, 1897, and received and opened the bids for the above-named material and work. The casting of the iron posts was let to the Heilman Machine Works of Evansville, Indiana, for the sum of one hundred and twenty dollars ($120), it being the lowest and best bidder; the making and setting in place of the three stone monuments was let to F. J. Scholz & Son of Evansville, Indiana, for the sum of two hundred and forty-five dollars ($245), said firm being the lowest and best bidder. The setting of the sixteen iron posts was let to Eb. Cross of Evansville, Indiana, for the sum of one hundred and ninety-seven dollars ($197), he being the lowest and best bidder. That contracts were made with each of said parties and bonds taken for the honest and faithful performance of the contracts. That on the 7th day of May, 1897, after the engineer in charge of the work had reported that the monuments had been erected, and posts placed in position, in conformity to the order of the court, and the location on the established line of each monument and post had been verified by accurate observations and measurements, the commission, accompanied by the engineer, visited the line, and, by observations and measurements, satisfied themselves of the accuracy of locations, and that the work of making and placing the boundary marks had been well done, and in accordance with the order of the court.

We herewith attach, as a part of this report, the report of the engineer in charge of the works. Also a statement of expenses incurred and compensation of the Commissioners since making the former report, which we recommend be adjudged as cost equally against the parties to the suit. We further recommend that upon the confirmation of this report, a certified copy of the same be sent to the governor of the state of Indiana, and one to the governor of the commonwealth of Kentucky.

Your commissioners therefore pray that this report be confirmed and they be discharged.

Amos Stickney,
Gustavus V. Menzies,
Gaston M. Alves,
Commissioners.

*To the Honorable Commissioners on the [272 Indiana and Kentucky Boundary Line at Green River Island.

Gentlemen: In accordance with your instructions, I made plans and detailed drawings for stone and iron monuments, to permanently mark the line between the states of Indiana and Kentucky, at Green River island, to replace the cedar posts as placed on it during the winter of 1896. Upon your approval of the plans and letting the contracts for the monuments, I proceeded to verify the line and angles to satisfy myself that no post had been moved. On the completion of the monuments I superintended the work of setting them.

The three monuments of stone are of sawed Green river limestone, 18 inches in cross section and 6 feet in length. At the starting point on the section line between sections 14 and 15, town 7 south, range 10 west, the monument has the word "Initial" on the side next section 14, on the north side the word "Indiana," and on the south side the word "Kentucky" cut horizontally in the stone near the top, in Egyptian letters.

Near the midway distance along the line, and near the line between sections 8 and 9, the second stone monument is set, with the word "Indiana" cut on the northerly side, and the word "Kentucky" cut on the southerly side, similar to the first monument.

At the terminal point going down the Ohio river, the third stone monument is placed. The word "Indiana" is cut on the northeastly side, the word "Kentucky" on the southwesterly side, and the word "Terminal" on the northwesterly side in the same style as the first monument.

For each of these monuments there was an excavation made 6 feet square and 4 feet deep, in the bottom of which 1 foot in thickness of concrete was placed and well rammed. On this the stone was placed on end and filled around with concrete, well rammed to the surface of the ground, leaving 3 feet of the stone above the ground.

At each of the 16 intermediate angles iron monuments were placed. These are of cast iron, round, 6 inches in cross section, the top closed and a square pedestal cast on the lower end, the casting being ¼ of an inch thick. The *word "Indiana" on the one side and [273 the word "Kentucky" on the other were cast in raised letters, the words reading downward.

An excavation was made for each of these, 3 feet square and 3½ feet deep, and 6 inches of concrete well rammed in the bottom, on which the post was set and filled around with concrete to the surface of the ground, leaving

3 feet above ground. In four places where silt had accumulated rapidly on account of a depression in the ground, the excavation was made more shallow, but in each case the concrete bed is 3½ feet in depth, and the earth banked around it to protect the concrete.

Great care was taken in having centers cut in each monument, and placing them on the exact angle point on the line as originally located.

Every monument was set and completed under my own personal supervision.

Respectfully submitted,
C. C. Genung, C. E.

Evansville, Ind., May 5th, 1897.

Statement of expenses incurred and compensation of the commissioners since making former report.

C. C. Genung, Civil Engineer.—Services of himself and assistants, making plans, specifications, writing contracts, verifying lines, angles, and points on boundary line; laying out and superintending work, expenses of teams for self and commissioners at various times for supervising and inspecting work		$195 50
Keller Printing Company, for printing and typewriting		12 50
Herman Machine Works, 16 iron posts		120 00
F. J. Scholz & Son, 3 stone monuments, placed		245 00
Eb. Cross, placing 16 iron posts in concrete		197 00
Expenses of Lt. Col. Amos Stickney, Commissioner	$34 50	
Services as member of commission	100 00	134 50
274] *Expenses of Gustavus V. Menzies, Commissioner	10 00	
Services as member of commission	100 00	110 00
Expenses of Gaston M. Alves, Commissioner	7 50	
Services as member of commission	100 00	107 50
Total		$1,122 00

It is ordered, adjudged, and decreed that their said report this day filed be and the same is hereby affirmed.

It is further ordered, adjudged, and decreed that the compensation of the commissioners and expenses attendant upon the discharge of their duties in permanently marking said line as directed by the decree of May 18, 1896, be and the same are hereby allowed at the sum of one thousand, one hundred and twenty two dollars ($1,122), in accordance with their report, and that said charges and expenses and the costs of this suit to be taxed be equally divided between the parties hereto.

And it is further ordered, adjudged, and decreed that the clerk of this court do forthwith transmit to the chief magistrates of the states of Kentucky and Indiana copies of this decree, duly authenticated, under the seal of this court.

TLA-KOO-YEL-LEE, *Plff. in Err.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 274-278.)

Testimony on murder trial—cross-examination.

1. A woman who has testified for the prosecution to the fact that a murder was committed by the defendant and by her husband, who was also indicted therefor, may be asked on cross-examination whether since her husband's arrest she has not been living with another witness for the prosecution, and whether they have not agreed to live together if the husband is convicted and they get clear.
2. A woman of a low order of intelligence and without proper appreciation of her responsibilities as a witness for the prosecution on a trial for murder, who has testified that it was committed by the defendant and her husband, may be asked on cross-examination as to the defendant's drunken sleep on that occasion and a conversation between him and her husband when he awoke, for the purpose of affecting her character and credibility.

[No. 516.]

Submitted March 1, 1897. Decided May 24, 1897.

IN ERROR to the District Court of the United States for the District of Alaska to review a judgment convicting the Indian Tla-Koo-Yel-Lee, of the murder of August Jansen in Alaska. *Reversed*, with directions to grant a new trial.

The facts are stated in the opinion.

Mr. **F. D. Kelsey** for plaintiff in error.

Mr. **Holmes Conrad**, Solicitor General, for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

This case comes here on writ of error to the district court of the United States for the district of Alaska. The plaintiff in error is an Indian, and was indicted with another Indian, named Tak-Ke, and, upon a separate trial, was convicted of the crime of murder in killing one August Jansen on or about January 5, 1894, at or near Shekan, within the territory of Alaska and within the jurisdiction of the district court thereof. He was thereupon sentenced to be hanged.

Upon the trial in the district court it appeared that the authorities at Fort Wrangel, some 70 miles from Shekan, were informed by some Indians at that place in May, 1894, of the alleged murder of Jansen in the preceding

NOTE.—*As to impeaching witness by proof of character; scope of inquiry as to character and time,* —see note to Teese v. Huntingdon, 16: 479.

That persons jointly indicted cannot be witnesses for each other; exceptions to the rule; when wife of one may be,—see note to United States v. Reid, 13: 1023.

As to the scope and limits of a cross-examination, see note to Rea v. Missouri, 21: 707.

As to evidence of contradictory statements made by witnesses to impeach; in regard to what facts inquired of on cross-examination the witness may be contradicted,—see note to Ellicott v. Pearl, 9: 475.

January at or near Shekan. In July of that year the United States commissioner, a deputy marshal, and some others started from Fort Wrangel in a steam launch, chartered for the purpose, and went to Shekan to find the body, if possible, and to take such other proceedings as were proper in the premises. An Indian woman, Tlak-Sha, voluntarily accompanied them for the purpose of showing where the body was to be found. A short distance from Shekan the party landed on the beach, and 276] *under her direction search was made, and the body of Jansen was discovered on the beach covered over with rock and brush. The body was sufficiently preserved to be identified, and it was recognized by some of the party. After the finding and recognition, the defendant, with the other above-named Indian (Tak-Ke), was indicted for murder, and, upon the defendant's separate trial, the Indian woman was sworn as a witness. She testified that in January, 1894, the deceased was killed by the defendant and Tak-Ke, who was her husband; that they were in a small sloop near Shekan at the time of the murder, and there were present the deceased, three male Indians, herself, and her child. The third Indian was named Ke Tinch, and he was also sworn on the trial, and while differing in some of the details from the story of the woman, he corroborated her in the statement that the killing was done by the defendant and by the woman's husband, the defendant shooting the deceased and the woman's husband striking him on the head with an axe.

The two Indians above named are the only witnesses to the killing. The female witness accompanied the searching party from Fort Wrangel, and with her assistance the body was found. As one of the two witnesses on the trial she testified against the defendant and her own husband, who was indicted for the crime, though not then on trial. It is apparent how important it was to show to the jury, if possible, the bias, if any, of the witness against the defendant, or to show that her credibility was not to be depended upon by the jury.

In the course of her cross-examination upon the trial the following questions were put to her:

"*Q.* Before this affair took place were you Tak Ke's wife? *A.* Yes, sir.

"*Q.* Whose wife are you now? *A.* I am not married now.

"*Q.* Who are you living with now?"

Counsel for the prosecution objected to the above question as immaterial and incompetent. Objection sustained by the court, to which ruling counsel for the defendant then and there duly excepted.

"*Q.* Is it not a fact that since your husband 277] was arrested *and convicted you have been living with this witness, Ke-Tinch?"

Counsel for the prosecution objected to the above question as incompetent. The objection was sustained by the court and an exception taken.

"*Q.* Is it not a fact that shortly after this affair took place that you and the witness Ke-Tinch agreed to live together if your husband was convicted and you yourselves got clear?"

Same objection was taken, which was sustained by the court, and an exception taken.

"*Q.* I will ask you if it is not a fact that this defendant got so drunk (upon this occasion) that he was laid in the canoe and covered over, and did not recover until after the body had been concealed? *A.* No, sir; he didn't get drunk; nobody drank.

"*Q.* I will ask you if it is not a fact that when he awoke and saw the sloop sailing away and asked where the sloop was going, that Tak-Ke told him the white man was sailing away?"

Objection taken to the question as incompetent, irrelevant, and immaterial. Objection sustained by the court and an exception taken.

We think answers to all of these questions should have been permitted. The questions were directed to the purpose of showing material facts bearing upon the character and credibility of the witness, and the counsel for the defendant ought to have been permitted to proceed with his examination and obtain answers from the witness to that end. The two Indian witnesses (of whom the woman was one) did not agree in regard to the details of the alleged murder, and there is enough in the record to show that they were both of a low order of intelligence, and that they testified without any very solemn appreciation of their responsibilities as witnesses upon the trial of one individual for the murder of another. The whole occurrence at the time of the alleged murder is left in a good deal of confusion, and the credence to be given to the testimony of the woman was of the highest importance.

*The learned solicitor general in his [278 brief in this case, with most commendable candor and fairness, has said:

"But we feel constrained to say from an analysis of the evidence certified in this record, that while it was left to the jury to ascertain the facts established by the evidence, the mind is oppressed with a painful doubt as to the soundness of the verdict returned by the jury."

And in speaking of the refusal of the court to permit answers to be given to the questions asked, as above recited, counsel for the government also says in his brief:

"No reason is given for the exclusion of these questions beyond that reiterated in the objection, that they were 'incompetent, irrelevant, and immaterial.'"

He frankly says that in his opinion this evidence was admissible, and we have no doubt that it was.

The judgment must therefore be reversed, and the cause remanded to the district court of Alaska, with instructions to set aside the verdict and grant a new trial.

UNITED STATES, *Appt.*,
v.
JULIAN SANDOVAL *et al.*

LEVI P. MORTON, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 278-298.)

Protecting property under treaties — court of private land claims — Mexican land claim.

1. The duty of protecting imperfect rights of property under treaties, such as those by which territory was ceded by Mexico to the United States in 1848 and 1853, in existence at the time of such cessions, rests upon the political, and not the judicial, department of the government.
2. A case presented for adjudication to the court of private land claims must be clearly within the act of Congress creating such tribunal, or relief cannot be given.
3. Unallotted lands within the exterior boundaries of a grant made on condition that a settlement should be formed and that the tract should be in common to all settlers who joined in the formation of a town thereon were, by the laws of Spain and Mexico, subject to the disposition of the government, and neither the settlers nor the town have any right to such lands in New Mexico which the court of private land claims, under the act of Congress of March 3, 1891, can confirm as a claim which the United States are "bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States."

[Nos. 205, 599.]

Argued March 9, 10, 1897. Decided May 24, 1897.

APPEALS from decrees of the Court of Private Land Claims in an action brought by Julian Sandoval *et al.*, against the United States in said court for the confirmation under the act of March 3, 1891, of a grant in the territory of New Mexico of land to Lorenzo Marquez *et al.*, and two other suits, one by Levi P. Morton, and the other by Marquez *et al.*, against the same defendant, for the same land, all three of which suits were consolidated and heard as one case and said court rendered judgment dismissing the suits of Morton and Marquez and confirming the grant in the name of Lorenzo Marquez *et al.* *Decree* in *Morton* v. *United States*, *affirmed*, and decree in *United States* v. *Sandoval et al.* *reversed*, and cause remanded, with directions to enter a decree in conformity with the opinion of this court.

Statement by Mr. Chief Justice **Fuller:**

279] *This was a petition filed by Julian Sandoval and others in the court of private land claims for the confirmation under the act of March 3, 1891 (26 Stat. at L. 854, chap. 539), of what was known as the San Miguel del Bado grant in the territory of New Mexico, containing 315,300 acres. It was alleged that the grant was made November 25, 1794, by Governor Chacon to Lorenzo Marquez for himself and in the name of fifty-one men accompanying him; and copies of the original application, of the decree of the governor thereon, of the report, November 26, 1794, of the alcalde Ortiz, and of the report of the alcalde Pino, in 1803, hereinafter set forth, were attached to the petition as exhibits.

Petitioners averred that Ortiz gave juridical possession of the grant to Marquez and his associates, and that they soon after "formed a settlement thereon, as required by the terms and conditions of the said grant, known as the town of San Miguel del Bado, on the present site of the town of that name, within the limits of the said grant, the said settlement being formed, as your petitioners are informed and believe, as a villa, with a corporation council, mayor, aldermen, attorney, and secretary, and that the said settlement of San Miguel del Bado continued as a municipal corporation up to the time the territory of New Mexico was ceded to the United States, the said town of San Miguel del Bado embracing within its jurisdiction all of the land within the exterior boundaries of the said grant heretofore described, and the said grant being, as your petitioners are informed and believe, given to the said settlement of San Miguel del Bado upon the condition that the said settlement should be formed and that the said tract should be in common not only to the petitioners, but to all other settlers who might join them in the future."

That the grant has since been occupied by the original settlers, their descendants and assigns, and others who have become part of that settlement, or moved upon the grant and formed other settlements within its exterior boundaries, or built isolated residences and settled thereon, and "has always been recognized as being a concession made to the town or settlement of San Miguel del Bado and all other settlers *who might join them in the[280 future, and from thence hitherto as being the property of all the settlers within the exterior boundaries of the said grant, to be held and used by them in common, except as to such parts and portions as from time to time have been set apart in severalty to individual settlers thereon.

"That there is now no municipal corporation existing within the limits of the said grant of San Miguel del Bado, but all of the settlers upon the said grant, whether residing within the town of San Miguel del Bado or in other towns upon the said grant, or in isolated places thereon, as a community, have succeeded to all of the lands of the said grant, which have not, by prescription and by assignment of alcaldes under the original concession, and subsequent alcaldes, become the property of private individuals and held in severalty, and that the said community, embracing all of said settlers, has managed and controlled the lands of said grant by and through committees, appointed in popular assemblies held for that purpose, since their said municipal corporation, under the laws of Spain and Mexico, was abandoned. That the said individuals herein named as petitioners are the present duly authorized committee of the settlers on the said

NOTE.—*As to Missouri private land claims*, see note to Les Bois v. Bramell, 11: 1051.

As to construction and operation of treaties, see note to United States v. The Amistad, 10: 826.

grant, and make this petition for and in behalf of themselves and all other settlers within the exterior boundaries of the said grant."

Certain proceedings were set forth as having been had on March 18, 1857, before the surveyor general of the territory of New Mexico on a petition "made for and in the name of the inhabitants of the settlements of La Cuesta, San Miguel, Las Mulas, El Pueblo, Puerticita, San José, El Gusano, and Bernal, the said settlements existing at the date thereof within the limits of the said grant and the inhabitants thereof comprising at that time all of the settlers upon the said grant, the said petition reciting that the inhabitants of said settlements claimed said grant as being the legal heirs and successors of Lorenzo Marquez and fifty-one other persons, and that they had been up to that date in continual possession of the said grant;" also a report made to Congress on November 13, 1879, and a survey made of the tract July 281] 26, 1880, it *being stated that "no action has ever been taken by Congress in reference to the said San Miguel del Bado grant, either looking to its confirmation or rejection."

The prayer of the petition was as follows:

"Your petitioners therefore claim the said San Miguel del Bado grant as bounded, surveyed, and described, as hereinbefore set forth, and pray that the validity of their claim may be inquired into and decided by this court, and that the said grant may be confirmed to your petitioners and all of the present settlers and residents upon the said grant, as being made to the town of San Miguel del Bado for the use and benefit of all of said settlers, and for the benefit of the owners in severalty of the lots and parcels of land within its limits."

The United States answered that the petition of Lorenzo Marquez of November, 1794, was not for, nor intended to be for, the exclusive use, benefit, and behoof of said Lorenzo Marquez or anyone else; that if Ortiz put Marquez and his copetitioners in possession of the property, it was not intended that said "Marquez and his copetitioners should have the exclusive possession of the whole of the property described in the boundaries set forth in his alleged petition, but that the same was for the use and benefit of said Marquez, his copetitioners, and any and all citizens without lands who might thereafter settle upon the same; and further, that the entrances and exits, waters and pastures, and the use of the land unappropriated by individuals in severalty, should be common."

The answer further averred that the alcalde Pino was directed by Governor Chacon in March, 1803, to ascertain whether the terms of the grant had been complied with, and that he reported March 12 that he "found fifty-eight heads of families occupying the same; that in obedience to his said instructions he caused an amicable partition among them to be made, and assigned to each one the land he was so occupying and cultivating; that upon the return of said report the same was approved and confirmed by said Governor Chacon on the 30th day of March, 1803, to the 282] residents *of the new town of El Bado, known as San Miguel; that thereafter, up to the occupation of this country by the American troops in 1846, under the terms and conditions of said grant, various parties have moved upon the same, have occupied and cultivated it, and are holding and occupying, were and have been recognized ever since, until now there are a large number of settlements under said grant consisting of several thousand people, and upon which several towns have grown up under the form and construction given to the grant by Governor Chacon in 1803, and under the terms of the conditions of the pretended possession designated by the alcaide Ortiz in 1794, which in point of fact was never executed as alleged and claimed, but was given by Pino in 1803.

"That the names of the settlements are La Cuesta, San Miguel, Las Mulas, El Pueblo, Puertlcita, San José, El Gusano, and Bernal. The defendant is informed and charges the fact to be that all of these settlements and possessors were recognized by the Spanish government, and were continued without interruption or challenge by the Mexican government, and were in existence at the time the sovereignty of the United States was extended over it under the treaty of Guadalupe Hidalgo, and that no title ever passed, or was intended to pass, either legal or equitable, against the Spanish or Mexican governments, except as to that portion which might be occupied and settled by said Marquez and his fifty-one copetitioners, and those who might thereafter come in and settle and occupy the same, and that said claim is not entitled to confirmation for any more than was actually appropriated, occupied, and cultivated in severalty prior to 1846; and it therefore says that this plaintiff, if entitled to confirmation of anything, is entitled to confirmation only of that portion which he actually occupied and possessed under said grant, and that all the portion of said land which had not been subjected in 1846 to actual occupancy and cultivation is, and of right ought to be, public domain."

After the commencement of Sandoval's suit, two others were instituted, one by Levi P. Morton and the other by Marquez and others, claiming that Lorenzo Marquez took *the [283 title to the entire grant, as the other fifty-one were not named in the grant, petition, or act of possession; and asking confirmation in their names alone as successors in interest to Lorenzo. These suits were consolidated with that of Sandoval and the three heard as one case.

The court of private land claims held that the act of partition of 1803 rendered the grantees certain, and dismissed the petitions of Morton and Marquez, and confirmed the grant in the name of Lorenzo Marquez and his co-grantees and all other persons who might have come in and settled on the grant up to December 30, 1848, Murray, J., dissenting. The United States and Morton appealed.

The papers referred to in Sandoval's petition, and constituting the expediente, were as follows:

"I, Lorenzo Marquez, resident of this town of Santa Fé, for myself and in the name of fifty-one men accompanying me, appear before your excellency and state that in consideration of having a very large family, as well myself as those accompanying me, though we have some land in this town, it is not sufficient

for our support, on account of its smallness and the great scarcity of water, which, owing to the great number of people, we cannot all enjoy, wherefore we have entered a tract of land on the Rio Pecos, vacant and unsettled, at the place commonly called El Vado, and where there is room enough not only for us, the fifty-one who ask it, but also for everyone in the province not supplied. And its boundaries are, on the north the Rio de la Vaca, from the place called the Rancheria to the Agua Caliente, on the south the Cañon Blanco, on the east the Cuesta, with the little hills of Bernal, and on the west the place commonly called the Guzano, which tract we ask to be granted us in the name of our Sovereign, whom may God preserve; and among these fifty-one men petitioning are thirteen Indians, and among them all are twenty-five firearms, and they are the same persons who appear in the subjoined list which I present in due form; and we unanimously and harmoniously, as one person, do promise to inclose ourselves in a plaza well fortified with bulwarks
284]*and towers, and to exert ourselves to supply all the firearms and ammunition that it may be possible for us to procure. And, as we trust in a compliance with our petition, we request and pray that your excellency be pleased to direct that we be placed in possession in the name of his Royal Majesty our Sovereign, whom may God preserve. And we declare in full legal form that we do not act with dissimulation, etc.

"Lorenzo Marquez,
"For Himself and the Petitioners."

[The list referred to does not appear.]

"Decree.

"At the town of Santa Fé, capital of this Kingdom of New Mexico, on the 25th day of the month of November, 1794, I, Lieutenant Colonel Fernando Chacon, knight of the order of Santiago, civil and military governor of said Kingdom, subinspector of the regular troops therein, and inspector of the militia thereof, for His Majesty (whom may God preserve), having seen the foregoing document and petition of Lorenzo Marquez for himself and in the name of fifty-one men, should and did direct the principal alcalde of this town, Antonio José Ortiz, to execute said grant as requested by the petitioners, so that they, their children, and successors may have, hold, and possess the same in the name of His Majesty, observing at the same time the conditions and requisites required in such cases to be observed, and especially that relative to not injuring third parties. Thus I ordered, provided, and signed with the witnesses in my attendance, with whom I act for want of a royal or public notary, of which there is none in said kingdom, and upon this common paper, there being none of any seal, to which I certify. Chacon.

"Attending: Fernando Lamelas."

"On the 26th day of the month of November, 1794, I, Antonio José Ortiz, captain of the militia and principal alcalde of the town of Santa
285] *Fé, in pursuance of the order of Lieutenant Colonel Fernando Chacon, knight of the order of Santiago, and civil and military governor of this Kingdom, before proceeding to the site of El Vado, I, said principal alcalde, in company with two witnesses, who were Xavier Ortiz and Domingo Santiestevan, the fifty-two petitioners being present, caused them to comprehend the petition they had made, and informed them that to receive the grant they would have to observe and fulfil in full form of law the following conditions:

"First. That the tract aforesaid has to be in common, not only in regard to themselves but also to all the settlers who may join them in the future.

"Second. That with respect to the dangers of the place, that they shall have to keep themselves equipped with firearms and bows and arrows, in which they shall be inspected as well at the time of settling as at any time the alcalde in office may deem proper, provided that after two years' settlement all the arms they have must be firearms, under the penalty that all who do not comply with this requirement shall be sent out of the settlement.

"Third. That the plaza they may construct shall be according as expressed in their petition; and in the meantime they shall reside in the pueblo of Pecos, where there are sufficient accommodations for the aforesaid fifty-two families.

"Fourth. That to the alcalde in office in said pueblo they shall set apart a small separate piece of these lands for him to cultivate for himself at his will, without their children or the successors making any objection thereto, and the same for his successor in office.

"Fifth. That the construction of their plaza, as well as the opening of acequies and all other work that may be deemed proper for the common welfare, shall be performed by the community with that union which in their government they must preserve.

"And when this was heard and understood by each and all of the aforesaid persons, they accordingly unanimously responded that they understood and heeded what was communicated to them.

*"Wherefore I took them by the hand [286 and announced in clear and intelligible words that in the name of His Majesty (God preserve him) and without prejudice to the royal interest or that of any third party, I led them over said lands, and they plucked up grass, cast stones, and shouted 'Long live the King,' taking possession of said land quietly and peaceably, without any objection, pointing out to them the boundaries, which are, on the north, the Rio de la Vaca, from the place called the Rancheria to the Agua Caliente, on the south, the Cañon Blanco, on the east, the Cuesta with the little hills of Bernal, and on the west, the place commonly called the Guzano, notifying them that the pastures and watering places are in common. And that in all time it may so appear, I, acting by appointment, for want of a notary, there being none in this jurisdiction, signed this with my attending witnesses, with whom I act. To which I certify.

"Antonio José Ortiz.
"Attending, José Campo Redondo.
"Ant'o José Ortiz.

"This copy agrees with its original on file among the archives of this town, and is faithfully and legally made, compared, and corrected. In testimony whereof I make my cus-

omary sign manual, in this town of Santa Fé, on the 8th day of the month of November, 1794.

"(Signed) Antonio José Ortiz."

"[SEAL.] Fourth rial.

"Fourth seal, fourth rial, years one thousand, seven hundred and ninety-eight and ninety-nine.

"[SEAL.]

"At this place, San Miguel del Bado del Rio de Pecos, jurisdiction of the capital town of Santa Fé, New Mexico, on the 12th day of March in the present year, 1803, I, Pedro Baptista Pino, justice of second vote of the town of Santa Fé and its jurisdiction, by verbal order of Colonel Fernando Chacon, governor 287] of this *province, have proceeded to this said settlement for the purpose of distributing the lands which are under cultivation to all the individuals who occupy said settlement; and, having examined the aforesaid cultivated land, I measured the whole of it from north to south and then proceeded to lay off and provide the several portions, with the concurrence of all parties interested, until the matter was placed in order according to the means myself and the parties interested deemed the best adapted to the purpose, in order that all should be satisfied with their possessions, although said land is very much broken on account of the many bends in the river. And after the portions were equally divided in the best manner possible I caused them to draw lots, and each individual drew his portion, and the number of varas contained in each one portion was set down, as will appear from the accompanying list, which contains the number of the individuals who reside in this precinct, amounting to number of fifty eight families, between whom all the land was divided, excepting only the portion appertaining to the justice of this precinct, as appears by the possession given by the said governor, and another small surplus portion, which by the consent of all is set aside for the benefit of the blessed souls in purgatory, on condition that the products are to be applied annually to the payment of three masses, the certificates for which are to be delivered to the alcalde in office of said jurisdiction. And after having made the distribution, I proceeded to mark out the boundaries of said tract from north to south, being on the north a hill situated at the edge of the river above the mouth of the ditch which irrigates said lands, and on the south the point of the hill of pueblo and the valley called Temporales, a large portion of land remaining to the south which is very necessary to the inhabitants of this town who may require more land to cultivate, which shall be done by the consent of the justice of said town who is charged with the care and trust of this matter, giving to each one of those contained in the list the amount he may require and can cultivate; and, after having completed all the foregoing, I caused them all to be collected together 288] and notified them that they *must each immediately erect mounds of stone on the boundaries of their lands so as to avoid disputes, and I also notified them that no one was privileged to sell or dispose of their land until the expiration of ten years from this date, as directed by said governor, who, if he be so pleased, will certify his proper approval at the foot of this document, of which a copy shall remain in this town and the original be deposited in the archives where it properly belongs. Done in the aforesaid town, on the day, month, and year above mentioned; signed with my hand with two attending witnesses, with whom I act in the absence of a public or royal notary, there being none of any description in this kingdom. I certify.

"(Signed) Pedro Baptista Pino.

"Attending: José Miguel Tafoya."

Here followed the list of fifty-eight individuals, with the number of varas each one received, running from 49 varas in one instance to 230 in another, 65 varas being allotted in thirty-eight instances.

"There are contained in this list fifty-eight families.

"San Miguel del Bado, March 12, 1803.

"Pedro Bapta. Pino.

"Given gratis, together with twenty-odd leagues travel.

["Pino's Rubric.]

"By virtue of what has been done by Pedro Pino, senior justice of second vote of this capital town of Santa Fé, concerning the distribution of lands made in the name of His Majesty to the residents of the new town of El Bado, known as San Miguel, I declare the aforesaid residents of El Bado the lawful owners thereof, approving and confirming the possession given by said Senior Justice Pedro Pino; and in order that it may so appear in all time, I sign this at Santa Fé, New Mexico, on the 30th day of March, 1803. Fernando Chacon."

It appeared in evidence that the alcalde Pino, two days after making the distribution at San Miguel, made another *at the place [289 of San José, within the same grant, which was approved by Governor Chacon, March 30, 1803, the same day that he approved the allotment of land at San Miguel; that allotments were made from time to time within this grant at various other places until at least 1846; that a town was formed known as the town of San Miguel del Bado, an ayuntamiento or town council being elected, and also an alcalde; that the town continued until the American occupation; that jurisdiction was exercised by the town council, not only over the municipality and those living therein, but over the adjoining country and settlements which were too small to be entitled to an ayuntamiento; and that at present there are living within the outboundaries of the grant at least four or five thousand people who have collected themselves principally within four or five settlements. Testimony was further introduced, disclosing the manner in which the lands included within the outboundaries had been administered, and also the administration of property rights in adjoining settlements. This tended to show that the people cultivated the portions of land that were partitioned to them according to the number in the family; that they obtained the land from the ayuntamiento, but the alcalde was the person who, under the direction of the board, made the partition to those who came in from time to time to settle, from lands which had not been partitioned before; that the unassigned lands were common pasture grounds for everybody, and the water and watering places were free to all and for

the benefit of all families; but none of them were considered the owners of the common pasture grounds, and they had no right to sell anything except the tracts upon which they had houses and farms.

In brief, the evidence is correctly summed up by counsel for the United States as showing that subsequent to the allotment and partition of 1803, and up to the date of the American occupation, the lands within the boundaries of this grant and a large amount of outlying lands were administered by the government of New Mexico through the ayuntamiento of San Miguel del Bado; that persons coming subse-
290] quent to *the allotment of 1803 applied to the ayuntamiento for land, and if the petition or application were favorably received and considered, the alcalde was instructed to make them allotments of land for agricultural purposes and to put them into possession of the same, but always subject to the territorial deputation.

Messrs. **Matthew G. Reynolds**, Special Assistant to the Attorney General, and *Holmes Conrad*, Solicitor General, for the United States.

Mr. **John De Witt Veeder** for Sandoval *et al.*

Messrs. **T. B. Catron** and *Edward L. Bartlett* for Morton.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By article 8 of the treaty of Guadalupe Hidalgo of February 2, 1848 (and we are not concerned here with the treaty of December 30, 1853), Mexicans established in territories previously belonging to Mexico, and remaining for the future within the limits of the United States as defined by the treaty, were free to continue where they then resided, or to remove at any time to Mexico, "retaining the property which they possessed in said territories or disposing thereof or removing the proceeds wherever they pleased," and "in the said territories property of every kind now belonging to Mexicans now established there shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may acquire said property by contract, shall enjoy, with respect to it, guaranties equally ample as if the same belonged to citizens of the United States." 9 Stat. at L. 922, 929.

The mode in which private rights of property may be secured, and the obligations imposed upon the United States by treaties fulfilled, belongs to the political department of the government to provide. In respect to California, this was done through the establishment
291] of a judicial tribunal, but in *respect of the adjustment and confirmation of claims under grants from the Mexican government in New Mexico and in Arizona, Congress reserved to itself, prior to the passage of the act of March 3, 1891, creating the court of private land claims, the determination of such claims. *Astiazaran* v. *Santa Rita Land & Min. Co.* 148 U. S. 80 [37: 376]; *Ainsa* v. *United States*, 161 U. S. 208, 222 [40: 673, 678].

By the act of March 3, 1851, chap. 41 (9 Stat. at L. 631), Congress created a board of land commissioners to determine claims to land in California asserted "by virtue of any right or title derived from the Spanish or Mexican government." § 8.

Section 11 of the act provided that the board of commissioners thereby created, the district court and this court, "in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of United States, so far as they are applicable;" that is, the decisions theretofore given in relation to titles in Louisiana and Florida, which were derived from the French or Spanish authorities previous to the cession to the United States. *Fremont* v. *United States*, 58 U. S. 17 How. 542, 553 [15: 241, 244].

Section 14 permitted the claims of lotholders in a city, town, or village to be presented in the name thereof, and authorized the presumption of a grant to such city, town, or village when shown to have been in existence on the day named.

The act of March 3, 1891 (26 Stat. at L. 854, chap. 539) is couched in different phraseology.

Section 6 authorizes any person or persons or corporation or their legal representatives, claiming lands within the limits of the territory derived by the United States from the Republic of Mexico, "by virtue of any such Spanish or Mexican grant, concession, warrant, or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States which at the date of the passage of this act have not been confirmed *by [292 act of Congress, or otherwise finally decided upon by lawful authority, and which are not already complete and perfect," to file a petition in the court of private land claims praying that "the validity of such title or claim may be inquired into and decided."

By § 7 it is provided that the proceedings should "be conducted as near as may be according to the practice of the courts of equity of the United States," and the court is empowered "to settle and determine the question of the validity of the title and the boundaries of the grant or claim presented for adjudication, according to the law of nations, the stipulations of the treaty concluded between the United States and the Republic of Mexico at the city of Guadalupe Hidalgo, on the 2d day of February, in the year of our Lord 1848, or the treaty concluded between the same powers at the city of Mexico, on the 30th day of December, in the year of our Lord 1853, and the laws and ordinances of the government from which it is alleged to have been derived."

Section 13 provides that all the proceedings and rights thereinbefore referred to shall be conducted and decided subject to certain enumerated provisions and to other provisions of the act.

Among the provisions contained in § 13 is the following:

"First. No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the government of Spain

or Mexico, or from any of the states of the Republic of Mexico having lawful authority to make grants of land, and one that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect."

The 7th subdivision of the same section reads thus:

293] *"No confirmation in respect of any claims or lands mentioned in § 6 of this act, or in respect of any claim or title that was not complete and perfect at the time of the transfer of sovereignty to the United States as referred to in this act, shall in any case be made or patent issued for a greater quantity than 11 square leagues of land to or in the right of any one original grantee or claimant, or in the right of any one original grant to two or more persons jointly, nor for a greater quantity than was authorized by the respective laws of Spain or Mexico applicable to the claim."

But this limitation does not, in our judgment, affect the construction of the act so far as brought in question in the case in hand.

In *Ainsa* v. *United States*, 161 U. S. 208, 223 [40: 673, 678], attention was called to the act of March 3, 1851, and it was said: "But, under the act of March 3, 1891, it must appear, in order to the confirmation of a grant by the court of private land claims, not only that the title was lawfully and regularly derived, but that, if the grant were not complete and perfect, the claimant could, by right and not by grace, have demanded that it should be made perfect by the former government, had the territory not been acquired by the United States."

This was reaffirmed in *United States* v. *Santa Fé*, 165 U. S. 675, 714 [41: 874, 888], and Mr. Justice White, speaking for the court, said: "An inchoate claim, which could not have been asserted as an absolute right against the government of either Spain or Mexico, and which was subject to the uncontrolled discretion of Congress, is clearly not within the purview of the act of March 3, 1891, chap. 539, creating the court of private land claims (26 Stat. at L. 854), and therefore is beyond the reach of judicial cognizance. The duty of protecting imperfect rights of property under treaties such as those by which territory was ceded by Mexico to the United States in 1848 and 1853, in existence at the time of such cessions, rests upon the political and not the judicial department of the government. *Les Bois* v. *Bramell*, 45 U. S. 4 How. 449, 461 [11: 1051, 1056]; *Ainsa* v. *United States*, 161 U. S. 208, 222 [40: 673, 678]. To the extent only that Congress has vested them with authority

294] to determine and protect such *rights can courts exercise jurisdiction. Where, therefore, a tribunal of limited jurisdiction is created by Congress to determine such rights of property, a party seeking relief must present for adjudication a case clearly within the act, or relief cannot be given. *United States* v. *Clarke*, 33 U. S. 8 Pet. 436, 444 [8: 1001, 1004]."

And after referring to §§ 13 and 7, and pointing out that "the meaning of the words 'complete and perfect,'" as used in § 6, "is to be derived by considering the context and not by segregating them from the previous part of the sentence exacting that the claim must be one which the United States was bound to recognize and confirm by virtue of the treaty;" and that "these words are moreover controlled by the mandatory requirements of § 13," the opinion thus continues: "Although the act of 1891 in § 11 authorized a town presenting a claim for a grant to represent the claims of lotholders to lots within the town, this provision does not override the general requirements of the statute as to the nature of the claim to title which the court is authorized to confirm. The difference between the act of 1891 and the California act of 1851, hitherto referred to, accentuates the intention of Congress to confine the authority conferred by the later act to narrower limits than those fixed by the act of 1851. The act of 1851 authorized the adjudication of claims to land by virtue of any 'right' or 'title' derived from the Spanish government, and conferred the power in express language on the board and court to presume a grant in favor of a town. The act of 1891 not only entirely omits authority to invoke this presumption, but, as we have seen, excludes by express terms any claim, the completion of which depended upon the mere grace or favor of the government of Spain or Mexico, and of the United States as the successor to the rights of these governments."

The contention on behalf of the United States is that the court of private land claims had no power to confirm lands situated as these were, within the outboundaries, that had not been allotted prior to the date of the treaty, because under the laws of Spain and Mexico the *jus disponendi* of all unassigned *lands re-[295 mained in the government and passed to the United States.

The papers in the expediente show that it was the intention that a town or pueblo should be, and that it was, established. The application stated that the land asked for was intended not only for the fifty-one petitioners, "but also for everyone in the province not supplied;" the alcalde Ortiz was directed to execute the grant on the conditions and requisites required in such cases to be observed;" the conditions are set out by the alcalde in his report as all agreed to by petitioners, among them being the provision that the tract was to "be in common, not only in regard to themselves, but also to all the settlers who may join them in the future."

In 1803 the alcalde Pino, under instructions from the governor, went upon the grant and divided the lands which had been occupied and cultivated amongst the original petitioners and some others, and put each one in possession of the lot drawn by him, notifying them that no one should have the right to sell the land allotted to him until the expiration of ten years from that date, as directed by the governor. The grant purported to convey only the use of the lands with the right to acquire the legal title to such portion of it as might be al-

lotted to each in severalty on condition that they remained on it and cultivated it for ten years, while the unoccupied or common lands were declared to be for the benefit of the original grantees and all other persons who might desire to settle on the grant and who complied with the terms in regard to settlement and cultivation.

Did the fee to lands embraced within the limits of the pueblo and intended for community use continue to remain in the sovereign or did it pass to the pueblo?

The general subject was much considered in *United States* v. *Santa Fé*, 165 U. S. 675 [41: 874], and it was said: "It cannot be doubted that under the law of Spain it was necessary that the proper authorities should particularly designate the land to be acquired by towns or pueblos before a vested right or title to the use thereof could arise." Various extracts were 296] made from the laws of the Indies, and *the following passages from Elizondo's Practica Universal Forense were quoted:

"The Kings, the fountains of jurisdictions, are the owners of all the terminos situated in their kingdoms, and as such can donate them, divide or restrict them, or give any new form to the enjoyment thereof, and hence it is that the pueblos cannot alienate their terminos and pastos without precedent royal license and authority." Vol. 3, p. 109. "There is nothing whatever designated by law as belonging to towns, other than that which by royal privilege, custom, or contract between man and man, is granted to them, so that although there be assigned to the towns at the time of their constitution a territorio and pertinencias, which may be common to all the residents, without each one having the right to use them separately, it is a prerogative reserved to the princes to divide the terminos of the provinces and towns, assign to these the use and enjoyment, but the domain remaining in the sovereigns themselves." Vol. 5, p. 226.

And it was then observed: "Moreover, the general theory of the Spanish law on the subject indicates that, even after a formal designation, the control of the outlying lands, to which a town might have been considered entitled, was in the King, as the source and fountain of title, and could be disposed of at will by him or by his duly authorized representative, as long as such lands were not affected by individual and private rights. This is shown by the quotation from Elizondo, already made. The provisions of law 14, title 12, book 4, of the Recopilacion (2 White, New Recop. p. 52), which is reproduced in the margin, illustrate the absolute control thus exercised by the King of Spain over the subject."

The existence of this power of control and disposition as to municipal lands in the supreme Spanish and then Mexican authority was shown by further references, and various acts of Congress were cited as enacted in view "of this state of the Spanish law and the unquestioned power lodged in the King of Spain to exercise unlimited authority over the lands assigned to a town and undisposed of and not the subject of private grant, to all of which 297] rights the United States *succeeded as successor of the King of Spain and the government of Mexico."

"So, also," said the court, "it may well be supposed that it was upon this aspect of the imperfect nature of right in land claimed by towns in territory formerly owned by Spain and Mexico, and the long established construction of such rights evidenced by the foregoing acts of Congress, which caused this court, speaking through Mr. Justice Field, in *Grisar* v. *McDowell*, 73 U. S. 6 Wall. 373 [18: 865], to say: 'Even after the assignment the interest acquired by the pueblo was far from being an indefeasible estate such as is known to our laws. The purposes to be accomplished by the creation of pueblos did not require their possession of the fee. The interest . . . amounted to little more than a restricted and qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the remainder for commons, for pasture lands, or as a source of revenue or for other public purposes. And this limited right of disposition and use was in all particulars subject to the control of the government of the country.'"

Although the particular question arising in the foregoing case was whether the Spanish law, *proprio vigore*, conferred upon every Spanish villa or town a grant of 4 square leagues of land, yet its disposition involved the same considerations as those presented on this record, and we regard its reasoning and conclusions as decisive here.

Under the laws of the Indies, lands not actually allotted to settlers remained the property of the King, to be disposed of by him or by those on whom he might confer that power. As Mr. Hall says (chap. 7, § 122): "The fee of the lands embraced within the limits of pueblos continued to remain in the sovereign, and never in the pueblo as a corporate body." Subsequent decrees, orders, and laws did not change the principle.

Towns were established in two ways: By their formation by empresarios or contractors, the title to the lands granted vesting in the contractors and settlers, minute provisions being made in relation thereto; by individuals associating themselves *together for that [298 purpose and applying to the governor of the province, through whose action a city, villa, or place was established. These municipalities appear to have been *quasi* corporations, corporations *sub modo*, and their ayuntamientos exercised political control over the pueblos and over surrounding country attached to their jurisdiction. The alcalde made allotments subject to the orders of the ayuntamiento, and they again were apparently subject to the provincial deputation or an equivalent superior body. At all events, unallotted lands were subject to the disposition of the government.

At the date of the treaty of Guadalupe Hidalgo, neither these settlers nor this town could have demanded the legal title to such lands of the former government, and the court of private land claims was not empowered to pass the title to either. It is for the political department to deal with the equitable rights involved.

The result is that the decree in Morton v. *United States is affirmed and the decree in United States* v. *Sandoval and others is reversed*, and the cause remanded that a decree may be entered in conformity with this opinion.

Ordered accordingly.

RIO ARRIBA LAND & CATTLE COMPANY, LIMITED, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 298-309.)

Unallotted lands in New Mexico—confirmation of similar grants—adjudication by local courts of the territory.

1. Unallotted lands in New Mexico within the exterior boundaries of a grant made on condition that a settlement should be formed and that the tract should be in common to all settlers who joined in the formation of a town thereon were by the laws of Spain and Mexico subject to the disposition of the government; and neither the settlers nor the town have any right to such lands which the court of private land claims, under the act of Congress of March 3, 1891, can confirm as a claim which the United States is "bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States."
2. The fact that Congress may have confirmed similar grants cannot justify the court of private land claims in making an adjudication in a case which does not come within the terms of the law of its creation.
3. An adjudication by the local courts of a territory cannot affect the title claimed under a Spanish grant when the title to the property under the treaty of Guadalupe Hidalgo and the act of Congress of July 22, 1854, was *sub judice*, as the claimants were then proceeding before the surveyor general and Congress under that act.

[No. 195.]

Argued March 9, 10, 1897. Decided May 24, 1897.

APPEAL from a decree of the Court of Private Land Claims confirming part of the claim of the petitioner, the Rio Arriba Land & Cattle Company, to lands lying in the Cañon del Rio de Chama, in Rio Arriba county, New Mexico. *Affirmed.*

Statement by Mr. Chief Justice **Fuller:**

This was a petition by the Rio Arriba Land & Cattle Company filed in the court of private land claims for the confirmation of what was commonly called the Cañon de Chama grant, situated in Rio Arriba county, New Mexico, and alleged to contain 472,763.95 acres.

It appeared that in 1806 a petition was addressed to the governor of the territory, Alencaster, as follows:

"I, Francisco Salazar, ensign in the militia of Abiquiu, together with my brothers (hermanos) and twenty eight other poor and needy citizens, appear before your excellency (and state) that I have examined a tract of land, unappropriated and unsettled, called the Chama river cañon, situated about 4 leagues distant from this place, and for which we petition to your excellency in the name of the King and without injury to any third party, as we find ourselves without any land wherefrom to support ourselves, owing to the decease of our mother at the rancho off of which she supported us, and as the latter has this day been divided among nine heirs residing in other jurisdictions we find ourselves absolutely deprived of any place to plant and to enable us to pay tithes and first fruits.

"We therefore humbly ask and pray your excellency to heed this our petition, and we trust from the charitable heart of your excellency you will consider the same favorably, and we protest our petition not to be made in dissimulation and whatever be necessary, etc.

This petition was referred, July 6, 1806, by the governor to the alcalde in these words:

"The alcalde will report fully on this petition, giving the extent of the land in question, its boundaries, the proportion of irrigable land, and when he comes to say how many settlers it will accommodate and the application being made public he will report whether any damage may result to any of the surrounding settlers, either in regard to pasturage, water, or watering places, and he will make personal examination *respecting all [300 these matters, to the end that action may be had in accordance with his report and subsequent questions avoided."

On July 14, 1806, the alcalde made the following report:

"I, Manuel Garcia de la Mora, chief alcalde, in obedience to the foregoing decree, proceeded personally to visit and examine the spot (rio) called the Chama river cañon, over all of which I passed with the greatest care and observation, as well the land itself as the places for taking out the heads of irrigating canals and the pastures and watering places, and I report that for pastures without fields and without any resulting damage there is 1 league from the last grant (that of Martinezes) to the side on which the sun rises, and that thence to the western boundary, which divides the said Chama river cañon from the Gallina river, there are about 2 leagues, somewhat more or less, cultivable land, and the town being placed in the center, the thirty-one families applying for it may be accommodated and land enough remain for the increase they may have in the way of children and sons-in-law (hijos y llernos), and the section of the country is a very desirable one, and the settlers may therefore proceed with their buildings, and for the other two boundaries there is assigned them on the north and on the south 1 league for pastures, for on these two sides no injury can result, as there is neither a settlement or grant now made or that might be made, and the heads of acequias along the length of the planting land there are five or six of them.

"With all the foregoing I have fulfilled your excellency's order. The same having been read faithfully and quite audibly to all the community, they replied that they had nothing to represent in regard to said petition, and that no one of them was injured, the land being uncultivated and unsettled, and the said cañou is distant from Abiquiu about 5 leagues."

On August 1, 1806, Governor Alencaster decreed:

"In pursuance of the foregoing report, that the said alcalde may proceed to the assignment of twenty-six lots of land capable of being

NOTE.—*As to Missouri private land claims*, see note to Les Bois v. Bramell, 11: 1051.

As to construction and operation of treaties, see note to United States v. The Amistad 10: 826.

planted with the equivalent of 3 cuartillas of wheat, 1 ditto or 3 almudes of corn, another 3 of beans, and of having erected on each of them **301**]a small house *with a garden, and of these lots two of them adjoining one another will be assigned to the Ensign Francisco Salazar, and the remaining twenty-four to the individuals who, upon report made by the said alcalde, may obtain my decree that they be assigned lands, the said assignments to be made in such manner that lands may remain unassigned equally on the four sides, or at least on two of them, so that new assignments may be made in the future and the lines bounding with the adjoining lands to be described in order that the rights to pastures and watering places may clearly appear; to the said parcel of lots held by the twenty-five settlers will be given the name 'San Joaquin del Rio de Chama;' and the said alcalde, having received the said twenty-four titles to settlers, will proceed to deliver and distribute, give possession, and make grant, in the name of His Majesty, to the twenty-four settlers aforesaid, and the said Ensign Salazar, being appointed justice, and all the foregoing provisions being verified, the granting document will be remitted to me to be legalized as required, the proper duplicates (testimonios) to be given the parties interested and then the original to be returned, to be duly deposited among the archives of this office."

On March 1, 1808, the alcalde made this report:

"I, Manuel Garcia de la Mora, chief alcalde of the town of La Canada, proceeded to the rancho of San Joaquin, and in view of and in obedience to the foregoing decree of Lieutenant Colonel Joaquin del Real Alencaster, governor of this royal province, I, said chief alcalde, proceeded to the Chama river cañon, called the San Joaquin cañon, accompanied by the twenty-five settlers; and there appearing also fourteen other citizens without land, and his excellency having given me verbal instructions to the effect that should other persons come forward to increase the settlement land should also be assigned to them with the same rights as the others enjoy, and all the settlers being assembled, I proceeded with the distribution of the land to them, as appears from the quantities of land they received, noted in the list and certified by me, and into the possession of which I placed them, taking them by the hand and leading each settler over his own **302**]piece *of land and placing him in possession in the name of the King, whom may God preserve; and they ran joyfully over the land, plucking up weeds and casting stones and shouting aloud, 'Long live the King that protects and helps us!' with which they remain in possession, naming the town whose site I pointed out to them, San Joaquin del Rio de Chama, and with which I have executed the foregoing decree and all of which authenticated with two instrumental witnesses, designating to the settlers as boundaries—on the north, the Ceballa valley; on the south, the Capulin; on the east, the boundary of the Martinezes; and on the west, the Little White hill (segita blanca), for their pastures and watering places, and with a view to the coming of other settlers and the increase of families and descendants; all of which I signed with two instrumental witnesses and with the witnesses in my attendance, with whom I act by appointment for lack of a royal or public notary, there being none of any kind in this royal province; to which I certify."

Then followed the specific distribution of so many varas to each duly authenticated.

The record showed that these documents were produced from private hands, and it did not appear that they were ever returned to the governor to be legalized, or authority given for the execution of the various testimonios, and the delivery thereof to the grantees, the original remaining in the office of the public record as directed by the governor in his decree of August 1, 1806; nor did it appear that these various testimonios were issued and the original returned.

In 1832, one Juan de Jesus de Chacon, for himself and Mateo Garcia and Antonio Duran, presented a petition to the governor, asking that all the privileges allowed by law be permitted them, stating that two or three years before the alcalde Ortiz had placed them in possession of lands on the Gallina river; but that the present alcalde, Gallego, was attempting to dispossess them "in a manner most strange," considering that the lands had been given to petitioners by a competent judge, and that they had cultivated it for two consecutive years and raised all the crops within their means; *and they applied to the governor[**303** that he would direct the alcalde to leave them at liberty to make such use as might appear proper of the lands lawfully belonging to them.

On April 2, 1832, the governor referred this petition to the asesor general, the licenciado Barreiro. On the same day Barreiro made his report stating that he had previously notified the alcalde of Abiquiu that he could not pass upon the rights of the parties on a simple communication, and recommending that the petitioners form an expediente of the whole matter and then refer the case to him; also directing, in regard to the possession given by Alcalde Ortiz, that nothing should be done until final adjudication, whereupon the governor made the following order:

"In order that the responsibility of the constitutional alcalde of Abiquiu may be covered, that the administration of justice may not experience delays prejudicial to the parties, and and that the property may not be prejudiced, the said alcalde will proceed in conformity with the decision of the attorney general and will form an expediente of the whole, and with new reference will decide as to what he may deem to be just, but in the meantime will respect the land in question, inasmuch as up to the present time the holders of it are not agreed as to the nullity of their possession, and consequently it will form a part of their property, as in such matters the regular formalities are indispensable, and without them the alcaldes cannot decide with the certainty required by the proper administration of justice."

On April 6, the alcalde Gallego reported that having examined the question between the parties he had directed that a suit of conciliation with two arbitrators named by the parties in litigation be brought in accordance with article No. 155; and he found that the alcalde not

having carried out the will of Governor Alencaster by properly certifying the grant document and giving certified copies to the parties in interest and returning the original to the capital to be placed in the archives, for which omission, and others, he adjudged the original possession not to be legal, and to be without right until confirmed by the governor. He also **304**]reported as to the *action of Alcalde Ortiz that it was not legal, possession having been given by him without the production of any document approved by the governor, or any approval or certification of petition, as is usual, nor the proper proceedings taken, which was the province of the most excellent territorial deputation, with report of the proper ayuntamiento on the petition; and that a new possession must be given.

This report was returned by Barreiro, who required the alcalde to make up an expediente as originally directed. The alcalde summoned the parties, and their answers, replies, and rejoinders were set forth at length. Salazar and his associates insisted that the possession of the lands at the Cañon de San Joaquin del Rio de Chama and the decree of Governor Alencaster were legal, but that the action of the alcalde Ortiz was wholly without right. On these papers the asesor general made his report as follows:

"The statements of the parties having been examined, the question is made clear, and it appears that the possession given by the alcalde José Maria Ortiz is of no value because, even if he were an authority, he was not competent to give and partition lands, because this is an exclusive attribute of the territorial deputation.

"Under date of February 6 I decided that with regard to the possession given by Ortiz that nothing should be done until I had resolved upon what I considered proper, but this was not in any way intended to approve the proceedings of the alcalde.

"Finally, I now say that the possession given at the Cañon de San Joaquin del Rio de Chama is legal because, even if there be any requisite lacking, it is not an essential requisite, but one of pure formality. With respect to the possession given, I am of the opinion that the alcalde Ortiz gave it without power and that it should be annulled, the right remaining with the parties aggrieved to petition the most excellent deputation to give them a good title, which will place them legally in possession of the lands which they may desire to possess, with the remark that the annulment must not be understood to extend to the **305**] possession which *the children of the old settlers may hold, because these should come in for their part, as is expressed in the grant itself, but not others who are strangers."

On May 10, 1832, Gallego made a partition of lands among eighteen interested parties, assigning to them lots of land of 50 varas each, and of uncultivated land of 100 varas each.

The record did not show that the proceedings before the asesor general or his action and opinion were returned to or in any way approved by the governor, or the territorial deputation; nor that the partition and assignment by the alcalde were ever reported and approved; nor under what authority he acted.

There was considerable controversy as to the west boundary of the tract, but it was not contended that the proceedings of 1832 extended the area of the lands intended to be granted by Governor Alencaster in 1806.

Certain records of suits in 1880 and 1887 in the district court of Arriba county, for the purpose of quieting the title and a partition of said lands, as between individual claimants, were set forth in the record.

The court of private land claims confirmed petitioner's claim to the extent of the lands lying in the Cañon del Rio de Chama, which were first actually apportioned among the settlers, and no more; and the company appealed.

Mr. **F. W. Clancy** for appellant.

Messrs. **Matthew G. Reynolds,** Special Assistant to the Attorney General, and *Holmes Conrad*, Solicitor General, for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Assuming, but without in any manner deciding, that Governor Alencaster had full power to make the grant in any quantity and in any manner he saw proper, we think it clear that he did not, and did not intend to, make a grant of nearly *half a million of acres to the [**306** original applicants, in common, and that the alcalde did not so understand it, and did not attempt to deliver juridical possession of such a tract, but only of the various allotments that were made to petitioners in severalty. The petition simply mentioned a tract called the Chama river cañon, and the governor directed the alcalde to report on its extent and boundaries, the proportion of irrigable land, and how many settlers it would accommodate. The alcalde reported that he had personally visited the Chama river cañon and passed over all the land with the greatest care and observation, and he said:

"The town being placed in the center, the thirty-one families applying for it may be accommodated and land enough remain for the increase they may have in the way of children and sons-in-law, and the section of the country is a very desirable one, and the settlers may therefore proceed with their buildings, and for the other two boundaries there is assigned them on the north and on the south 1 league for pastures, for on these two sides no injury can result."

There is nothing in the terms of the grant to indicate that the governor intended to place thirty one persons in possession, with the exclusive right of property, of a grant 25 miles north to south, and 30 miles from east to west. He says: "In pursuance of the foregoing report, the said alcalde may proceed to the assignment of twenty-six lots of land capable of being planted with the equivalent of 3 cuartillas of wheat, 1 ditto or 3 almudes of corn, another 3 of beans, and of having erected on each of them a small house with a garden." He directed that Salazar should have two lots, and "the remaining twenty-four to the individuals who, upon report made by the said alcalde, may obtain my decree that they be assigned lands," etc., and that "to the said parcel of lots held by the twenty-five settlers will be given the name 'San Joa-

quin del Rio de Chama.'" The governor then continued thus:

"And the said alcalde, having received the said twenty-four titles to settlers, will proceed to deliver and distribute, give possession, and make grant, in the name of His Majesty, to the **307**] *twenty-four settlers aforesaid, and the said Ensign Salazar, being appointed justice, and all the foregoing provisions being verified, the granting document will be remitted to me to be legalized, as required, the proper duplicates (testimonios) to be given the parties interested and then the original to be returned, to be duly deposited among the archives of this office."

Eighteen months thereafter the so-called act of possession was executed on a verbal order of the governor. The alcalde recites:

"I proceeded with the distribution of the land to them, as appears from the quantities of land they received, noted in the list and certified by me, and into the possession of which I placed them, taking them by the hand and leading each settler over his own piece of land and placing him in possession in the name of the King, whom may God preserve; and they ran joyfully over the land, plucking up weeds and casting stones and shouting aloud, 'Long live the King that protects and helps us!' with which they remained in possession, naming the town whose site I pointed out to them San Joaquin del Rio de Chama, and with which I have executed the foregoing decree and all of which authenticated with two instrumental witnesses, designating to the settlers as boundaries—on the north, the Ceballa valley; on the south, the Capulin; on the east, the boundaries of the Martinezes; and on the west, the little White Hill (cejita blanca), for their pastures and watering places, and with a view to the coming of other settlers and the increase of families and descendants."

The alcalde does not state that he delivered the possession to any one individual or to all these individuals in common, of a large tract of land, but possession to each individual of the land to which he was entitled and no more, and this was accompanied by a description of the outboundaries within which allotments could be made by the proper governmental officials to persons that might come in thereafter.

Reference is indeed made to the use of the lands within the outboundaries for pastures and watering places, but this did not put them out of the class of public lands, and, whatever equities might exist, no title was conveyed.

308] *We have just held in *United States* v. *Sandoval*, 167 U.S. 278 [*ante*, 168], that as to all unallotted lands within exterior boundaries where towns or communities were sought to be formed, as in this instance, the title remained in the government for such disposition as it might see proper to make.

Moreover, it is clear that the alcalde had no authority to give possession of 475,000 acres of land to these thirty-one petitioners, even if he could have done so if expressly authorized by direct order of the superior authorities, which is not pretended.

We entirely agree with the holding of the court of private land claims, as indicated by their decree, that the act of possession, the alcalde's report, and the governor's decree, taken together, show that the only title which was passed on or intended to be passed on was to the various allotments which were actually made. Nor can we concur in the view that the result is affected by the proceedings had before the asesor general in 1832. Whatever the judicial authority of this officer, his action did not amount to an adjudication that those who were living on the grant, or who went there in 1806 or 1808, were the absolute and unconditional owners of 475,000 acres of land, and, indeed, he seems to have been of opinion, not only that the unallotted lands were subject to disposition by the government, but that the proper authority to make such disposition was the territorial deputation.

It is also said that Congress has repeatedly confirmed similar grants, but the fact that Congress may have thus disposed of the public lands, in its discretion, cannot operate to justify the court of private land claims in adjudication in a case not coming within the terms of the law of its creation.

The proceedings in the district court of Rio Arriba county are nothing to the purpose, as the title of this property, under the treaty of Guadalupe Hidalgo and the act of Congress of July 22 1854 (10 Stat. at L. 308, chap. 103), was *sub judice*. The claimants were then proceeding on their claim before the surveyor general and Congress, under that act, and an attempt to enforce that title and have it adjudicated by the local *courts comes within the de- [**309** cision in *Astiazaran* v. *Santa Rita Land & M. Co.* 148 U. S. 80 [37: 376].

In that case it was said by Mr. Justice Gray, delivering the opinion of the court: "Undoubtedly, private rights of property within the ceded territory were not affected by the change of sovereignty and jurisdiction, and were entitled to protection, whether the party had the full and absolute ownership of the land, or merely an equitable interest therein, which required some further act of the government to vest in him a perfect title. But the duty of providing the mode of securing these rights, and of fulfilling the obligations imposed upon the United States by the treaties, belong to the political department of the government; and Congress might either itself discharge that duty or delegate it to the judicial department."

We have frequently reaffirmed the well-settled rule thus announced and perceive no reason for reviewing it, although counsel suggests that we should do so as bearing on the jurisdiction of the territorial courts and in view of the so-called protocol signed by the commissioners of this country to Mexico, at the time of the exchange of the ratifications of the treaty of Guadalupe Hidalgo. A sufficient account of that diplomatic incident will be found in President Polk's message of February 8, 1849 (Ex. Doc. H. Rep. 2d Sess. 30th Cong. vol. 5), and in Mr. Secretary Bayard's letter of November 24, 1886 (3 Whart. Int. Dig. 2d ed. Appx. p. 885, § 131). We did not feel called upon to discuss it in *Astiazaran's Case*, nor do we now in disposing of the case in hand, under the act of March 3, 1891, on

this record. *Botiller* v. *Dominguez*, 130 U. S. 238 [32: 926].

Furthermore it is conceded that these records were put in evidence only to show that petitioner had succeeded, in part at least, to the rights of the original grantees. *Decree affirmed.*

310] WILLIAM MAY, Trustee of John Frederick May, Deceased, and in His Own Right, and Amy May, His Wife, *Appts.*,

v.

SARAH MARIA MAY *et al.*

(See S. C. Reporter's ed. 310-323.)

Power to remove a trustee—power of court of equity—suit in equity—rights of persons not in being.

1. The express power to remove a trustee "for good and sufficient cause," given by will to his co-heirs to be exercised by unanimous resolution, with the concurrence of the testator's widow, is not limited to a removal for such cause as a court of equity would deem sufficient, but includes the power to determine when there is good and sufficient cause for such removal, subject to the restraining power of a court of equity against the abuse of it.

2. The power of a court of equity to remove a trustee and to substitute another in his place is incidental to its paramount duty to see that trusts are properly executed, and may properly be exercised whenever such a state of mutual ill feeling, growing out of his behavior, exists between the trustees, or between the trustee in question and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent the cotrustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out or are greatly exaggerated.

NOTE.—*As to power of a court of equity to remove a trustee or appoint a new trustee; causes for removal or appointment.*

Wherever circumstances render it necessary or desirable to appoint new trustees the court of chancery in exercise of its inherent jurisdiction will interpose upon a proper application, and make the appointment. 2 Sudgen, Powers, 6th ed. 532.

This jurisdiction exists, and will be equally enforced, whether the instrument creating the trust does or does not contain a power to appoint new trustees. Webb v. Shaftsbury, 7 Ves. Jr. 480; Re Fauntleroy, 10 Sim. 252; Finlay v. Howard, 2 Dru. & W. 490; Millard v. Eyre, 2 Ves. Jr. 94; Atty. Gen. v. Clack, 1 Beav. 467.

Where vacancies in the trust have been occasioned by the death of any existing trustee, or by his having gone abroad and released, or by no person being found answering to the description of the trustee in the instrument creating the trust, the court will on a proper application appoint new trustees to supply those vacancies. Hibbard v. Lamb, Ambl. 309; Hewit v. Hewit, Ambl. 508; Atty. Gen. v. Clack, 1 Beav. 467; Drayson v. Pocock, 4 Sim. 283; Finlay v. Howard, 2 Dru. & W. 490; Devey v. Peace, Tami. 77.

This relief has been decreed where the original trustee or trustees declined to act, or were desirous of being discharged, or had absconded, or were incapable of acting through age and infirmity, or could not discharge the trust through disagreement amongst themselves, or had been guilty of breaches of trust, or had become bankrupt. Howard v. Rhodes, 1 Keen, 581; Coventry v. Coventry, 1 Keen, 758; Hamilton v. Fry, 2 Moll. 458; Greenwood v. Wakeford, 1 Beav. 576; Miles v. Near, 1 Cox, Ch. 159; Millard v. Eyre, 2 Ves. Jr. 94; Bennett v. Honywood, Ambl. 710; Bagot v. Bagot, 10 L. J. Ch. N. S. 116; Uvedale v. Ettrick, 2 Ch. Cas. 130; Coventry v. Atty. Gen. 7 Bro. P. C. 235; Ex parte Greenhouse, 1 Madd. 92; Atty. Gen. v. Shore, 7 Sim. 290, 309, note; Atty. Gen. v. Drummond, 1 Dru. & W. 353, 3 Dru. & W. 162; Bainbridge v. Blair, 1 Beav. 495; Re Roche, 1 Conn. & L. 306, 2 Dru. & W. 287.

But a failure by a trustee in discharging the duties of his office, from mistaking or misunderstanding his duty, will not of itself be a sufficient ground for removing him, and the bona fide refusal of a trustee to exercise a pure discretionary power for the benefit of the trust estate (as a power of varying securities) is also a wholly insufficient reason for a suit to have him discharged from the trust. Atty. Gen. v. Coopers' Co. 19 Ves. Jr. 192; Atty. Gen. v. Caius College, 2 Keen, 150; Lee v. Young, 2 Younge & C. Ch. 532; Hill, Trustees, 191, 192.

Where one of several trustees refuses to accept the trust, it devolves upon the others, and the whole trust estate vests in them; but if all refuse, though the legal estate nominally vests in the trustees, the execution of the trust devolves upon the court, and new trustees may be appointed, if necessary. King v. Donnelly, 5 Paige, 46.

If the devisee of a power in trust refuses to accept the trust, a new trustee may be appointed by the court, on application by the *cestui que trust* Hawley v. James, 5 Paige, 318.

Where one of the persons named as trustee in a will refused to accept the trust, and renounced it by a formal instrument, it was held that he could not be reinstated while any of the cotrustees continued to act as such. *Re* Van Schoonhoven, 5 Paige, 559.

A devise in trust will be carried into effect by the appointment of a trustee by the court, if the trustee named in the will renounce the trust. De Peyster v. Clendining, 8 Paige, 295.

The court of chancery of Maryland may appoint an agent or trustee to make a sale under its decree. Gibson's Case, 1 Bland, 138.

Where the trustee in a deed of trust dies, pending a suit to enjoin a sale under the deed, the chancellor, on dismissing the bill, may direct the property to be sold by his marshal. Pate v. McClure, 4 Rand. 164.

Where a sole trustee for infants, appointed under a will, dies, and the will does not provide for the appointment of a successor, a court of equity will appoint one. Dunscomb v. Dunscomb, 2 Hen. & M. 11.

In such case the new appointee should be required to give bond, with approved security in double the amount of the trust estate, conditioned to discharge the duties of his trust. Dunscomb v. Dunscomb, 2 Hen. & M. 11.

So, where all the trustees appointed by a will refuse to act. Lee v. Randolph, 2 Hen. & M. 12.

A trustee by settling a grossly unreasonable claim to the trust property adverse to the *cestui que trust* is guilty of such misconduct as will authorize his removal. Cooper v. Day, 1 Rich. Eq. 26.

A trustee who has transferred the trust property to a trustee substituted by order of the court will be bound by the substitution, although he was not a party to the suit in which it was made. Thomas v. Higham, 1 Bail. Eq. 222.

Upon petition by a trustee appointed by the court, showing that the *cestui que trust* was prohibited by the laws of the state from coming within

3. The filing of a bill by a trustee for instructions does not suspend the power to remove him given by will to the beneficiaries with the concurrence of another trustee, but only subjects their action to the supervision and control of the court.

4. Questions depending upon future events, and affecting the rights of persons not in being, and unnecessary to be decided for the present guidance of the trustee, will not be decided upon a bill in equity by a trustee for instructions in the execution of his trusts.

[No. 269.]

Argued April 2, 5, 1897. Decided May 10, 1897.

APPEAL from a decree of the Court of Appeals of the District of Columbia affirming

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its limits, the court substituted for such trustee a person living in the state where the *cestui que trust* resided. Ex parte Tunno, 1 Bail. Eq. 395.

Though a proceeding to remove a trustee must be by bill, yet, where by the death of the trustee the trust has devolved upon his executor, a new trustee may be appointed upon petition. Ex parte Knust, 1 Bail. Eq. 489.

On a petition stating the death of the trustees in a marriage settlement, that the representative of one was unwilling to act, and the representative of the other was absent, and a prayer to substitute others, it was held, there being no allegation that the absent representative had permanently removed from the state, that there were not sufficient grounds set forth in the petition for the removal of the trustees, as the one remaining could be compelled to assume the trust, and that to justify their removal their refusal or incapacity must be shown, either by answer to the petition or by affidavits of the petitioners, or their neglect to show cause on proper citation. Re Gale's Petition, R. M. Charlt. 109.

It is competent for a court of equity to remove one trustee and appoint another in his stead, under some circumstances. Chambers v. Mauldin, 4 Ala. 477.

Fraud, negligence, or wilful breach of trust will alone justify the removal of a trustee. Thompson v. Thompson, 2 B. Mon. 161.

The appointment of new trustees is an ordinary remedy, enforced by courts of equity in all cases, where there is a failure of suitable trustees to perform the trust, either from accident, or from the refusal of the old trustees to act, or from their original or supervenient incapacity to act, or from any other cause. Ellison v. Ellison, 6 Ves. Jr. 663, 664; Lake v. De Lambert, 4 Ves. Jr. 592; Millard v. Eyre, 2 Ves. Jr. 94; Buchanan v. Hamilton, 5 Ves. Jr. 722; Hibbard v. Lamb, Ambl. 309; Comyns Dig. *Chancery*, 4 W. 7; 2 Story, Eq. Jur. § 1287; 2 Fonblanque, Eq. chap. 7, § 1, note *a*; 2 Madd. Ch. Pr. 133.

In cases of positive misconduct courts of equity will remove trustees who have abused their trust. It is not every mistake or neglect of duty or inaccuracy of conduct of trustees which will induce courts of equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property, or to show a want of honesty, or want of proper capacity to execute the duties, or a want of reasonable fidelity. Portsmouth v. Fellows, 5 Madd. 450; Coventry v. Atty. Gen. 7 Bro. P. C. 235; Atty. Gen. v. Coopers' Co. 19 Ves. Jr. 192; 2 Story, Eq. Jur. § 1289.

A trustee will be removed if he fails to discharge his duty and attempts to misappropriate the property or divert it to a use not contemplated in the creation of the trust. Guilfoil v. Arthur, 158 Ill. 600.

A trustee who has invested trust funds in his own name in violation of the will under which he was appointed, requiring all such funds to be invested in the name of both trustees, and who is unable to produce an affidavit of any person to whom he had loaned the money when charged with appropriating it to his own use, should, notwithstanding his subsequent return of such money, be removed as trustee where all the beneficiaries, with their attorneys and his cotrustee, unite in stating that the interest of the estate demands such removal. Re Havemeyer, 3 App. Div. 519.

A trustee appointed to succeed a trustee appointed under a mortgage will not be removed on the application of a person having no interest, where the appointment has been acquiesced in by the mortgagor and the bondholders. New York Secur. & T. Co. v. Saratoga Gas & E. L. Co. 88 Hun, 569.

A letter by a trustee under a will to the beneficiaries, threatening in case proceedings are taken against him to disclose malpractices by the testator which might result in penalties being exacted from the estate, is sufficient cause for his removal. Grant v. Maclaren, 23 Can. S. C. 310.

The appointment of a new trustee is not dependent upon misconduct of the trustee sought to be superseded, but it is sufficient if, by reason of hostile relations between him and the *cestui que trust*, disadvantage, inconvenience, or great discomfort to the latter will naturally result, under Purdon's Dig. p. 2035, pl. 61, providing that the court of common pleas or the orphans' court of Philadelphia may remove a trustee and appoint another upon petition of the *cestui que trust* having a life estate. Re Marsden's Estate, 166 Pa. 213.

Although the power of the court to appoint a new trustee is not to be exercised capriciously or at the mere whim of the *cestui que trust*, it is not dependent upon the misconduct of the trustee, but it is sufficient that his retention, by reason of the existence of hostile relations between him and the *cestui que trust*, will naturally work disadvantage, inconvenience, or great discomfort to the latter. Re Marsden's Estate, 3 Pa. Dist. R. 281.

Trustees appointed by a judgment in place of original trustees who have been removed will not be removed on the ground that they are unfriendly to one of the *cestuis que trust*, where the judgment adjudicates that each of the *cestuis que trust* has equal rights to the trust fund, and that while the trustees have a certain discretion as to the amount they will pay over to the *cestuis que trust* from time to time, whatever sum is paid must be divided equally between them all. Jones v. Jones, 8 Misc. 660.

A trustee may be removed for misuse of funds; for friction between cotrustees; for insanity; for lack of fidelity; for friction between trustee and beneficiary; for drunkenness; for lack of understanding; for improvidence; for negligence; for insolvency; for bad investments; for acting as counsel for interests inconsistent with the trusts; for violation of directions of the will; for unnecessary and frivolous litigation and wasteful depletion of the estate; and for moral delinquency. Re McGillivray, 138 N. Y. 308; Re Havemeyer, 3 App. Div. 519; Fleet v. Simmons, 3 Dem. 542; Re Wiggins, 29 Hun, 271; Quackenboss v. Southwick, 41 N. Y. 117; Oliver v. Frisbie, 3 Dem. 22; Deraismes v. Dunham, 22 Hun, 86; Re Dearing, 4 Dem. 81; Re Wadsworth, 2 Barb. Ch. 381; Re Worthington, 141 N. Y. 9, 23 L. R. A. 97; Re Cohn, 78 N. Y. 248; Fernbacher v. Fernbacher, 4 Dem. 227; Re Cady, 36 Hun, 122; McGregor v. McGregor, 3 Abb. App. Dec. 92; Re Mechanics' Bank, 2 Barb. 446; Van Epps v. Van Epps, 9 Paige, 237; Morgan v. Morgan; 3 Dem. 612; McMahon v. Harrison, 10 Barb. 659; Re Jacob, 5 App. Div. 508.

a decree of the Supreme Court of that District removing William May from the office of trustee under the will of his father, John Frederick May. *Affirmed.*

See same case below, 5 App. D. C. 552.

Statement by Mr. Justice **Gray**:

This was an appeal from a decree of the court of appeals which affirmed a decree of the supreme court of the District of Columbia, removing the appellant from the office of trustee under the will and codicil of his father, Dr. John Frederick May, of Washington in the District of Columbia, who died there May 1, 1891, leaving a widow, Sarah Maria May, and six children, William and Frederick, and four daughters, all of age, a large estate, consisting mostly of real estate in the city of Washington, and a will and codicil, both of which were duly admitted to probate.

By the will, dated February 4, 1890, he devised and bequeathed all his estate, real and personal, to his wife, and her heirs and assigns, upon the following trusts: 1st. That she should receive one third of the net annual income of his real estate during her life, one third of his personal property absolutely, and the use for her life of his dwelling house in Washington. 2d. That his estate should be kept intact and undivided while any of his children lived; and the rents and profits, with the exception of his wife's thirds, be applied to the payment of his debts, and especially to the canceling of any encumbrance or mortgage existing at the time of his death; and, after full payment and cancelation of such debts and encumbrances, be equally divided among his children. 3d. That any part of the estate might be sold by the trustee if manifestly for the benefit of his heirs, and the proceeds reinvested in real estate, or in mortgages of a particular kind; and that such parts of the estate as should at the time of his death be subject to mortgages might, upon the expiration of such mortgages, and if the trustee should be unable to pay or cancel them, be remortgaged. 4th. That, upon the death of any child leaving issue, its share of the rents and profits should go to its issue. The testator also gave his wife "the power to appoint a trustee to succeed her should she deem it best at any time to do so;" appointed **312**] her executrix of his will; and *directed that she should not be required to give bond as trustee or as executrix.

On December 17, 1890, the testator gave William May a power of attorney to lease or rent his real estate in the city of Washington, to recover possession of the same, and to collect the rents thereof.

The codicil was dated March 27, 1891, and, omitting the formal parts, was as follows:

"I hereby appoint my son, William May, cotrustee with my wife, Sarah Maria May, my said son and my wife to have and exercise the powers and authority in my said will mentioned and created, except as hereinafter otherwise directed. It is my further wish, and I hereby will and direct, that my said son, William May, shall take charge of my real estate (except my present dwelling house, which shall be and remain in the exclusive charge of my wife during her life) and care for and manage the same for the best interests of my said estate, and in accordance with the terms of my said will; and he shall collect the rents and income of my said real estate, and pay the lawful taxes and assessments, and other expenses thereon, and shall keep the same in good repair. It is my will, and I so direct, that the taxes, insurance, and repairs of my said dwelling house shall be paid out of the general income of my other real estate.

"For the said service of my son, William May, in caring for and managing said estate, and for collecting the rents and paying the taxes and assessments, and other services, as hereinbefore directed, he shall and may retain from money so collected, as his compensation, a commission equal to 5 per cent of the amount of money by him collected from said estate; and the said William May shall render to my said wife full and true accounts of the rents by him collected, and of the disbursements by him made in the execution of this trust, such accounts to be rendered each and every month, and shall be accompanied by the vouchers for such disbursements. After the death of my wife, said accounts shall be rendered to my other heirs. It is my will that no commission shall be paid to my wife, as a trustee.

*"I hereby further will and direct that, [**313** for good and sufficient cause, my other heirs, with the concurrence of my wife if she be living, shall have and they are hereby given the power, by their unanimous resolution, to remove my said son, William May, from his office as such trustee, and to appoint another person in his stead.

"It is my wish that neither of my said trustees shall be required to give a bond or other security in reference to the execution of the trusts created by my said will or this codicil."

On May 2, 1892, before the estate had been fully administered, William May, as "trustee of John Frederick May, deceased, and in his own right," filed in the supreme court of the District of Columbia a bill against his mother, brother, and sisters, to obtain the instructions of the court as to the execution of the trust, and especially upon the effect of the omission of the will to dispose of the principal of the estate after the termination of the trust, and upon the question whether the widow was entitled to a full third of the income without allowing for or deducting the interest upon outstanding mortgages.

On July 5, 1892, answers to the bill were filed in behalf of all the defendants; and on September 28, 1892, the plaintiff filed a general replication.

On November 25, 1892, an instrument was drawn up, purporting to be a "deed, declaration, and resolution made" by the four daughters and by Frederick May, and by the widow joining therein as evidence of her concurrence, reciting the clause of the codicil authorizing the removal of William May from his office as trustee and the appointment of another person in his stead; and further reciting that "good and sufficient cause exists for the exercise of such power of removal and substitution, for a number of reasons," some of which, without admitting it to be obligatory to state them, were stated to be that he had failed to

render full and true accounts, as required by the codicil; that he had made excessive and improper charges against the estate; and that "by his intolerably domineering and disagreea-
314] ble manner in discussing *the affairs of the trust with his cotrustee, displays of anger when questioned, and attempts to browbeat legitimate opposition and criticism, he has compelled said cotrustee to decline any direct communication with him upon business matters, and she is obliged to employ an expert accountant to examine and report upon the monthly accounts of said William May, and act as her representative in relation to the affairs of the trust." The instrument concluded with the statement that therefore the four daughters and Frederick May, with the concurrence of the widow, "have unanimously resolved, and do hereby resolve, that said William May be and he is hereby removed from his office as trustee or cotrustee under the said codicil and the will of said John Frederick May, deceased, and further that they, the declarants aforesaid, by their unanimous resolution, have appointed and do hereby appoint William H. Dennis, of Washington, D. C., trustee in the stead of said William May, removed, to the fullest extent of the powers conferred by said first codicil."

This instrument was signed and sealed by the widow and the four daughters in person, and by the widow as attorney in fact of Frederick May; and was acknowledged before a notary public on November 26, 1892, by the widow and two of the daughters, and on December 3, 1892, by the other two daughters. The widow, at that time, held a power of attorney, executed July 2, 1891, by Frederick May, then residing at Valparaiso in the Republic of Chili, appointing her his attorney "to do and perform any act or acts necessary to be done or performed to protect and care for" his interest in the estate of his father.

William H. Dennis, by writing upon the resolution of removal, accepted the appointment made and the trust conferred thereby; and on December 29, 1892, wrote and sent a letter to the plaintiff, enclosing a copy of the instrument, as well as a letter from the attorney of the defendants, requesting the plaintiff to turn over to Dennis the possession of all property of the testator in his possession or control, and all documents appertaining to the estate.

On January 3, 1893, the plaintiff filed a peti-
315]tion in the*cause, alleging that the widow and daughters, in undertaking to remove him from the office of trustee, and in making the resolution of removal, falsely and deceitfully pretended that the removal was for good and sufficient cause, and did not act with good faith, but from invidious motives; that they had no power to remove him, pending this suit, except upon application to the court; and that the signature of Frederick May by the widow as his attorney was nugatory and of no effect; specifically denying all the allegations of the resolution of removal; and praying for an injunction against the defendants and Dennis from claiming any right or doing any act under that resolution. On January 7, 1893, upon the plaintiff's motion, Dennis was made a party defendant to the suit; and on January 24, 1893, a temporary injunction was granted as prayed for.

On March 7, 1893, the defendants, by leave given January 21, 1893, filed a cross bill, praying that the plaintiff be decreed to surrender possession of the real estate and all moneys and documents in his charge as cotrustee to Dennis as his successor, and to settle his final account.

Frederick May, on May 8, 1893, executed and acknowledged before a notary public in the city of Washington a deed, ratifying, approving, and confirming the acts of the widow in voting for and executing in his behalf the resolution of removal, and also the filing of the prior answer and cross bill in his behalf; and on June 6, 1893, personally appeared in the cause, and, by leave of court, filed a supplemental answer to the like effect.

After the filing of an answer to the cross bill, and a general replication to that answer, and other motions and pleadings not material to be stated, much evidence was taken (the substance of which is stated in the opinion of this court), and the case was heard upon pleadings and proofs before the supreme court of the District of Columbia; and that court, on July 31, 1894, entered a final decree, by which the injunction granted on the plaintiff's petition was dissolved; "and it appearing to the court that the heirs of John Frederick May, deceased, other than said William May, with the concurrence of *Sarah Maria May, [**316**
widow of said deceased testator, proceeded rightfully and within the power conferred by the first codicil to the will of said testator in removing, by their unanimous resolution, dated November 25, 1892, for good and sufficient cause, said William May from his office as trustee or cotrustee named in said first codicil, and in appointing the defendant William H. Dennis in his stead; and it further appearing to the court from the proofs that there existed good and sufficient cause why the said William May ought to have been removed from said office of cotrustee, more particularly on account of the discordant relations between him on one side and his cotrustee and all the beneficiaries of the trust except himself on the other side," it was decreed that William May within twenty days surrender possession and control of the trust property in his hands, and all leases, papers, and books pertaining to the trust, and all moneys of the trust estate, derived from the collection of rents or otherwise, to the widow and Dennis as cotrustees, and that all the powers and duties originally conferred upon him by the will and codicil be vested in them; that he be perpetually enjoined and restrained from acting as cotrustee, and from interfering with their possession and management of the trust property, "without prejudice, however, to the right of said William May to apply to this court as he may be advised, in his quality as a beneficiary interested in said trust;" and that he render a full and final account of all his receipts and disbursements as cotrustee; and it was further adjudged that the widow (in addition to the other provisions for her benefit) was entitled to receive for life to her own use one third of the net income from the rents and profits of the real estate, after deducting taxes, insur-

ance, and repairs, and without any deduction for interest paid or to be paid on debts of the testator, or on any mortgages or encumbrances upon his estate.

The plaintiff appealed to the court of appeals, which affirmed the decree, with costs, and afterwards denied a motion to amend it so as to allow him his costs and counsel fees in the cause. 5 App. D. C. 552. Thereupon he appealed to this court.

Messrs. **Walter D. Davidge** and *W. D. Davidge*, Jr., for appellants.

Messrs. **Enoch Totten** and **William Henry Dennis** for appellees.

Mr. Justice **Gray** delivered the opinion of the court:

The important question in this case is whether William May has been rightly removed from the office of trustee under the will and codicil of his father.

As to the facts bearing upon this question, we concur, after careful examination of the voluminous record, in the conclusions expressed by the courts below in the following passages of their opinions:

In the supreme court of the District of Columbia, Justice Hagner said: "In the present case, the testimony clearly proves that between Mrs. May, the other trustee, and William May there exists so wide a breach that they can have no personal communication. The jealousy and unfriendliness existing before the testator's death on each side has widened into positive, distinct, and most unnatural enmity. On William May's part, it has been undoubtedly increased by his mother's positive refusal to confer with him on the business of the estate, because, as she testifies, quarrels would always result from such conferences, which would be perilous to her health, and also by the terms in which she had expressed herself towards him in her pleadings and testimony in this cause and by her execution of the instrument intended to effect his removal; and, on the part of Mrs. May, that dislike has been intensified by the statements in William May's pleadings and his testimony, and perhaps more pointedly because of his introduction of the painful correspondence, many years old, between her husband and herself, and of Dr. May's letters to the plaintiff on the subject of his domestic troubles. She and all the beneficiaries have testified in painful terms that they believe him to be untrustworthy, dis-[318] honest, dictatorial, and *disagreeable in manner, and incompetent as a business man. Under such circumstances, anything like free conference between the trustees, or concert of action, in the proper sense of the term, is impossible. If either is to act at all as trustee, each must pursue his or her independent way, with a certainty of differing as to the proper performance of many of the duties of the trust, if not as to all. . . . This unfortunate state of feeling between the trustee and sisters and brother must equally prevent that peaceable intercourse that beneficiaries should enjoy with the party charged with the management of their interests in this considerable estate. They are certainly entitled to confer in peace with the agent appointed to manage their affairs, and receive from him good-tempered explanations, and give their suggestions as to what they consider the proper steps in the management of their business, without risk of unpleasant disputes, naturally liable to increase in violence at each successive difference. Such a state of affairs would ultimately become insufferable, and most hurtful to the interests of all concerned."

The court of appeals, speaking by Justice Morris, expressed the same view as follows: "Dissension, however, very soon arose between William May on the one side, and his mother, brother, and sisters, on the other; and, as usual in such cases, the dissension became intense and bitter. There is in the record a painful disclosure of domestic discord which should have been avoided, and into the details of which we do not deem it necessary for the purposes of this case to enter. . . . As we have stated, we will not enter into any investigation of the causes of dissension between the parties, or of the reasonableness or unreasonableness of their respective positions. That there is dissension, bitter and uncompromising, is beyond question. That such dissension precludes intercourse between the parties is their mutual declaration. If there can be no intercourse between them, no communication of views, their joint execution of their joint trust is an impossibility. The due execution of the trust requires concurrence of action, and consultation preliminary to action." 5 App. D. C. 555, 561.

We agree with both the lower courts in thinking it to be *unnecessary and unde-[319] sirable to enter upon a discussion of the conflicting testimony, or to enlarge upon the details of the conduct and expressions of the parties.

It is sufficient to say that, while nothing is shown to justify an imputation of dishonesty against the appellant, it is indisputable that, from the time of his entering upon the execution of the trust, he treated his mother and co-trustee without due respect and consideration, and was somewhat careless and inaccurate in his accounts rendered to her; that his conduct was calculated to excite, and did excite, resentment in her, sympathy with her in his sisters and brother, and suspicion and distrust upon the part of all of them; and that, as is too apt to happen in family quarrels, the breach once made became wider and wider until there was no longer any natural, or even friendly, intercourse between the appellant and the rest of the family.

What, then, are the rules of law applicable to the case, taking into consideration the peculiar provisions of the will and codicil?

The testator by his will, dated February 4, 1890, devised all his estate to his widow in fee, in trust, to receive herself one third of the income of the real estate for life, and one third of the personal property absolutely; to divide the income of the other two thirds of the estate, after paying his debts and canceling existing mortgages, among his children and the issue of any deceased child; and, in certain circumstances, to sell or mortgage the real estate; and gave her power to appoint a trustee to succeed her, and appointed her sole executrix. Some ten months afterwards, on December 17, 1890, he gave his son William a power

of attorney to lease or rent his real estate, to recover possession of the same, and to collect the rents thereof. About three months later, on March 27, 1891, he executed the codicil, by which he appointed William a cotrustee with the widow, the two together to have and exercise all the powers created by the will, except that William alone was to take charge of, care for, manage, and keep in repair the real estate, to collect the rents thereof, and to pay the taxes [320] and other expenses thereon, *receiving a commission of 5 per cent on his collections, and rendering monthly accounts to the widow. The separate authority thus given to William was substantially that of an agent, little more than he had under the power of attorney in his father's lifetime. The powers of paying and canceling mortgages, and of distributing income among the children, and of making sales or new mortgages of the real estate, belonged to him and the widow jointly as trustees; and were active trusts, requiring mutual consultation and the exercise of discretion in carrying them into execution.

The clause in the codicil, which gave his other heirs, "for good and sufficient cause," and with the concurrence of the widow, power "by their unanimous resolution" to remove William May from his office as trustee, and to appoint another person in his stead, was evidently intended to enable them to remove him by their own act, without being obliged to resort to a court of equity. If no such power had been given them by the testator, any one of them could have applied to a court of equity, and have had the trustee removed, on proving good and sufficient cause therefor, satisfactory to the court. If the words "for good and sufficient cause," in the codicil, mean only such cause as would be deemed by a court of equity to be good and sufficient, the only effect of conferring the express power of removal would be to restrict the power of removal by requiring their action to be unanimous. This cannot have been the testator's intention. The extent of the power conferred appears to us to have been well and accurately stated by the court of appeals in these few words: "The power to remove their trustee was vested in the defendants to this cause. The power to determine when there was good and sufficient cause for such removal was necessarily in them also, subject to the restraining power of a court of equity against the abuse of it." 5 App. D. C. 561.

The power of a court of equity to remove a trustee, and to substitute another in his place, is incidental to its paramount duty to see that trusts are properly executed; and may properly be exercised whenever such a state of mutual [321] *ill-feeling, growing out of his behavior, exists between the trustees, or between the trustee in question and the beneficiaries, that his continuance in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent the cotrustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out, or are greatly exaggerated. *Uvedale* v. *Ettrick*, 2 Ch. Cas. 130 *Letterstedt* v. *Broers*, L. R. 9 App. Cas. 371, 386; *McPherson* v. *Cox*, 96 U. S. 404, 419 [24: 746, 751]; *Scott* v. *Rand*, 118 Mass. 215, 218; *Wilson* v. *Wilson*, 145 Mass. 490, 493; 2 Story, Eq. Jur. § 1288.

A good illustration of this is afforded by the leading case of *Uvedale* v. *Ettrick*, above cited, decided by Lord Chancellor Nottingham in 1682. In that case, the plaintiff's husband, being seised of Horton and other manors, by his will devised them to his wife and Ettrick and three other persons, in trust to be sold, "and, after his debts and legacies paid, the surplus of the land to be conveyed to his heir;" and died, "having, after his marriage with the plaintiff, mortgaged Horton, so as the plaintiff was dowable of all the estate." She brought a bill in equity against Ettrick and the other three trustees and the heir—"which was to have a sale made, but principally that Ettrick might be put out of the trust." The other three trustees declined the trust. The bill alleged that the plaintiff "was drawn into agreement to release her dower" in the other manors, "and to give a bond of £4,000 that, if any of the children died, she would not take administration, except they all died; after which Ettrick turns to be the plaintiff's enemy, and divers matters are charged in the bill upon Ettrick, as if he practised to get Horton, and to be the whole manager himself." At the hearing, the plaintiff declared in court that she was content to accept dower in the manor of Horton, and to join in the sale of the rest of the land, thereby to extinquish her dower therein, "so that Ettrick might be discharged of the trust. On the other side, Ettrick insisted to be continued in the trust, and would attend a master from time to time to get a purchaser, *and to do all reasonable acts, [322] etc." "Lord Chancellor. 'I like not that a man should be ambitious of a trust, when he can get nothing but trouble by it;' and declared that, without any reflection on Ettrick, he should meddle no farther in the trust, etc." 2 Ch. Cas. 131.

The facts of the case at bar, therefore, far from showing any abuse of the power conferred by the testator, present a state of things which would justify a removal of the appellant by a court of equity had the will been silent upon the subject.

The filing of this bill by one trustee did not suspend the power of removal given by the will to the beneficiaries with the concurrence of the other trustee; but only subjected their action to the supervision and control of the court. *Cafe* v. *Bent*, 3 Hare, 245, 249.

The form in which their power to remove the appellant was undertaken to be executed was by a resolution in writing, declaring that there was good and sufficient cause for his removal; specifying, among other reasons, his failure to render full and true accounts to his cotrustee, and his domineering and disagreeable conduct towards her; and signed by the widow and the four daughters in person, and by the widow as attorney in fact of the other son. Whether the widow was authorized by the power of attorney from him to act in his behalf in the removal need not be considered, since he afterwards formally ratified her action, and the unanimous wish of all concerned

that the removal should take place was made manifest to the court before it acted upon the matter.

The necessary conclusion is that the decree appealed from, in so far as it ordered William May to be removed from his office as trustee, was in accordance with law and justice.

The direction, in the decree, that he should surrender possession and control of the trust property, and all the leases and papers in his hands, and all moneys, whether derived from the collection of rents or otherwise, was a necessary incident of his removal and the appointment of a new trustee in his stead. The management of the real estate would have been one of the duties imposed upon the two trustees jointly by the first clause of the codicil, but for the concluding words of that 323]*clause, "except as hereinafter otherwise directed," followed by the direction that he should manage the real estate. This duty of management was not separate from, but annexed to, his office of trustee; and after his removal from that office, he could not perform this or any other duty connected with the administration of the trust.

The question who will take the estate after the deaths of the wife and the children cannot be decided now, before those events happen, and in the absence of parties who may then be interested. Upon a bill in equity by a trustee for instructions in the execution of his trust, the court will not decide questions depending upon future events, and affecting the rights of persons not in being, and unnecessary to be decided for the present guidance of the trustee. As was said by Mr. Justice Grier: "The court has no power to decree *in thesi*, as to the future rights of parties not before the court or *in esse*." *Cross* v. *Del Valle*, 68 U. S. 1 Wall. 1, 16 [17:515, 519].

The decree, in allowing the wife one third of the net income of the real estate, deducting taxes, insurance, and repairs, but without any deduction for interest on debts or mortgages, was clearly in accordance with the explicit provisions of the will, that she should receive one third of the net annual income, and that her thirds should be exempted from the payment of debts or mortgages.

That part of the decree which substitutes Dennis as trustee in the place of the appellant was not specifically objected to in argument, and we allude to it only to prevent any inference that, in affirming the decree generally, we express any opinion upon the question whether Dennis, by acting as counsel for the rest of the family throughout this suit, and supporting all the charges, whether grave or frivolous, made by them against the appellant, has so far identified himself with one side of this unhappy controversy as to make it unfit that he should hold the office of trustee under the will. That question is left to be dealt with by the court below, under the right reserved by the decree to the appellant to apply to the court as he may be advised, in his quality as a beneficiary interested in the trust.

Decree affirmed.

LEWIS E. PARSONS, Jr., *Appt.*, [324
v.
UNITED STATES.

(See S. C. Reporter's ed. 324-344.)

Right of President to remove district attorney.

The President of the United States has power to remove a district attorney within the four years for which he was appointed under U. S. Rev. Stat. § 769, and to appoint his successor by and with the advice and consent of the Senate.

[No. 270.]

Argued April 8, 9, 1897. Decided May 24, 1897.

APPEAL from a judgment of the Court of Claims dismissing a suit brought by Lewis E. Parsons, Jr., against the United States for payment of the balance due for his salary and fees as district attorney. *Affirmed.*

See same case below, 30 Ct. Cl. 223.

Statement by Mr. Justice **Peckham:**

The appellant, on the 4th day of December, 1894, filed in the court of claims an amended petition, in which he alleged that on the 4th of February, 1890, after his nomination and confirmation, he was duly appointed, qualified, and commissioned for the term of four years as attorney for the United States for the northern district of Alabama, and also to act as such for the middle district of Alabama; that thereupon he entered upon the discharge of the duties of his office; that he never resigned the same, and that he then resided, and has continued to reside, since the date of his commission, in the city of Birmingham, Alabama, and within the northern district of Alabama, and that he had given his personal attention to the duties of his office, and that no cause of removal had existed since his appointment.

Although the appellant was, as he alleged, duly commissioned as such district attorney, the contents of the commission do not appear in the petition nor in the record, but it has been *assumed that it contained the usual lan-[325
guage, which, after authorizing and empowering the officer to execute and fulfil the duties of the office, proceeds as follows: "To have and to hold the said office with all the powers and privileges and emoluments to the same of right appertaining unto him, the said Lewis E. Parsons, Jr., for the term of four years from the date hereof, subject to the conditions prescribed by law."

It was further alleged in the petition that on May 29, 1893, the appellant received a written communication from the President of the United States as follows:

Executive Mansion,
Washington, D. C., May 26, 1893.

Sir: You are hereby removed from the office of attorney of the United States for the northern and middle districts of Alabama, to take effect upon the appointment and qualification of your successor.

Grover Cleveland.

To Lewis E. Parsons, Jr.,
Birmingham, Ala.

No charges had been preferred against the appellant.

Under date of Birmingham, Alabama, June 5, 1893, he sent a written communication to the President of the United States, at Washington, D. C., in which he said:

My commission bears date February 4, 1890, and authorizes me to hold said office for the definite term of four years from the date thereof, fixed by law, and I am advised by counsel, and it is my own opinion, that you have no power to remove me, and I respectfully decline to surrender the office.

Very respectfully,
Lewis E. Parsons, Jr.,
United States Attorney for
the Northern District of Alabama.

This answer was duly mailed to the President of the United States, and on the same day, **326]** *viz.*, the 5th day of June, 1893, *the appellant notified both the Attorney General of the United States and Emmet O'Neal that he declined to surrender the office of attorney of the United States for the northern district of Alabama to said O'Neal, who was named by the President as appellant's successor, his (O'Neal's) appointment bearing date May 26, 1893.

Upon June 20, 1893, O'Neal moved the circuit court for the southern division of the northern district of Alabama, to require appellant to turn over to him all the books and papers and other property appertaining to the office, which motion was resisted by appellant, but was granted by the court, although it did not adjudicate or determine the question of the title to the office, or the power of the President to remove the appellant. *Re O'Neal*, 57 Fed. Rep. 293.

The appellant applied to this court for leave to file a petition for a writ of mandamus to compel the judge to vacate his order granting the motion of Mr. O'Neal, which application was denied, but the merits of the case were not passed upon. *Re Parsons*, 150 U. S. 150 [37:1034].

The appellant further alleged in his petition that from January 1, 1893, to May 26 of that year he had earned certain fees, which had been duly accounted for and approved by the district judge, and that since May 26, and prior to December 31, 1893, certain other fees had been earned for services rendered by Mr. O'Neal, who had been performing the duties of United States attorney since May 26, 1893, and that on the whole there was a balance due appellant for salary and fees during the year 1893, appertaining to his office as district attorney, which amount had been demanded by appellant and payment had been refused. Judgment for the amount was demanded.

The usual answer was put in by the United States. It further appears that on May 26, 1893, the Senate of the United States was not in session, but that in August, 1893, that body was in session, and that the nomination of Mr. O'Neal was sent to it, and his appointment was by it consented to and confirmed, and that he was commissioned as United States district attorney for four years from that time. These **327]** facts have *not been stated in the formal finding of facts by the court below, but they have been referred to by both the counsel in their briefs in the case as part of the admitted facts, and the fact of the confirmation of Mr. O'Neal on August 26, 1893, by the Senate, is stated by Judge Weldon in the course of his opinion in this case. 30 Ct. Cl. 222. The court below determined, as a conclusion of law, that the appellant was not entitled to recover, and his petition was therefore dismissed. From that judgment he has appealed to this court.

Messrs. **J. A. W. Smith, L. T. Michener,** *J. H. Parsons*, Jr., *D. D. Shelby*, *W. W. Dudley*, and *R. R. McMahon* for appellant.

Mr. **Joshua Eric Dodge,** Assistant Attorney General, for appellee.

Mr. Justice **Peckham** delivered the opinion of the court:

The question here presented is whether the President of the United States has power to remove a district attorney who had been duly appointed, when such removal occurs within the period of four years from the date of his appointment, and to appoint a successor to that officer by and with the advice and consent of the Senate. The appellant in this case claims that the President has no such power, and that by virtue of the appointment of appellant to the office of district attorney in February, 1890, he was entitled to hold that office for four year from that date, and to receive the emoluments appertaining thereto during the same period. He bases his claim upon U. S. Rev. Stat. §§ 767, 769.

Section 767 provides for the appointment in each district of the United States, with the exceptions therein stated, of "a person learned in the law to act as attorney for the United States in such district."

Section 769 reads as follows:

"District attorneys shall be appointed for a term of four *years and their commis- **[328** sions shall cease and expire at the expiration of four years from their respective dates. And every district attorney, before entering upon his office, shall be sworn to the faithful execution thereof."

The appellant claims that this section gives to every district attorney the legal right to hold his office for four years, and that during that time the President has no power to remove him directly, and the President and Senate have no power to remove him indirectly by the appointment of a successor, and that, therefore, he has never been legally removed; and he bases his claim to recover herein upon that fact.

The first question which arises is in regard to the proper construction of the above-quoted section. Does it provide for the continuance in office for four years at all events and for a termination at the expiration of that period, or does it mean to provide that the term shall not last longer than four years, subject to the right of the President to sooner remove? If it were to be construed in accordance with the claim of appellant, the further question would then arise whether a statute which fixed a term of office for a district attorney, during the running of which neither the President, nor the President and Senate, by the appointment of a

successor, should have power to remove the incumbent from office, would be constitutional.

It will greatly aid us in giving the proper construction to this section if we look for a moment at the constitutional history of the subject relating to the President's power of removal and at the debates which have taken place in Congress in regard to it. The question arose in the first session of the first Congress which met after the adoption of the Constitution.

On May 19, 1789, in the House of Representatives, Mr. Madison moved: "That it is the opinion of this committee that there shall be established an executive department, to be denominated the department of foreign affairs; at the head of which there shall be an officer to be called the secretary of the department of foreign affairs, who shall be appointed by the President by and with the advice and consent of the Senate; and to be removable by the Pres-
329] ident." *Subsequently a bill was introduced embodying those provisions. Mr. Smith of South Carolina said that "he had doubts whether the officer could be removed by the President; he apprehended that he could only be removed by an impeachment before the Senate, and that being once in office he must remain there until convicted upon impeachment; and he wished gentlemen would consider this point well before deciding it." (1st Lloyd's Cong. Reg. pp. 350, 357.) Then ensued what has been many times described as one of the ablest constitutional debates which has taken place in Congress since the adoption of the Constitution. It lasted for many days, and all arguments that could be thought of by men—many of whom had been instrumental in the preparation and adoption of the Constitution—were brought forward in debate in favor of or against that construction of the instrument which reposed in the President alone the power to remove from office.

After a most exhaustive debate the House refused to adopt the motion which had been made to strike out the words "to be removed from office by the President," but subsequently the bill was amended by inserting a provision that there should be a clerk to be appointed by the secretary, etc., and that said clerk, "whenever said principal officer shall be removed from office by the President of the United States, or in any other case of a vacancy," shall be the custodian of the records, etc., and thereupon the 1st clause, "that the secretary shall be removable from office by the President," was stricken out, but it was on the well-understood ground that the amendment sufficiently embodied the construction of the Constitution given to it by Mr. Madison and those who agreed with him, and that it was at the same time free from the objection to the clause so stricken out that it was itself susceptible to the objection of undertaking to confer upon the President a power which before he had not. The bill so amended was sent to the Senate, and was finally passed after a long and able debate by that body, without any amendments on this particular subject. The Senate was, however, equally divided upon it, and the question was decided in favor of the bill by
330] *the casting vote of Mr. Adams, as Vice President. Mr. Charles Francis Adams, in the Life of John Adams (vol. 2, p. 143), in speaking of this action of the Vice President, says:

"It was the only time during his eight years of service in that place that he felt the case to be of such importance as to justify his assigning reasons for his vote. These reasons were not committed to paper, however, and can therefore never be known. But in their soundness it is certain that he never had the shadow of a doubt. His decision settled the question of constitutional power in favor of the President, and consequently established the practice under the government which has continued down to this day.

"Although there have been occasional exceptions taken to it in argument, especially in moments when the executive power, wielded by a strong hand, seemed to encroach upon the limits of the co-ordinate departments, its substantial correctness has been, on the whole, quite generally acquiesced in. And all have agreed that no single act of the first Congress has been attended with more important effect upon the working of every part of the government."

Many distinguished lawyers originally had very different opinions in regard to this power from the one arrived at by this Congress, but when the question was alluded to in after years they recognized that the decision of Congress in 1789, and the universal practice of the government under it, had settled the question beyond any power of alteration. To this effect see 1 Kent, Com. Lecture 14, p. 310, subject, *United States Marshals;* 2 Story, Const. §§ 1542-1544.

In the subsequent debates in Congress over the removal of the deposits of the government, by direction of the President, from the Bank of the United States, and the dismissal by the President of the Secretary of the Treasury, Mr. Duane, as a means to accomplish that purpose, the subject of the power of the President to remove from office was alluded to by Mr. Webster, and he admitted the proposition that the President had the power of removal. Although as an original question he would have had a different opinion, yet in view of the action of Congress and the practice of the government he said: *"I regard it as a settled[331 point, settled by construction, settled by precedent, settled by the practice of the government, settled by legislation;" and he did not ask to disturb it. In speaking on that subject, and referring to Mr. Webster's admission, Mr. Evarts, upon the trial of President Johnson, said: "He knew the force of those forty-five years, the whole existence of the nation under its Constitution, upon a question of that kind; and he sought only to interpose a moral restraint upon the President in requiring him, when he removed from office, to assign the reasons of the removal." 2 Johnson's Impeachment Trial, 314, remarks of Mr. William M. Evarts, of counsel for the President.

In *Ex parte Hennen*, 38 U. S. 13 Pet. 230, 259 [10: 138, 152], which was a case involving the validity of an appointment of a clerk of the district court of Louisiana by the district judge thereof, it was said, by Mr. Justice Thompson, in speaking of the power of removal:

"In the absence of all constitutional pro-

vision, or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of this government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate; and the great question was, whether the removal was to be by the President alone or with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate, jointly, to remove, where the tenure of the office was not fixed by the Constitution, which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution."

And in speaking of the different language employed in the act establishing the Navy De-**332**] partment from that which was *used in regard to the Department of State, the learned justice further remarked: "The change of phraseology arose, probably, from its having become the settled and well-understood construction of the Constitution that the power of removal was vested in the President alone, in such cases, although the appointment of the officer was by the President and Senate."

The opinions of the law officers of the government have been in harmony with the foregoing views.

In 1847, Attorney General Clifford, subsequently and for many years one of the justices of this court, in the course of an opinion given in regard to the claim of Surgeon Du Barry for back pay, in speaking of this power of the President and the acquiescence in the result arrived at by the Congress of 1789, said:

"No one ever thought of maintaining that the inferior offices, so called in the Constitution, should be held during life. The doubt which arose was, whether the concurrence of the Senate was not requisite to effect a removal in all cases where it is required to consummate the appointment. The power was finally affirmed to be in the President alone by a majority of both Houses of Congress after great deliberation and, perhaps, one of the ablest discussions in the history of the country. 4 Elliott, Debates, 350, 404. That decision was acquiesced in at the time, and has since received the sanction of every department of the government. It is worthy of special remark that several commentators on the Constitution, who do not entirely admit the correctness of the construction adopted, are, nevertheless, constrained to regard the question as closed. Mr. Justice Story, after reciting the arguments on both sides, remarks: 'If there has been any aberration from the true constitutional exposition of the power of removal (which the reader must decide for himself), it will be difficult, perhaps impracticable, after forty years' experience, to recall the practice to the correct theory.' 3 Story, Const. § 1538. The remarks of Chancellor Kent are still more decisive on this point. He says: 'It may now be considered as firmly and definitely settled; and there is good sense and practical utility *in the construction.' 1 Kent, [**333** Com. 311." 4 Ops. Atty. Gen. 603, 609.

In 1851, Attorney General Crittenden, in a written opinion delivered to the President of the United States, stated that the President was not only invested with authority to remove the chief justice of the territory of Minnesota from office, but that it was his duty to do so if it appeared that he was incompetent and unfit for the place. Speaking of these territorial judges, Mr. Crittenden said:

"Being civil officers, appointed by the President, by and with the advice and consent of the Senate, and commissioned by the President, they are not exempted from that executive power which, by the Constitution, is vested in the President of the United States over all civil officers appointed by him, and whose tenures of office are not made by the Constitution itself more stable than during the pleasure of the President of the United States."

Concluding, he said:

"To answer your inquiry specifically, I have only, in conclusion, to add that, in my opinion, you, as President of the United States, have the power to remove from office the chief justice of the territory of Minnesota for any cause that may, in your judgment, require it." 5 Ops. Atty. Gen. 288, 291.

In that case the statute under which the territory of Minnesota was organized (9 Stat. at L. 403, 406, § 9) provided for the appointment of judges of the supreme court, and that they should "hold their offices during the period of four years." In regard to that provision Mr. Crittenden said, in the opinion above referred to: "That these territorial judges were appointed under a law which limited their commissions to the term of four years does by no means imply that they shall continue in office during that term, howsoever they may misbehave. An express declaration in the statute that they should not, during the term, be removed from office, would have been in conflict with the Constitution, and would have precluded either the House of Representatives or the President from the exercise *of their [**334** respective powers of impeachment or removal. The law intended no more than that these officers should certainly, at the end of that term, be either out of office, or subjected again to the scrutiny of the Senate upon a renomination."

Attorney General Evarts, in speaking of the tenure of civil office act, said that it was passed "to change the doctrine and practice of the government, by which removal from office, at the mere discretion of the President, had been established as a proper, and, as had been thought, a necessary attendant of the executive duty and responsibility under the Constitution to maintain the efficiency and fidelity of the public service in fulfilling the manifold and incessant obligations of administration and in execution of the laws." 12 Ops. Atty. Gen. 439, 446.

This power has been recognized as extending to officers of the army and navy. Attorney General Cushing, in the *Case of Lansing* (6 Ops. Atty. Gen. 1), said:

"I am not aware of any ground of distinc-

tion in this respect so far as regards the strict question of law between officers of the army and any other officers of the government. As a general rule, with the exception of judicial officers, they all hold their offices by the same tenure in this respect." See also *Case of Colonel Belger*, 12 Ops. Atty. Gen. 421, 425, and also the opinion of Attorney General Devens as to the power of the President to dismiss an officer from the military service, 15 Ops. Atty. Gen. 421.

The foregoing references to debates and opinions have not been made for the purpose of assisting us in ourselves arriving at a decision of the question of the constitutional power of the President in his discretion to remove officials during the term for which they were appointed and notwithstanding the existence of a statute prohibiting such removal, but simply for the purpose of seeing what the views of the various departments of the government have been upon the subject of the power of the President to remove and what claims were made and how much of acquiescence had been given to the proposition that to the President belonged the exclusive power of removal in all cases other than by way of impeachment.

335] *It is unnecessary for us in this case to determine the important question of constitutional power above stated.

The short review we have taken throws light upon the question of the true construction of the language used by Congress in the section of the Revised Statutes under examination. Other legislation will be adverted to.

Before doing so, however, we think it well to comment upon one or two cases which have been said to indicate a different view on the part of this court as to the power of the President. It is said that in the case of *Marbury* v. *Madison*, 5 U. S. 1 Cranch, 137 [2: 60], it was held that a justice of the peace in the District of Columbia was not removable at the will of the President, as his office was one created by Congress, and the term was limited in the act. The case was an original application to this court for a mandamus against the Secretary of State to compel him to deliver a commission to the petitioner which had, as was alleged, been signed by the President and sealed by the Secretary, commissioning the petitioner as one of the justices of the peace for the District of Columbia under an act of Congress. The court unanimously held that it had no jurisdiction to grant an original writ in such case. Chief Justice Marshall, in the course of his opinion, stated that "Mr. Marbury, then, since his commission was signed by the President and sealed by the secretary of state, was appointed; and as the law creating the office gave the officer the right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country."

Whatever has been said by that great magistrate in regard to the meaning and proper construction of the Constitution is entitled to be received with the most profound respect. In that case, however, the material point decided was that the court had no jurisdiction over the case as presented. The remarks of the Chief Justice in relation to the right of an appointee to retain possession of an office created by Congress in and for the District of Columbia, as against the power of the President to remove him during the term for which he was appointed, are not necessarily applicable to the case of an *officer appointed to an office [**336** outside of such district. In the District of Columbia Congress is given by the Constitution power to exercise exclusive legislation in all cases. U. S. Const. art. 1, § 8, subd. 17. The view that the President had no power of removal in other cases outside of the District, as has been seen, is one that had never been taken by the executive department of the government, nor even by Congress prior to 1867, when the first tenure of office act was passed. Up to that time the constant practice of the government was the other way, and in entire accord with the construction of the Constitution arrived at by Congress in 1789.

The case of *United States* v. *Guthrie*, 58 U. S. 17 How. 284 [15: 102], has also been cited upon the same point. The question in that case was in regard to the right of the relator Goodrich to a writ of mandamus to compel the Secretary of the Treasury to draw his warrant to pay the amount of salary due to the relator, as he alleged, during the term nominated in his commission appointing him chief justice of the supreme court of the territory of Minnesota. The President had removed him within the period of four years, the term named in the statute and in his commission. It was in relation to the power to remove this official appointed under the statute organizing the territory of Minnesota that Attorney General Crittenden gave his opinion, which is above referred to. This court held that the circuit court had no power to issue a writ of mandamus commanding the Secretary of the Treasury to pay a judge of the territory of Minnesota his salary for the unexpired term of his office from which he had been removed by the President of the United States. The question whether or not the President had power to remove a territorial judge during his statutory term of office was argued, but was not decided in the case. The prevailing opinion was very brief, and was delivered by Mr. Justice Daniel, and it simply discussed and denied the power of the court to issue the writ. Mr. Justice McLean delivered his own opinion in regard to the power of the President to remove, in which he said that he differed from the opinion of the court in answering the question as it did, and he was of the opinion *that the question [**337** as to the power of the President to remove was before the court, and that such power of removal was not committed solely to the President. The case is not claimed to be authority for the doctrine asserted by Mr. Justice McLean, and it can only be cited for the purpose of showing that there was an exception to the general acquiescence in the power of the President to remove. The case also arose in regard to the dismissal of a judicial officer of a territory.

The case of *McAllister* v. *United States*, 141 U. S. 174 [35: 693], has also been cited. There is nothing in that case which gives any countenance to the doctrine contended for by the appellant. The court there held that a judge of the district court of Alaska was not a judge

of a court of the United States within the meaning of the exception contained in U. S. Rev. Stat. § 1768, relating to the tenure of office of civil officers, and it was held that the judge of the district court of Alaska, prior to the repeal of that section, was subject to removal, before the expiration of his term of office, by the President in the manner and upon the conditions set forth in that section. Mr. Justice Harlan, in delivering the opinion of the court in that case, and replying to the suggestion that the conclusion reached by the court was not in harmony with some observations of Mr. Chief Justice Marshall in *Marbury* v. *Madison*, 5 U. S. 1 Cranch, 137 [2: 60], stated on page 188 [77] that there was nothing in those observations which militated, in any degree, against the views expressed by him in the case then under consideration, and he said (p. 189 [698]): "The decision in the present case is a recognition of the complete authority of Congress over territorial offices, in virtue of 'those general powers which that body possesses over the territories of the United States,' as *Marbury* v. *Madison* was a recognition of the power of Congress over the term of office of a justice of the peace for the District of Columbia." The case contains nothing in opposition to the contention as to the practical construction that had been given to the Constitution by Congress in 1789 and by the government generally since that time and up to the act of 1867.

We may now look at the course of legislation [338] in regard to *the appointment of district attorneys from the earliest period in our constitutional history down to the repeal in 1887 of those sections of the Revised Statutes which contained in substance the provisions of the tenure of office acts.

By § 35, chap. 20, Laws 1789, entitled "An Act to Establish the Judicial Courts of the United States," it was provided, among other things, as follows: "And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents," etc. Stat. at L. 73, 92. No provision was made in the act for the removal of such officer. In the view held by that Congress as to the power of the President to remove, it was unnecessary. The legislation remained in this condition until May 15th, 1820, when the act (chapter 102 of the Laws of that year) was passed, entitled "An Act to Limit the Term of Office of Certain Officers Therein Named, and for Other Purposes." 3 Stat. at L. 582.

The 1st section of that act provided that from and after its passage "all district attorneys, collectors of the customs, naval officers, and surveyors of the customs, navy agents, receivers of public moneys for lands, registers of the land office, paymasters in the army, the apothecary general, the assistant apothecaries general, and the commissary general of purchases, to be appointed under the laws of the United States, shall be appointed for the term of four years, but shall be removable from office at pleasure."

This was an act designed, as indicated by its title, and by the language used in the body of the act, to bring the terms of those offices named therein to an end after the expiration of four years. Its purpose clearly was not to grant an unconditional term of office for that period. It was an act of limitation and not of grant.

The provision in the 2d section, that the commissions should cease and expire at the end of four years, shows clearly that the intention of Congress was to restrict what had been a possible life term of office to a period of not more than *four years under any one [339] appointment. The provision for a removal from office at pleasure was not necessary for the exercise of that power by the President, because of the fact that he was then regarded as being clothed with such power in any event. Considering the construction of the Constitution in this regard as given by the Congress of 1789, and having in mind the constant and uniform practice of the government in harmony with such construction, we must construe this act as providing absolutely for the expiration of the term of office at the end of four years, and not as giving a term that shall last, at all events, for that time, and we think the provision that the officials were removable from office at pleasure was but a recognition of the construction thus almost universally adhered to and acquiesced in as to the power of the President to remove.

The legislation in regard to these various officers remained as provided for in this act of 1820 until the passage of the first tenure of office act, March 2, 1867. 14 Stat. at L. 430, chap. 154. By that act it was provided that every person holding any civil office to which he had been appointed by and with the advice and consent of the Senate, and all who should be thereafter appointed to any such office, "and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except," etc. The reason for the passage of this well-known act is a matter of history. It was the result of a contest which sprang up between President Johnson and the two Houses of Congress within a very short time after he became President, and which grew in force and bitterness as the views of Congress on the one side and the President on the other became more opposed to each other in the matters regarding the states lately in rebellion and the proper measures to be pursued for their government. The act was a portion of the legislation passed by Congress at that time for the purpose of keeping those men in office who were then supposed to be friendly to the views of Congress upon that great subject. On the same day (March 2, 1867), Congress passed the army appropriation act (14 Stat. at L. 486, chap. 170), by which *the headquarters of the general of [340] the army were established at Washington, and all orders and instructions relating to military operations issued by the President to the Secretary of War were directed to be issued through the general of the army. Other provisions were also therein contained for the purpose of restraining the action of the President in the exercise of his power to remove or suspend the general of the army. Reference

to the subject is made in *Blake* v. *United States*, 103 U. S. 227, 236 [26: 462, 465].

The President, as is well known, vetoed the tenure of office act, because he said it was unconstitutional in that it assumed to take away the power of removal constitutionally vested in the President of the United States—a power which had been uniformly exercised by the executive department of the government from its foundation. Upon the return of the bill to Congress it was passed over the President's veto by both Houses and became a law. The continued and uninterrupted practice of the government from 1789 was thus broken in upon and changed by the passage of this act, so that, if constitutional, thereafter all executive officers whose appointments had been made with the advice and consent of the Senate could not be removed by the President without the concurrence of the Senate in such order of removal.

Mr. Blaine, who was in Congress at the time, in afterwards speaking of this bill, said: "It was an extreme proposition—a new departure from the long-established usage of the Federal government—and for that reason, if for no other, personally degrading to the incumbent of the Presidential chair. It could only have grown out of abnormal excitement created by dissensions between the two great departments of the government. . . . The measure was resorted to as one of self-defense against the alleged aggressions and unrestrained power of the executive department." Twenty Years in Congress, vol. 2, pp. 273, 274.

The conduct of President Johnson in regard to the provisions of this act and his contest with Secretary Stanton in relation to the office of Secretary of War led to his impeachment by the House and his trial before the Senate, resulting in his acquittal.

341] *In November, 1868, a new President was elected, who came into office on March 4, 1869. His relations with Congress were friendly, and the motive for the passage of the act of 1867 had ceased to operate. Within five days after the meeting of Congress a bill was introduced in the House to repeal the act of 1867, and was passed by that body. In the Senate, however, the repeal failed, but the act was modified by the act passed on April 5, 1869 (16 Stat. at L. 6), and the 1st section of the original act was modified so as to provide as follows:

"That every person holding any civil office to which he has been or hereafter may be appointed by and with the advice and consent of the Senate, and who shall have become duly qualified to act therein, shall be entitled to hold such office during the term for which he shall have been appointed, unless sooner removed by and with the advice and consent of the Senate, or by the appointment, with the like advice and consent, of a successor in his place, except as herein otherwise provided."

Assuming the constitutionality of these acts, it is seen that under the act of 1869 a person who had been appointed to an office by and with the advice and consent of the Senate could yet be removed by and with such advice and consent, or by the appointment, with the like advice and consent, of a successor in his place, except as provided in the second section of the act, which provided for appointments during the recess of the Senate, and for the designation of persons to fill vacancies which might happen during that time. No further legislation upon the subject of removals or appointments was enacted for some years, although repeated but unsuccessful attempts were made to repeal the act of 1869, and to leave the President untrammeled by any statute upon the subject. With the legislation of 1869 in force, this appellant would under the facts of this case have been legally removed by the appointment of his successor in the way it occurred.

A revision of the statutes having been undertaken since 1869, § 769 was placed therein as the substance of the statute of 1820. The section is quoted above. It does not *contain [**342** the affirmative recognition of the power of removal which is contained in the act of 1820. The reason for the omission plainly was because the insertion of language in the section which in so many words recognized a right of removal would have conflicted with the succeeding sections embodying the terms of the tenure of office act, which prohibited removals. Section 769 was so drawn that in effect it permitted removals within the term, and it was left to the succeeding sections to make provisions that should limit the right of removal otherwise existing by virtue of the language of that section. The same construction of the language of that section should be adopted which we would apply to the act of 1820, and which was applied by Attorney General Crittenden and acted upon by the President, in the case of the chief justiceship of the territory of Minnesota (5 Ops. Atty. Gen. 288), a construction of limitation and not of grant a construction by which no more than a period of four years is permissible, subject in the meantime to the power of the President to remove. In thus construing § 769 we think full effect is given to its language and the practical construction of former periods is adhered to, while at the same time the purpose of Congress to retain officials in office is also given full effect to by the succeeding provisions upon the subject of the tenure of office. The right to remain in office is made to depend upon those subsequent sections, and when, in 1887, they were repealed by Congress (24 Stat. at L. 500; 1 Rev. Stat. Supp. 558) the full legal force and effect of the language used in § 769 is permitted to come in play, freed from the restraints of the sections thus repealed. Such being the case, the persons appointed under § 769 are not entitled to hold for four years as against any power of the President to remove, and in no event can they remain in office longer than that period without being reappointed. This construction of the act as one of limitation, we think, in the light of the history of the subject, is a most natural and proper one.

The argument of the appellant, however, shows, if adopted, that the result of the passage of the repealing statute of 1887 has been to limit the power of the President more than it was limited before that statute was passed. While the tenure of *office provisions [**343** existed, it is conceded that the President might

remove an officer like a district attorney within the four years for which he was commissioned, provided his removal was concurred in by the Senate or was effected by the appointment of his successor by and with the advice and consent of the Senate; yet, now since the repeal of those sections which it was supposed limited and restrained the power of the President, he is still further restrained and limited in his power, because under the construction as claimed by the appellant he cannot now remove an officer within four years, even with the advice and consent of the Senate or by the appointment of his successor by like advice and consent. This extraordinary result is reached by construing, according to appellant's views, § 769 as meaning to give a term of office for four years in any event, and while this term of office was, before the repeal of the section above named, subject to be shortened in accordance with their provisions, yet as they have been repealed it leaves § 769 in force as granting an unconditional and absolute term of four years which cannot be shortened by the President, or the President and Senate combined, and which leaves the incumbent subject only to removal by the slow and weary process of impeachment by the House and a conviction thereon and a removal by the Senate as a punishment.

This could never have been the intention of Congress. On the contrary, we are satisfied that its intention in the repeal of the tenure of office sections of the Revised Statutes was again to concede to the President the power of removal if taken from him by the original tenure of office act, and by reason of the repeal to thereby enable him to remove an officer when in his discretion he regards it for the public good, although the term of office may have been limited by the words of the statute creating the office. This purpose is accomplished by the construction we give to § 769, while the other construction turns a statute meant to enlarge the power of the President into one circumscribing and limiting it more than it was under the law which was repealed for the very purpose of enlarging it.

344] *After a careful review of the case before us we are of the opinion that *the Court of Claims committed no error, and its judgment is affirmed.*

ROBERT M. YARDLEY, Receiver of the Keystone National Bank, *Appt.*,

v.

GEORGE PHILLER, President First National Bank, *et al.*, being the Clearing House Committee of the Clearing House Association of the Banks of Philadelphia.

(See S. C. Reporter's ed. 344-362.)

Clearing-house account—appropriation of credit—insolvency of the bank.

1. The credits in favor of a bank on the credit side of a clearing-house account, to the amount of checks and drafts on other banks surrendered on a clearing-house exchange, are not changed or destroyed by the fact that, on an announcement of the bank's insolvency after such exchange, the checks and drafts which had been debited to that bank at the clearing-house, and which amounted to more than the credit and were held by the manager as security for the balance, were withdrawn by the banks which had presented them, and charged back by them to those by whom they had been deposited, although the result of this transaction is to change the original debit balance to a credit in favor of the insolvent bank.

2. A clearing-house association which, as fiduciary agent of a bank belonging to the association, is in possession of a credit to the bank, which arises, after the announcement of the bank's insolvency, by reason of the withdrawal of checks and drafts against that bank which other banks had surrendered to the clearing house on exchange, cannot appropriate such credit to its own debt due from the bank for loan certificates, in the absence of any lien or agreement giving such right; as to do so would constitute a preference by the insolvent bank within the inhibition of U. S. Rev. Stat. § 5242.

3. A clearing-house credit which arises in favor of a bank after the announcement of its insolvency by the withdrawal from the clearing house, after the insolvency, of checks and drafts which other banks held against it and which after clearing-house exchange had been left with the manager of the clearing house as security for balance due from the bank, cannot be appropriated, under the principles of the general law of set-off, by the clearing-house association on a debt due from such bank for loan certificates, because the right to set-off must be governed by the state of things existing at the moment of insolvency.

[No. 296.]

Argued April 28, 1897. Decided May 24, 1897.

APPEAL from a decree of the United States Circuit Court of Appeals for the Third Circuit reversing the decree of the Circuit Court of the United States for the Eastern District of Pennsylvania that the receiver recover from the defendants a certain amount, and also remanding the cause, with directions to dismiss the complaint in an action brought by Robert M. Yardley, Receiver of the Keystone National Bank, against George Philler, President of the First National Bank, *et al.* *Decrees of Circuit Court of Appeals and Circuit Court reversed,* with directions to allow the pleadings to be reformed, and as to costs.

See same case below, 58 Fed. Rep. 746, 17 U. S. App. 647.

The facts are stated in the opinion.

Messrs. **H. B. Gill** and **Silas W. Pettit** for appellant.

Messrs. **A. T. Freedley** and **John G. Johnson** for appellees.

Mr. Justice **White** delivered the opinion of the court:

The Clearing House Association of Philadelphia is a voluntary organization, created by the co-operation of national banks doing

NOTE.—*As to collection by banks, liability for,* see note to Washington Bank v. Triplett, 7: 37.

As to liability of bank upon check, see note to National Bank of Republic v. Millard, 19: 897.

As to certification of checks, liability of banks on, see note to Merchants' Nat. Bank v. State Nat. Bank, 19: 1008.

As to liability of bank for general deposits, see note to Planter's Bank v. Union Bank, 21: 473.

As to special deposits, responsibility of bank for, see note to First Nat. Bank v. Graham, 25: 750.

346] *business in that city. Its affairs are governed by rules and regulations adopted by agreement between the banks forming the association, and the general direction of its operation is under the control of a president, secretary, and manager, and of a committee selected by the members of the association. As the name of the association implies, it is intended to afford a uniform and convenient method by which daily settlements of balances can be had between the banks entering into the association. In addition to the function of affording a means for the daily clearing of balances, the Clearing House Association, by agreement among its members, issued, at periods when it was deemed best to do so, clearing-house certificates. These certificates were delivered, under the discretion of the managers, when applied for by a member of the association, and were secured by the pledge of bills receivable or assets taken from the portfolio of the bank obtaining the certificates. These certificates were available as cash in settlements between the banks and for other purposes, and the object of issuing them was, in times of panic or stringency, to create, to the extent of the certificates, solidarity of responsibility between the banks, as each bank was liable for a proportionate share of the certificates in case of default in their payment, thus fortifying the credit of one by the credit of all. Moreover, the certificates afforded a means by which a bank with good assets could use them in order to obtain certificates which were, for banking purposes, the equivalent of cash, when, from any stringency or panic, the assets themselves, although entirely sound, could not be readily convertible into current money.

Article 2 of the constitution of the Clearing Association provided as follows:

"Art. 2. Its object shall be to effect at one place the daily exchanges between the several associated banks, consisting of a morning exchange and a runners' exchange, and the payment, at the same place, of the balances resulting from such exchanges. The responsibility of the association for such exchanges is strictly limited to the faithful distribution by the manager, among the creditor banks for the 347] time being, of *the sums actually received by him; and should any losses occur while the said balances are in the custody of the manager, they shall be borne and paid by the associated banks, in the same proportion as the expenses of the clearing-house, as hereinafter provided for."

Article 11 said:

"Art. 11. Should any of the associated banks fail to appear at the clearing house at the proper hour, prepared to pay the balance against it, the amount of that balance shall be immediately furnished to the clearing house by the several banks exchanging at that establishment with the defaulting bank, in proportion to their respective balances against that bank, resulting from the exchanges of the day, and the manager shall make requisitions accordingly, so that the general settlement may be accomplished with as little delay as possible. The respective amounts so furnished the clearing house on account of the defaulting bank will, of course, constitute claims on the part of the several responding banks against that bank: *Provided*, That the amount of the due bill given by the defaulting bank, in settlement of its debit balance in the runners' exchange of the previous day, and deposited by the clearing house in its depository bank, shall be deducted from the total charge of such bank, and shall be the first claim against the securities deposited by the defaulting bank, under article 17."

Article 17 was as follows:

"Art. 17. Each bank, member of the Clearing House Association, shall deposit securities with the clearing-house committee as collateral for their daily settlements, in the following percentage or assessment on capital:

"1st. Banks with capitals of $800,000 and over, 10 per cent.

"2d. Banks with capitals of $500,000 and under $800,000, 14 per cent; but not to be required to deposit over $80,000.

"3d. Banks with capitals over $250,000 and under $500,000, 20 per cent; but not to be required to deposit over $70,000.

*"4th. Banks with capitals of and [348 under $250,000, shall deposit not less than $50,000.

"The committee shall apply the deposit of any defaulting bank to the payment of the balance due by such bank at the clearing house, or to the reimbursement, *pro rata*, of the several banks furnishing said balance, under article 11; and the surplus, if any, shall be held as collateral security for other indebtedness to members of this association."

By article 9 of the constitution the hour for making the morning exchange at the clearing house was fixed at eight and a half o'clock, and the hour for making the runners' exchange at half-past eleven. By the same article it was provided that a bank becoming a debtor by the morning clearing must pay the sum debited to it to the clearing house between the hours of eleven and twelve o'clock that day, and at twelve and a half o'clock of the same day the bank, being a creditor in the daily clearing, should receive from the manager of the clearing house the sum of the credit to which it was entitled. The settlement at the runners' exchange was made by due bills, and these due bills were deposited by the manager of the clearing house in his bank account, kept with one of the banks belonging to the association, and were checked against by him as if the due bill were cash. Such due bill, when so received on deposit by the bank and treated by it as cash, became a credit item, presented by it, in the clearing of the following morning. In addition, where claims were presented by the runner of one bank for payment to another bank during the course of a business day, the bank by whom the money was to be paid, to obviate the risk of carrying it, instead of handing over money, gave to the runner a due bill for the amount, which, on its face, was stipulated to be payable in the clearing of the next day.

The Keystone National Bank was a member of the Clearing House Association. It deposited with the association, in accordance with the rules, securities to guarantee its obligations to meet its daily clearing. It had obtained, moreover, from the Clearing House Association clearing-house certificates to a

large amount, and in December, 1890, by an
349] agreement *between the association and the Keystone Bank, the securities deposited by the Keystone Bank, to guarantee its liability to pay any balance arising from the daily clearing, were returned to that bank, and were by it deposited anew with the Clearing House Association as security for clearing-house certificates. It resulted from this transaction that the Keystone Bank did not have in the hands of the Clearing House Association any security to guarantee its obligation to meet its daily clearing. At the time, however, when the securities were withdrawn and used by the Keystone for the purpose of securing clearing-house certificates, an agreement was made that in order to secure the performance of any obligations which might arise from the daily clearing the Keystone Bank would leave in the hands of the manager of the clearing house the vouchers presented by other banks against it at the time the clearing was made, to be held by the manager until the balance shown to be due by it in the clearing was paid in accordance with the agreement. From December, 1890, until March 20, 1891, in execution of this agreement, whenever in the daily clearing the Keystone Bank owed a balance, it did not take away the vouchers delivered to its settling clerk, but they were turned over to the manager of the clearing house to be held until the obligation of the Keystone Bank resulting from the clearing was made good.

The operation of making the clearing was accomplished by the following method: At the hour named a runner and a settling clerk representing each bank met at the clearing house. These representatives of the respective banks brought with them in separate sealed packages the checks which the banks they represented held against other banks. The runner of each bank thereupon delivered to the settling clerk of the others these packages, taking receipts therefor, so that at the common place of meeting the clerk of each bank received from every other bank the checks drawn against the bank he represented. The making up of these packages for exchange is thus provided for in the rules:

"Rule 3. Sealed packages, well gummed and sealed with wax and indorsed with ink or in-
350] delible pencil, shall be used *exclusively in the morning exchange and in the runners' exchange, and the amounts stated thereon shall be the basis of settlement. These packages, with the seals unbroken, shall be delivered by the messengers of the several banks to their respective institutions; otherwise, no responsibility shall attach to the sender."

After these packages had been received the settling clerk of each bank made up from the indorsements on the packages delivered to him the debits, and stated the credits arising from the sum of the packages delivered by the runner of his bank to the settling clerks of the other banks. The sheets thus made up were then turned over to the manager of the clearing house, by whom they were verified and consolidated. The manager's balance sheet hence necessarily contained a statement itemizing the aggregated debits and credits of all the banks concerned in the clearing. Where any fractional sum was due by a bank in consequence of the clearing, this fractional sum was paid to the manager by a due bill, the manager treating this due bill as cash, deposited it in the bank where his account was kept, and the sum of this due bill became a credit item in favor of the bank holding it in the clearing of the next morning.

In the clearing of March 19, 1891, the Keystone Bank presented charges against other banks to the amount of $155,136.41, and the other banks presented charges against it for $240,549, making the Keystone Bank a debtor in the clearing for $75,359.08. In accordance with the rule, the Keystone Bank between the hours of eleven and twelve paid the $75,000 in cash or its equivalent, and gave its due bill to the manager of the clearing house for the fractional sum of $359.08, which was deposited by the manager and checked against by him as cash. In the runners' exchange of that day, that is, the 19th of March, the Keystone Bank owed a balance of $23,021.34, which balance it settled by giving its due bill to the manager for deposit in accordance with the system above stated. In operating the clearing on the morning of March 20, the Keystone Bank, through its runner, delivered to the respective clerks of the various banks packages containing *claims held by the Keystone Bank [**351**
amounting to $70,005.46, and the settling clerk of the Keystone Bank received from the runners of the other banks packages containing $117,035.21, leaving the Keystone Bank debtor in the clearing for $47,029.75. The packages containing the demands which the Keystone Bank held against other banks, and which had been delivered to the agent of each of those banks, were by them taken away at the termination of the clearing. The packages containing the charges presented against the Keystone Bank, which in the aggregate amounted to $117,035.21, instead of being taken away by its settling clerk, were, under the arrangement which we have stated, turned over by him to the manager of the clearing house, to be retained until at the hour named the Keystone Bank paid the balance due by it.

Before the hour for making the payment, however, the Keystone Bank, by order of the Comptroller of the Currency, was closed, and subsequently was placed in the hands of a receiver. On the failure of the Keystone to make the payment of $47,029.75, the committee of the association instructed the manager to call on the banks by whom claims had been presented against the Keystone, "to redeem the packages against the Keystone Bank;" in other words, "to redeem the amounts which they had been credited with on the manager's balance sheet, in settlement of the account of checks drawn on the Keystone Bank." Not being able from his records to ascertain what banks to call upon to make the payment of $117,035.21, the manager sent to the Keystone Bank, and received from that institution their settlement and package sheets for that day. On receipt thereof, the manager thereupon gave the proper notification, and the various banks notified sent their checks and redeemed the packages in question. Among the obligations for $117,035.21, however, were due bills amounting to $41,197.36. These due bills

came from the fractional amounts arising by the settlement made on the morning of the 19th, to wit, $359.08; for the due bill given at the runners' settlement on the morning of the 19th, $23,031.44; and for due bills given to var-
352] ious banks during the course *of business on the 19th, amounting to $17,806.84. Thereupon, and as part of the same transaction, the manager paid from the $70,005.36, which by his settlement sheet appeared to the credit of the Keystone as owing from other banks to the Keystone Bank for the checks surrendered by that bank, the amount of the due bills referred to, *viz.*, $41,197.36. This left to the credit of the Keystone the sum of $28,808.10, and this amount was by the manager, acting under direction of the committee of the association, credited on the loan certificate account of the Keystone Bank with the association. The result of the transaction was a reduction of the claims which had been originally made against the Keystone Bank in the exchanges of March 20, 1891, from $117,035.21 to $41,197.36, and a return to the various banks of $75,837.85 as checks and drafts received from their customers. While the record does not affirmatively show the fact, it is fairly inferable from it that these checks, etc., aggregating $75,837.85, were immediately charged back by the banks by whom they had been received and were returned to the depositors from whom they had received them, and therefore reached ultimately the drawers, who were depositors in the Keystone Bank, thus leaving the Keystone Bank liable for their amount in its deposit account with its depositors.

On February 19, 1894, the receiver of the Keystone Bank filed his bill in this cause in the circuit court of the United States for the eastern district of Pennsylvania, setting forth the relations between the Keystone Bank and the clearing house, and detailing the transactions of March 20, 1891, substantially as we have stated them; alleged an appropriation by the association to its own use, after the insolvency of the Keystone Bank, and in violation of the statutes of the United States, of the checks and drafts which had been surrendered at the clearing house by the Keystone Bank on the morning of the 20th of March, as hereinbefore stated, and also alleging an appropriation and application to the use of the association of bonds of the Baltimore Traction Railway Company of the par value of $100,000, which it was claimed had been specifically deposited by the Keystone Bank as security for
353] *the payment of any balance which might be owing by it in the daily clearing. It was averred that demand had been made on the association, and that it had refused to account to the receiver for the said checks, drafts, and bonds. A discovery was asked and relief prayed that the association surrender the checks, drafts, and bonds, or, in the alternative, that the association be decreed to pay the amount collected thereon with interest. The answer of the association detailed most of the facts heretofore recited and averred the lawfulness of the appropriation made of the $70,005.36. As to the traction bonds, it was averred that they were deposited as security for loan certificates, and that they had been sold and the proceeds duly accounted for in the account as to such certificates. The claim of the receiver as to these bonds was subsequently abandoned.

A decree was entered in the circuit court adjudging that the receiver recover from the defendants $70,005.36 with interest from March 20, 1891. 58 Fed. Rep. 746. On appeal, the circuit court of appeals reversed that decree, and remanded the cause to the trial court with directions to dismiss the bill of complaint. 17 U. S. App. 647. From this latter decree an appeal was taken to this court. The opposing judgments rendered by the circuit court and by the circuit court of appeals well define the conflicting contentions of the parties, since the conclusion of the circuit court entirely sustained the position taken by the complainant while the court of appeals justified the rights asserted by the defendants.

The receiver of the Keystone Bank argues that the result of the transactions at the clearing house on March 20, 1891, after the failure of the bank, was to wholly dismiss the Keystone Bank from the clearing and leave it with a claim of $70,000 against the clearing house, which it is entitled to have paid in full without reference to all or any of the debts due by it, which otherwise would have been properly chargeable in the clearing. In other words, the Keystone Bank, although it put into the clearing only claims against other banks sufficient to partially discharge its obligations, and failed subsequently to perform the duty, owing by it, to pay *in cash a sum adequate to [354
make up the difference, that is, to discharge all its debts resulting from the clearing, asserts that as a consequence of its failure to pay all it has been absolved from thereafter paying anything whatever in the clearing. Or, stated in another form, the argument is this: As the banks which held checks on the Keystone Bank, when they received these checks from the clearing house, charged them back to their depositors, and therefore made them obligations due by the Keystone Bank on its deposit account with its depositors, these banks elected to consider the Keystone Bank as no longer connected with the clearing house, and hence also lost their right to compensate the credit of the Keystone Bank by such other obligations, outside of the checks, which were properly entitled to and had actually figured in the clearing, such as due bills, etc., which these banks had not charged back, because they were not of the nature to be so charged, as they were when presented in the morning clearing held by the banks for their own account. It is clear, then, that the claim of the receiver of the Keystone Bank is that, by the default of that bank, its liability to have its claim in the clearing compensated by its due bills held by other banks was canceled, and hence that it was in a much better position by its failure than it would have been if it had not suspended and had furnished the funds to pay all the claims presented against it in the clearing.

On the other hand, the claim of the Clearing House Association is that it owes nothing, and that by the default of the Keystone Bank the clearing house became entitled to appropriate the balance of the credit due the Keystone Bank in the clearing, to debts due to the clear-

ing house, although such debts were not of a nature to have authorized them to be charged against the clearing if the failure had not taken place. That is, the clearing house also contends that the effect of the failure was to give it rights against the Keystone Bank which it would not have had if the failure had not taken place.

The claims of both parties, therefore, when analyzed, amount to the assertion, as a proposition of law, that they both have greater rights in consequence of the insolvency than they **355]** *would have had if the insolvency had not taken place. The self-evident error of this proposition points to the unsoundness of the claims of both parties to the controversy.

We will demonstrate that this is the case by considering the situation of the parties in order thereby to determine their respective rights against and obligations towards each other. A clear ascertainment of the legal status of the parties will be at the outset greatly facilitated by first considering a matter much discussed in argument, *viz.:* What, if any, bearing the payment of $117,035.21 to the manager of the clearing house by sundry members of the association has upon this controversy.

In the manager's settlement sheet of the daily clearings between the banks, made up from the *data* contained in the settlement sheets prepared by the settling clerk of each bank at the close of the clearing, there was set out in the center of the sheet, running from top to bottom, a list of banks, each bank being given a number ranging from 1 to 43. In a column to the left of the number and name of each bank there was a list of debit items, each item indicating that the sum stated was owing from the bank opposite to which it was placed, for checks and drafts and due bills which had been presented against that bank by other banks in the association. The banks which had presented these checks, drafts, and due bills were given credit therefor on the credit side of the sheet, in a column to the right of the name of each bank, as being claims in their favor against the debit items due from other banks. The aggregate of the debit items was therefore the fund from which the aggregate of the credit item was to be paid. The two necessarily balanced each other.

If, as the result of the failure of the Keystone Bank and the return to the banks which had presented them, of the packages in question, the sum of $117,035.21 had been stricken from the debit side of the manager's sheet, the effect necessarily would have been that the totals on the credit side would have been just that much greater than the total of the debit side, and therefore there would have been a shortage of that amount in the execution of the clearing. It follows that in paying the aggregate credits the manager of the clearing house **256]** would *have been short that much money. In other words, to have paid the banks who had presented the checks against the Keystone Bank the sum of their claims against all the banks in the association, as shown by the credit side of the manager's sheet, the manager necessarily would have had to make good the shortage by paying less to that amount to the banks who had received an increased credit because of the expected payment of the debit item charged against the Keystone. That is to say, the deficiency on the credit side which would have resulted from taking out the $117,035.21 debit due by the Keystone would have caused the loss to fall on the banks which had presented the claims against the Keystone, because they would have received that much less on the aggregate amount due to them from the entire clearing, that is, from all the other banks. Instead of doing this, however, and in order to render his settlement regular in form, the manager called upon the banks who had presented the claims against the Keystone Bank to substitute money for these claims, so that this money, paid in by them in response to the call, might take the place of the amount of $117,035.21, and thus cause the debit and credit side to agree, and enable him to carry out the clearing just as it had been made in the early morning. The effect of this was not to change the situation at all, since if the $117,035.21 had not been paid in, the loss would have fallen on the banks who had received credit, because they had presented claims against the Keystone amounting to $117,035.21. It results that by paying in the amount called for and having it put fictitiously on the sheet, in lieu of the $117,035.21 due from the Keystone Bank the banks paying in the amount neither gained nor lost, since they immediately received back the amount when the clearing was carried out. Whilst the transaction then assumed the form of a payment of $117,035.21 by the banks called upon, it was in reality no payment at all, for it simply enabled the money paid in to be considered as on one side of the account in order to be handed back to them on the other. This is the inevitable result of the transaction, which, besides, is clearly shown by the testimony of Mr. Boyd, the manager of the clearing house, who *says that the payment of the **[357** $117,035.21 *was a mere matter of bookkeeping.*

When it is understood that the payment in of the money in consequence of the call made upon the banks was in reality no payment at all, since it was but the giving on the one hand to the manager of a sum of money to be handed back by him on the other in order that his settlement sheet might balance, it becomes perfectly clear that the result was in no way to change or destroy the credit of $70,005.36 standing on the clearing sheet in favor of the Keystone Bank. This latter amount was the sum of checks which the Keystone Bank had surrendered at the morning exchange to the settling clerks of the banks upon which such checks were drawn. As a result of such surrender, the Keystone Bank was entitled to receive out of the debits paid by other banks the sum named. The banks which owed that sum were charged in the debits as owing that amount to the clearing house, and when, as they did, they settled their indebtedness to the clearing house the manager thereof necessarily received that sum for account of the Keystone Bank. The banks which for mere bookkeeping purposes had paid in a sum of money and at once received it back certainly cannot be permitted to claim that the effect of this transaction was to destroy the rights of the Keystone Bank on the credit side of the clearing, which rights of necessity resulted from the

paying into the clearing house of the aggregate debits.

But these banks who had paid in their money, under the call, and received it back, while they were not in a position, in consequence of having done so, to enable them to assert that the credit of the Keystone had disappeared, were certainly not thus put in a position by which they could not exercise their lawful claims upon the credit of the Keystone. The claims which, as we have seen by the rules of the clearing house and the contracts between the parties, were to be mutually compensated, in the clearing, one with the other, were the due bills and the items of bankers' exchange checks, drafts, etc. The $117,035.21 against the Keystone Bank contained $75,837.99 of checks and drafts, and the
358] remainder *consisted of due bills. These checks and drafts, on the failure of the Keystone Bank, were charged back by the banks who held them to those who had deposited them, and in consequence presumably, ultimately reached the hands of the depositors of the Keystone, by whom the checks were drawn. The right of a bank holding a check against the Keystone Bank, on the failure of that bank, to charge back the checks was unquestionable. Indeed, it was not only to the interest, but it was the duty, of the banks towards their stockholders to do this, for if they had held the checks, without charging them back, they would have become responsible for them, and therefore would have assumed a debt which they were under no obligation to assume. Having exercised the right to return the checks, there arose a resulting obligation on the banks not to continue to present against the Keystone Bank, for payment out of its credit in the clearing, obligations for which there was no longer a right to make a claim. Deducting, therefore, the $75,837.99 of checks, left only the due bills, $41,197.26, which were paid by the manager of the clearing house out of the $70,005.36, to the credit of the Keystone Bank. This payment of course extinguished the due bills and reduced the credit of the Keystone Bank ($70,005.36) to the extent of the payment of $41,197.26, leaving, therefore, a balance to the credit of the Keystone Bank of $28,808.10 unappropriated by anything resulting from or entering into the clearing. This sum the Clearing House Association at once appropriated in reduction of an indebtedness due it by the Keystone Bank upon the loan-certificate account, an account which had arisen from loan certificates which the Keystone Bank had previously obtained from the clearing house, secured by collaterals, as already stated.

From the foregoing it obviously results that the claim of the receiver, that the Keystone Bank was entitled to be paid $70,005.36 of credit irrespective of the outstanding due bills which it had been previously agreed between the parties were to be paid by way of set-off in the clearing, is without foundation. This conclusion leaves only for consideration the question whether the Clearing House Association pos
359] sessed the *right to appropriate and impute the $28,808.10 of the balance in its hands and due to the Keystone Bank towards the payment of the indebtedness the Keystone Bank for loan certificates.

It is undisputed that there was no agreement between the clearing house and the Keystone Bank by which the sums due to the latter, in the clearing, could be applied to the loan-certificate account. It is obvious that the Clearing House Association was an agent and fiduciary representative of all the banks forming the association. When the nature of the loan certificates and the relation of the Clearing House Association to its members is thus understood, the question whether the Clearing House Association had a right to take as it did the clearing credit of the Keystone and apply it to the debt in question, in reason, answers itself. As said in *Reynes* v. *Dumont*, 130 U. S. 354, 391 [32: 934, 944]: "A general lien does not arise upon securities accidentally in the possession of the bank, or not in its possession in the course of it business as such, . . . or where there is a particular mode of dealing, inconsistent with such general lien."

The Clearing House Association having been, therefore, in the possession of the $28,808.10 as the fiduciary agent of the Keystone Bank without a lien or right upon it, its appropriation of the same after the insolvency of the Keystone Bank to the debt owing for loan certificates was obviously a preference within the inhibition of the statute against preferences in the cases of insolvent banks. U. S. Rev. Stat. § 5242.

But want of power in the clearing house to absorb the $28,808.10 belonging to the Keystone necessarily follows, even if we eliminate from view all claim of lien or all question of fiduciary relation, and consider the matter solely under the principles of the general law of set-off. It is certain that all or any portion of the $70,005.36 entered on the clearing sheet and resulting from the claims presented against other banks by the Keystone Bank, in the clearing of that morning, was a debt due by the clearing house, not to the Keystone Bank, but to the other banks who had presented claims against the Keystone in excess of the $70,005.36. This is shown by the fact that *up to the time of the insolvency not only [360 did the Keystone Bank have no claim against the clearing house, but it was under obligation to pay $47,029.75, the difference between the sum which it had presented and the sum of the claims presented against it. Not only, therefore, all of the $70,005.36 presented by the Keystone Bank in the clearing, but the $47,029.75, which it had to pay, belonged to other banks, and hence up to the time of the insolvency the Keystone was a debtor and not a creditor. The credit of $28,808.10 which the clearing house impounded arose as a result of the transactions between the parties, after the announcement of the insolvency of the Keystone was made, that is, the credit of $28,808.10 was solely caused by the withdrawal, after the insolvency, by certain banks of checks and drafts which they held against the Keystone Bank. It was only when, in consequence of the failure of the Keystone to pay the sum due by it to the other banks, and thereupon these banks exercised their un-

doubted right to make this withdrawal and charge back to the persons from whom they had received them the checks and drafts against the Keystone, that credit in the favor of the Keystone arose. But this withdrawal was confessedly made after the declared insolvency, and hence the credit which the withdrawal caused could only have arisen after that time. The claim of the clearing house, therefore, is that a fund put in its hands for account of certain banks having become the property of the Keystone after the insolvency of the latter, by a partial release granted by the banks in whose favor the fund existed, therefore there instantly arose on the part of the clearing house a right to set off its certificate account held against the Keystone by the sum of the fund so created after insolvency. But, obviously, the right to set-off as recognized in *Scott* v. *Armstrong*, 146 U. S. 499 [36:1059], is to be governed by the state of things existing at the moment of insolvency, and not by conditions thereafter created. The case under this aspect is directly controlled by *National Security Bank* v. *Butler*, 129 U. S. 223 [32:682], and, indeed, is governed by the general principle announced in *Davis* v. *Elmira Sav. Bank*, 161 U. S. 275 [40:700].

361] *While, however, we find the appropriation of the $28,808.10 to have been unlawful, the record is not in such a shape as to enable us to dispose finally of the controversy. As we have said, the bill of the complainant sought, not only the recovery of the entire $70,005.36 credit shown on the manager's clearing sheet, but also an accounting for certain bonds which it was claimed had been held by the clearing house as collateral for the payment of the daily balances in the clearing. The proof having shown that these collaterals were not held as security for the clearing but for the loan certificates, this claim was abandoned. But from the evidence offered in relation to this item and found in the record, there is a statement of the condition of the loan-certificate account between the clearing house and the Keystone Bank or its receiver. This statement shows that after reducing the loan-certificate account by the $28,808.10 credit, resulting from having appropriated the balance in the clearing, as above stated, and after having realized on certain assets held as collateral for that account, there was a balance of $9,695.62 in cash to the credit of the Keystone Bank or its receiver. That is to say, after putting the clearing house in funds to discharge all the loan certificates, it had in cash nearly $10,000 to the credit of the receiver. The statement moreover shows that in addition to this cash there were in the hands of the clearing house collaterals held for the loan certificates and which had not been realized, amounting to $331,941.47, and besides that there was a balance due on collateral notes, in process of collection, amounting to $16,397.72. Necessarily, if the appropriation made by the clearing house of the $28,808.10 be stricken from the loan-certificate account, the amount due to the Clearing House Association by the Keystone or its receiver will be increased by that amount, and this would absorb the sum of $9,695.62 credited thereon as shown by the account in the record, and leave a balance besides against the Keystone. The uncollected collaterals would, of course, be a guarantee for the payment of the balance, and the ultimate sum due, after exhausting all the collaterals, would be a claim against the receiver, entitled to its distributive share from the *assets of the [362 Keystone Bank. The record fails to disclose whether the receiver of the Keystone Bank has taken the collaterals and the balance of cash stated in the account. If he has, the issues are settled, for plainly he cannot be permitted, after having taken the collaterals or the cash balance, upon the theory that the loan-certificate account has been extinguished by imputing thereto the $28,808.10, and then in this suit seek to recover by repudiating the credit.

We conclude, therefore, that the ends of justice require that the result of the dealings between the parties should be ascertained and settled before a final decree passes, and that to accomplish this purpose *it will be necessary to reverse both the decrees of the Circuit Court of Appeals and of the Circuit Court*, and to remand the cause with directions to allow the parties if necessary to reform their pleadings so that their rights may be determined in conformity with the foregoing opinion, the costs of the circuit court of appeals to be borne by the receiver, those of this court by the appellees, those in the circuit court to abide the final result, and it is so ordered.

CALIFOKNIA NATIONAL BANK, *Plff. in Err.*,
v.
NAT. KENNEDY.

(See S. C. Reporter's ed. "*California Bank* v. *Kennedy*," 362-371.)

Federal question—national bank cannot deal in stock — estoppel—receipt of dividend—ultra vires transaction cannot be ratified.

1. A decision by a state court as to the power of a national bank to become a stockholder in a savings bank presents a Federal question.
2. Stock of a savings bank, not taken as security or acquired in the course of the business of banking, cannot be purchased or dealt in by a national bank.
3. The fact that stock of another corporation could be lawfully acquired under some circumstances does not estop a national bank from asserting that a transaction by which it did acquire such stock was *ultra vires*.
4. The receipt of dividends on stock of another corporation does not estop a national bank from asserting that the transaction by which the stock was acquired was absolutely void because *ultra vires*.

NOTE.—*Charter or by-laws of, as to transfer of stock; lien on stock for debt due by stockholders*,—see note to Union Bank v. Laird, 4: 269.

As to right to pledge stock; rights of pledgee of same,—see note to Anderson v. Philadelphia Warehouse Co. 28: 478.

As to preferred stock, its issue; rights of holders of,—see note to Warren v. King, 27: 769.

As to ultra vires, what contracts and acts are; in violation of statute or public policy; estoppel; ratification,—see note to Central Transp. Co. v. Pullman's Palace Car Co. 35: 55.

5. An *ultra vires* transaction which is absolutely void cannot be confirmed or ratified.

[No. 206.]

Argued and Submitted March 10, 1897. Decided May 24, 1897.

IN ERROR to the Supreme Court of the State of California to review a judgment of that court affirming the judgment of the Superior Court of the County of San Diego, State of California, adjudging that the California National Bank was a stockholder in the California Savings Bank and responsible as such to the creditors of the savings bank. *Reversed.*

See same case below, 101 Cal. 495.

Statement by Mr. Justice **White:**

This action was commenced in the superior court of the county of San Diego, state of California, against the California Savings Bank, and other defendants, including the plaintiff in error. In each of five counts of an amended petition a separate cause of action was stated, seeking a judgment against the savings bank for the amount of a particular deposit of money alleged to have been made with it on a specified date, and a recovery was asked against the other defendants upon the ground that they were stockholders in the savings bank on the dates of the various deposits, and in consequence liable under the laws of California to pay the debts of the savings bank in proportion to the amount of stock held and owned by each stockholder. A demurrer to the amended complaint was overruled, and the California National Bank answered, denying that it was ever the owner of any stock in the savings bank, and alleging that if any such stock was ever issued to it it was issued without due authority from the bank in its corporate capacity, and without authority of law. The answer also averred that the bank never acquired "in the usual course of business or now has as owner any stock with the said defendant, the California Savings Bank."

No issue was taken upon the truth of the averments in the amended complaint as to the amount and date of the respective deposits which plaintiff alleged he had made in the savings bank.

From the evidence it appeared that the savings bank began business in January, 1890. Its stock consisted of twenty-five hundred shares, and was originally distributed in five certificates, each for 500 shares, one certificate being made in the name of each of the following persons: J. W. Collins, S. G. Havermale, D. D. Dare, William Collier, and H. F. Norcross. Norcross had no official connection with [364]the national bank,*but Collier, Dare, and Collins were, respectively, president, vice president, and cashier of the national bank, and were also, with Havermale, directors of the bank during the period when the alleged transfers of stock were made to the bank.

The certificates in the names of Collier and Norcross were never delivered, and when subsequently canceled contained no indorsement. In the stead of those certificates, however, on September 14, 1890, three certificates, aggregating 990 shares, were issued in the name of J. W. Collins, cashier, and two certificates, each for five shares, were issued to Collier and Norcross, respectively. On January 2, 1891, the three certificates for 990 shares in the name of Collins, cashier, were surrendered, and a single certificate for that number of shares was issued in the name of the California National Bank.

In December, 1890, and January, 1891, 5 per cent dividends were declared and paid on the stock of the savings bank. The amount of each dividend received by the California National Bank was $750. No direct evidence was introduced accounting for these payments having been made on the basis of an ownership of 1,500 shares, when the bank was sought to be held liable for and appeared to be the holder of but 990 shares, put in its name as above stated. Both the savings bank and the national bank became insolvent, the former suspending November 12, 1891, while the receiver of the national bank qualified December 29, 1891.

The cause was tried by the court without a jury, and by findings of fact and conclusions of law rested thereon the court sustained the averments of the complaint, adjudged the national bank to be the holder of 990 shares of the stock of the savings bank, and responsible to the creditors of the savings bank in that proportion. Judgment was entered against the savings bank for $47,497.75, and against the national bank for $18,507.52, a payment to the savings bank, however, to be a satisfaction of the judgment against the national bank. Both at the hearing, by objection to the introduction in evidence of the certificate of stock and in a statement filed with the motion for a new trial, the point was made that the issue *of the stock to the bank was void[365 because not shown to have been acquired pursuant to authority of its board of directors, and because the stock was not taken in the ordinary course of the business of the bank as security for the payment of a debt or otherwise. In addition, by the first, second, and third specifications of errors of law occurring at the trial it was specially stated that error had been committed in admitting the certificate in evidence and holding the national bank liable—substantially the same language being employed in each specification—because the national bank, a corporation under the banking laws of the United States, could "not in law become a stockholder or incorporator in any other corporation." The motion for a new trial was overruled, and an appeal was taken to the supreme court of the state, by which court the judgment was affirmed. 101 Cal. 495. A writ of error was allowed and the cause has been brought here for review.

Mr. **Edward Winslow Paige** for plaintiff in error.

Messrs. **George Fuller,** *H. E. Doolittle,* and *T. L. Lewis* for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

Before discussing the merits, we will briefly consider and dispose of a suggestion that no

Federal question appears by the record to have been properly raised below, and therefore there is a want of jurisdiction in this court to review the judgment. The answer averred that if any stock of the savings bank appeared to have been issued to the national bank, it was "issued without authority of this corporation defendant, and without authority of law." In view of the fact that the defendant was a national bank, deriving its powers from the statutes of the United States, the averment that a particular transaction of the character of the one in question, if entered into, was without authority of law, can in reason be construed only to relate to the law controlling and gov-
366] erning the conduct of *the corporation, that is, the law of the United States. But if there were ambiguity on this subject, it is entirely removed by the grounds which were presented on the motion for a new trial and the specifications of error which formed the basis of the appeal which was taken to the supreme court of the state of California, for in both the motion and specifications the want of power under the laws of the United States was clearly asserted. The supreme court of the state interpreted the case brought to it from the court below as presenting the question of the power of the corporation under the law of the United States to become a stockholder in a savings bank, for in the opening sentence of its opinion it said:

"The California National Bank, one of the defendants, has appealed upon the ground that, by virtue of the statutes under which it is organized it had no power to become a stockholder in another corporation, and that its act in becoming such stockholder is so far *ultra vires* that it cannot be made liable for any portion of the indebtedness of the corporation."

The suggestion as to the want of jurisdiction is therefore without merit.

The Federal questions which therefore arise on the record may be thus stated: 1st, Do the statutes of the United States (U. S. Rev. Stat. §§ 5136 *et seq.*) relating to the organization and powers of national banks prohibit them from purchasing or subscribing to the stock of another corporation? And, 2d, If a national bank does not possess such power, can the want of authority be urged by the bank to defeat an attempt to enforce against it the liability of a stockholder?

As to the first question.—It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted or which are incidental to carrying on the business for which they are established. *Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67, 73 [35: 107, 110]. No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may in the usual course of doing
367] *such business accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. *Germania Nat. Bank* v. *Case*, 99 U. S. 628 [25: 448]. So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. *First Nat. Bank* v. *National Exch. Bank*, 92 U. S. 128 [23: 682].

On behalf of the plaintiff below it was admitted at the trial that the stock of the savings bank was not "taken as security or anything of the kind," and it is not disputed in the argument at bar that the transaction by which this stock was placed in the name of the bank was one not in the course of the business of banking for which the bank was organized.

2. *The transfer of the stock in question to the bank being unauthorized by law, does the fact that under some circumstances the bank might have legally acquired stock in the corporation estop the bank from setting up the illegality of the transaction?*

Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an *ultra vires* act. The cases of *Thomas* v. *West Jersey R. Co.* 101 U. S. 71 [25: 950]; *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 290 [30: 83]; *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1 [32: 837]; *Pittsburg, C. & St. L. R. Co.* v. *Keokuk & H. Bridge Co.* 131 U. S. 371 [33:157]; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24 [35: 55]; *St. Louis, V. & T. H. R. Co.* v. *Terre Haute & I. R. Co.* 145 U. S. 393 [36: 748]; *Union P. R. Co.* v. *Chicago, R. I. & P. R. Co.* 163 U. S. 564 [41: 265]; and *McCormick* v. *Market Nat. Bank*, 165 U. S. 538 [41: 817],—recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute, and that, to quote from the *opinion [**368** of the court in *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 59, 60 [35: 68, 69]:

"A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

This language was also cited and expressly approved in *Jacksonville, M. P. R. & Nav. Co.* v. *Hooper*, 160 U. S. 514, 524, 530 [40: 515, 523, 525].

As said in *McCormick* v. *Market Nat. Bank*, 165 U. S. 550 [41: 821]:

"The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any-

one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. *Pearce* v. *Madison & I. R. Co.* 62 U. S. 21 How. 441 [16: 184]; *Pittsburg, C. & St. L. R. Co.* v. *Keokuk & H. Bridge Co.* 131 U. S. 371, 384 [33: 157, 161]; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 48 [35: 55, 64].

The doctrine thus enunciated is likewise that which obtains in England. *Asbury R. Carriage & Iron Co.* v. *Riche*, L. R. 7 H. L. 653; *Attorney General* v. *Great Eastern R. Co.* L. R. 5 App. Cas. 473; *Wenlock* v. *River Dee Co.* L. R. 10 App. Cas. 354; *Trevor* v. *Whitworth*, L. R. 12 App. Cas. 409; *Ooregum Gold Min. Co.* v. *Roper* [1892] A. C. 125; *Mann* v. *Edinburg Northern Tramways Co.* [1893] A. C. 70.

369]*Applying the principles of law thus settled to the case at bar, the result is free from doubt.

The power to purchase or deal in stock of another corporation, as we have said, is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers expressly conferred. A dealing in stocks is consequently an *ultra vires* act. Being such, it is without efficacy. *Pearce* v. *Madison & I. R. Co.* 62 U. S. 21 How. 441, 445 [16: 184, 185]. Stock so acquired creates no liability to the creditors of the corporation whose stock was attempted to be transferred. 1 Cook, Stock & Stockholders, p. 435, § 316, note 1, and authorities there cited.

In the *Royal Bank of India's Case* (1869) L. R. 4 Ch. 252, while it was held by the court of appeal that, as incidental to the power to advance money on a deposit of shares of stock, a corporation might do such acts as were reasonable and proper for making the security available, it was conceded that a purchase of stock of another company as a speculation would have been *ultra vires*, and, despite acts of ownership exercised by the company, the shares might be repudiated at any time.

Sir C. J. Selwyn, L. J., said (p. 261):

"If it could have been shown that it was an act absolutely prohibited by their memorandum or articles of association, then, no doubt, a different question would have arisen; the act would have been *ultra vires* and incapable of confirmation or ratification."

Sir G. M. Giffard, L. J., said (p. 262):

"I quite agree that the Royal Bank of India had no authority to speculate in shares, and that if it had gone upon the Stock Exchange and bought shares as a speculation, such a proceeding would have been *ultra vires*, and all that has taken place would not have been enough to constitute the Royal Bank of India shareholders in this bank or prevent them from repudiating these shares."

In *Ex parte Liquidators of British Nation Life Assur. Asso.* (1878) 8 L. R. 8 Ch. Div. 679, the court of appeals (Lords Justices James, **370**] Baggally, and Thesiger) *discharged an order of an arbitrator which had put the British Nation Association on the list of contributories of the British Commercial Insurance Company, a corporation in the process of being wound up. Pursuant to authority conferred by its deed of settlement, the British Nation Association had, through its directors, purchased the business of the British Commercial Insurance Company. Under the agreement entered into between the companies, certain stock of the British Commercial company was transferred to the trustees appointed the British Nation company. Subsequently this stock was transferred into the name of the association, and it was sought to hold it liable as a stockholder because of its alleged ownership of such stock. Lord Justice James delivered the opinion of the court, holding that while the British Nation Association was empowered to purchase for investment shares of a certain character, it was not empowered to purchase stock which would practically constitute it a partnership in business speculations or adventures, and that the transfer of the stock in question into the name of the bank was *ultra vires* and void. It was further held that the shareholders who had transferred the stock to the British Nation Association had no power, as between themselves and the association, to transfer their liability to the latter, and that, "no other person or body of persons could be prejudiced or benefited or affected by an instrument to which they were absolutely strangers, such instrument being void as between the parties to it."

The case before the court was declared to be not one of a person induced to become a shareholder, and who had become a shareholder by fraud, but that of a person who had never in fact become a shareholder.

The circumstance that the dealing in stocks by which, if at all, the stock of the California Savings Bank was put in the name of the California National Bank, was one entirely outside of the powers conferred upon the bank, and was in nowise the transaction of banking business or incidental to the exercise of the powers conferred upon the bank, distinguishes this case from the class of cases relied upon by the defendant *in error. *National Bank*[**371** v. *Whitney*, 103 U. S. 99 [26: 443]; *Union Nat. Bank* v. *Matthews*, 98 U. S. 621 [25: 188]. The difference between those cases and one like this was referred to in *McCormick* v. *Market Nat. Bank*, 165 U. S. 538 [41: 817], and it is therefore unnecessary to particularly review them. The claim that the bank in consequence of the receipt by it of dividends on the stock of the savings bank is estopped from questioning its ownership and consequent liability is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void could not be confirmed or ratified As was said by this court in *Union P. R. Co.* v. *Chicago, R. I. & P. R. Co.* 163 U. S. 564 [41: 265], speaking through Mr. Chief Justice Fuller (p. 581 [271]):

"A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel."

It follows from the foregoing that *the judgment of the Supreme Court of California against the bank was erroneous, and it must therefore be reversed.* And it is so ordered.

Mr. Justice **Harlan** dissented.

CITY OF NEW ORLEANS *et al.*, *Appts.*, *v.* CITIZENS' BANK OF LOUISIANA.

(See S. C. Reporter's ed., 371-407.)

Res judicata—judgment against officer—existence of exemption—estoppel by judgment—decision that tax is void—exemption of shareholders and real estate purchased on foreclosure—exemption, when not implied—exemption of capital of bank—license.

1. The fact that the civil district court of the parish of Orleans, Louisiana, is composed of several judges, each of whom presides over a separate division, does not prevent the judgment of one of the divisions from being *res judicata*.
2. A change in the person holding an office does not destroy the effect of a judgment against such officer as *res judicata* in a similar action against his successor.
3. A judgment that a tax is entirely void and must be canceled, without reducing the amount of the tax, where the only relief prayed was the cancelation upon the sole ground that the property was exempt, although there was an allegation that the assessments were excessive, is *res judicata* as to the existence of the exemption.
4. The estoppel of a judgment does not depend upon the question whether or not there is the same demand in both cases, but it exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies.
5. A decision that the tax for a certain year is void because the property is exempt is *res judicata* as to the tax of a subsequent year when the same question of exemption is presented on the same facts.
6. A judgment establishing the exemption from taxation of the capital of a bank, its banking house, and furniture, and from liability to pay a tax on its shareholders, is not *res judicata* as to the exemption of the shareholders themselves, or of real estate acquired by the bank on foreclosure of mortgages securing stock subscriptions, nor as to the exemption of the bank from a license tax.
7. An exemption of shareholders on their shares of stock in a corporation is not implied by an exemption of the capital of the corporation.
8. Real estate acquired by a bank on foreclosure of mortgages to secure stock subscriptions or stock loans is not within an exemption of the capital of the bank, when the capital was not furnished by the subscriptions and mortgages, but these were merely a security on the faith of which the capital was obtained by the sale of state bonds.
9. A decree as to the nonliability of a bank for a license tax is erroneous when that question was not presented by the pleadings, and was entirely *dehors* the issues of the case.

[No. 108.]

Argued January 15, 18, 1897. Decided May 24, 1897.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Louisiana in favor of plaintiff, the Citizens' Bank of Louisiana, against the defendants, the city of New Orleans *et al.*, enjoining the collection of certain taxes assessed against the plaintiff. *Reversed*, and case remanded, with directions to enter a decree in favor of the Citizens' Bank recognizing and enforcing its nonliability to taxation on its capital stock, etc., and rejecting the claim of the bank to nonliability of its shareholders for taxation, and to nonliability to taxation on property acquired by it under foreclosure of mortgage, etc.

See same case below, 54 Fed. Rep. 73.

The facts are stated in the opinion.

Messrs. **Samuel L. Gilmore**, *M. J. Cunningham*, Attorney General of Louisiana, *F. C. Zacharie*, and *Alex. Porter Morse* for appellants.

Messrs. **William A. Maury**, *Henry Denis*, and *Branch K. Miller* for appellee.

Mr. Justice **White** delivered the opinion of the court:

Under the taxing laws of the state of Louisiana, real estate held or owned by banking corporations is assessed like the same class of property owned by other citizens, but special provision is made for the assessment in other respects of the capital of the banks as follows:

"That no assessment shall hereafter be made under that name, on the capital stock of any national bank, state bank, banking company, banking firms, or banking association, whose capital stock is represented by shares, but the shares shall be assessed at their actual value as shown by the books of the bank, or banks, to the shareholders who appear as such upon the books, regardless of any transfer not registered or entered upon the books; and it shall be the duty of the president or other officer to furnish to the assessor a* complete list of those who [373 are borne upon the books as shareholders; and all taxes so assessed shall be paid by the bank, company, firm, association, or corporation which shall be entitled to collect the amounts from the shareholders or their transferees; all real estate owned by the bank, company, firm, association, or corporation shall be assessed directly to the bank, company, firm, association, or corporation, and the *pro rata* of such direct property taxed, proportioned to each share of capital stock, shall be deducted from the amount of taxes assessed to that share under this section.

"Such assessment shall be made where the bank, etc., is located, and not elsewhere, whether the shareholders reside there or not.

NOTE.—*That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations,*—see note to Providence Bank v. Billings, 7: 939.

As to exemption from taxation; whether a contract or not; not implied,—see note to Tucker v. Ferguson, 22: 805.

As to judgment, when conclusive; res judicata,—see note to Johnson Co. v. Wharton, 38: 429.

As to estoppel by judgment, see note to Aspden v. Nixon, 11: 1059.

The said book value shall be ascertained upon a statement duly sworn to by the president, cashier, or secretary, and chairman of finance committee, or in the absence of such latter officer then by one of the directors, showing the assets in detail, and the valuation placed upon each, and said valuation shall be at a fair market value. The sworn statement of the bank's condition made next preceding the date of listing shall be the basis of assessment. Any president or other officer who shall refuse or fail to deliver the said list of shareholders, and said statement of book value and of bank's condition, within the first twenty days of January of each year, to the assessor, shall be guilty of a misdemeanor, and on conviction shall be punished by fine or imprisonment, or both, at the discretion of the court. The district attorney will at once act upon any complaint of such neglect or refusal made to him by the assessor, or by the board of assessors in the parish of Orleans." La. Acts 1890, p. 133; La. Acts 1888, p. 123.

The revenue laws of the state in addition provide that whenever the assessors find that property has been omitted from the assessment rolls, such property shall be assessed for the current year and for three back years.

The Citizens' Bank of Louisiana, a corporation created under the laws of that state, filed in 1892 its bill in the circuit court of the United States against the city of New Orleans, the board of state assessors for the parish of Orleans, **374**] and *the state tax collectors for the various collection districts in the parish of Orleans. The bill in substance alleged that although the bank was contractually exempt from state and municipal taxation under its charter and the acts supplementary thereto, that the board of assessors were about to assess the bank under the assessing law above referred to, not only for the tax of the year 1892, but also for the three preceding years, *viz.*, 1889, 1890, and 1891; that the assessing board had called upon the bank for a list of its shareholders in order to make the assessment, and that unless restrained the assessment would be made and the tax collected thereon. Besides alleging the contractual exemption resulting from the charter, the bill averred that the fact of such exemption was conclusively determined by the presumption of the thing adjudged resulting from judgments previously rendered between the parties. The bill also averred that an attempt to enforce the assessment and tax would impair the obligations of a contract protected by the Constitution of the United States, the rights asserted by the bank under the Federal Constitution being specially set up and claimed in the complaint. The prayer was for a restraining order and for an injunction enjoining the board of assessors from taking the steps necessary to make the assessment, from completing the assessment, and the collectors from collecting any tax thereunder. The restraining order which was issued allowed the board of assessors to obtain the necessary information from the bank to make the assessment, and also the formal making of the assessment by the board subject to the final decision as to its legal right to assess the bank, but restrained any attempt to collect any tax or to enforce any assessment after it was made under the conditions above stated until the final decision in the cause. Under the terms of the restraining order the board of assessors assessed the bank in accordance with the law above referred to for the year 1892 and for the years 1889, 1890, and 1891.

The complainant was refused leave to file an amended bill attacking these assessments for invalidity in form. Thereupon the complainant filed a supplemental bill against the sheriffs of *thirteen parishes in the state of Louisi-[**375** ana, outside of the parish of Orleans. This bill alleged that the sheriffs named as defendants were *ex officio* tax collectors for the respective parishes in which they held the office of sheriff, and that as such they proposed to collect, and were about to collect, certain taxes for various years on real property belonging to the bank situated in said parishes, and which had been illegally assessed for taxation therein. That the assessment of the taxes complained of had impaired, and the collection thereof would further impair, the obligations of the contract resulting from the charter of the bank protected from impairment under the Constitution of the United States. The prayer was that the named defendants be made parties to the bill and that the collection of the taxes be perpetually enjoined. Demurrers to the jurisdiction to entertain either the original or supplemental bill having been overruled, answers were filed specially denying the right of the bank to the exemptions claimed. A hearing was had, and from a decree entered against them (54 Fed. Rep. 73) the defendants appealed to this court.

The court found in favor of the complainant and adjudged that "the exemption of said Citizens' Bank, its capital, property, and shares of stock of its shareholders, is hereby recognized and decreed to exist as conferred by its charter and the laws amendatory thereof and relating to the Citizens' Bank, and especially by the act No. 40 of 1874, extending the charter of the Citizens' Bank, which extension and the said exemption from the further period thereof is hereby recognized and decreed to exist, and the injunction herein issued is hereby made peremptory." The injunction which the final decree allowed forbade the collection of taxes for designated years by the state of Louisiana and the city of New Orleans, "upon the capital, property, or shares of stock of the stockholders of said bank, whether assessed against the bank or its shareholders," and in addition the writ also enjoined the demanding or collecting from the bank of any state or city license tax.

The exemptions to which the decree below held the bank to be entitled relate therefore to distinct objects of taxation, *one not [**376** necessarily connected with or dependent upon the other, and may be summarized as follows: First. That the bank was not subject to taxation on its capital, shares of stock, or real estate and furniture actually used for the carrying on of its banking business, and that the bank could not be lawfully obliged to pay the sum of any tax assessed on its shareholders. Second. That the stockholders of the bank were not liable for assessment on their shares of stock. Third. That the bank was also not subject to taxation on any real estate

held by it which had been mortgaged to secure stock subscriptions and had become the property of the bank under foreclosure proceedings, because property so acquired became by virtue of the purchase a part of its capital stock. Fourth. That the nonliability of the bank to taxation embraced also immunity from the payment of a license tax to either the state of Louisiana or the city of New Orleans.

The contentions which arise between the parties on this appeal from the decree below rendered are as follows: First, the bank asserts that by the effect of its charter it was contractually exempt from taxation on all the foregoing objects of taxation; that this exemption existed not only during the terms of the original charter, but during the term for which the charter was extended. The contract being asserted to result, not only from the express terms of exemption in the original act, but from the fact that the very nature of the contract between the bank and the state carried this exemption into the period of the extended charter, as the bank and its capital was dedicated to the payment of the bonds, outstanding obligations of the state, and the bank was therefore, in a measure, a quasi state institution. Second, that the contractual right to the exemption as above stated is conclusively determined by the presumption of the thing adjudged, resulting from certain judgments relied upon.

On the other hand, the contention of the defendants is that the exemption did not originally obtain, or if it did, was not carried into the extended period of the charter, because it could not be so carried under the Constitutions of the state of Louisiana of 1868 and 1879, by which the bank was bound, and that the judgments relied on and which were offered in evidence do not constitute "the thing adjudged."

377] *A brief statement of the history and purposes of the organization of the Citizens' Bank and of the past action of the taxing authorities in the state of Louisiana as to that bank is necessary in order to make clear the conclusions which we have formed on the foregoing contentions.

The Citizens' Bank was organized by a legislative charter granted in 1833, and amended in 1836. As the effect of the charter on the taxing power will be hereafter fully stated in the language of the supreme court of the state of Louisiana, it suffices now to say that in its ultimate form the scheme proposed by the charter was as follows: The subscribers to the stock of the bank did not pay for their subscriptions in cash, but evidenced the amount thereof by interest-bearing notes, payable in instalments maturing many years ahead, the last instalment becoming due only in 1886. The payment of these notes, thus furnished for the amount of the subscription, was secured by a mortgage on real estate and slaves. The working capital of the bank was procured by a loan from the state to the bank of its bonds to the amount of $7,000,000, and these bonds of the state were indorsed by the bank, and were by it sold in open market. To secure the payment of these state bonds the bank pledged all the notes furnished by its stockholders for the amount of their stock subscriptions, as well as the mortgages by which the payment of these notes was secured. As an additional security for the payments of the bonds of the state, the right of the stockholders to receive a dividend was limited, the charter providing that a given portion of the earnings should be added to the capital. The state, moreover, was to have an interest in the profits of the bank to a stated amount, and its affairs were to be conducted by a board partly elected by the stockholders and partly appointed by the state.

By the original act, the term of the charter would have expired in 1884, and § 4 of the act of 1836 provided that "the capital of said bank shall be exempt from any tax laid *by the [**378** state, or by any parish or body politic under the authority of the state, during the continuance of its charter." The Constitution of the state of Louisiana, adopted in 1868 (art. 118), after directing that all property shall be taxed in proportion to its value, provided that "the general assembly shall have power to exempt from taxation property actually used for church, school, or charitable purposes." In interpreting this provision of the Constitution, the supreme court of the state of Louisiana has held in many cases that it deprived the general assembly of all power to exempt property not actually used for church, school, or charitable purposes. In 1874, ten years prior to the period when the charter of the Citizens' Bank would have expired, the general assembly of the state of Louisiana passed an act extending the charter to the year 1911. The preamble of this act recited the loss and damage which must ensue from an attempt to promptly realize on the obligations resulting from the stock mortgage and interest of the state in the collection of the sums due, as they were the means relied upon to pay the bonds by it issued. Besides extending the charter to the period stated, it authorized the board of directors to the bank to negotiate for an extension of the state bonds. La. Acts 1874, No. 40, p. 77.

In the year 1880 (La. Acts 1880, p. 104), the general assembly of Louisiana passed an act conferring on the Citizens' Bank the power to compromise and settle the obligations of its mortgage stockholders, providing the assent of the bondholders was obtained, and the compromise was made also with the approval of the directors of the bank appointed on behalf of the state. The act contained a provision for its acceptance by the bank, and stipulated that the bank should be made subject to arts. 234 and 237 of the Constitution of 1879.

When this act was adopted the Constitution of 1879 had superseded that of 1868. The new Constitution contained a provision as to taxation differing in some respects from that of 1868, but which as to the power of the general assembly to exempt from taxation may be said to be equally as stringent *as were **[379** the provisions found in the Constitution of 1868. The Citizens' Bank accepted the terms of the act.

From the date of the original charter in 1833 to the year 1877, that is, for a period of forty-four years, no attempt was made by the state or any of its political subdivisions to tax the bank on the subjects of taxation referred to above under the first heading. The state, therefore, in all its taxing departments of

every nature for this long period recognized the bank as in part not subject to taxation. In 1878, for the taxes of 1877, assessable in 1878, the board of state assessors, whose assessment rolls were also the basis for the taxation of the city of New Orleans, assessed the bank on taxable assets over and above the capital stock, not including real estate, at a value of $159,828.62, and on the cash value of the capital stock assessed to the shareholders $636,450, and the bank under the law of Louisiana was notified not only to pay the tax thus placed upon its assets, but also the sum of the tax resulting from the assessment made on the shares of stock against the shareholders. In June, 1878, the bank filed its petition in the third district court for the parish of Orleans, seeking to enjoin the collection of the tax so assessed. The petition for an injunction set out the charter and the amendments thereto, the fact that the bank was not liable to taxation, and that if enforced it would impair the obligations of the contract entered into between the state, the bank, the stockholders and bondholders, and upon the petition of the bank a preliminary injunction was allowed. To this suit the state tax collector and the state auditor and the board of assessors were made parties defendant. The board of assessors answered, admitting the assessment and averring its validity. The answer besides averred that the clause of the charter exempting the bank from taxation was in violation of the Constitution of the state of Louisiana of 1812, in force at the time the charter was granted, and that it also violated subsequent Constitutions, and particularly the clause in the Constitution of 1868, to which reference has already been made. The answer, moreover, averred that the tax on the shares of stock in the hands of
380 the shareholders was not a *tax on the bank, and that the provisions of the state law by which the bank was obliged to pay the sum of the tax assessed on the shares of stock of its shareholders was lawful. The state tax collector and the state auditor, through the assistant attorney general of the state, also answered, setting up defenses similar in character to those made by the board of assessors. By way of reconvention under the Louisiana law (Code Pr. arts. 374, 375), these officials, averring the liability of the bank for the taxes assessed as above stated, prayed judgment against the bank for the entire sum of the taxes, with costs, penalties, and attorneys' fees.

Upon these issues there was judgment in favor of the bank, declaring the assessment null and void, and perpetuating the injunction. From the judgment so rendered an appeal was prosecuted to the supreme court of the state of Louisiana. The case was heard in that court. *Citizens' Bank* v. *Bouny*, 32 La. Ann. 239. Two opinions were announced by the court, one on the first hearing and the other on a rehearing. In the first, the court unanimously held that the exemption of the bank under its charter was valid, and, therefore, the taxes assessed against it *eo nomine* were void because impairing the obligations of its contract, but that the tax assessed against the shareholders was irregular in form and not in accordance with the provisions of the Louisiana statute, and was therefore invalid. In the opinion on application for rehearing, the previous opinion as to the nonliability of the bank *eo nomine* to taxation of its capital or assets was reiterated, but the previous conclusion as to the irregularity of the assessment on the shareholders was withdrawn, the court unanimously holding that under the peculiar provisions of the charter of the Citizens' Bank any attempt by the state to take from the funds of the bank any of its money for the purpose of paying the sum of the tax assessed against the shareholders impaired the obligation of the contract entered into between the state and the bondholders and stockholders, and was therefore void. The opinion of the court on the rehearing so clearly and concisely states the attitude of the bank to the state, and the obligations resulting from those relations, that we reproduce in full the text of the opinion:

*"SPENCER, J.: It will be seen by our former opinion in this case, that there is demanded of the bank taxes— [381

"First, on $159,828.62 assessed as 'taxable assets over and above the capital stock,' and

"Second, on $636,450 assessed to the shareholders of said bank, as 'value of capital stock,' etc.

"The taxes so assessed to the stockholders are demanded of the bank, under the revenue act of 1878, which requires the banks to pay such assessments.

"The bank resists both demands on the ground that by its charter it is exempt therefrom.

"1. We see no reason to doubt the conclusion that by § 4 of the act of January 30, 1836, the capital of the Citizens' Bank is exempt from taxation. 'The capital of said bank shall be exempt, etc., . . . during the continuance of its charter,' is the language used. That language is broad enough to cover everything which, during its existence, should enter into and make part of the capital of said bank.

"By the 29th section of the original charter 'all the profits made by said corporation shall be added to and made a part of its capital,' except a certain fraction of any excess of profits over what was necessary to pay the bonds issued by the bank. It is not pretended that any such excess of profits exists or ever has. As a matter of fact, the bank has never declared a dividend to its shareholders. This sum of $159,828.62 is accumulated profits, which, by the charter, enter into and become part of the bank's capital, and is therefore exempt.

"2. The shareholders of the bank have been assessed for the value of their shares of stock and the tax thereon is demanded of the bank. Under the view we have taken of this case, it will be unnecessary to discuss the question so much argued by counsel as to the right of the state to tax the shares of the shareholders. The bank has no mission to raise such a question, except so far as it may be necessary to protect itself. Even if the shareholders be liable to taxation on their shares (upon which we express no opinion), under the peculiar and exceptional nature of the charter of the Citizens' Bank we *think it cannot be forced [382 to pay the taxes assessed to its shareholders.

"To enable this bank to obtain its capital,

the state loaned it bonds to the amount of several millions, which bonds were put upon the market and sold by the bank, the bank binding itself to take them up at their maturities, and to pay the interest thereon as it accrued. In order to secure the state against loss, and guarantee the payment of the bonds, the mortgages and pledges given by the stockholders to secure their subscriptions and loans were transferred to the state and the bondholders. All profits were to be capitalized, except as above mentioned. No dividends were to be distributed, except out of a small fraction of any surplus of profits, after meeting and paying the maturing bonds and interest.

"It is, we think, manifest that the bondholders are to be paid out of the profits of this bank by preference, and before any dividend can be declared or distributed to shareholders. It is not shown or pretended that the bank has in its possession any funds which it could legally distribute to its shareholders, or which it could pay to them without a manifest violation of its charter. If voluntary payments to or for account of its shareholders would violate its charter, and be a breach of its contract with the state and its bondholders, forced payments would be equally so. The authorities cited by the defendants are inapplicable to the present case. Where the capital, assets, and profits of a bank are at the disposal of its shareholders, the state may perhaps compel the bank to pay their taxes on stock. But such legislation with reference to the Citizens' Bank would be violative of the vested rights of others, and, as we think, unconstitutional."

Under this judgment of the supreme court of the state, the taxes against the bank were canceled.

In the meanwhile, pending the appeal to the supreme court of the state in the case just mentioned, a like assessment on the Citizens' Bank and its shareholders was made for the taxes of 1879, and in 1882 the city of New Orleans brought suit in division A of the civil district court, a court of general and unlimited original **383]** jurisdiction created under the *Constitution of 1879, to enforce the payment of this assessment. To this suit the bank answered, setting up by way of defense its nonliability to taxation under its charter, and there was judgment in favor of the bank rejecting the claim of the city, and in consequence of this fact the assessment was canceled.

From 1879 to 1884, presumably in consequence of the foregoing judicial proceedings, no assessment was made against the bank. In 1884, however, the board of assessors again assessed the bank on its furniture and banking house, and upon its shares of stock. Thereupon, in October, 1884, the bank filed its petition in division B of the civil district court against the board of assessors, the city of New Orleans, and the state tax collector of the city of New Orleans, praying for judgment decreeing "that said assessments are illegal, null, and void, that they be erased and canceled and be prohibited from being collected, and that any record of the mortgage therefrom resulting, be decreed to be erased." The petition set out the charter of the bank, the decision of the supreme court of the state in the case of *Citizens' Bank* v. *Bouny*, 32 La. Ann. 239, and averred the nonliability of the bank for taxation, and averred no other legal defense. After issue joined, there was judgment in favor of the bank "against the defendants, the board of assessors for this parish, the city of New Orleans, and the state tax collector above Canal street, ordering said board of assessors in and for the parish of Orleans, the city of New Orleans, and the state tax collector of the city of New Orleans above Canal street, to be directed and commanded to erase as illegal, null, and void the assessments described in plaintiff's petition and recited below, and that they be prohibited from collecting any taxes based on said assessment." From this judgment no appeal was prosecuted, and on its finality an entry canceling the assessment was made. From the date of this assessment in 1884 until the year 1886 no other assessment on the subjects of taxation referred to was made against the bank. In 1886, however—the term of the original charter of the bank having expired in 1884, and the extended term provided for by the act of 1874 having therefore come into existence—the board of assessors again assessed the bank for the state and *city taxes for the year 1886, on its bank-[**384** ing house and on its shares in the name of the shareholders. In October, 1886, the bank filed its petition in division D of the civil district court for the parish of Orleans, praying the annulment of this assessment, and making the board of assessors, the state auditor, the city of New Orleans and the state tax collector parties defendant. The petition set out the charter of the bank, its nonliability to taxation thereunder, and the judgment of the supreme court of the state in the case of *Citizens' Bank* v. *Bouny* was pleaded as *res judicata*. Although there was a general averment in the petition that the tax was excessive besides being illegal, there was no allegation contained therein adequate to justify or support the prayer that the assessment be annulled, except the assertion that the property of the bank was exempt from taxation.

After answer by the parties defendant, there was judgment on March 10, 1887, decreeing "the assessment for the year 1886, standing against the banking house or real estate in the square bounded by Gravier, Camp, Poydras, and St. Charles streets, assessed at $75,000 on 10,500 shares of the capital stock, at $42.75 per share, aggregating an assessment of $448,875, null and void and of no effect, and that the same be canceled and erased from the books of their respective offices, and that any inscription of the same in the mortgage office be canceled and erased, and costs of suit." This judgment was not appealed from, and on its becoming final an entry on the assessment roll was made canceling the assessment.

On the 21st of March, 1887, a few days after the decision in the cause just stated, the Citizens' Bank filed its petition in division A of the civil district court of the parish of Orleans against the board of assessors. In this petition, after averring that under its charter the bank was not liable to assessment, and that it could not be taxed without impairing the obligations of the contract created by the charter and in violation of the Constitution of the state

and of the United States, the petitioner proceeded to aver the previous judicial recognition
385] *of the effect of the charter, and alleged that, notwithstanding these facts, the board of assessors were about to assess the bank for the taxes of 1887 upon its shares of stock, upon its banking building, and upon the furniture therein used by petitioner for conducting its said banking business and upon other property possessed by petitioner, that said proposed assessments were without warrant of law, and the bank was entitled to enjoin the making of the same. A preliminary injunction having been issued as prayed for, the case was put at issue, and resulted in a judgment, on the 3d of May, 1887, perpetuating the preliminary injunction, and enjoining the board from "assessing the Citizens' Bank for taxes, state or city, for the year 1887, upon its capital stock, on the shares thereof, or its property, and that said assessment, if made, be canceled from the books of the assessor for the year 1887, and that the recorder of mortgages for the parish of Orleans be and is hereby enjoined from recording said assessments upon the books of his office." This judgment was also not appealed from, and upon its becoming final was executed by proper entry on the books of the recorder of mortgages. From the date of this judgment in 1887 to the year 1892, to quote the language of the deputy recorder of mortgages, "there are no assessments on the roll against the bank on capital or on the bank building or on the shares. In the place of the assessments there is the word 'exempt' and the name of the bank, but no assessments, and all of the assessments of which I have spoken [referring to those above alluded to] have been marked canceled by order of court."

In 1892 the right to assess was again asserted by the board of assessors under the circumstances which we have previously stated, and the controversy now before us therefore arose.

Since this case was decided below, the supreme court of the state of Louisiana has had before it a suit brought by the bank against the board of assessors, asserting its nonliability to assessment and taxation under its charter for taxes against real estate acquired by it under foreclosure of its stock mortgages. Certain judgments rendered in favor of the bank (presumably those relied upon in this record)
386]were set up as *constituting *res judicata*. The court of last resort of the state said in its opinion on the first hearing that it was unnecessary to pass upon the plea of the thing adjudged, since the judgments relied upon did not embrace the question of whether property bought by the bank under foreclosure of its stock mortgages was included within its exemption. The court held, considering the terms of the charter, that such property was not included in the exemption. In that case both the act of 1880, above referred to, and the act of 1874 were set up as conclusively establishing that the bank was not exempt from taxation at all. In an opinion on a rehearing the court somewhat modified the grounds for its conclusions, and in the course of the opinion said:

"We refrain from stating the effects as to the taxation of the bank's capital in consequence of act 79 of 1880. We now do the same, because we think it unnecessary to do so. We propose to let this question as to the exemption of the bank's capital rest on the decisions heretofore rendered."

In concluding the opinion the court said:

"We think the Citizens' Bank has heretofore obtained all that it is entitled to, the exemption from taxation of its capital proper and the real estate necessary for the carrying on its legitimate business or purposes." *State, Citizens' Bank*, v. *Board of Assessors*, 48 La. Ann. 35.

From the foregoing statement it is evident that the contention of the plaintiffs in error, if maintained, will overthrow the construction of a statute of the state of Louisiana sanctioned by nearly sixty years of practical execution and supported by decrees of the courts of that state, which are final and which were regularly rendered during a long period of time whenever an attempt was made to assess the property of the bank. It is true that during the greater portion of the time when the charter was construed by the officers of the state of Louisiana, and interpreted by the courts as rendering taxation of the bank illegal, the original charter was in force, and the question whether the bank was subject to taxation during the term of its extended charter could not therefore technically arise. But the old charter period expired in 1884, *and it is clear that from 1884 until [387 1892, not only was the bank generally treated as not liable to taxation under its charter, but whenever an attempt was made to tax it the courts of the state held the assessment unlawful.

Indeed, the language of the supreme court in the case to which we have referred, decided since the decree under review was rendered, sustains the construction which the charter of the bank had previously received under so many years of practice approved by the repeated adjudications of the Louisiana courts. It is argued that in giving expressions to these views the supreme court of the state of Louisiana indulged in mere *dicta*, but although this be conceded, the *dicta* necessarily afford some light as to the proper meaning of the charter.

Passing the consideration of the question of the correctness of the decisions of the courts of Louisiana, and the influence which they should have upon this court in interpreting a purely Louisiana contract, the question arises, Are not the judgments rendered between the bank, the board of assessors, the city of New Orleans, and the state taxing officers, absolutely conclusive, under the principle of the thing adjudged, of the issue here presented? Of course, if the judgments are the thing adjudged, and conclusively determine as between the parties that the exemption of the bank under its charter exists, to the extent determined by the judgments, the duty in that regard of discussing the charter itself will be eliminated, since the effect of the thing adjudged will be to settle that question.

In considering this question, we at once eliminate all the judgments rendered prior to the period when the amended charter took effect, and therefore confine our examination to the two judgments rendered by the civil district court, the one as to the taxes of 1886 and the other as to those of 1887. The reasons relied on to establish that these judgments do not constitute the thing adjudged are embodied

in three propositions: First, because although it is true the officials who are made defendants are the successors in office of the officers who were impleaded in the judgments relied upon, as they are not the same natural persons, there-
388] fore there is a want of *identity of parties; second, because the records do not show with sufficient certainty that these judgments were based on the identical claim of exemption from taxation which is now asserted, and therefore that the judgments do not establish that the matter here in issue was necessarily therein concluded; third, because, whatever as a general principle may be the efficacy of the thing adjudged, that rule has no application to taxes of different years, since a judgment decreeing a tax of one year illegal can never be *res judicata* as to a tax of a future year, although the right to tax for a future year is resisted upon the same facts and between the same parties, and upon the identical legal grounds held to be conclusive in a judgment previously rendered between them.

In passing we notice briefly an argument advanced in the discussion at bar, that as the civil district court of the parish of Orleans is a court composed of several judges, each of which judges preside over a separate division, therefore the judgments of one of the divisions can never become the subject-matter of *res judicata*. But this argument denies that the civil district court of the parish of Orleans is a court at all. The civil district court is a court of general and unlimited original jurisdiction, possessing full common law, equity, and probate powers, besides having an appellate jurisdiction over the city courts. La. Const. 1879, art. 130. It is true that the court is divided into divisions, but each division has a plenary jurisdiction over the causes allotted to it for decision, and the mere creation of separate divisions does not deprive the courts of their judicial character, or prevent their judgments when final from creating the presumption of the thing adjudged between the parties thereto. La. Const. 1879, art. 130.

The first contention based upon the mere change in the person holding the particular office is without merit. It is not denied that the tax collectors and board of assessors who stood in judgment in the suit when the decisions were rendered were duly qualified and empowered to that end. And it is also not gainsaid that the successors in office of those officers who are defendants here are also duly
389]empowered. *The mere fact that there has been a change in the person holding the office does not destroy the effect of the thing adjudged. *Scotland County* v. *Hill*, 112 U. S. 183 [28: 692]; *United States* v. *Knox County* (*"Harshman* v. *Knox County Ct."*) 122 U. S. 306 [30: 1152]; *State, Wilson,* v. *Rainey*, 74 Mo. 229; *Harmon* v. *Auditor of Public Works*, 123 Ill. 122.

The second question then is this: *Were the final judgments which held that there was no power to levy the taxes on the Citizens' Bank for the years 1886 and 1887 based upon the identical claim of exemption now asserted by the bank in order to defeat the taxes here in question?*

The petition filed by the bank in the suit by it commenced, to have the taxes of 1886 on stock canceled and annulled, is set out in full in the margin.† It will be seen that it specifically averred the charter of the bank, and that under its provisions the bank could not be taxed, and that to so do would impair

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†PETITION Filed October 29, 1886.

The Citizens' Bank of Louisiana } No. 19144. Civil
vs. } District Court.
The Board of Assessors *et als.* } Division "D."

To the Honorable the Civil District Court for the Parish of Orleans:

The petition of the Citizens' Bank of Louisiana, a corporation established by law, domiciled in New Orleans, respectfully shows—

That the board of assessors for the parish of Orleans have assessed petitioner upon the assessment rolls for 1886 for taxes to the city of New Orleans and the state of Louisiana, on which the assessments are as follows, to wit:

On the banking house of petitioner, erected on petitioner's real estate in the square bounded by Gravier, Camp, Poydras, and St. Charles streets, and on said real estate, assessed at $75,000 and on 10,500 shares of the capital stock of the bank, assessed at $42.75 per share, aggregating an assessment of $448,875, on which the taxes assessed will amount to upwards of $15,000, as appears by said assessment, specially referred to for fuller explanation and greater certainty.

That under the charter of the bank granted by the state the bank is exempted from all taxation, state, parish, and municipal, in any form; that on the faith of said charter and of said exemptions the capital of the bank was furnished, the bank organized, and its banking has been for years and is now conducted, all of which more fully appears by the legislative acts on it, the act to incorporate the Citizens' Bank, approved April 1, 1833; the act amendatory of the first act, approved January 30, 1836; the act No. 246 of 1853, the act 241, p. 852, and other acts on the subject, under which acts of 1835 and 1836 the original capital of the bank of $10,000,000 and under which acts of 1852 and 1853 the additional capital of the bank $1,000,000 were furnished, all of which more fully appears by the said acts, specially referred to for fuller explanation and greater certainty, said exemptions being contained in the 30th section of the act of 1833.

That the aforesaid assessment on shares of $448,875 purports to represent the capital of the bank and is specially in excess of the value of the shares and of the capital, besides being illegal and without warrant of law; that the aforesaid real estate assessed as aforesaid is in excess of the value of said real estate, besides being illegal; that said real estate was purchased and the building thereon erected with the funds of and belonging to the capital of the bank, and said real estate and building represent and form part of said capital; that said assessments are in violation of the exemption granted to the bank and are illegal, null, and void, and any liens, if any there be, binding to direct said assessments are void for repugnancy to art. 1, § 10, of the Constitution of the United States, and art. 155 of the Constitution of the state.

That in the suit of State Tax Collector v. Citizens' Bank, decided by the civil district court on the ——, 1880, and affirmed by the supreme court of the state (32 La. Ann. 239), said exemption was maintained and adjudged valid, and said adjudication is *res judicata* against said present assessment and all demands thereon.

That within the delays and according to the forms prescribed by law petitioner protested against said assessment and applied to the board of assessors to have the assessment canceled, but said protest and application were disregarded; that within the delays and according to the forms prescribed by law petitioner made the same protest and application to the common council, and to its standing committee on assessments of the city council, but said protest and application were also disregarded.

Wherefore petitioner prays that the board of assessors for the parish of Orleans and the city of New Orleans be duly cited to answer this demand; that the state tax collector for the first district be also cited; that after due proceedings according to law there be judgment in petitioner's favor, decreeing said assessment of said shares and on said real estate to be void and null and decreeing it to be canceled and annulled, and that any inscription of the same in the mortgage office be erased and canceled, and for general relief.

contract obligations created by the charter, and would be violative of the Constitution of the state of Louisiana and of the United States. It, moreover, referred to the previous adjudication by the supreme court, and contained an allegation that the assessments, besides "being illegal and without warrant of law, were excessive." But the relief prayed was not the correction or reduction of an excessive assessment, but solely that the assessment be decreed "void and null," and be "canceled and annulled." The answers of the defendants asserted the legality of the assessment and denied the right of the bank to question the amount, because it had not availed itself of the antecedent statutory remedies necessary to entitle it to assert such right.

390] The judgment *rendered upon these issues decreed, not that the tax was excessive, not that it should be reduced, *but that it was null and void, and must be canceled.* The judgment **391]** is inserted in the *margin.† Now, to say that this judgment may have proceeded upon other issues or may have been rendered because of some presumed irregularity, without considering the asserted exemption, is to substitute conjecture for the facts unequivocally and conclusively established by the record itself. Under the pleadings only two issues were presented, that the tax was void because under the charter the bank could not be taxed, and that it was excessive; but the judgment did not reduce the amount of the tax—it decreed it to be void. In the pleadings there is nothing which justified the decree or to which it was responsive except the exemption of the bank. And this conclusion results by an overwhelming implication when the state of the statute law of Louisiana is considered. By that law, as is shown by the assessment here assailed, wherever a tax is excessive in amount **392]** it is not to be avoided, *but is reduced, and the board of assessors are entitled when property is omitted for any reason to immediately make up a supplemental roll correcting the error. La. Acts 1884, p. 136, § 2.

If, therefore, the court had concluded that there was an excessive or irregular assessment it could not have rested its decree upon that ground, because, as the tax could have been reduced, or, in case of irregularity, have been assessed, the issues necessarily required a decision of the question of exemption *vel non.* In other words, if the court had found that the tax was excessive or irregular, to have so decreed would not have passed upon the issue before it or terminated the controversy. In this connection it is worthy of remark that the record discloses that from the date of this judgment no supplemental roll of any kind assessing the bank for the tax of 1886 was made. But under the statutes of Louisiana, if the judgment had proceeded upon an irregularity in the assessment, the plain duty of the board was to comply with the statute and make the supplemental roll. The fact that no such roll was prepared is a conclusive demonstration that the judgment was based on the claim of exemption, which rendered it impossible that the new roll should be made out.

The judgment rendered for the tax of 1887 is, if it were possible, even more conclusive of the identity of the issue than the one rendered for the taxes of 1886. In that case the suit was brought by the bank, not to assail an assessment which had been actually made, but to enjoin the making of any assessment against it whatever. The petition, which is set out in the margin,† stated no ground for relief other

†JUDGMENT.

In this cause, submitted to the court for adjudication, for the reasons orally assigned by the court, the law and evidence being in favor of plaintiffs—

It is ordered, adjudged, and decreed, that there be judgment in favor of plaintiffs, the Citizens' Bank of Louisiana, and against the board of assessors of the parish of Orleans and James D. Houston, tax collector for the upper district of the parish of Orleans, decreeing the assessment for the year 1886 standing against the banking house or real estate in the square bounded by Gravier, Camp, Poydras and St. Charles streets, assessed at $75,000, or on 10,500 shares of the capital stock at $42.75 per share, aggregating an assessment of $448,875, null and void and of no effect, the same to be canceled and erased from the books of their respective offices, and that any inscription of the same in the mortgage office be canceled and erased, and costs of suit.

Judgment rendered March 3, 1887.

Judgment signed March 10, 1887.

†No. 20541.—PETITION Filed March 21, 1887.

To the Honorable the Civil District Court in and for the Parish of Orleans:

The petition of the Citizens' Bank of Louisiana, a corporation established by law, domiciled in the city of New Orleans, respectfully shows—

That petitioner is exempted by law—all taxation, state or municipal, upon its capital shares, and property of every description, as appears by the act of the legislature of Louisiana, approved April 1, 1833, entitled "An Act to Incorporate the Citizens' Bank of Louisiana," and especially the 30th section of said act, and by the act amendatory of the preceding act, approved January 30, 1836, and especially by the 4th section thereof, which acts are specially referred to for fuller explanation and greater certainty.

Petitioner shows that under said charter as contained in said legislative acts, and in accordance with the conditions thereof, the Citizens' Bank of Louisiana was organized in 1836, with a capital of upwards of $10,000,000, then obtained from the subscribers to the capital stock, in accordance with the charter of the bank; that in 1853 additional capital for the Citizens' Bank of $1,000,000 was obtained from the subscribers thereto under the authority of the act of the legislature of Louisiana for the relief of the Citizens' Bank, being the act No. 141 of 1852 and the act of the legislature of Louisiana No. 249 of 1853, approved April 28, 1853; that the aforesaid original capital obtained in 1836, as well as the said increased and additional capital obtained in 1853, was all furnished and paid to the bank on the faith of its charter, and especially on the faith of the aforesaid exemption in the charter of all the property, stock, and capital of the Citizens' Bank, and that, relying on the aforesaid exemptions, the said bank has conducted and is now conducting its banking business.

Petitioner further shows that said acts containing the charter of the said bank, and especially the provisions thereof containing said exemptions from taxation, are contracts under the protection of the articles of the Federal and state Constitutions protecting contracts, said articles being art. 1, § 10, of the Constitution of the United States and similar articles in the state Constitutions, and petitioner further shows that said exemptions have been decreed valid by the courts.

Petitioner further shows that notwithstanding said exemptions from said taxation and said judgments decreeing the same to be valid, the board of assessors for the parish of Orleans are about to assess the Citizens' Bank upon the assessment rolls for the year 1887 for taxation upon its shares of stock, and upon its banking building and upon the furniture therein used by petitioner for conducting its said banking business, and upon other property possessed by petitioner; that said proposed assessments are without warrant of law, are prejudicial and injurious to petitioner and will cause irreparable injury to petitioner, and it is entitled to an injunction to prohibit and enjoin said assessments.

393]than the claim *of exemption. Indeed, the very nature of the remedy invoked precluded the possibility of any other ground, since the relief sought related, not to an assessment already made, but to prevent any assessment whatever, under the existing law, of objects named from being made. How can it be contended that the assertion in the pleadings, that there was no power to make any assessment at all of the specified property, was simply a claim that an assessment was irregular? The 394] judgment, *a copy of which is reproduced in the margin, † was responsive to the issue presented, and enjoined the making of any assessment for taxes for the year 1887. Now, as there was in the case of excess or irregularity lawful power provided by statute to make an assessment by supplemental roll, the decree prohibiting any assessment could have rested alone upon a want of power to tax, that is, of exemption, for that cause alone was adequate to justify the relief afforded. It is shown in the proof that, both as to the taxes of 1886 and 1887, after the two judgments were rendered, there was entered on the official rolls, "canceled exempt." The effect of this contemporaneous execution of the judgment cannot in reason be argued away. The additional fact is shown that for five years after these judgments were rendered the board of assessors, in annually making up their rolls, placed the name of the bank on the roll but made no assessment, marking in the place where the assessment should have been the word "exempt." In other words, all the departments of 395] the state *and municipal government, having tested the question of exemption before the courts and having been defeated, recognized the fact, and for a series of years treated the judgments as concluding the question of exemption. The effect, therefore, of the claim now made, is, in substance, to disregard the pleadings, to disregard the necessary effect of the decrees, and to repudiate their execution contemporaneously made and followed by years of official conduct. The fact that the petition of the bank, filed in 1887, after alleging the exemption, contained the general averment that "said proposed assessments are without warrant of law and prejudicial and injurious to petitioner," does not furnish reason for saying that other reasons than the exemption may have been (in consequence of the use of these words) presented for adjudication. The quoted sentence was not traversable and was a mere legal conclusion from the facts previously alleged, that is, the exemption of the bank under its contract.

It results from the foregoing that the two judgments rendered after the expiration of the original charter necessarily adjudged the claim of exemption upon identically the same facts and conditions as those here presented, and they therefore are conclusive unless the proposition be sound that a claim for taxes for one year being a distinct cause of action from the tax for a subsequent year, the judgment holding that the tax of the prior year cannot be assessed or collected, can never be the subject of the thing adjudged as to the tax for the future year, however absolute may be the identity of the defense and of the facts upon which the defense is founded.

There is difficulty in meeting the argument by which the foregoing proposition is supported, because the reasoning commingles and treats as one, two distinct and different questions. For instance, the argument that because a tax of one year is a different cause of action from the tax of a subsequent year, therefore a demand for a tax of a subsequent year can never be concluded by the thing adjudged in the prior year, admits the relevancy of *res judicata* to demands for taxes, but contends that wherever there are different demands the thing adjudged has no application, although the last demand may *depend [396 upon a question which has previously been determined under the same facts and circumstances. On the other hand, the reasoning that this must be the rule, because it would be intolerable to recognize that a judgment as to the tax of one year could be conclusive as to the tax of a subsequent year, has for its basis the proposition that as a matter of public policy and public necessity the principles of the thing adjudged can never apply to taxation. In considering the question we separate at once these two conflicting contentions and examine first the proposition that because a tax of one year is a different demand from the tax of a subsequent year, therefore *res judicata* as to one can never apply as to the other, and the second question of whether as a matter of public policy the thing adjudged applies to taxes at all.

The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res judicata* cannot apply, whilst admitting in form the principle of the things adjudged, in reality substantially denies and destroys it. The

Wherefore petitioner prays that said board of assessors of the parish of Orleans and the city of New Orleans be duly cited to answer this petition; that, considering the bond and affidavit herewith filed, a writ of injunction issue, directed to said board, enjoining them and prohibiting them and each member thereof from assessing the Citizens' Bank for taxes, city or state, for 1887, or for any subsequent year upon the capital stock of the Citizens' Bank, or the shares thereof, or upon the banking building of petitioner or upon the furniture used therein, or upon any other property of petitioner; that said injunction be made perpetual, and that said board and the recorder of mortgages be prohibited and enjoined from recording any such assessments in the office of the recorder of mortgages, and for general relief.

†JUDGMENT.

In this case, submitted to the court upon the evidence and pleadings filed, the law and evidence being in favor of plaintiff, it is ordered, adjudged, and decreed that the injunction herein issued on the 21st day of March, 1887, be now made perpetual, and that the board of assessors for the parish of Orleans and the members thereof be enjoined and prohibited from assessing the Citizens' Bank for taxes, city or state, for the year 1887 upon its capital stock, on the shares thereof, or its property, and that said assessment, if made, be canceled from the books of assessments for the year 1887, and that the recorder of mortgages for the parish of Orleans be, and he is hereby, enjoined from receiving said assessment upon the books of his office.

Costs herein be paid by defendants.

Judgment rendered April 27, 1887.

Judgment signed May 3, 1887.

estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the clemental rule stated in the text-books and enforced by many decisions of this court. A brief review of some of the leading cases will make this perfectly clear.

In *Bank of United States* v. *Beverly*, 42 U. S. 1 How. 134–139 [11: 75–78], it was held that a construction of a will affecting the rights of parties must govern in subsequent controversies between the same parties, without reference to the different nature of the demands. In *Tioga R. Co.* v. *Blossburg & C. R. Co.* 87 U. S. 20 Wall. 137 [22: 331], and *Mason Lumber Co.* v. *Buchtel*, 101 U. S. 638 [25: 1074], it was held that when the proper construction of a contract was in controversy, the construction adjudged by the court would bind the parties in all future disputes.

In *Cromwell* v. *Sac County*, 94 U. S. 353 [24: **397**] 198], after *a full statement of the nature of the estoppel resulting from the thing adjudged where the demand was the same in both cases, the court then considered the extent of the estoppel where the causes of action were distinct, and said (p. 353 [198]):

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to the matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

It is unnecessary to multiply citations of authority, as the subject has been quite recently fully considered and passed upon by this court. In *Last Chance Min. Co.* v. *Tyler Min. Co.* 157 U. S. 687 [39: 862], where an estoppel resulting from the thing adjudged was enforced, this court said (p. 687 [862]):

"The law in respect to estoppel by judgment is well settled, and the only difficulty lies in the application of the law to the facts. The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is therefore not conclusive in this as to matters which might have been decided, but only as to matters which were in fact decided. *Hopkins* v. *Lee*, 19 U. S. 6 Wheat. 109 [5: 218]; *Smith* v. *Kernochen*, 48 U. S. 7 How. 198 [12: 666]; *Pennington* v. *Gibson*, 57 U. S. 16 How. 65 [14: 847]; *Stockton* v. *Ford*, 59 U. S. 18 How. 418 [15: 395]; *Washington, A. & G. Steam Packet Co.* v. *Sickles*, 65 U. S. 24 How. 333 [16:650], 72 U. S. 5 Wall. 580 [18:550]; *Doe*, *Parrish*, v. *Ferris*, 67 U.S. 2 Black, 606 [17:317]; *Cromwell* v. *Sac County*, 94 U. S. 351 [24: 195]; *Davis* v. *Brown*, 94 U. S. 423 [24: 204]; *Russell* v. *Place*, 94 U. S. 606 [24: 214]; *Campbell* v. *Rankin*, 99 U. S. 261 [25: 435]; *Mason Lumber Co.* v. *Buchtel*, 101 U. S. 638 [25: 1074]; *Stout* v. *Lye*, 103 U. S. 66 [26: 428]; *Nesbitt* v. *Riverside Independent Dist.* 144 U. S. 610 [36: 562]; *Johnson Co.* v. *Wharton*, 152 U. S. 252 [38: 429]."

*And the law of Louisiana is exactly [**398** in accord with the rulings of this court, for, as said by the supreme court of Louisiana in *Heroman* v. *Louisiana Institute of Deaf & Dumb*, 34 La. Ann. 814:

"No principle of the law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies. Whether the reasons upon which it was based were sound or not, and even if no reasons at all were given, the judgment imports absolute verity, and the parties are forever estopped from disputing its correctness. Cooley, Const. Lim. 47 *et seq.*, and authorities there cited. 'Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection, though the judgment may have been erroneous and liable to, and certain of, reversal in a higher court.' Bigelow, Estoppel, 3d ed. Outline, pp. lxi, 29, 57, 103. 'The estoppel extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause, and was determined therein.' *Aurora* v. *West*, 74 U. S. 7 Wall. 102 [19: 49]; *Van Pelt* v. *McGraw*, 4 N. Y. 113; *Bryan* v. *Atchison*, 2 La. Ann. 462; *Scuddy* v. *Shaffer*, 14 La. Ann. 576; *Plicque* v. *Perret*, 19 La. 318; *Gilman* v. *Horseley*, 5 Mart. N. S. 664; *Dufour* v. *Camfranc*, 11 Mart. 607; *Patterson* v. *Bonner*, 14 La. 233; *Martin* v. *Martin*, 5 Mart. N. S. 170."

It follows, then, that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if in the prior cases the question of exemption was neeessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed.

The argument that as a matter of public policy the principle of the thing adjudged should be held not to apply to controversies as to taxation, if there be merit in it, should be addressed to the lawmaking and not to the judicial department. But if the judicial mind could entertain the suggestion, it seems clear that it is not without real merit. In its ultimate aspect it asserts that no question concerning government or public authority ought ever to be submitted to judicial investigation. Indeed, *the contention is that there is no [**399** power in courts of justice to consider any question of taxation or render any judgment in relation thereto. That this is the result of the proposition is manifest from the fact that the very essence of judicial power is that when a matter is once ascertained and determined it is forever concluded when it arises again under the same circumstances and conditions between parties or their privies. To admit the judicial

power on the one hand, and to deny on the other the very substance and essence of such power, is not only contradictory but destructive of the fundamental conceptions upon which our system of government is based. Under this theory the cause under consideration should not be entertained, but should be dismissed. Accepting the argument in its full consequence, every judgment rendered by this court from the foundation of the government, declaring a particular tax or burden unconstitutional, imports no efficacy whatever. Every decree of this court enforcing taxation in order to discharge obligations previously contracted, where the right to the tax was a part of the obligation, is deprived of the sanctity of the thing adjudged, for manifestly if the estoppel of the thing adjudged does not arise from a judgment preventing taxation, such an estoppel cannot also result from a judgment enforcing taxation.

It is contended, however, that the asserted theory finds support in two authorities, one a decision of this court, *Keokuk & W. R. Co.* v. *Missouri*, 152 U. S. 301 [38: 450], and the other, *Davenport* v. *Chicago, R. I. & P. R. Co.* 38 Iowa, 633, 640. But that these authorities do not sustain the contention is demonstrable. In the *Keokuk Case* the court held that the controversy which it decided was not between the same parties as was the controversy in the case wherein the judgment was rendered which was relied upon as *res judicata*. The two judgments not being between the same parties, there could have been and was no necessity for deciding whether, if the judgment had been between the same parties or their privies, it would have been *res judicata*. True it is that in the *Keokuk Case* the opinion *arguendo* discusses the question of whether a judgment against the validity of a tax for one year would [400] *be a bar to a suit for taxes for a subsequent year. But that this reasoning was not considered as relating to a case where the validity of the tax was resisted on a particular ground, which particular and special defense had been previously held between the same parties to be valid under identically the same conditions and circumstances, becomes clear when the context of the opinion is examined, and it is discovered that it approves and quotes the case of *Cromwell* v. *Sac County*, the opinion in the *Keokuk Case* saying: "If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit upon the principle stated in *Cromwell* v. *Sac County*, 94 U. S. 351 [24: 195]" To seek, then, to avail of the general language used in the opinion in the *Keokuk Case* without taking note of the circumstance that it was there said that the estoppel would exist even as to a tax in a case like this is, in reason, to misinterpret the opinion and make it cover the very case which it in express language declared it was not intended to govern. It may also be conceded that language was used in the course of the opinion in *Davenport* v. *Chicago, R. I. & P. R. Co. supra*, which is susceptible of the interpretation that under no circumstance, even between the same parties, would a judgment as to the tax of one year operate as the thing adjudged as to the tax of a future year. But that case stands alone, and the language therein used has been since, if not repudiated, at least qualified, by the Supreme Court of Iowa to the extent necessary to bring that case in harmony with the true and universal doctrine so often laid down by this court. In *Goodnow* v. *Litchfield*, 59 Iowa, 226, where the *Davenport Case* was pressed as an authority upon the supreme court of Iowa, that court in an opinion on a rehearing said:

"It is undoubtedly true that the taxes of each year ordinarily constitute separate and distinct rights or causes of action. But where an action is brought to recover taxes paid in one year, and an action is afterwards brought to recover for the taxes paid in a subsequent year, and the adjudication in the first is pleaded as a bar to the recovery in the second action, *the question whether the estoppel [401] is effectual will depend upon the issues in the two actions. If the right to recover and the defense thereto are based upon precisely the same grounds, why litigate again the question that has been determined? In such case the very right of the matter has been determined by a court of competent jurisdiction. It is not essential the causes of action should be the same, but it is essential the right or title should be; that is the issue in both actions and the matter on which the estoppel depends must be the same, or substantially so. The very matter or thing which it is sought to litigate must have been adjudicated in the prior action. In such case the bar or estoppel is complete. This rule will not, we think, be disputed. Therefore authorities are not required in its support, but see *Merriam* v. *Whittemore*, 5 Gray, 316."

It follows, then, that the theory by which it is sought to take questions of taxation entirely out of the reach of the rule of the thing adjudged is not only without foundation in reason, but is also without support of authority, since the case from this court, which is cited to sustain it, cannot properly be said to maintain the contention, and the other from the supreme court of Iowa has been either overruled or qualified.

The only question then remaining to be determined is, to what subjects of taxation does the estoppel of the thing adjudged apply, for it extends only to the matters which are necessarily concluded by the judgment. It is clear upon the face of the records and judgments which are relied upon to constitute *res judicata* that the only questions therein presented and decided were the nonliability of the bank for taxation on its capital, its banking house, and furniture acquired for the purposes of its banking business, and to a tax levied *eo nomine* on its shareholders, with obligation imposed by the taxing law on the bank to pay the tax. These items, however, embrace only the subjects of taxation mentioned in the first of the enumerations which we at the outset made, and do not include the objects embraced in the other three. The thing adjudged, therefore, on the face of the records and *judgments does not conclude three [402] of the general subjects of taxation as to which the court below decreed the bank not liable for taxation. The argument, however, is that although the objects embraced in the last

three headings are not apparently within the estoppel resulting from the thing adjudged, they are nevertheless substantially so, for it is said as the thing adjudged determined that the bank under its contract cannot be taxed, the principle thus established carried the other items with it. The contention is unsound, and to demonstrate that it is we will examine briefly the three items referred to, which are embraced in the second, third, and fourth headings. They are as follows:

Second. That the stockholders of the bank are not liable for assessment on their shares of stock. The doctrine that an exemption of the capital of a corporation does not, of necessity, include the exemption of the shareholders on their shares of stock is now too well settled to be questioned. *Bank of Memphis* v. *Tennessee, Memphis*, 161 U. S. 134, 146 [40: 645, 649], 163 U. S. 416 [41: 211].

Indeed, the judgment of the supreme court of the state of Louisiana in *Citizens' Bank* v. *Bouny*, 32 La. Ann. 239, expressly noted this distinction, and the opinion on the rehearing expressly held, not that the shareholders could not be taxed, but that even although they could be, the law could not lawfully impose, under the exceptional nature of the charter of the Citizens' Bank, the duty on the bank to pay the tax. Moreover, in the *Bouny Case* the supreme court of Louisiana held that the bank was without authority to champion the rights of its stockholders, and the bill in this case is filed in behalf of the bank alone, and is predicated solely upon the theory that the bank was entitled to attack the tax because of the absolute duty imposed upon it to pay. The decree below, therefore, which held that the stockholder could not be taxed because of the contract right of the bank conflicted with the settled rules of law, and accorded the complainant a right to which it was not entitled, although under the authority of the thing adjudged the nonliability of the bank to taxation as to certain objects of taxation be fully established.

Third. That the bank was also not subject to 403 *taxation on any*real estate held by it, which had been mortgaged to secure stock subscriptions or stock loans and had become the property of the bank under foreclosure proceedings, because property so acquired became by virtue of the purchase by the bank a part of its capital stock.* The argument by which it is asserted that this right is embraced within the contract, and therefore is covered by the thing adjudged, may be thus briefly stated. The thing adjudged, it is said, establishes that the capital of the bank is nontaxable, and where the capital cannot be taxed, that in which the capital is invested becomes a part of the capital, and therefore cannot be taxed, and authorities are cited which, it is claimed, support this proposition.

But conceding *arguendo* the correctness of the premise it begs the question for consideration, since it assumes that the capital of the bank was invested in the debt which the stock mortgages secured. The stock mortgages guaranteed the payment of the subscriptions to the stock, and these mortgages with the obligations arising from the subscriptions were pledged to secure the loan from which the capital resulted. In other words, the stock subscriptions and mortgages, instead of drawing away the capital and therefore being an investment into which the capital entered, were a mere security on the faith of which the capital was obtained. The review which we have made of the legislation as to the Citizens' Bank makes this clear, and it is additionally fortified by these considerations. The act of 1833 provided for the subscriptions to the stock and for the securing of these subscriptions by mortgage, but the subscriptions were not to produce the capital. On the contrary, the capital was to be obtained by the issue by the bank of bonds secured by the subscriptions and the mortgages; the money coming from the sale of the bonds to constitute the capital of the bank. Thus the very 1st section of the act of 1833 says "that the capital of said bank shall be $12,000,000, to be formed and procured by means of a loan or loans to be made by the directors of said bank." Section 4 of the act, which in detail provides for the making of the loan, says "that in order to facilitate the directors of said bank in negotiating or obtaining the loan aforesaid, *which is to form*the capital thereof.*" La. Acts 1833, [404 pp. 172, 175. By the act of 1836 the state provided for the loan of its own bonds to the bank from the sale of which the capital of the bank was to be derived as a substitute for the provision of the act of 1833. But the substitution of state bonds for bonds of the bank, instead of weakening the proposition that the capital was to be derived from the bonds of the bank, strengthens it, for it makes obvious the fact that the state on her credit furnished the capital, taking as security the stock subscriptions and the mortgages. To accept the theory that the subscriptions to the stock and the stock mortgages securing the same were the capital of the bank would necessarily presuppose that the bank was to be carried on without capital, for the subscriptions were not to be paid for a long period of time. Indeed, the whole theory of the act was that the capital being obtained by the bonds the subscriptions would only produce capital when by operations of the provisions of the act they were paid, thereby discharging the obligations of the state. But this operation could not be effectual until either the subscription had been paid or the property mortgaged to secure the same had been actually sold and converted into money, and this was manifestly the view taken by the supreme court of Louisiana in the case upon which the defendant in error relies, *Citizens' Bank* v. *Bouny, supra*, where the court said:

"To enable the bank to obtain its capital, the state loaned it bonds to the amount of several millions, which bonds were put upon the market and sold by the bank, the bank binding itself to take them up at their maturity and to pay the interest thereon as it accrued. In order to secure the state against loss and guarantee the payment of the bonds, the mortgages and pledges given by the stockholders to secure their subscriptions and loans were transferred to the state and the bondholders."

Evidently it was a confusion of thought on this question which led the court below to hold that the property bought in in enforcement of the stock mortgages and held by the

bank was the capital of the bank and therefore
405]not liable to taxation. *In considering the question of whether the capital of the bank was taxable, in one part of its opinion the court said:

"The original charter was granted in 1833. La. Acts 1833, p. 172. That act contemplated that the capital of the bank which was fixed at $14,000,000, would be obtained by the issuance by the bank of its own bonds. The subscribers for the stock were to pay nothing upon their subscriptions, but were to furnish mortgages upon cultivated lands and slaves to secure the payment of their subscriptions."

And after speaking of the failure of this plan and the provision of the act of 1836 loaning the bonds of the state to the bank for the purpose of obtaining its capital, the court said: "And the bonds of the state were loaned to the bank as its capital." Whilst taking this correct view of the act in considering the question of whether the capital could be taxed, a directly opposite opinion was held to be the sound one in determining whether the property bought in by the bank in foreclosure of its stock mortgages was a part of its capital, for on that branch of the case the court said: "*The bank had no other capital except the subscriptions by the stockholders secured by stock mortgages.*" We cannot approve a conclusion which rests, on one branch of the case, upon the proposition that the bank had no other capital but the proceeds of the sale of the state bonds, and on another issue in the cause holds that the bank had no other capital but the subscriptions to the stock and the mortgages securing the same. If the asserted rights of the bank as to nontaxation on the one hand arise from the premise that the proceeds of the state bonds were its capital, it cannot derive the advantage resulting from this interpretation of the charter and then immediately reject this construction for the purpose of obtaining an additional advantage by saying that the proceeds of the bonds were not the capital, but that the stock subscriptions and mortgages securing the same alone constituted the capital. That the capital of the bank consisted of the money derived from the sale of the state bonds, and not from subscriptions and stock
406] mortgages by which they were *secured, was unquestionably the contemporaneous and continued construction of the statute, results from the fact that the record affirmatively shows that for many years after the charter was adopted the property acquired by the bank under foreclosure of its mortgages was taxed like property of other citizens, and the tax was voluntarily paid. Indeed, it was stated in the discussion at bar, and not denied, that the supposed right of the bank to exemption on property acquired by it under foreclosure of mortgage was for the first time asserted in this suit, and that for the long series of years which had elapsed since the organization of the bank that character of property was regularly taxed and the tax paid.

The claim that because the charter provided that the subscribers should have a right to borrow from the bank on their stock a certain amount of the capital afforded by the sale of the bonds, therefore the stock mortgages constitute an investment of the capital, is likewise without merit. Whatever may have been the obligations of the stockholder to reimburse the money so loaned, and conceding that these obligations were secured on the property mortgaged for the stock subscription, primarily the property upon which the stock mortgage rested was and continued to be, until it was converted into cash and applied to the *pro tanto* extinction of the loan which had furnished the capital, a security for the capital and not the capital itself. The rights of the holders of the bonds and of the state which had furnished the capital necessarily exact this view of the relations between the parties.

Fourth. That the nonliability of the bank to taxation embraced also immunity from the payment of a license tax to either the state of Louisiana or the city of New Orleans. We are at a loss to understand by what process of reasoning the decree was made to cover the question of the nonliability of the bank for license. It was not presented by the pleadings, and was entirely *dehors* the issues in the case.

As we conclude that the decree below was in part erroneous we must reverse it. *The decree below is therefore reversed,* and the case remanded with the following directions: First, to enter a decree in favor of the Citizens' *Bank,[407 recognizing and enforcing its nonliability to taxation, state, parochial, and municipal, on its capital stock, its banking house and furniture acquired and used for the purposes of its banking business, and on a tax on its shareholders *eo nomine*, accompanied with a legal obligation on the bank to pay the tax. Second, rejecting the claim of the bank to the nonliability of its shareholders for taxation, without prejudice to the rights of the shareholders to resist an assessment for taxation against the shares owned by them unaccompanied with an obligation on the part of the bank to pay, in case such tax should be levied by the laws of Louisiana. Third, rejecting the claim of the bank to nonliability to taxation on the property acquired by it under foreclosure of mortgage—the whole without prejudice to the right of the state and municipal authorities to claim a license tax, should such be imposed by law on the bank, and without prejudice to the right of the bank to assert any legal defenses which it may have to the payment of such license tax, and it is so ordered.

Mr. Chief Justice **Fuller**, Mr. Justice **Brown**, and Mr. Justice **Peckham** dissented on the ground that the judgments relied on by the appellee are not *res judicata*, although in all other respects they concurred.

STATE OF LOUISIANA, *ex rel.* CITIZENS' BANK OF LOUISIANA, *Plff. in Err.*,

v.

BOARD OF ASSESSORS FOR PARISH OF ORLEANS, City of New Orleans *et al.*

(See S. C. Reporters' ed. 407, 408.)

Exemption of bank from taxation.

Property bought in by a bank under foreclosure of its stock and stock-loan mortgages is not capital of the bank, or within an exemption from taxation of its capital, but is taxable. *New Orleans* v. *Citizens' Bank*, 167 U. S. 371 [*ante*, 202], followed.

[No. 483.]

Argued January 15, 18, 1897. Decided May 24, 1897.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment as to the taxability of certain property of the Citizens' Bank of Louisiana. *Affirmed.*

See same case below, 48 La. Ann. 35.

The facts are stated in the opinion.

Messrs. **William A. Maury,** *Henry Denis*, and *Branch K. Miller* for plaintiff in error.

Messrs. **M. J. Cunningham,** Attorney General of Louisiana, *F. C. Zacharie*, and *Alexander Porter Morse* for Board of Assessors and Tax Collectors of the Parish of Orleans.

Mr. **Samuel L. Gilmore** for the city of New Orleans.

Mr. Justice **White** delivered the opinion of the court:

The reasons given for our decree in the case of *New Orleans* v. *Citizens' Bank*, just decided, 167 U. S. 371 [*ante*, 202], are decisive of this cause, which comes on error to the supreme court of the state of Louisiana. The controversy presented to that court was whether property bought in by the Citizens' Bank under foreclosure of its stock and stock-loan mortgages became a part of its capital, and as such was not liable to taxation. The supreme court of Louisiana held, conceding, *arguendo*, the nontaxability of the capital, that the real estate so purchased was taxable. *State, Citizens' Bank*, v. *Board of Assessors*, 48 La. Ann. 35.

The theory on which the writ of error was prosecuted is that this decision of the supreme court of the state of Louisiana constitutes an impairment of the obligations of the contract arising from the charter of the bank.

As in the case just decided, we have held that the property bought in by the bank under foreclosure of its stock mortgages was not the capital of the bank, and therefore was not covered by the estoppel of the thing adjudged, the conclusions there expressed are in all respects applicable and decisive of the controversy here presented, and *the judgment of the Supreme Court of Louisiana is therefore affirmed.*

CHARLES E. HOVEY, as Survivor of William P. Dole, *Plff. in Err.*,

v.

GEORGE ELLIOTT and George L. Elliott, as Executors, etc., of John Elliott, Deceased.

(See S. C. Reporters' ed. 409–447.)

Due process of law—right to defend a suit—court cannot strike out answer and enter decree pro confesso as a punishment for contempt.

1. Due process of law signifies a right to be heard in one's defense.
2. The power of the court to deny a favor to a person in contempt does not include the power to refuse to a person in contempt the right to defend in the principal case on the merits.
3. A decree *pro confesso* entered after striking defendant's answer from the files as a punishment for his contempt in refusing to obey an order of the court is void for want of due process of law.

[No. 255.]

Argued March 30, 31, 1897. Decided May 24, 1897.

IN ERROR to the Court of Appeals of the State of New York to review a judgment of that court affirming a judgment of the General Term of the New York Superior Court which affirmed the judgment entered upon the report by the referee dismissing the complaint on the merits in an action brought by Charles E. Hovey against John Elliott to establish a lien upon and right to certain bonds, and which action was revived after the death of John Elliott against George Elliott *et al.*, his executors. *Affirmed.*

See same case below, 145 N. Y. 126.

The facts are stated in the opinion.

Messrs. **Everett P. Wheeler, A. S. Worthington,** and **H. B. Titus,** for plaintiff in error:

The cases in which it has been held that a decree can be assailed collaterally for want of jurisdiction are many and complicated. They may be conveniently divided into four classes:

1. Where the court has no jurisdiction of the subject-matter of the case, as, for example, the state courts of an admiralty proceeding.

Bird v. *The Josephine*, 39 N. Y. 19.

Or an action to enforce a patent. *Dudley* v. *Mahew*, 3 N. Y. 9.

2. Where no notice or hearing is allowed the defendant.

(a) Where it never acquired jurisdiction of his person, as in divorce cases.

Scott v. *McNeal*, 154 U. S. 34 (38: 896); *Pennoyer* v. *Neff*, 95 U. S. 714 (24: 565); *Reed* v. *Chilson*, 142 N. Y. 152.

NOTE.—*That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations,*—see note to Providence Bank v. Billings, 7: 939.

As to exemption from taxation; whether a contract or not; not implied,—see note to Tucker v. Ferguson, 22: 805.

As to judgment; when conclusive; res judicata,—see note to Johnson Co. v. Wharton, 38: 429.

As to estoppel by judgment, see note to Aspden v. Nixon, 11: 1059.

NOTE.—*As to what is due process of law,* see note to Pearson v. Yewdall, 24: 436.

(b) Where a hearing was denied the defendant.

McVeigh v. *United States*, 78 U. S. 11 Wall. 259 (20: 80); *Windsor* v. *McVeigh*, 93 U. S. 274 (23: 915).

3. Where the judgment "is entirely aside from the issue raised in the record."

Reynolds v. *Stockton*, 140 U. S. 254, 266 (35: 464, 468); *Munday* v. *Vail*, 34 N. J. L. 418.

4. In a court of special and limited jurisdiction the total absence of evidence as to any fact essential to the jurisdiction.

Scott v. *McNeal*, 154 U. S. 34 (38: 896); *Hewitt* v. *Newburger*, 141 N. Y. 538.

Of this class of cases the proceedings in a court of probate in the matter of the estate of a person supposed to be dead are an illustration.

Springer v. *Shavender* (N. C.) 33 L. R. A. 772, *note*.

The decree in *Hovey* v. *McDonald*, 109 U. S. 150 (27: 888), is not assailable collaterally.

Laing v. *Rigney*, 160 U. S. 531 (40: 525); *Loyd* v. *Waller*, 74 Fed. Rep. 601; *Comstock* v *Crawford*, 70 U. S. 3 Wall. 396 (18: 34); *Simmons* v. *Saul*, 138 U. S. 439, 452 (34: 1054, 1060); *Noble* v. *Union River Logging R. Co.* 147 U. S. 165, 174 (37: 123, 127); *Thaw* v. *Falls* ("*Thaw* v. *Ritchie*"), 136 U. S. 519, 548 (34: 531, 538); *Grignon* v. *Astor*, 43 U. S. 2 How. 319 (11: 283); *Manley* v. *Mickle*, 53 N. J. Eq. 155, Aff'g 52 N. J. Eq. 712.

The rights of defendant are not ignored when a bill is taken *pro confesso*. Complainant is not entitled to any relief he chooses to ask; defendant can still be heard, and may appeal from the decree.

Thomson v. *Wooster*, 114 U. S. 104 (29: 105).

It cannot be impeached collaterally, but only upon a bill of review or (a bill) to set it aside for fraud.

Ogilvie v. *Herne*, 13 Ves. Jr. 563.

The refusal to comply with the order of the court, and the remaining out of its jurisdiction, waived any constitutional guaranty. This was expressly held in reference to contempt proceedings in *Eureka Lake & Y. Canal Co.* v. *Yuba County Super. Ct.* 116 U. S. 410 (29: 671).

So, also, with reference to the constitutional right to be confronted with the witnesses against an alleged criminal.

Reynolds v. *United States*, 98 U. S. 145 (25: 244).

A party may waive a rule of law or statute, or even a constitutional provision enacted for his benefit or protection.

Sentenis v. *Ladew*, 140 N. Y. 463, 466; *Embury* v. *Conner*, 3 N. Y. 511.

Service of the several notices upon the attorney for the defendants was regular and sufficient.

Eureka Lake & Y. Canal Co. v. *Yuba County Super. Ct.* 116 U. S. 410 (29: 671); *Walker* v. *Walker*, 82 N. Y. 260, Aff'g 20 Hun, 400; *Pitt* v. *Davison*, 37 N. Y. 235.

The decree in *Hovey* v. *McDonald*, 109 U. S. 150 (27: 888), is conclusive, even if erroneous or irregular.

Dowell v. *Applegate*, 152 U. S. 327 (38: 463); *Grignon* v. *Astor*, 43 U. S. 2 How. 319 (11: 283); *Re Chapman*, 156 U. S. 211 (39: 401); *Herron* v. *Dater*, 120 U. S. 464 (30: 748); *Wineman* v. *Gastrell*, 53 Fed. Rep. 697; *Bigelow* v. *Chatterton*, 51 Fed. Rep. 614, 620; *Hendrick* v. *Whittemore*, 105 Mass. 23; *Oceanic Steam Nav. Co.* v. *Compania Transatlantic Espanola*, 134 N. Y. 46; *Rocco* v *Hackett*, 2 Bosw. 579.

It is immaterial whether the judgment was by default or confession. It is final and no more open to collateral attack than one rendered after a trial upon the merits.

Thomson v. *Wooster*, 114 U. S. 104 (29: 105); *White* v. *Crow*, 110 U. S. 183 (28: 113); *Ogilvie* v. *Herne*, 13 Ves. Jr. 563; *Gates* v. *Preston*, 41 N. Y. 113; *Nemetty* v. *Naylor*, 100 N. Y. 562; *Kinnier* v. *Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Ferris* v. *Fisher*, 67 Hun, 135; *Austin* v. *Austin*, 43 Ill. App. 488.

A court of equity is said not to have jurisdiction when the common law is adequate to give relief. Nevertheless it is well settled that if this objection is not taken at the hearing it is waived, and cannot be taken for the first time, even on appeal, much less collaterally. In such a case the appellate court, in its discretion and for its own protection, may on appeal take the objection, but the parties cannot.

Reynes v. *Dumont*, 130 U. S. 354 (32: 934); *Brown* v. *Lake Superior Iron Co.* 134 U. S. 530 (33: 1021); *Mentz* v. *Cook*, 108 N. Y. 504, 508.

In like manner it is often said that the courts of one state have not jurisdiction of an action to recover damages for trespass to land in another state. If, however, such a suit is brought, and the objection is not taken before the judgment, the judgment is valid, and will not be reversed on appeal, much less collaterally.

Sentenis v. *Ladew*, 140 N. Y. 463.

In like manner, the jurisdiction of the circuit courts of the United States in many cases depends upon the citizenship of the parties. If this does not appear affirmatively on the record a judgment will be reversed on appeal.

Susquehanna & W. Valley R. & Coal Co. v. *Blatchford*, 78 U. S. 11 Wall. 172 (20: 179).

But this objection, for want of jurisdiction, cannot be taken collaterally.

Kent v. *Lake Superior Ship Canal R. & I. Co.* 144 U. S. 75 (36: 352) *Whyte* v. *Gibbes*, 61 U. S. 20 How. 541 (15: 1016); *Dowell* v. *Applegate*, 152 U. S. 327 (38: 463); *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.* 123 U. S. 552 (31: 202); *Kinnier* v. *Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132.

The 5th Amendment to the Constitution of the United States provides that no person shall be deprived of his "property without due process of law." This means process adapted to the character of the case. It does not mean that the practice in common-law cases shall be the constitutional right of a defendant who is sued in a court of admiralty or of equity.

Defendants had ten months' time to comply with the order of the court for the deposit of the money, and over three months to apply to have the answer reinstated. This was due process of law. Since the English court of chancery began to exercise its powers there never was a time when a defendant in such circumstances had the right to be heard upon the merits of his alleged defense.

Walker v. *Walker*, 82 N. Y. 260, Aff'g 20

Hun, 400; *Stubbs* v *Ripley*, 39 Hun, 626, 630; *Laing* v. *Rigney*, 160 U. S. 531 (40: 525); *Ex parte Wall*, 107 U. S. 265 (27: 552); *Hovey* v. *McDonald*, 3 MacArth. 184.

The supreme court of the District of Columbia had power to strike out an answer of a defendant because of his disobedience to a previous order of the court.

Hovey v. *McDonald*, 109 U. S. 150 (27: 888); *Kendall* v. *United States, Stokes*, 37 U. S. 12 Pet. 524 (9: 1181); *United States* v. *Schurz*, 102 U. S. 378, 393 (26: 167, 171); *Ex parte Watkins*, 28 U. S. 3 Pet. 193 (7: 650).

Federal statutes do not apply to the territorial courts, unless these are expressly mentioned.

Clinton v. *Englebrecht*, 80 U. S. 13 Wall. 434 (20: 659); *Thiede* v. *Utah*, 159 U. S. 510 (40: 237).

All courts having full equity powers have power to strike out an answer for disobedience to an order of the court.

Walker v. *Walker*, 82 N. Y. 260.

A court of equity had always power to refuse to a person in contempt the right to take "aggressive proceedings."

Coyle v. *Alleyne*, 16 Beav. 548; *Lord Gort's Case*, 1 Hog. 77; *Volle* v. *O'Reilly*, 1 Hog. 199.

The decree in the District of Columbia is not a punishment for contempt.

McConihay v. *Wright*, 121 U. S. 201, 206 (30: 932, 933); *Boyle* v. *Zacharie*, 31 U. S. 6 Pet. 648, 658 (8: 532, 536).

A court has inherent power to strike out a pleading for disobedience to its order, although no mention is made of such a power in the statute relating to contempts.

Cross v. *Clark*, 87 N. Y. 272; *Brinkley* v. *Brinkley*, 47 N. Y. 40; *Gray* v. *Gray*, 84 Hun, 347; *Barker* v. *Barker*, 15 How. Pr. 568; *Farnham* v. *Farnham*, 9 How. Pr. 231; *Quigley* v. *Quigley*, 45 Hun, 23; *People* v. *Nevins*, 1 Hill, 154; *Ford* v. *Ford*, 41 How. Pr. 169, 176.

Defendants, as purchasers *pendente lite*, are bound by the decree.

Conner v. *Reeves*, 103 N. Y. 527; *Ferguson* v. *Crawford*, 70 N. Y. 253, 26 Am. Rep. 589; *Voorhis* v. *Jackson, Bank of United States*, 35 U. S. 10 Pet. 474 (9: 500); *Laing* v. *Rigney*, 160 U. S. 531 (40: 525); *Horey* v. *McDonald*, 109 U. S 150 (27: 888); *Gore* v. *Stacpoole*, 1 Dow, P. C. 18, 31; *Stoddard* v. *Myers*, 8 Ohio, 203; *Gibbon* v. *Dougherty*, 10 Ohio St. 365; *Mellen* v. *Moline Malleable Iron Works*, 131 U. S. 352 (35: 178); *Stout* v. *Lye*, 103 U. S. 66 (26: 428); *Eyster* v. *Gaff*, 91 U. S. 521 (23: 403); *Bellamy* v. *Sabine*, 1 De G. & J. 566, 578; *Leitch* v. *Wells*, 48 N. Y. 601; *Turner* v. *Houpt*, 53 N. J. Eq. 526, 553.

Mr. **John Selden**, for defendants in error:

The power of the courts of the United States to punish contempts of their authority is limited by statute to fine or imprisonment.

Ex parte Smith, 94 U. S. 456 (24: 165); *Börs* v. *Preston*, 111 U. S. 255 (28: 420); *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 383 (28: 462); *Manchester* v. *Massachusetts*, 139 U. S. 240 (35: 159); *United States* v. *Eaton*, 144 U. S. 687 (36: 594); *United States* v. *Hudson*, 11 U. S. 7 Cranch, 34 (3: 260); *Ex parte Crane*, 30 U. S. 5 Pet. 210 (8: 100); *Tennessee* v. *Davis*, 100 U. S. 275 (25: 654); *Ex parte Terry*, 128 U. S. 303 (32: 408); *Eilenbecker* v. *Plymouth County Dist. Ct.* 134 U. S. 36 (33: 803); *Re Debs*, 158 U. S. 595, 596 (39: 1106, 1107).

Hence, the circuit court for the District of Columbia was limited, under § 17 of the judiciary act of 1789, in the punishment of contempt, to fine or imprisonment.

Ex parte Norvell, 9 Mackey, 348, 353; *Embry* v. *Palmer*, 107 U. S. 3, 10 (27: 346, 349).

If the supreme court of the District of Columbia be not a court of the United States, § 725 of the Revised Statutes of the United States is, nevertheless, operative within that District.

United States v. *Guiteau*, 1 Mackey, 530, 47 Am. Rep. 247; *Re Spencer*, MacArth. & M. 447; *Ex parte Norvell*, 9 Mackey, 354; *United States* v *Dunn*, 3 Mackey, 153; *Page* v. *Burnstine*, 102 U. S. 664 (26: 268); *McAllister* v. *United States*, 141 U. S. 174, 184 (35: 693, 696); *Ex parte Robinson*, 86 U. S. 19 Wall. 512 (22: 208); *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 489 (38: 1061), 4 Inters. Com. Rep. 545.

The interlocutory orders and decrees of the circuit court for this District were enforced, when disobeyed, only by fine or imprisonment.

Monroe v. *Harkness*, 1 Cranch, C. C. 157; *Boss* v. *Luke*, 1 Cranch, C. C. 338, note; *Monroe* v. *Bradley*, 1 Cranch, C. C. 158; *United States* v. *Emerson*, 1 Cranch, C. C. 158; *United States* v. *Williams*, 4 Cranch, C. C. 386; *Thornton* v. *Davis*, 4 Cranch, C. C. 500; *Richard* v. *Van Meter*, 3 Cranch, C. C. 214.

The inhibitions imposed by national authority—the privileges and immunities which it secures—cannot be defeated or impaired by means of mere forms and ceremonies.

Brown v. *Maryland*, 25 U. S. 12 Wheat. 444 (6: 687); *Cummings* v. *Missouri*, 71 U. S. 4 Wall. 319, 329 (18: 362, 365); *Kring* v. *Missouri*, 107 U. S. 233 (27: 510).

In the courts of the United States an order striking out an answer "is not a mere proceedure in the cause." It is the ending of the cause, leaving the action undefended and with a right to immediate judgment.

Fuller v. *Claflin*, 93 U. S. 16 (23: 786).

It is a denial to the defendant of the right to be heard in resistance of the claim made against him.

Windsor v. *McVeigh*, 93 U. S. 277, 278 (23: 916).

The proceedings against McDonald and White are unlawful when viewed as civil proceedings.

Osborn v. *Bank of United States*, 22 U. S. 9 Wheat. 738 (6: 204); *Ex parte Parker*, 131 U. S. 221, 225 (33: 123, 124).

If the decree against McDonald and White was obtained through proceedings which violated this inhibition of the Constitution, the decree must be admitted to be a nullity.

Ex parte Nielsen, 131 U. S. 182–184 (33: 120, 121); *York* v. *Texas*, 137 U. S. 20, 21 (34: 604, 605).

Due process of law involves and implies the right to be heard.

Ex parte Wall, 107 U. S. 289 (27: 562); *Hurtado* v. *California*, 110 U. S. 535 (28: 238); *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 708 (28: 572); *Harris* v. *Hardeman*, 55 U. S. 14 How. 341 (14: 447); *Lasere* v. *Rochereau*, 84 U. S. 17 Wall. 438 (21: 695); *Taylor* v. *Porter*, 4 Hill, 140, 40 Am. Dec. 274.

Due process of law imports, under Federal decision, compliance with established methods of procedure.

Pennoyer v. *Neff*, 95 U. S. 733 (24: 572); *Scott* v. *McNeal*, 154 U. S. 34,46 (38: 896, 897); *Crain* v. *United States*,162 U. S.625 (40: 1097); *Walker* v. *Sauvinet*, 92 U. S. 93 (23: 679).

In the states of the Union, in general, pecuniary indemnities, fines, and imprisonments are supposed to exhaust the direct remedies and penalties for contempts of judicial orders or decrees, whether such contempts be prosecuted as civil remedies or punished as criminal offenses.

Eads v. *Brazelton*, 22 Ark. 499, 516, 79 Am. Dec. 88; *Re Fil Ki*, 80 Cal. 201, 204; *Green* v. *Hill*, 3 Del. Ch. 92; *State* v. *Johnson*, 13 Fla. 33, 52; *Tolman* v. *Jones*, 114 Ill. 147, 153; *Baily* v. *Baily*, 69 Iowa, 77–79; *State* v. *Dent*, 29 Kan. 416, 418; *Russell* v. *Russell*, 69 Me. 339; *Haines* v. *Haines*, 35 Mich. 146; *Scott* v. *Chambers*, 62 Mich. 532; *Potts* v. *Potts*, 68 Mich. 492; *Langdon* v. *Wayne County Circuit Ct.* 76 Mich. 372, 373; *Re Fanning*, 40 Minn. 4; *Phillips* v. *Welch*,11 Nev. 187; *Freese* v. *Swayze*, 26 N. J. Eq. 439; *Ex parte Rhodes*, 65 N. C. 519; *Ex parte Walker*, 82 N. C. 95; *Baker* v. *Cordon*, 86 N. C. 116, 41 Am. Rep. 448; *Re Patterson*, 99 N. C. 407, 417; *Lowe* v. *State*, 9 Ohio St. 339; *Schultz* v. *State*, 32 Ohio St. 276,281,282; *Diehler* v. *Friester*,37 Ohio St. 473; *Newhouse* v. *Newhouse*, 14 Or. 292; *Tome's Appeal*, 50 Pa. 285; *Com., Lowry*, v. *Reed*, 59 Pa. 429; *Com., Keely*, v. *Perkins*, 124 Pa. 36, 2 L. R. A. 223; *Hazard* v. *Durant*, 11 R. I. 195, 12 R. I. 99; *Earle* v. *Stokes*, 5 S. C. N. S. 336, 340; *Golson* v. *Holman*, 28 S. C. 53, 57, 58; *Robins* v. *Frazier*, 5 Heisk. 100; *Blair* v. *Nelson*, 8 Baxt. 1; *Harwell* v. *State*, 10 Lea, 547; *Edrington* v. *Pridgham*, 65 Tex. 612, 617; *Stimpson* v. *Putnam*, 41 Vt. 238; *Baltimore & O. R. Co.* v. *Wheeling*, 13 Gratt. 40, 57; *Wells* v. *Com.* 21Gratt. 500,504,505; *State, Mason*, v. *Harper's Ferry Bridge Co.* 16 W. Va. 364; *Ruhl* v. *Ruhl*, 24 W. Va. 283; *Alderson* v. *Commissioners*, 32 W. Va. 640, 648; *State* v. *McClaugherty*, 33 W. Va. 250, 256; *Ex parte Day*, 34 Wis. 638; *Haight* v. *Lucia*, 36 Wis. 355; *Re Murphy*, 39 Wis. 286; *Re Pierce*, 44 Wis. 411; *Cleveland* v. *Burnham*, 60 Wis. 16, 17; *Wright* v. *Wright*, 74 Wis. 439.

The rule that a party in contempt cannot move till he has cleared his contempt, is, in practice, confined to cases where such party comes forward voluntarily and asks for an indulgence; and therefore a defendant cannot object to a cause being heard because the plaintiff is in contempt.

1 Dan. Ch. Pr. 5th Am. ed. 505.

It cannot be denied, however, that since the decisions made by the court of chancery in New York, answers of defendants have there been removed from the files for contempt, and the cases ordered to proceed as though no answers had been interposed.

Farnham v. *Farnham*, 9 How. Pr. 231; *Barker* v. *Barker*, 15 How. Pr. 568; *Brisbane*, v. *Brisbane*, 67 How. Pr. 184; *Brinkley* v. *Brinkley*, 47 N. Y. 42–49; *Walker* v. *Walker*, 20 Hun, 450. 8 Abb. N. C. 443; *Walker* v. *Walker*, 82 N. Y. 261, 263, 264.

Mr. Justice **White** delivered the opinion of the court:

The facts out of which this controversy grows are fully stated in *Hovey* v. *McDonald*, 109 U. S. 150 [27: 888], but we briefly reiterate those which are material to an understanding of the issues now presented.

A. R. McDonald, a British subject, obtained an award from the mixed commission appointed under the treaty of 1871 for the settlement of the "Alabama claims." 17 Stat. at L. 863. Before the payment of the award two suits in equity were commenced in the supreme court of the District of Columbia *against [**410** McDonald and one William White, to whom it was asserted McDonald had made a fraudulent assignment of his claim. One of the suits was by Thomas R. Phelps, who alleged that he was the owner of the claim as the assignee in bankruptcy of McDonald; the other was brought by Hovey and Dole, who claimed to be entitled to a one fourth interest in the award in consequence of an alleged contract which they asserted they had made with McDonald entitling them to an interest, to that extent, for professional services rendered or to be rendered in the prosecution of the claim. Injunctions were issued against the collection by McDonald and White of the fund. In the Phelps suit a consent decree was entered, which was also assented to by the parties in the Hovey and Dole cause, releasing one half of the award, and authorizing G. W. Riggs, who was appointed receiver, to collect the other half and retain it to abide the result of both suits. The receiver, moreover, was directed to invest the money by him collected either in registered bonds of the United States or of the District of Columbia guaranteed by the United States.

The bills and amended bills were demurred to in each suit, and the demurrer in both cases being sustained, the bills were dismissed. The decree of dismissal in the Hovey and Dole case, entered on June 24, 1875, simply stated that the demurrer was sustained and the bill dismissed with costs. On the same day an appeal, without supersedeas, to the general term, was noted on the minutes of the court. This decree was a few days thereafter, on the 28th of June, amended by ordering the receiver to pay over the funds in his hands and providing for his discharge. This decree was presented to the receiver, and in accordance with personal and verbal instructions given him by a judge of the court by which the decree of dismissal was rendered, the receiver delivered the bonds in his custody to McDonald. On the same day the firm of Riggs & Company, supposing that they had a perfect right so to do, purchased the bonds from McDonald at their full market value, and caused them to be transferred into their name. The decree of dismissal in the Phelps case, which was also appealed from, was affirmed by the general term of the *supreme court of the District, but [**411** that in the case of Hovey and Dole was reversed. The latter case was put at issue by filing an answer, averring fraud and wrongdoing on the part of Hovey and Dole, the answer alleging facts which, if found to be true, would have

defeated a recovery by the complainants. After replication, testimony was taken at various times during the years 1875 and 1876.

In June, 1877, the complainants obtained an order from the supreme court of the District of Columbia at general term, requiring the defendants McDonald and White to "pay over to the registry of the court" the sum of $49,297.50, which had been paid them by the receiver. This order was disobeyed, and thereupon the complainants, in September, 1877, moved the defendants McDonald and White to show cause "why they and each of them should not be punished for disobedience of the the order as for a contempt." On December 8, 1877, the supreme court of the District of Columbia made a decree at general term that "the rule upon the defendants to show cause why they should not be decreed to be in, and punished as for a contempt of court, etc., be made absolute, and that the said McDonald and White be taken and deemed to be in contempt of the aforesaid order," etc. Such decree further provided that "unless McDonald and White, within six days from the entry of this order, and the service of a copy thereof upon their solicitors, shall in all respects comply with the said order of June 19, 1877, and pay unto the said registry of this court the sum of $49,297.50, the answer filed by them in the cause be stricken out, and that this cause proceed as if no answer therein had been interposed; and that, until the said defendants shall comply with the said order of June 19, 1877, all proceedings on the part of said defendants in this cause be and the same are hereby perpetually stayed."

On December 29, 1877, the supreme court of the District of Columbia at general term, on motion of the complainants, and proof of noncompliance on the part of the defendants McDonald and White with the requirements of the decree of December 8, 1877, "ordered, adjudged, and decreed that the answer filed in this cause by the defendants, McDonald and **412**]*White be stricken out and removed from the files of the court, and that this cause do proceed as if no answer herein had been interposed."

On February 12, 1878, the supreme court of the District of Columbia at general term made decree as follows:

"The answer of defendants having been removed from the files for their contempt in refusing to obey the order of court and deposit in the registry the sum of $49,297.50, it is now ordered, adjudged, and decreed that the bill be taken *pro confesso* against them."

On April 17, 1878, that order was made absolute by another order or decree, which, after reciting material allegations in the complainants' bill as "standing without denial on the part of the defendants," ordered and adjudged "that the complainants have a lien upon the claim of Augustine R. McDonald against the United States . . . of $197,190, and upon any draft, money, evidence of indebtedness, or proceeds thereof."

Thereafter proceedings were taken in the court by which the judgment had been awarded, to compel Riggs as receiver to account for the money which had come into his hands and which he had paid over to McDonald under the circumstances already stated. This suit culminated in a judgment in favor of Riggs, affirmed by this court in *Hovey* v. *McDonald*, 109 U. S. 150 [27: 888].

The suit now before us was subsequently commenced in the state of New York against the surviving partners of Riggs & Company, but service was had only on one of the partners, John Elliott, and he having died, his executors were substituted as parties defendant. The object of the suit was to compel the defendants to account for the bonds or their value, upon the theory that Riggs & Company had acquired them with actual notice of the pending litigation concerning the bonds, and were bound by the result of the judgment rendered as above stated in the suit of *Hovey* v. *McDonald*. The court of appeals of New York held that the judgment was not binding upon Riggs & Company or the surviving members thereof, because as it was rendered in a contempt proceeding after striking out the answer and refusing to consider the testimony filed in the cause, the judgment was beyond *the jurisdiction of the court, as the [**413** power of courts of the District of Columbia to punish for contempt was restricted by the provisions of U. S. Rev. Stat. § 725. 145 N. Y. 126. The New York court, moreover, held that, even assuming that the supreme court of the District had jurisdiction, and that the doctrine of the liability of purchasers *pendente lite* applied to a purchase made under the circumstances shown, the firm of Riggs & Company were not such purchasers with reference to the judgment in question, as the *lis* in which the judgment was rendered was not the one pending at the time of the sale to the firm. From this judgment error was prosecuted to this court upon the theory that the decision of the court of appeals of the state of New York denied proper faith and credit to the judgment rendered by the supreme court of the District of Columbia.

Whether, as held by the court below, the courts of the District of Columbia are confined in all characters of contempt only to an infliction of the penalties authorized in U. S. Rev. Stat. § 725, and therefore have not power in any other form or manner to punish for a contempt, is a question which we do not deem it necessary to decide, and as to which, therefore, we express no opinion whatever. In the view we take of the case, even conceding that the statute does not limit their authority, and hence that the courts of the District of Columbia, notwithstanding the statute, are vested with those general powers to punish for contempt which have been usually exercised by courts of equity without express statutory grant, a more fundamental question yet remains to be determined, that is, whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and con-

science, to render imperative a negative answer. **414**] The fundamental *conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

In *McVeigh* v. *United States*, 78 U. S. 11 Wall. 259 [20: 80], the court, through Mr. Justice Swayne, said (p. 267 [81]):

"In our judgment, the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. . . . The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

And quoting with approval this language, in *Windsor* v. *McVeigh*, 93 U. S. 277 [23: 916], the court, speaking through Mr. Justice Field, again said (pp. 277, 278 [915, 916]):

"The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has **415**]no jurisdiction *in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim of the charges made; it is a summons to him to appear and speak, if he has anything to say why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial sentence."

This language but expresses the most elementary conception of the judicial function. At common law no man was condemned without being afforded opportunity to be heard. Thus, Coke (2 Inst. 46), in commenting on the 29th chapter of Magna Charta, says: "No man shall be disseised, etc., unless it be by the lawful judgment; that is, verdict of his equals (that is, of men of his own condition), or by the law of the land (that is, to speak it once for all), by the due course and process of law."

Blackstone in Book 4 of his Commentaries, at p. 282, after referring to the subject of summary convictions, says:

"The process of these summary convictions, it must be owned, is extremely speedy. Though the courts of common law have thrown in one check upon them by making it necessary to summon the party accused before he is condemned. This is now held to be an indispensable requisite, though the justices long struggled the point, forgetting that rule of natural reason expressed by Seneca:

'*Qui statuit aliquid, parte inaudita altera,*
Æquum licet statuerit, haud æquus fuit:'

—a *rule to which all municipal laws that [**416** are founded on the principles of justice have strictly conformed; the Roman law requiring a citation at the least, and our common law never suffering any fact (either civil or criminal) to be tried until it has previously compelled an appearance by the party concerned."

In *Capel* v. *Child* (1832), 2 Cromp. & J. 558, the validity of a proceeding by a bishop under an act of Parliament against a church vicar was in question. A requisition upon the vicar to do a certain act was held to be in the nature of a judgment and void, as the party had no opportunity of being heard. Lord Lyndhurst, C. B., at p. 574, said:

"A party has a right to be heard for the purpose of explaining his conduct; he has a right to call witnesses for the purpose of removing the impression made on the mind of the bishop; he has a right to be heard in his own defense. On consideration, then, it appears to me that, if the requisition of the bishop is to be considered a judgment, it is against every principle of justice that that judgment should be pronounced, not only without giving the party an opportunity of adducing evidence, but without giving him notice of the intention of the judge to proceed to pronounce the judgment."

In *Bonaker* v. *Evans*, 16 Q. B. 162, the main question for consideration was whether a sequestration ordered by a bishop was a proceeding simply in the nature of a distress to compel residence, or altogether, or even in part *in pœnam* for previous nonresidence. The court said (p. 171):

"If it be the latter, then the bishop ought to have given the incumbent an opportunity of being heard before it was issued; for no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offense by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless in

deed the legislature has expressly or impliedly given an authority to act without that necessary preliminary. This is laid down in *Bagg's Case*, Coke Rep. pt. 11, 93*b*, 99*a*; *Rex* v. *University of Cambridge* (*Dr. Bentley's Case*), 1 Str nge, 557; *Rex* v. *Benn*, 6 T. R. 198; *Harper* v. *Carr*, **417**] 7 T. R. 270; *and *Rex* v. *Gaskin*, 8 T. R. 209; and many other cases, concluding with that of *Capel* v. *Child*, 2 Cromp. & J. 558, in which Bayley, B., says he knows of no case in which you are to have a judicial proceeding by which a man is to be deprived of any part of his property without his having an opportunity of being heard. That case was a very strong one, and shows how firmly the court adheres to that great principle of justice, that, in every judicial proceeding, '*qui aliquid statuerit parte inauditâ alterâ Æquum licet statuerit, non æquus fuerit.*'"

Story, in his treatise on the Constitution (vol. 2, § 1789), speaking of the clause in the 5th Amendment, where it is declared that no person "shall be deprived of life, liberty, or property without due process of law," says:

"The other part of the clause is but an enlargement of the language of Magna Charta, '*Nec super eum ibimus, nec super eum mittimus, nisi per legale judicium parium suorum, vel per legem terrae*' (neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land). Lord Coke says that these latter words, *per legem terrae* (by the law of the land), mean by due process of law, that is, without due presentment or indictment, and being brought in to answer thereto by due process of the common law. So that this clause in effect affirms the right of trial according to the process and proceedings of the common law."

Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power **418**] to *disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent.

In *Galpin* v. *Page*, 85 U. S. 18 Wall. 350 [21: 959], the court said (p. 368 [963]):

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered."

Again, in *Ex parte Wall*, 107 U. S. 289 [27: 562], the court quoted with approval the observations as to "due process of law" made by Judge Cooley, in his Constitutional Limitations, at page 353, where he says:

"Perhaps no definition is more often quoted than that given by Mr. Webster in the *Dartmouth College Case*, 17 U. S. 4 Wheat. 518 [4: 629]: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgments only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.'"

And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying: "The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry,' and 'render judgment only after trial.'"

The necessary effect of the judgment of the supreme court of the District of Columbia was to decree that a portion of the award made in favor of the defendant, in other words his property, belonged to the complainants in the cause. The decree therefore awarded the property of the defendant to the *complain- **[419** ants upon the hypothesis of fact that by contract the defendant had transferred the right in or to this property to the complainant. If the court had power to do this, by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law? If the power to violate the fundamental constitutional safeguards securing property exists, and if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to proceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard on the theory that he is in contempt, and sentence him to the full penalty of the law? No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other, the one as pointedly as the other would convert the judicial department of the government into an engine of oppression, and would make it destroy great constitutional safeguards.

But the argument is that however plain may be the want of power in all other branches of the government to condemn a citizen without a hearing, both upon the elementary principles of justice and under the express language of the Constitution, these principles do not limit the power of courts to punish for contempt or as for contempt, because it is asserted that from the earliest times the chancery court in England has possessed

and exercised the power to refuse the right to be heard to one in contempt, and that a power so well established in England before the adoption of the Constitution, and which has been so often exercised since, is not controlled by the principles of reason and justice just stated. But this contention is without solid foundation to rest upon, and is based upon a too strict and literal rendering of general language to be found in isolated passages contained in the works of writers on ancient law and practice, and on loose statements as to the practice of the court of chancery to be found in a few decisions of English courts. Certain it **420**] is that *in all the reported decisions of the chancery courts in England no single case can be found where a court of chancery ever ordered an answer to be stricken from the files and denied to a party defendant all right of hearing because of a supposed contempt. And in the American adjudications, while there are two cases, one in New York and the other in Arkansas, asserting the existence of such power, an analysis of these cases and the authorities upon which they rely will conclusively show the erroneous character of the conclusions reached.

The foundation for the assertion that the power existed in and was exercised by the English court of chancery to strike from the files the answer of a defendant in contempt for disobedience to an order made in the cause, and to decree *pro confesso* against him, primarily rests upon what is supposed to be the true construction of one of the ordinances of Lord Bacon (promulgated in 1618), which reads as follows:

"78. They that are in rebellion, especially as far as proclamation of rebellion, are not to be here (heard?) neither in that suit, nor any other, except the court of special grace suspend the contempt."

What construction was given to this ordinance or the extent to which it was enforced by the court of chancery in the years immediately succeeding its adoption cannot be positively affirmed, as we have not found nor have we been referred to any decisions made in the seventeenth or eighteenth centuries purporting to be based upon that ordinance.

On the mere text of the ordinance, it is manifest that it does not necessarily embrace the power to enter a decree *pro confesso*, after answer filed, upon the theory that the defendant was guilty of contempt. On the contrary, the proclamation of rebellion, referred to in the ordinance, was one of the then recognized processes for the purpose of compelling an answer in the suit. Indeed, the powers of the chancery courts to punish for contempt were normally brought into play, beginning with an attachment of the person and culminating in the sequestration of the property of the one in contempt in order to compel an appearance and answer. Gilbert, Forum Romanum, p. 33; Bl. Com. bk. 3, p. 443. Nowhere in these works **421**] is *there an intimation that, as a penalty for contempt, a refractory defendant, not in default for answer, might be punished by being disallowed the right to defend against the bill filed in the cause. So far from such being the case, as already stated, a party who failed to appear or answer was treated as in contempt, and the various processes for contempt were resorted to in order to compel his appearance and answer; this being done in order that the conscience of the court might be satisfied when it entered a decree in the cause.

Thus, in the Forum Romanum, Lord Chief Baron Gilbert says (p. 35):

"The canonists do take the proclamation or *primum decretum* to be *quasi litis contestatio;* and that, therefore, the plaintiff may proceed to his proofs, and then the *secundum decretum* for the thing in demand may be pronounced. We have no *quasi litis contestatio* with us, because, unless the defendant comes in and contests, there is no jurisdiction to a court of conscience; for unless the party confesses the fraud or corruption of which the court inquires, or it be proved upon him, there is no sufficient ground for a decree, which cannot be without *contestatio litis.* But there are two cases in which an implied confession is sufficient ground for a decree. The first is, when a man appears by his clerk in court, and afterwards lies in prison, and is brought up three times to court by ha. cor., and has the bill read to him, and he refuses to answer. Such public refusal in court does amount to the confession of the whole bill. The second case is, when a person appears and departs without answering, and the whole process of the court has been awarded against him after his appearance and departure, to the sequestration. There also the bill is taken *pro confesso*, because it is presumed to be true when he has appeared, and departs in despite of the court, and withstands all its process without answering; and this seems to have been the ancient practice of the civil law, for Justinian, by the Novel, brought in the *secundum decretum* in the absence of the party; and the canonists, by a fiction of law, made the *proclamation [**422** *quasi litis contestatio;* but by the ancient civil law no decree could be had against an absent person against whom process had been issued, but could never be brought in to appear. And it is so with us, that if the whole process of the court be spent, and the defendant never appears, you can never have a decree, for you can never make any proofs against an absent person who is never brought into contest, and there is no foundation for a decree without confession or proofs. However, the plaintiff has the benefit of the sequestration, which answers to the *primum decretum.*"

While by act 5 Geo. II., chap. 25, for want of appearance, when a defendant avoided service of process, the court was authorized, after the giving of prescribed public notice, to order the plaintiff's bill to be taken *pro confesso* (*Davis* v. *Davis*, 2 Atk. 23), the text quoted is convincing evidence that a decree was only permissible in the "court of conscience" under a state of facts which justified the implication of an admission by the defendant that the allegations of the bill were true, and that the practice was not pursued as a punishment for any other contempt than of contumaciously refusing to inform the chancellor of the defense, if any, possessed by the defendant in a cause.

In stating the practice with reference to injunction suits, several of the ancient writers use general language as to the practice pursued when a party disobeyed an injunction, which, perhaps, affords room for speculation as to the

extent to which the court *might* have proceeded in refusing to hear a party who had violated its order and had not purged his contempt. Thus, in the Practical Register in Chancery, p. 217, it is said:

"Where an injunction is disobeyed, on oath thereof, process of contempt is to issue against the contemnor, as in other cases, till he yield obedience; nor is he to be heard in the principal case till he yield obedience."

Comyns, in his Digest (*Chancery D*, 8), thus puts it:

"And if, after service (of an injunction), it shall be disobeyed, all process for contempt issues, till the offender be taken and committed upon an *affidavit* of his disobedience. *Vide* Prac. Reg. in Ch. 217.

423] *"And when he is taken he shall be committed until he obeys or gives security for his obedience, and shall not be heard in the principal case until he obeys." *Vide* Prac. Reg. in Ch. 217.

Whether in early chancery times the practice was to stay all proceedings on the part of a disobedient party defendant until his contempt of an injunction was purged, can only be surmised. In 1788 it seems that a defendant, though in contempt for violating an injunction, might file his answer in the cause. *Robinson* v. *Byron*, 2 Dick. Ch. 703. It is not at all unlikely that the restriction was upon the party coming before the court by way of motion seeking affirmative action by the court in his favor. It is certain that neither in the Register nor in Comyns is there a suggestion that a party, while in contempt for disobedience of an injunction, might, *for such cause*, be defaulted upon the merits.

The Forum Romanum makes no reference to the rule or method of practice stated in the Register, otherwise than as may be inferred from the statements in paragraph 11, p. 194, where the author mentions that by the proceeding then in vogue for punishing for breach of an injunction "a man is at once deprived of his liberty, and cannot move or petition but *in vinculis*, unless the court otherwise give leave on a petition to hear him."

The review and analysis of the English cases which we now propose to make will demonstrate that the passages to which we have just referred could not have imported the power of a court to strike an answer from the files and take a bill for confessed because of a contempt, since that analysis will conclusively establish that there is no basis for the assertion that the courts of chancery in England claimed or exercised the power, after answer filed, to decree *pro confesso* on the merits against a defendant, merely because he persisted in disobedience to an order of the court, though the cases do show that the chancery courts commonly refused to hear a defendant in contempt when asking at their hands a favor. The difference between the want of power, on the one hand, to refuse to one in contempt the right to defend in the principal case on the merits, and the existence of the authority, on the other, to **424**] refuse to *accord a favor to one in contempt, is clearly illustrated by the whole line of adjudicated cases.

The cases of *Phillips* v. *Bucks* (1683), 1 Vern. 228; *Roper* v. *Roper* (1688), 2 Vern. 91, and *Maynard* v. *Pomfret* (1746), 3 Atk. 468, do not discuss the ordinance of Lord Bacon, but touch upon the question of the right of a defendant in contempt to be heard. In the first case cited, the reporter, in a marginal note, alluding to a defendant who was in contempt *for failure to appear or answer*, says: "One of the defendants is in contempt and stands out to a sequestration and the cause is heard against the other defendants; yet he may come in and answer, and the cause may be heard again as to him." In *Roper* v. *Roper*, upon a decree for payment of money, after a writ of execution and an attachment returned, the court declined to give leave to defendant to be examined, unless he gave security to abide the decree. This was clearly an application addressed to the discretion of the court, and therefore a matter of favor.

In *Maynard* v. *Pomfret* a bill was brought against the defendant for a discovery. As the material part of the case depended upon the discovery, the defendant would not answer, but stood out the whole process of contempt to a sequestration, and the bill was taken *pro confesso*, and there was a decree against the defendant *ad computandum*. It was moved, on behalf of the defendant, that the sequestration may be discharged on paying the costs of the contempt. The chancellor regarded action upon the application as discretionary, and held that the sequestration should be kept on foot to stand as security for the appearance of the defendant before the master.

That in the time of Lord Clarendon the practice of the court of chancery was only to deny to a party in contempt the privilege of having favorable action taken by the court upon applications addressed to its discretion finds support, not only in the case of *Phillips* v. *Bucks*, *supra*, but also in a decision of Sir H. Grimston, master of the rolls, who, in refusing an application for relief against a sequestration of lands of the defendant following a decree, assigned, among other reasons, the *following: "2dly, the defendant not [**425** having performed the decree by the payment of money, he shall not receive any favor from the court whilst he stands in contempt." Bacon, Abr. title, *Sequestration*, *C*, the marginal reference being to a case entitled *Sands* v. *Darrel*.

Vowles v. *Young* (1803), 9 Ves. Jr. 172, was likewise an application to the favor of the court. A decree absolute had been entered after a decree *nisi*, against a defendant who was in default, and consequently in contempt. He applied for a rehearing, and in the course of an opinion granting the application upon terms, Lord Eldon said, not citing authority: "As to contempt, the general rule is, that the parties must clear their contempt before they can be heard." The language of the chancellor necessarily related to the question before it, that is, an application for a rehearing addressed to the exercise of discretion. Stating the *general* and not the *invariable* rule, implied the possible existence of exceptions to such rule.

Anonymous (1808), 15 Ves. Jr. 174, was a case where the defendant, being in default for not answering, filed an answer without making any stipulation for the payment of

costs, and also moved to dismiss the bill for want of prosecution. Upon the authority of the passage in *Vowles* v. *Young*, just quoted, counsel for the complainant objected that the defendant could not make the motion or take any steps to the prejudice of the plaintiff, until the contempt was discharged. The lord chancellor said: "The general rule, that has been referred to, is perfectly true; that a party who has not cleared his contempt, cannot be heard." The plaintiff, however, was held to have waived the right to treat the defendant as being in contempt, because he had excepted and replied to the answer without insisting upon the costs and enforcing his process of contempt. Presumably the general rule here referred to was that to which we have already adverted, *viz.*, the power of a chancellor to refuse to grant a favor to one in contempt. The facts brought the case under this rule, since the defendant, who was in contempt for not paying the costs on filing his answer, sought to invoke the aid of the court to dismiss the plaintiff's bill for failure to prosecute the suit.

426] *Heyn* v. *Heyn*, Jac. 49, decided in 1821, was a case where, after a decree *pro confesso* upon default for answer, the defendant moved that a sequestration which had been issued against his property for not putting in his answer might be discharged upon payment of costs, and that he might be allowed to attend the master upon the taking of the accounts directed by the decree. The lord chancellor observed that an answer which had been put in after an order for taking the bill *pro confesso* ought not to be noticed, and that it could not vary the decree which had been rendered. He, however, granted the application upon conditions, being of opinion that the defendant was not at liberty to go before the master without an order. The mere statement of this case demonstrates that it involved purely a question of whether the chancellor would accord to the defendant a favor or privilege.

In *Clark* v. *Dew* (1829), 1 Russ. & M. 103, the plaintiff applied for the appointment of a receiver, and it was objected by the defendants that, as the plaintiff was in contempt of court for disobeying certain orders in another cause pending between the same parties, he ought not to be heard in this. All that was said by the lord chancellor on the subject under review was as follows:

"That the practice was the same, he apprehended, in equity as at law, that a party could not move till he cleared his contempt; but that the rule must be confined to proceedings in the same cause; otherwise, the consequence would be that a party who was utterly unable to comply with an order of the court might be prevented from afterwards prosecuting any claims, however just, against the person who had succeeded in obtaining that order. Here the suit was between the same parties, but it had reference to distinct properties."

It will be seen that this conflicts with the literal language of Lord Bacon's ordinance, which was that a party should not be heard "neither in that suit, *nor any other*," etc.

Several decisions of the rolls court in Ireland bearing upon the question are contained in the 1st volume of Hogan's Reports.

Thus, in *Anon.* v. *Gort* (1823) p. 77, a receiver was *moved for on process against the [**427** defendant, who opposed the application. Counsel for plaintiff insisted that, as the defendant was in contempt, he should not be heard unless he purged his contempt, citing *Vowles* v. *Young*, *supra*. The master of the rolls said:

"The general rule is, that when a party is in contempt, he will not be allowed to oppose the relief sought by the plaintiff, by contradicting the allegations in his bill, or bringing forward any defense, or alleging new facts; neither will he be heard by affidavit, except it be made with a view of purging his contempt; but he may be heard to direct the attention of the court to any error or insufficiency in the plaintiff's own case, as made by the bill,—as, for example, if it should appear by the bill that plaintiff's charge only extends over Whiteacre, and the plaintiff, by motion, sought a receiver over Blackacre."

The application for a receiver would seem to have been one of the steps in the process of punishment for contempt for not answering. Thus, in the case of *Fitzpatrick* v. *Hawkshaw*, 1 Hog. p. 82, a motion was made for the appointment of a receiver on process against the defendant, and in the marginal note it is said: "A defendant who has appeared, but is in contempt for not answering, is entitled to notice of a motion for a receiver on process."

A further indication that the rule was not understood to operate to deny to a defendant a hearing upon matters of strict right is shown by the case of *Cooke* v. *De Montmorency*, 1 Hog. 181, where it was held that, though a party was in contempt, he might notwithstanding apply for and obtain time to answer the bill, and an order on the plaintiff to stay the entry of process in the meantime.

In the case of *Valle* v. *O'Reilly*, 1 Hog. 199, complainant moved for the appointment of a receiver on process against the defendant, on an affidavit stating that the bill was filed to raise the arrears of an annuity which was still due. The contempt would seem to have consisted in failure to answer. After observing that the estate was in the possession of a receiver in another cause, the master of the rolls said:

"As this defendant is in contempt, he cannot be heard *to dispute or deny the plaint- [**428** iff's case, as disclosed by his bill; but he may be heard to point out the irregularity or impropriety of any application made by his antagonist. I must refuse this motion and give the defendants the cost of appearing here this day."

The cases of *Howard* v. *Newman*, 1 Moll. 221, and *Odell* v. *Hart*, 1 Moll. 492, were decided by the lord chancellor in 1828. In *Howard* v. *Newman* a rule to refer the bill for impertinence was obtained by the defendant, against whom there was process *for want of an answer*. The rule was discharged, the lord chancellor saying: "A party in contempt is not to be heard until his contempt is cleared, except only to complain that he is irregularly put in contempt, and ought not to be so. He is precluded from applying for an order of any kind." Of course refusal to allow a party to move until he has answered,

and when he was in default for not answering, cannot possibly be construed as supporting the contention that when a defendant had regularly answered his answer might be stricken from the files, and the case be decided as though no answer had ever been filed.

In *Odell* v. *Hart* a motion was made on behalf of the defendant to set aside as irregular an order which awarded an attachment absolute (instead of conditional) in the first instance against him for not bringing in title deeds according to a previous order. It was objected that the defendant, being *de facto* in contempt, ought to appear *in vinculis*, citing *Vowles* v. *Young*, 9 Ves. Jr. 172.

The lord chancellor said:

"A party in contempt may move by counsel to set aside the order against him, by which he is declared to be in contempt, for irregularity in that order, without coming *in vinculis*, but for no other purpose, without submitting himself to custody."

In other words, the party in contempt, when not in custody, cannot *apply to the court for an order* except to set aside for irregularity the order adjudging him guilty of contempt.

In *Ricketts* v. *Mornington*, 7 Sim. 200, decided in 1834, we find the first adjudicated case directly referring to the seventy-eighth ordinance of Lord Bacon. On the authority of the [429] *ordinance and the case of *Vowles* v. *Young*, *supra*, defendant objected to the cause being heard, on the ground that the plaintiff was in contempt for disobedience of an order in the case. The opinion rendered by the vice chancellor is as follows:

"Suppose the defendant had moved to dismiss the bill, the plaintiff, notwithstanding he was in contempt, might have come forward and assigned reasons why his bill should not be dismissed. Lord Bacon's order, as administered in practice, is confined to cases where parties who are in contempt come forward, voluntarily, and ask for indulgences. But the rules of the court make it imperative on the plaintiff to bring his cause to a hearing at a certain time, and therefore the cause must proceed."

Barker v. *Dawson* and *Parry* v. *Parryman* were decided, respectively, in 1837 and 1838, and are reported in 1 Coop. Ch. 206, 207, note. The general rule was stated to be that a party in contempt could not be heard on other matters, but it was held that there were exceptions to it, as where an order which was alleged to be irregular was obtained subsequent to a contempt, and it was sought to set it aside for irregularity, and "where the party in contempt was merely protecting himself," in both of which cases the rule was held not to apply. The lord chancellor said that to extend the rule to the case of an order made subsequent to the contempt "would place the party in contempt too much at the mercy of his adversary."

King v. *Bryant* (1838) 3 Myl. & C. 191, was a foreclosure suit, in which the defendant, after appearance, was in contempt for want of an answer, and was imprisoned under attachment. A decree was subsequently taken *pro confesso* ordering an account, and the proceedings before the master were had *ex parte* without notice to the defendant. An application was made by the defendant praying that the order confirming the report of the master might be discharged, and that it might be referred back to the master to review his report. An objection made before the vice chancellor was renewed on appeal, *viz.*, *that the de- [430] fendant was not entitled to be heard, because in contempt. The lord chancellor, however, decided that the defendant was entitled to be heard to show that the plaintiff had been irregular in his mode of prosecuting the decree, and also said (p. 195):

"If the plaintiff ought to have served warrants on the defendant [to attend before the master], and if he ought to have served him with the order *nisi*, it would be a most unjust extension of the rule against parties in contempt to take away a man's estate without giving him any opportunity of coming in and protecting himself. The court will not hear a party in contempt coming himself into court to take any advantage of proceedings in the cause; but such a party is entitled to appear, notwithstanding, and resist any proceedings taken against him, and it would be a very easy way of evading that rule if his adversary, instead of giving him notice, were to avoid serving him, and then to say that he could not take advantage of the rule in order to impeach the previous proceedings. However there is no such practice. . . . The court punishes the defendant's default in refusing to answer, by giving to the plaintiff the benefit of a decree upon the bill as confessed; but there the advantage stops, and when the decree is once pronounced, the subsequent duty of the court and its officers is to execute that decree in the ordinary way. Accordingly, no authority is to be found in support of the proposition that, upon a decree taking the bill *pro confesso*, and directing an account, the account may be prosecuted *ex parte*. The case of *Dominicetti* v. *Latti*, 2 Dick. Ch. 588, shows that in the year 1781 the practice was considered to be directly otherwise. . . . The plaintiff here has miscarried. He has proceeded *ex parte*, when he ought to have proceeded by warrants, and the present application is to protect the defendant against an order for a foreclosure, obtained upon an irregular report, which can only be considered as a nullity."

In *Wilson* v. *Bates*, 3 Myl. & C. 197, the plaintiff, while in *contempt and in the cus- [431] tody of the sheriff for failure to pay the costs of a motion, sued out an attachment against the defendants for want of an answer, under which the defendants were arrested and thereupon entered into bail bonds. The vice chancellor having refused a motion, on behalf of the defendants, that the attachments against them might be set aside, and that the bail bonds might be ordered to be canceled, the motion was renewed before the lord chancellor, by way of appeal. Counsel for defendants contended that the proceedings of the plaintiff were irregular because a party in contempt could not take any proceedings in the cause, and cited the seventy-eighth ordinance of Lord Bacon and *Vowles* v. *Young*, 9 Ves. Jr. 172. Counsel for plaintiff characterized the proposition that a plaintiff could not take any step in a cause for the reason that an attachment had issued for nonpayment of costs, "as new, and, if established, would be a *dangerous exten-*

sion of the ordinary rule with respect to parties in contempt." The lord chancellor, after alluding to the fact that *no case upon the point had been produced*, and that the argument was mainly grounded upon the seventy-eighth ordinance of Lord Bacon, said (p. 200):

"That ordinance, although the foundation of the practice, can only be construed now by the practice which has since prevailed with reference to it. It is quite obvious that its terms, if strictly acted upon, would produce a very different state of practice from that which is recognized in modern times. If I had to decide upon that in the first instance, and were called upon to settle a rule for future guidance, I certainly never should lay down any such rule. It would seem extraordinary that a party who may not be able to pay the costs of a refused motion should be therefore absolutely stopped from asserting his rights. At the same time, if the practice be established, it would not be for me to alter it. Now, although it may be generally true that a party in contempt cannot be heard to make a motion, he is nevertheless permitted to be heard upon a motion to get rid of that contempt, a case for which, so far as I can see, Lord Bacon's ordinance makes no provision. It is also [432] well settled that if a party in *contempt is brought into court by any proceedings taken against him, he has a right to be heard in his defense, and in opposition to those proceedings; another case which is inconsistent with Lord Bacon's ordinance, if construed strictly."

The conclusion was reached that there was an absence of all authority to sustain the proposition contended for, and that the vice chancellor was right in permitting the plaintiff to proceed in the cause.

In *Bickford* v. *Skewes* (1839), 10 Sim. 193, plaintiff moved to defer the trial of a cause until the defendant had cleared himself of a contempt. The vice chancellor said (p. 196):

"The motion now before me is one of the first impression. A party who is in contempt may, at any time, clear his contempt. At the time when the lord chancellor's order was made, the defendant was not in contempt. That order is still in full force, and I cannot understand how the circumstance that the defendant had subsequently come into contempt can give to the plaintiff the right to postpone the trial of this action, which, to a certain extent, he is under an obligation to try. The defendant may, perhaps, clear his contempt before the trial, but whatever may be the circumstances of the defendant, the order of the court may remain as it is. Although the cases cited afford some countenance for this application, I cannot think that they warrant it, and therefore I shall refuse the motion without costs."

Here it appears that the defendant, though in contempt, was conceded to be entitled to participate in the trial of the cause.

In *Everett* v. *Prythergch* (1841), 12 Sim. 363, it was held that a defendant, though himself in contempt for want of answer, might except to the bill for scandal, but not for impertinence.

In *Cattell* v. *Simons*, 5 Beav. 396, it was held that it was competent for a plaintiff, though in contempt, to refer for scandal and impertinence an affidavit filed on the part of the defendant in opposition to a motion filed by the plaintiff, while he was in contempt for nonpayment of costs, asking that costs be set off between the parties. The master of the *rolls [433] said that the motion was one which the plaintiff was clearly entitled to make, being an application for relief against the process of attachment.

In *Morrison* v. *Morrison* (1844), 4 Hare, 590, it was held that a party in contempt for nonpayment of costs, and who had been served with an order *nisi* to confirm a report, might, notwithstanding his contempt, take exceptions to the report, and draw up, pass, and enter an order to set down the exceptions; and might also present and be heard upon his petition to discharge the report as irregular, and for leave to open the accounts allowed in former reports, on the ground that items therein were allowed in the absence of the petitioner and while the suit was abated. A motion to discharge the order setting down the exceptions, and that the exceptions might be taken off the files, was made upon the ground that a party in contempt cannot take any active step in the cause until he has cleared his contempt. Counsel in opposition to the motion contended that the steps taken by the defendant were purely defensive, and characterized as "most extravagant" the proposition "that a party who was unable to pay a sum for costs should be precluded from taking any step in a cause, while his adversary might proceed, and his entire rights on the subject of the suit be concluded without allowing him to be heard." The vice chancellor held (p. 594) that—

"What the petitioner is in truth doing, is seeking to protect himself against the proceedings which have been taken in the cause; and the cases of *Wilson* v. *Bates* and *King* v. *Bryant* show that, in such a case, the being in contempt will not now prevent, *if it ever would have prevented*, the party from applying to the court."

In *Oldfield* v. *Cobbett* (1845), 1 Phil. Ch. 613, it was held, among other things, that a party who is in contempt for nonpayment of costs in a suit is not thereby prevented from moving for leave to defend it *in forma pauperis*.

Chuck v. *Cremer*, 1 Coop. Ch. 205, was decided in 1846. A defendant having unsuccessfully sought to dissolve an injunction obtained *ex parte*, gave notice of motion by way of appeal. It was objected that the defendant could not be *heard, because previously to the [434] giving of notice an attachment had issued against him, when abroad, for not having put in an answer. The decision upon this objection is thus reported:

"The lord chancellor said he was of opinion that the appeal motion could not proceed. That a party was entitled to be heard if his object was to get rid of the order or other proceeding which placed him in contempt, and he was also entitled to be heard for the purpose of resisting or setting aside for irregularity any proceedings subsequent to his contempt; but he was not generally entitled to take a proceeding in the cause for his own benefit. That there were exceptions to the last rule, but they were few in number."

In *Fulvoye* v. *Kennard* (1860), 2 Giff. 110,

the plaintiff moved to discharge an order in the cause, and the defendants took the preliminary objection that the plaintiff being in contempt for the nonpayment of the costs of a motion, which had been refused, with costs, could only be heard to purge his contempt. On the intimation of the vice chancellor that he thought the objection could not be maintained, the objection was not pressed, and the motion was heard and refused.

In *Fry* v. *Ernest* (1863), 12 Week. Rep. 97, a bill was filed by mortgagees for the purpose of enforcing their security. The defendant put in his answer and also filed a bill in the cause of *Ernest* v. *Partridge* (to which Fry and several others were made defendants) for the purpose, among other things, of setting aside the mortgage security. A demurrer being allowed to this bill, Ernest afterwards filed in *Fry* v. *Ernest* a concise statement, containing in substance the same averments as those in *Ernest* v. *Partridge*, and exhibited interrogations for the examination of the plaintiff Fry. Upon a summons taken out by the plaintiff the chief clerk made an order enlarging the plaintiff's time to answer the interrogatories for one month, after payment by the defendant of the costs of the demurrer in *Ernest* v. *Partridge*. Counsel for the plaintiff contended that the concise statement must be treated merely as a cross bill, and that the defendant could not be allowed to harass the plaintiff with a second cross bill until he had paid the costs of the first. **435**]*"Wood, V. C., said that, according to the general rule, a defendant, though in contempt, was at liberty to take every step necessary for his defense. He looked upon this mode of proceeding as of a nature purely defensive, and the defendant was therefore entitled to file a concise statement and interrogatories, which were material for his defense, and the plaintiff must answer within the usual time. The order of the chief clerk would be discharged with costs; such costs, however, as the defendant was in default for his former costs, were not to be paid to him."

In *Haldane* v. *Eckford* (1869), L. R. 7 Eq. 425, it was held that although a defendant is in contempt, not for nonpayment of costs, but for non-compliance with orders of the court, he is entitled to take any step required for the purposes of his defense. The report of the case (p. 426) reads as follows:

"The vice chancellor said that although the contempts committed have been of the most flagrant kind, as these documents were required by the defendants for the purpose of defending themselves, *he had no jurisdiction to refuse the order.*"

In *Chatterton* v. *Thomas* (1866), 36 L. J. Ch. 592, a plaintiff in contempt was held to be at liberty to proceed with the cause in the ordinary way; and a special order for leave to amend was granted to him.

Other decisions illustrating the general rule that a party in contempt cannot be heard to ask a favor are digested by Chitty in his Equity Index, vol. 5, p. 4366, but it is unnecessary to particularly refer to them, as none of them are relied on in argument or change the result of the foregoing cases.

It is manifest from this review of the English cases that they lend no support whatever to the claim that the English court of chancery claimed to exercise the power to strike out an answer and render a decree *pro confesso*, as a punishment for contempt. It also clearly establishes that the seventy-eighth ordinance of Lord Bacon was never construed or enforced according to its strict import, if under that import it authorized the conclusion that a power existed in a court of chancery to condemn without a hearing.

*The conclusion which we have reached [**436** accords with that of Daniell, who in his Chancery Pleading and Practice (vol. 1, *504, *505) says:

"Besides the personal and pecuniary inconvenience to which a party subjects himself by a contempt of the ordinary process of the court, he places himself in this further predicament, *viz.*: That not being in a situation to be heard, in any application which he may be desirous of making to the court. Lord Chief Baron Gilbert lays it down that 'upon this head it is to be observed, as a general rule, that the condemnor, who is in contempt, is never to be heard, by motion or otherwise, till he has cleared his contempt and paid the costs; as, for example, if he comes to move for anything, or desires any favor of the court.' . . .

"The rule that a party in contempt cannot move till he has cleared his contempt is, in practice, confined to cases where such party comes forward voluntarily and asks for an indulgence; and, therefore a defendant cannot object to a cause being heard because the plaintiff is in contempt. So, a defendant in contempt is entitled to a production of documents."

The learned author nowhere suggests in his treatise that under any conceivable circumstance has a court of chancery in England ever allowed a decree *pro confesso* to be taken, otherwise than upon default for appearance for answer. See chap. 11, *517, "On Taking Bills *Pro Confesso*."

The decisions in this country, with two exceptions, which we have in the outset referred to, substantially maintain the view we have reached of the question under consideration. An early case holding the correct rule, *viz.*, that a party in contempt was not entitled to be heard upon an application not of strict right, but a matter of mere favor, is *Johnson* v. *Pinney*, 1 Paige, 646, decided in 1829. In that case, after an order had been entered closing the proofs, the defendant applied for a commission to take the testimony of a witness. Objection was made that the defendant was in contempt for not paying a bill of costs on a motion previously made by him to dissolve an injunction in the suit. In granting the application, upon terms, the chancellor said: "It is a general *rule that a party can- [**437** not apply to the court for a favor while he is in contempt. *Vowles* v. *Young*, 9 Ves. Jr. 173; Prac. Reg. in Ch. 138; *Green* v. *Thompson*, 1 Sim. & Stu. 121." The doctrine of this decision was adopted by the supreme court of New Hampshire in *Robinson* v. *Owen* (1865), 46 N. H. 38.

In 1846, in *Ellingwood* v. *Stevenson*, 4 Sandf Ch. 366, the bill having been taken *pro confesso* when the defendant was in default for

not answering, a motion was made to open the default and for other relief. The vice chancellor said (p. 368):

"3. The motion to open the default for not answering would be granted upon terms, but for the contempt for which the attachment is ordered. His application is made to the favor of the court, and he cannot be heard until his contempt be purged. Gilbert Forum Romanum, 102; 1 Dan. Ch. Pr. 655; *Johnson* v. *Pinney*, 1 Paige, 646."

In *Brinkley* v. *Brinkley*, 47 N. Y. 40, 49, after reviewing the authorities, it was held that a court which has control of its own proceedings can refuse the benefit of them to the party in contempt, *when asked as a favor*, and can prevent him from taking any progressive proceedings against his adversary, but it has no power to stay him in his proceedings by motion or appeal, where the object is to rid himself of the alleged contempt, or show that the order which he did not obey was erroneous. While the order reviewed provided that unless the defendant complied with a certain order his answer should be stricken out and the cause should proceed as though there was no answer, the reviewing court held that the order in this particular was conditional and not final and absolute, and was, therefore, not appealable.

However, in the case of *Walker* v. *Walker*, 82 N. Y. 260, the court of appeals of New York declared that the rule was broader than that laid down in *Brinkley* v. *Brinkley*, *supra*, and maintained also *that it had been enforced with much rigor by the English courts*, and concluded its consideration of the subject by saying "that there has long been exerted by the court of chancery in England the power to refuse to hear the defendant when he was in contempt of the court by disobeying its orders, and that [438] that power was in the courts of *chancery of this country." The expression "the power to refuse to hear the defendant" was manifestly intended to be understood as meaning that a court of equity might disregard any answer lawfully filed by the defendant and proceed to adjudicate upon the claim of the adversary party as though in contempt for want of answer. In the case before the court the answer of a defendant in a divorce suit had been stricken from the files for failure to obey an order to pay alimony and counsel fees, though a decree was not granted as a matter of course, but a reference had been directed to take proof of the facts stated in the complaint. Immediately after stating that the rule was broader than that laid down in the *Brinkley Case*, the learned judge who delivered the opinion of the court said (p. 262):

"Chief Baron Gilbert lays it down in his Forum Romanum (p. 33) that 'if the defendant appeared before the *secundum decretum*, he was liable to a mulct, for he could not be heard in the cause till he had cleared his contempt.' . . It is suggested in *Cooper's Cases* (*temp.* Cott. 209) that this is merely a statement of the practice according to the canon law. But the Chief Baron says, at another place (p. 71), that 'the answer will not be received without clearing his contempt;' and at another (p. 211): 'So it is where a man hath a bill depending in court and falls under the displeasure of the court and is ordered to stand committed. Here, when his cause is called, if the other side insist that he hath not cleared his contempt, nor actually surrendered his body to the warden of the Fleet, he must do both these things before his cause can be proceeded in.'"

The statement in the opinion as to the practice of the court of chancery in England does not, as we have shown, accord with the authorities, and it is equally clear that the citation from the work of Baron Gilbert does not justify the conclusion for which it was cited. This is abundantly shown by the citations we have made from the work of Baron Gilbert, confirmed by an analysis of the passages quoted. Thus the extract from page 33 is from a chapter which is devoted to a comparison of the practice under the civil and canon law *with that of the English court of chan- [439] cery in the particular of compelling an appearance and answer by a defendant to a bill, and the particular extract cited was a statement of the canon law. The *secundum decretum* or second decree was the last step in the process employed to compel an appearance in the cause, and only issued at a time when the defendant was in default and could not file his answer except by leave of the court.

So, the statement that "the answer will not be received without clearing his contempt" was made in the course of a consideration of the various processes that follow the filing of the bill, designed to secure an appearance and answer of the defendant. The author had previously observed that where an attachment by proclamation (one of the steps in the process to compel an appearance and answer) had issued, the defendant could not, as of course, purge his contempt by a mere tender, and had also remarked that by the very fact of an attachment he was required to answer, and also clear his contempt at the same time, adding:

"But the usual way is not to take the penalty, which is no more than for the clearing his contempt, till he hath answered. For when the penal sum is received, the defendant may reasonably say that the fault is purged, and so there would be no sufficient foundation to retain the party or carry on the process, in case he will not answer; and therefore the usual way is for the plaintiff to insist that the defendant should answer; but the answer will not be received without clearing his contempts."

The case spoken of was one where the defendant was in actual custody, liable to be coerced into paying the costs of the contempt.

The extract from page 211 had reference to the case of a *plaintiff*, and was in effect merely a declaration that the court might stay the proceedings in the cause until the contempt was purged.

Indeed, there is nowhere in the Forum Romanum anything suggestive of the existence of a practice in the English court of chancery in accord with the power which the New York *court mistakenly considered as always [440] exercised by that tribunal.

It needs, however, no critical review of the passage from Baron Gilbert cited by the New York court to establish that the construction put upon it was a mistaken one, for Baron

Gilbert leaves no doubt in another passage not cited by the New York court that the opinion attributed to him by the New York court was unfounded. At page 101 of the Forum Romanum, speaking of the steps usually taken to compel a further answer where the answer of a defendant had been held insufficient, he said:

"And upon this head it is to be observed, as a general rule, that the contemner who is in the contempt is never to be heard, by motion or otherwise, till he hath cleared his contempt and paid the costs. As, for example, *if he comes to move for anything, or desires any favor of the court*, if the other side says or insists he is in contempt, though it be but an attachment for want of an answer, which, if not executed, is only 10 shillings, and if executed, is 12 shillings and 6 pence, yet even in this case he is not entitled to be heard till he hath paid these costs (however small they are). He must first pay them to the party, or his clerk in court, and produce a receipt for them in open court, before he can be heard; and this is always allowed as a good cause against hearing of the contemner in any case whatsoever."

The English authorities cited by the New York court to support its conclusion are: *Maynard* v. *Pomfret*, 3 Atk. 468; *Vowles* v. *Young*, 9 Ves. Jr. 172; *Heyn* v. *Heyn*, Jac. 49; *Clark* v. *Dew*, 1 Russ. & M. 103; *Anon.* v. *Gort*, 1 Hog. 77, and *Valle* v. *O'Reilly*, 1 Hog. 199. The review we have made of these cases does not, as we have already stated, induce us to regard them as sustaining the doctrine of the New York decision.

Nor is the opinion expressed in the *Walker Case* supported by the American cases to which reference is made therein, *viz.*: *Mussina* v. *Bartlett*, 8 Port. (Ala.) 277; *Rutherford* v. *Metcalf*, 5 Hayw. 58, 61; and *Saylor* v. *Mockbie*, 9 Iowa, 209, 212.

Mussina v. *Bartlett*, decided in 1839, was a case where the defendant was in default for answer, **441**] and he was held incapacitated *thereby from appearing to contest the complainant's demand before the clerk and master to whom after decree *pro confesso* the bill had been referred to take an account.

Rutherford v. *Metcalf*, 5 Hayw. 58, 61, was a case where, on a hearing upon a proceeding to punish for breach of an injunction, an answer of one of the defendants in the cause, not a party to the contempt proceedings, was offered, but the court refused to receive it, on the ground that whether the injunction was rightfully issued or not, the defendant should submit to it until he had procured a dissolution of the injunction. In the course of the opinion, in stating the practice upon proceedings for contempt, the court said—though the question was not before it for decision—that after a party had been found guilty of contempt, "he must stand committed and pay the costs; and then he cannot be heard in the principal cause until he has yielded obedience to the injunction." The authority for the latter statement were the passages in Practical Register and Comyns' Digest, already alluded to.

Saylor v. *Mockbie* was decided in 1859, and was a case where the application was to the favor of the court. The defendant, *being in default for answer*, also violated an injunction which had been granted in the cause, and, on an attachment being issued, he was brought into court, filed his answer to the bill and to the rule granted against him, and moved to dissolve the injunction. The court, after observing that throughout the whole of the proceedings complained of the defendant was in default, held that until he had purged himself of the contempt in disobeying the rule of the court, the court might well refuse to receive his answer to the bill (which was only entitled to be filed as a matter of favor) or consider the matters therein set up by way of excuse for his refusal to obey the order.

It is then manifest that the decision in *Walker* v. *Walker* finds no support in the authorities upon which it is based. It was accepted, however, without any review of the authorities in *Pickett* v. *Ferguson* (1885), 45 Ark. 177, 191, as correctly stating the law on the subject, though both the *trial court and [**442** the reviewing court shrank from enforcing the doctrine to its logical consequences, as though the complaint of a plaintiff in contempt was removed from the files, and he was denied the right to answer a cross bill, in determining the questions presented by the cross bill, the trial court considered the evidence which had been taken in the case before it and in another cause, supposed to embody all the material facts upon which the rights of the parties depended. The reviewing court also held that if the complainant below had been prejudiced by the action of the trial court, the record furnished the means of correcting the error, and, after a consideration of the whole record, ordered a personal judgment in favor of the complainant for a large amount.

Hazard v. *Durant*, 11 R. I. 195, has in one instance been referred to as a case where the court was much perplexed over the proper decision of a like question, and had declined to definitely decide it. That case was one where a party in contempt for violating an injunction was also in default for answer, and a decree *pro confesso* had been taken. He was, however, held entitled to take such steps in the cause as were matters of strict right; and while refusing an application of the petitioner to be let in to defend, the reviewing court held that it did not follow that the suit was to be abandoned to the plaintiffs, and, as the defendant denied the truth of the averments in the bill, the question was reserved as to whether a decree ought to be entered against the defendant without first referring the case to a master "to ascertain the truth of the allegations, *so that our minds and consciences may be satisfied upon the point.*" This branch of the case having been subsequently argued, the court rendered an opinion, from which we extract as follows (12 R. I. 99):

"The defendant entreats for leave to answer, denying them [the averments of the bill]. Shall we then proceed as if they were true, because the defendant, being in contempt and unable to relieve himself, cannot make his denials effectual by answer or defense? The question is novel; but we think it admits of but one solution. The court must be careful not to become an instrument of injustice, even against a person *who has forfeited all [**443** claims upon its favor. We decide, therefore, that

the cause must go to a master to inquire into the truth of the inculpating allegations of the bill, and if he finds them true to any extent, to take the account accordingly, making, for the sake of despatch, one report of the entire matter. We also decide that in making the inquiry the master shall not be confined to testimony furnished by the complainants, but shall notify Durant, so that he may be present, if he sees fit, to aid the inquiry, and to testify himself, and furnish the testimony of others."

Nor is there force in the contention that *Allen* v. *Georgia*, 166 U. S. 138 [41: 949], impliedly sustains the validity of the authority exercised by the court of the District of Columbia in the matter now under consideration. In the *Allen Case* the accused had been regularly tried and convicted, and the error complained of was that the Georgia supreme court had violated the Constitution of the United States in refusing to hear his appeal because he had fled from justice. In affirming the judgment of the supreme court of Georgia, the court called attention to the distinction between the inherent right of defense secured by the due process of law clause of the Constitution and the mere grace or favor giving authority to review a judgment by way of error or appeal. It said (p. 140 [949]):

"Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the supreme court of a state has acted in consonance with the constitutional laws of a state and its own procedure it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

The same view had been previously announced in *McKane* v. *Durston*, 153 U. S. 687 [38: 868], where the court said:

"An appeal from a judgment of conviction is [444] not a matter *of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary."

Whether in the exercise of its power to punish for a contempt a court would be justified in refusing to permit one in contempt from availing himself of a right granted by statute, where the refusal did not involve the fundamental right of one summoned in a cause to be heard in his defense, and where the one in contempt was an actor invoking the right allowed by statute, is a question not involved in this suit. The right which was here denied by rejecting the answer and taking the bill for confessed because of the contempt involved an essential element of due process of law, and our opinion is therefore exclusively confined to the case before us.

The demonstration of the unsoundness of the contention that courts of equity have claimed and exercised the power to suppress an answer and thereupon render a decree *pro confesso*, which results from the foregoing review of the authorities, is strengthened by the reflection that if such power obtained, then the ancient common-law doctrine of "outlawry," and that of the continental systems as to "civil death," would be a part of the chancery law, a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen.

It being therefore clear that the supreme court of the District of Columbia did not possess the power to disregard an answer which was in all respects sufficient and had been regularly filed, and to ignore the proof taken in its support, the only question remaining is whether a judgment based upon the exercise of such an assumed power is void for want of jurisdiction, and may therefore be collaterally attacked. It cannot be doubted that where a judgment is rendered without the issuance and service of summons against a party who did not *enter an appearance, the court rendering [445] it is without jurisdiction to do so, and it can be assailed as void whenever presented as a muniment of right against another. Looking at the substance and not the form of the decree in the case of *Hovey* v. *McDonald*, 109 U. S. 150 [27: 883], upon which the rights of the plaintiff in error depend, it is plain that the judgment was substantially one without a hearing, for of what efficacy or avail was the summons to appear when the court which issued the summons rendered its judgment upon the theory that the summons was inefficacious, and that the defendant had no right either to appear or be heard in his defense? As said by this court in *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 689 [39: 312, 5 Inters. Com. Rep. 1]: "The substance, and not the shadow, determines the validity of the exercise of the power."

The case at bar is within the principle of the decision in *Windsor* v. *McVeigh*, 93 U. S. 277 [23: 916]. It is also controlled by the decision in *Reynolds* v. *Stockton*, 140 U. S. 254 [35: 464]. In that case, the scope and object of a suit in a court of the state of New York—a judgment recovered in which was sought to be enforced in a court of the state of New Jersey—were the subjection of a fund in the hands of the superintendent of the insurance department of the state of New York to the satisfaction of claims against a New York insurance company which had become amalgamated with a New Jersey corporation which had passed into the hands of a receiver. The New York company and the New Jersey company and its ancillary receiver in the state of New York, one Parker, were made parties defendant. There was no actual appearance by Parker or the New Jersey company subsequent to the filing of their answer. Parker took issue merely upon the allegations of the petition, and the cause proceeded to trial upon such issue before a referee. Upon the report of the latter, a decree was entered which finally disposed of the

fund. Paragraph 8 of that decree contained the following reservation:

"And it is further ordered that either party to this action, or any person interested in the subject-matter thereof, have liberty to apply for 446] further directions on the foot of this *decree, and the question of the indebtedness of Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, and the former superintendent, John F. Smyth, and William McDermott, and Messrs. Harris and Rudd, reported by the referee Samuel Prentiss, be reserved."

Subsequently to the entry of the decree just referred to, on notice to the attorney who had represented Parker, a judgment was entered in favor of plaintiffs against the receiver Parker and the New Jersey company for more than $1,000,000. This was the judgment which was sought to be enforced in New Jersey against the assets in the hands of the receiver in that state. The courts of New Jersey decided that the judgment was void, and this court affirmed such decision on the ground that the decree passed upon questions not at issue in the cause, and was rendered against a party who had taken no actual part in the litigation subsequent to the filing of his answer. There is no distinction in principle between determining a cause upon issues not raised by the pleadings in the actual absence of the party, and rendering a decree by refusing to permit a defendant to be heard in his defense or to consider the merits of a sufficient defense, and, indeed, by striking the pleading containing such defense from the files.

As a consequence of the foregoing views, we conclude that the court of appeals of New York did not err in refusing to give effect to the judgment in question as against a member of the firm of Riggs & Company, as in the courts of the District of Columbia the decree in question was not entitled to be regarded as valid as to them. Whether since the rendition of the judgment for any cause, such as by reason of active steps taken by McDonald and White, in the courts of New York, assailing the validity of the judgment in question, those parties are now estopped from asserting the invalidity of the decree (*Lawrence* v. *Nelson*, 143 U. S. 223 [36:134], and cases there cited), we need not determine. It is sufficient for the purposes of the case now before us to say that, as the record contains no proof of facts constituting an estoppel as to Riggs & Company, the judgment is not binding upon them.

From the fact, however, that we rest our de-447]cision on the *want of power in the courts of the District of Columbia to suppress an answer of parties defendant, and after so doing to render a decree *pro confesso* as in case of default for want of an answer, we must not be considered as implying that we think the purchasers of the bonds under the circumstances disclosed by the record took them subject in any way to the *lis pendens* created between the actual parties to the controversy arising from the suit, or that such purchasers were or could be in any way bound by the result of that litigation.

Judgment affirmed.

E. M. PARSONS, *Plff. in Err.*,
v.
CHICAGO & NORTHWESTERN RAILWAY COMPANY.

(See S. C. Reporter's ed. 447-460.)

Carrier's favoritism to other shippers—violation of Act to Regulate Commerce—publication of tariff—proof of injury.

1. A recovery by a shipper from a carrier because of partiality and favoritism to other shippers cannot be had, in the absence of statute, provided the complaining shipper has not been charged more than a reasonable rate.

2. An averment that the fixing or naming of Turner and Rochelle as the pretended termini of shipments under joint tariffs when destined to New York, Boston, Philadelphia, or Baltimore, was a device to evade the law, and that the property was in fact transported to Chicago and there sold on the market or delivered to connecting roads for eastern points, without stating what evasion was intended, or how the device operated to make an evasion of the law, and without denying that there was a joint tariff established, or alleging that the tariff itself was a pretense, is not sufficient to show a violation of the Act to Regulate Commerce.

3. One who does not show that he would have taken any advantage of a joint tariff if he had known of it cannot recover of a carrier for failure to publish the tariff or file it with the Interstate Commerce Commission as required by the Interstate Commerce Act.

4. Before any party can recover under the Interstate Commerce Act for the nonpublication of a joint tariff, he must show, not merely the wrong of the carrier, but that the wrong has in fact operated to his injury.

[No. 198.]

Argued March 8, 9, 1897. Decided May 24, 1897.

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment affirming the judgment of the Circuit Court of the United States for the Southern District of Iowa in favor of the defendant in an action brought by E. M. Parsons, plaintiff, to recover of the defendant, the Chicago & Northwestern Railway Company, damages for alleged violation of the Interstate Commerce Act. *Affirmed.*

See same case below, 27 U. S. App. 394.

NOTE.—*From what liability a contract that a common carrier is not to be responsible for loss or damage will exonerate*, see note to New Jersey Steam Nav. Co. v. Merchants' Bank, 12: 465.

As to liability of common carrier for goods to be transported beyond termination of its line, see note to Michigan C. R. Co. v. Mineral Springs Mfg. Co. 21: 297.

As to liability of carrier by water, for loss or damage to goods, see note to Moore v. American Transp. Co. 16: 674.

As to delivery by common carrier by water, see note to Richardson v. Goddard, 16: 412.

As to how far consignment of goods vests the property in consignee, and to whom is the carrier responsible for loss or injury, see note to Grove v. Brien, 12: 1142.

Statement by Mr. Justice **Brewer:**

This was an action commenced by the plaintiff in error, plaintiff below, in the circuit court of the United States for the southern district of Iowa to recover of the defendant $1,550 on **448**]account of alleged violations *of the Interstate Commerce Act. An amended and substituted petition was filed which, in five counts, stated plaintiff's causes of action. To this the defendant demurred, and the demurrer having been sustained judgment was entered in its favor. The plaintiff took the case to the court of appeals of the eight circuit, by which court the judgment was affirmed. 27 U. S. App. 394. Thereupon the case was brought here on writ of error.

The first count alleged facts which, as claimed, show that the defendant had such relations to the Fremont, Elkhorn, & Missouri Valley Railroad Company and the Sioux City & Pacific Railroad Company that the lines of those railroads, together with that of the defendant, were under a common control and management, and therefore that the defendant was to be treated for all practical purposes as the owner of a single line from the points in Nebraska, hereinafter mentioned, to Chicago. It stated the distance from those points to Chicago, and also from the places in Iowa along the line of defendant's road from which the plaintiff made his shipments, these latter distances being substantially less than the former. Then after a general averment that the Nebraska rates to Chicago had always theretofore been greater than the Iowa rates, it alleged that on December 30, 1887, the defendant, for the purpose of giving unlawful preference to the shippers of corn and oats in Nebraska, and to unlawfully discriminate against the plaintiff and other shippers of corn and oats in Iowa, put in force from Nebraska points a certain freight tariff upon corn and oats, in words and figures following:

C. & N. W., G. F. D. No. 2927, superseding G. F. D. No. 2724, F., E. & M. V. and S. C. & P., G. F. D. 949 and G. F. D. No. 859 of 1887.

Chicago & Northwestern Railway, Fremont, Elkhorn, & Missouri Valley, and Sioux City & Pacific Railway.

Joint tariff on corn and oats in carloads, taking effect December 30, 1887, to Rochelle, Ill., when destined to New York, Boston, **449**]* Philadelphia, Baltimore.

From	Per 100 lbs.
Blair, Neb.	11
Kennard, Neb.	11

. . . . . .

[Here follow rates from many other Nebraska points, which are omitted as immaterial in the case.]

Prepaid. Waybill through to Rochelle, Ill., *via* Missouri Valley, at rates given above. For rates from Rochelle to Baltimore, Philadelphia, New York, and Boston, see C. & N. W., G. F. D. No. 2604, November 25, 1878, amendments or subsequent issues.

H. R. McCullough,
G. F. A., C. & N. W. R.

K. C. Morehouse,
G. F. A., S. C. & P., and F. E. & M. V. R.'s

After this it continued:

"Plaintiff avers that said freight tariff was never printed in type and was never circulated or published at any of the stations on defendant's road in the state of Iowa, and no copy thereof was ever filed with the Interstate Commerce Commission, as required by law, and the existence of the same was concealed from the knowledge of plaintiff and of shippers in the state of Iowa upon the line of defendant's road, and the benefits and advantages of the rates specified in such tariff were denied to plaintiff and shippers on the line of defendant's road in the state of Iowa.

"Plaintiff avers that said special tariff remained in force at the several stations named therein upon the line of the Fremont, Elkhorn, & Missouri Valley Railroad in the state of Nebraska from December 30, 1887, up to the 1st of February, 1888, and large quantities of corn and oats were shipped during said time upon and over the several roads aforesaid, to Turner and Rochelle, and thence to Chicago, Illinois, at the rates therein specified, to wit, the sum of 11 cents per 100 pounds from the stations of Blair and Kennard, Nebraska.

"Plaintiff avers that between the 30th day of December, A. D. 1887, *and the 1st day of[**450** February, A. D. 1888, and at the several dates named in the schedule No. 2 attached to original petition and made a part of this petition, plaintiff had for shipment at Correctionville, Iowa, aforesaid, the number of pounds of corn and oats in said schedule specified, and plaintiff was prevented and deprived by reason of the matters herein alleged, of the right to ship the same upon the terms and at the rate given, as aforesaid, to the shippers in the state of Nebraska; and plaintiff then and there was compelled to ship and did ship said corn and oats on and over the road of defendant from said station of Correctionville to Chicago, Illinois, and defendant then and there demanded and received for said service the sum of 21 cents per 100 pounds for the transportation of said corn and oats a distance of only 475 miles, the same being a less distance, and for a like and contemporaneous service over the same line in the same direction, under substantially similar circumstances, as the transportation of corn and oats, as aforesaid, from Blair and Kennard and other points in Nebraska to Chicago, Illinois.

"Plaintiff avers that the fixing of said points of Turner and Rochelle as the pretended terminus of the shipment of corn and oats under said special tariff of December 30, 1887, was a mere device to evade the law. That Turner and Rochelle were not grain markets and had no elevators or facilities for handling grain, and said grain was intended to be, and was, in fact, transported by defendant to Chicago, Illinois, and was then sold on the market or delivered to connecting roads for eastern seaboard points.

"Plaintiff avers that the charges so made, demanded, received, and collected from plaintiff as aforesaid were unlawful, unreasonable, and unjust, and contrary to the provisions of an act of Congress entitled 'An Act to Regulate Commerce,' approved February 4, 1887, in that an unlawful preference and discrimination was practised by defendant in favor of

shippers of grain in the state of Nebraska and against this plaintiff, a shipper of grain in the state of Iowa, and in that defendant charged, demanded, and received a greater compensation for a short than for a longer haul in the 451] same direction, over the *same line, the shorter being included in the longer haul, and being for a like and contemporaneous service in the transportation of a like traffic under substantially similar circumstances.

"Plaintiff avers that the price and value of corn and oats at the dates of said shipment was at Chicago the price at New York and other seaboard points, less the freight, and the price at—— in Iowa, was the Chicago price, less the freight, and that plaintiff was damaged by reason of the premises, in a sum equal to the difference in the price charged and received by the defendant and the rate given from Kennard and Blair, Nebraska, to wit, the sum of 10 cents per 100 pounds upon 241,710 pounds of corn and oats, to wit, the sum of $241.71, for which sum he asks judgment on this count of his petition, with 6 per cent interest per annum from February 1, 1888."

The next three counts were, so far as any question is involved in this case, substantially like the first.

The fifth count alleged that the defendant was a common carrier engaged in the business of transporting freight over its line of road in Iowa, Illinois, and Nebraska, "and in connection with other railroads in Chicago, east to New York, Philadelphia, Boston, Baltimore, and other seaboard points." Then, after stating facts showing plaintiff's interest in the matter, it averred that the defendant "on the 17th day of February, 1888, at all the stations on the said Fremont, Elkhorn, & Missouri Valley Railroad in Nebraska between Blair and Skull creek and each of said points put in force a certain tariff on corn and oats destined for New York and other seaboard points, whereby it proposed to transport, and did, on and between said 17th day of February and the 1st day of March, A. D. 1888, transport corn and oats from Blair and other points in Nebraska, on the line of said road, to New York for 36½ cents per 100 pounds, and to Boston for — cents per 100 pounds, and to Philadelphia for 34½ cents per 100 pounds, and to Baltimore for 33½ cents per 100 pounds. Plaintiff avers that all of said points on the Fremont, Elkhorn, & Missouri Valley road, were a greater 452] distance from *Chicago and from New York and other seaboard points aforesaid than the stations on the defendant's road in the state of Iowa." It alleged a failure to publish such rates, substantially as in the first count, and "that the only rate on corn and oats made known during February, 1888, to shippers at Iowa points on defendant's road was a local rate to Chicago and a rate of 27½ from Chicago to New York, and a correspondingly high rate from Chicago to other seaboard points. That said local rate from Carroll to Chicago was 19 cents per 100 pounds." And concluded as follows:

"Plaintiff avers that between the 17th day of February, and the 1st day of March, A. D. 1888, and at the several dates named in schedule No. 4 attached to original petition and made a part of this petition, plaintiff had for shipment at Carroll, Iowa, aforesaid, the number of pounds of corn and oats in the said schedule described, and plaintiff was prevented and deprived, by reason of the matters herein alleged, of the right to ship the same upon the terms and at the rates given to shippers in the state of Nebraska, and plaintiff then and there was compelled to ship and did ship said corn and oats on and over the road of defendant from said station of Carroll to Chicago, Illinois, and defendant then and there demanded and received for said service the sum of 19 cents per 100 pounds for the transportation of said corn and oats to Chicago, and subjected said plaintiff to a further charge of 27½ cents per 100 pounds to transport the same to New York and a like local charge to other seaboard points, or dispose of the same at Chicago at 27½ less per 100 than the price at New York.

"Plaintiff avers that the charges so made, demanded, and received, and collected as aforesaid were unlawful, unreasonable, and unjust, and contrary to the provisions of an act of Congress entitled 'An Act to Regulate Commerce,' approved February 4, 1887, in that an unlawful preference and discrimination was practised by defendant in favor of shippers of grain in the state of Nebraska, and against this plaintiff, a shipper of grain in the state of Iowa, and in that defendant charged and demanded a greater compensation for a short *than [453 for a longer haul in the same direction over the same line, the shorter being included in the longer haul and being for a like and contemporaneous service in the transportation of a like traffic under substantially similar circumstances.

"Plaintiff avers that the price and value of corn and oats at the dates of said shipments was, at Chicago, the New York or other seaboard price less the freight, and the price at Carroll, Iowa, was the Chicago price less the freight, and that plaintiff was damaged by reason of the premises in a sum equal to the difference between the aggregate of the two local rates from Carroll to Chicago and from Chicago to New York, to wit, 46½ cents, and the said sum of 36½ cents, the rate given from said Nebraska points to New York, which difference was the sum of 10 cents per 100 pounds on 107,750 pounds of corn and oats named in schedule No. 4 aforesaid, for which the plaintiff asks judgment on this second count of his petition."

Mr. **C. C. Nourse** for plaintiff in error.

Mr. **Lloyd W. Bowers** for defendant in error.

Mr. **Edward B. Whitney,** Assistant Attorney General, filed by leave of court a brief on behalf of the Interstate Commerce Commission.

Mr. Justice **Brewer** delivered the opinion of the court:

Some preliminary matters deserve notice. The wrongs charged against the defendant took place in the winter of 1887–'88, and affected other Iowa shippers than the plaintiff. Several actions were brought by such shippers on account thereof, and brought by the coun-

sel for this plaintiff. Two of such actions were tried before juries, and resulted in judgments for the plaintiffs. *Osborne* v. *Chicago & N. W. R. Co.* 48 Fed. Rep. 49. These judgments were taken to the court of appeals, and in October, 1892, were reversed and the cases remanded for new trials, 10 U. S. App. 430. The plaintiffs then applied to this court for a 454]*certiorari (146 U.S. 354 [36:1002]) which, on December 5, 1892, was denied on the ground that there had been no final judgment. See *Forsyth* v. *Hammond*, 166 U. S. 506, 514 [41:1095, 1098]. Thereafter, and on December 28, 1892, this amended and substituted petition was filed. Now it is contended that the court of appeals read into this petition the facts disclosed by the records in the former cases, and so decided some other case than the one presented. This is a mistake, though it may be that that court construed the allegations of this petition in the light of those facts. And it is not strange that it did so. For, while this being an action in behalf of a different plaintiff, he is not concluded by the evidence introduced on those trials, can state other and different facts, and recover on other and distinct grounds, yet the same acts on the part of the defendant are made in all the cases the basis of relief. Hence, allegations in this petition, which are doubtful in their meaning and susceptible of two constructions, may not unfairly be taken as intended to mean that which the testimony in the former cases showed were the facts. The course of the litigation makes it apparent that the purpose was not simply to present a new case to the same court, but to obtain from a higher court a construction of the law applicable to the facts. The brief of counsel, while it points out what is alleged are differences between the case made in this petition and that established in the prior cases, also discloses that in his judgment the views expressed by the court of appeals in those cases were wrong, and that he is seeking the judgment of this court thereon. It was easy, if counsel intended to present an entirely different case, to make the averments so positive and distinct as to clearly distinguish it.

We remark again that there is no averment in this petition that the rates charged to and paid by the plaintiff were, in themselves, unreasonable; that is, it is not claimed that the rates charged for shipping corn from points in Iowa to Chicago were not fair and reasonable charges for the services rendered. The burden of the complaint is the partiality and favoritism shown to places and shippers in Nebraska. The plaintiff is not seeking to recover 455] money which inequitably *and without full value given has been taken from him. He is only seeking to recover money which he alleges is due, not because of any unreasonable charge, but on account of the wrongful conduct of the defendant.

Again, his cause of action is based entirely on a statute, and to enforce what is in its nature a penalty. Suppose that the officials of the defendant company had charged the plaintiff only a reasonable rate for his personal transportation from his home in Iowa to Chicago, and at the same time had, without any just occasion therefor, given to his neighbor across the street free transportation thus being guilty of an act of favoritism and partiality—an act which tended to diminish the receipts of the railroad company, and to that extent the dividends to its stockholders—such partiality on their part would not, in the absence of a statute, have entitled the plaintiff to maintain an action for the recovery of the fare which he had paid, and thus to reduce still further the dividends to the stockholders.

So, but for the provisions of the Interstate Commerce Act, the plaintiff could not recover on account of his shipments to Chicago, if only a reasonable rate was charged therefor, no matter though it appeared that through any misconduct or partiality on the part of the railway officials shippers in Nebraska had been given a less rate.

It was, among other reasons, in order to avoid the public injury which had sprung from such conduct on the part of railway officials that the Interstate Commerce Act was passed, and violations of its provisions were subjected to penalties of one kind or another. But it is familiar law that one who is seeking to recover a penalty is bound by the rule of strict proof. Before, therefore, the plaintiff can recover of this defendant for alleged violations of the Interstate Commerce Act he must make a case showing, not by way of inference, but clearly and directly, such violations. No violation of statute is to be presumed. Now, the tariff set out in the first four counts appears on its face to have been a joint tariff, and stated the rates to be charged from points of shipment to Rochelle or Turner on corn shipped to the four cities of New York, Boston, Philadelphia, and Baltimore. It does not purport *to be the local rate on grain shipped [456 to Rochelle or Turner, or even to Chicago—the eastern limit of the defendant's road. Nowhere in these counts is there an allegation as to the through rates from Nebraska or Iowa points to the four above-named eastern cities, or to any other place beyond the eastern terminus of defendant's road. There is nothing, therefore, to show that the local rate charged plaintiff from the Iowa place of shipment to Chicago was greater than the through rate charged from Nebraska to the four places on the seaboard, or greater than that charged for like shipments from his place of shipment to the same four places. No figures as to the through rate are given, no averments as to its relation to the local rates on the defendant's road, whether from Nebraska or Iowa to Chicago. So that if we regard this tariff as being (what on its face it purports to be) a joint tariff, there is no violation of the 4th section of the Interstate Commerce Act, the one containing the long and short haul clause.

But it is said that there is an averment that the fixing or naming of Turner and Rochelle as the pretended termini of the shipments of corn and oats under the special tariff was a mere device to evade the law; that they were not grain markets, and had no elevators or facilities for handling grain, and that the grain was intended to be, and was, in fact, transported by the defendant to Chicago, and there sold on the market or delivered to connecting roads for eastern points. It is this averment which introduces some uncertainty into the case. For if there had been no agreement between the de-

fendant and eastern companies, and no through rates established thereby from Nebraska to the four places named, and this putting forth of the so-called joint tariff was a mere device, under color of which the defendant was shipping grain over its own lines from Nebraska to Chicago only, at less rates than were charged to the nearer points in Iowa, there would have been a violation of the long and short haul clause. But the trouble is the pleader does not distinctly make such a case. He does not allege that there was not such an agreement between the defendant and eastern roads, that there was
457] *not such a joint tariff established, that the grain shipped from Nebraska was not shipped on such tariff, or that the tariff was itself a pretense. He does say that the naming of the points Turner and Rochelle as termini of the shipment, was a mere device to evade the law, but what evasion, or how it operated to make the evasion, is not indicated. It is true he says that the grain was intended to be, and was, in fact, transported by the defendant to Chicago. But it must have been so transported if it was shipped to the termini named in the joint tariff. It is true also that he alleges that when transported to Chicago the grain was sold on the market or delivered to connecting roads for eastern seaboard points, but which, he does not advise us. If the former, that might happen by the shipper's intercepting at Chicago a shipment made under the joint tariff through to one of the four eastern points; if the latter, it would necessarily occur if the shipment was under such tariff. So the former is consistent with and the latter implies the joint tariff. Neither makes certain any violation of the long and short haul clause. On the contrary, the plain implication of the averments of these counts is that there was such a joint tariff, (indeed, it is alleged that it was never printed in type, was not circulated or published at any of the stations on defendant's road in Iowa, and no copy thereof filed with the Interstate Commerce Commission, as required by law; and also that it remained in force up to February 1, 1888, and that the corn shipped from Nebraska was shipped on that tariff); and further, that the ground of complaint is not that it did not exist, but that it was not published in Iowa; that plaintiff was not informed and did not know of its existence, and therefore did not get the benefit of it, but shipped his corn at local rates to Chicago instead of at through rates to the eastern points. That the portion of a through rate received by one of the companies party thereto may be less than its local rate is not questioned. The Interstate Commerce Commission, which has filed a brief in this case, and which has criticised some of the views expressed in the opinion of the court of appeals in *Osborne* v. *Chicago & N. W. R. Co.* 48 Fed. Rep. 49, concedes this, and also that the judgment in that
458] case was *right. All that it contends for is that the total through rate shall be greater than the local rate, so as not to violate in this respect the long and short haul clause.

We pass, therefore, to consider the allegations as to the nonpublication of this tariff. It is alleged that it was never printed in type, was never circulated or published at any of these stations on defendant's road in Iowa, that no copy thereof was ever filed with the Interstate Commerce Commission, and that the existence of the same was concealed from the knowledge of the plaintiff and other shippers in Iowa, and the benefits and advantages of the rates therein specified were denied to plaintiff and such other shippers. The burden of this is the ignorance of the plaintiff, through failure to publish this tariff at Iowa stations. The Interstate Commerce Act, in § 6, requires the railroad company to post in every station along the line of its road its local tariffs. It also requires such carrier to file with the Commission copies of all contracts, agreements, or arrangements with other common carriers, and also copies of any joint tariffs made with such common carriers, and adds that "such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published."

In the former cases it was shown that the Commission had made a general order requiring the publication of joint tariffs "at every depot or station upon the line of the carriers uniting in such joint tariff, where any business is transacted in competition with the business of a carrier whose schedules are required by law to be made public as aforesaid," and it was there held that the places of shipment in Iowa are not competing points within the scope of this order, and that, therefore, no publication of this tariff at the points named was necessary. Counsel contends that this fact only appeared in *the evidence on the part
[459 of the defendant and is not disclosed or suggested in the petition in this case, and that the court of appeals improperly based its decision upon the supposed existence of this order. We do not so understand the scope of its opinion. No reference is made to any such order, and the case is discussed upon simply the averments in the petition. The allegation is that this joint tariff was not filed with the commission, and not published at the Iowa stations from which plaintiff made his shipment, and that in consequence thereof he was ignorant of its rates. His argument practically is that if the tariff had been filed with the commission it might have made an order, either general or special, requiring that it be posted at the Iowa stations; that if it had been so posted he might have examined the rates and might have determined to ship his corn, not to Chicago, but to one of the four eastern points named in such tariff. But these "might be's" interfere very materially with the line of sequence. He does not show that he had not already contracts with some consignee in Chicago, New Orleans, or some place other than the four eastern points named in the tariff, for shipment to him of all grain at his command. He does not allege that he had or would have made any arrangement with any consignee in

any of those points for the receipt and sale of his corn, or even that the extra commissions there would not more than make the difference in rates. In short, he does not allege, either directly or indirectly, that if he had known of these rates he would have shipped his corn under this tariff to either of those points, but rests his contention upon the suggestion that the mere difference in the prices would naturally have caused him to ship to one or other of them, and thus to take advantage of the joint tariff. Every fact which he alleges might be absolutely and fully true, and yet he, with knowledge of the joint tariff, with the privilege of shipping under it, have never offered or sought to forward a single pound of corn to any other place than Chicago. Surely it needs but the statement of this to show that he comes far short of that rule of strict proof which enables one to enforce a penalty for wrong; for, if he would not under any circumstances **460**] have shipped to New York, was *compelled by his contracts or any other consideration to ship to Chicago, he cannot say that he was injured by his ignorance of the rate to New York. The only right of recovery given by the Interstate Commerce Act to the individual is to the "person or persons injured thereby, for the full amount of damages sustained in consequence of any of the violations of the provisions of this act." So, before any party can recover under the act he must show, not merely the wrong of the carrier, but that that wrong has in fact operated to his injury. If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped. Penalties are not recoverable on mere possibilities. We think, therefore, without attempting to take judicial knowledge of the general order made by the Interstate Commerce Commission in reference to the publication of joint tariffs, the plaintiff has failed in that full and clear showing of injury which is necessary in order to justify a recovery under the Interstate Commerce Act.

With reference to the fifth count, little need be said. In that it is disclosed that the through rates to the four eastern points were largely in excess of the local rate charged by the defendant for shipment to Chicago. Of course, therefore, within any view of the scope of the 4th section—the one containing the long and short haul clause—there was no violation of its provisions.

With reference to the matter of publication, nothing more need be said than has been in reference to such allegations in the prior counts, and as to the complaint of an unlawful preference and discrimination forbidden by the third section of the act, it is sufficient to refer to the fact heretofore noticed of the failure of the plaintiff to show a certain injury to him.

These are all the matters that call for consideration. *We see no error in the judgment of the court of appeals, and it is affirmed.*

Mr. Justice **Brown** took no part in the decision of this case.

MERCHANTS' & MANUFACTURERS' NATIONAL BANK of Pittsburg, Pennsylvania, *Plf. in Err.*, [461

v.

COMMONWEALTH OF PENNSYLVANIA.

(See S. C. Reporters' ed. *Merchants' & Manufacturers' Bank* v. *Pennsylvania*, 461-467.)

State decision, when conclusive as to state statute —state tax law as to banks constitutional—discrimination—U. S. Rev. Stat. § 5219—due process of law.

1. The decision of the supreme court of a state sustaining a statute is conclusive in this court as to any question of conflict between the statute and the state Constitution.
2. Lack of uniformity in the result of a state tax law as to banks does not violate the 14th Amendment of the Federal Constitution as denying to any person the equal protection of the laws,—at least when the inequality comes from the election of certain taxpayers to avail themselves of privileges offered to all.
3. Discrimination between national banks in the matter of taxation does not violate U. S. Rev. Stat. § 5219, when the statute treats state banks and national banks alike without any discrimination against national banks as such.
4. A statute making a national bank the agent to collect taxes from shareholders, without compelling a state bank to do the same, does not make such a discrimination against national banks as is prohibited by U. S. Rev. Stat. § 5219, because of the possibility that some of the shareholders in state banks may escape taxation.
5. A statute for the taxation of shares of stock is not wanting in due process of law because it does not contemplate any personal notice to the shareholder, when it defines the time when the assessment shall be made by an officer, and specifically directs him to hear any stockholder who may desire to be heard.

[No. 301.]

Argued April 28, 29, 1897. Decided May 24, 1897.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment and decision of that court in favor of the validity of a statute of Pennsylvania of date June 8, 1891, in respect to the taxation of national banks. *Affirmed.*

See same case below, 168 Pa. 309.

Statement by Mr. Justice **Brewer**:

This case comes on a writ of error to the supreme court of the state of Pennsylvania, and involves the validity of the statute of that state of date June 8, 1891 (Pa. Laws 1891, p. 240), in respect to the taxation of national

NOTE.—*Jurisdiction of United States Supreme Court; it is for state courts to construe their own statutes; supreme court will not review their decisions except when specially authorized by statute,*—see note to Commercial Bank v. Buckingham, 12: 169.

That taxation of stock or shares in corporation does not impair obligation of contracts; taxation of shares of national banks and other corporations,—see note to Providence Bank v. Billings, 7: 939.

As to what is due process of law, see note to Pearson v. Yewdall, 24: 436.

banks. The decision of that court was in favor of its validity. 168 Pa. 309. Sections 6 and 7 of the statute contain these provisions:

"Sec. 6. In case any bank or savings institution incorporated by the state or the United States shall elect to collect annually from the shareholders thereof a tax of 8 mills on the dollar upon the par value of all shares of said bank or savings institution that have been subscribed for or issued, and pay the same into the state treasury on or before the 1st day of March in each year, the shares and so much of the capital and profits of such bank as shall not be invested in real estate shall be exempt 462]* from local taxation under the laws of this commonwealth.

"Sec. 7. That from and after the passage of this act, every national bank located within this commonwealth, which shall fail to elect to collect annually from the shareholders thereof a tax of 8 mills on the dollar upon the par value of all the shares of said bank that have been subscribed or issued, shall, on or before the 20th day of June in each and every year, make to the auditor general a report in writing, verified by the oath or affirmation of the president or cashier, setting forth the full number of shares of the capital stock issued by such national bank, and the actual value thereof, whereupon it shall be the duty of the auditor general to assess the same for taxation at the same rate as that imposed upon other moneyed capital in the hands of individual citizens of this state, that is to say, at the rate of 4 mills upon each dollar of the actual value thereof."

Messrs. **Jeremiah M. Wilson,** *John Wilson*, and *William M. Hall, Jr.*, for plaintiff in error.

Messrs. **John P. Elkin,** Deputy Attorney General of Pennsylvania, and *Henry C. McCormick*, Attorney General of Pennsylvania, for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The validity of this statute is challenged by plaintiff in error on three grounds: The first is, that its operation results in a lack of uniformity of taxation upon the same class of subjects, to wit, shares of national banks within the state; and the argument of counsel is that it conflicts with Pa. Const. art. 9, § 1, which requires that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

It is sufficient to say in reference to this contention that the decision of the supreme court of the state of Pennsylvania sustaining the statute is conclusive in this court, as to any question of conflict between it and the 463]-state *Constitution. *West Rirer Bridge Co.* v. *Dix*, 47 U. S. 6 How. 507 [12: 535]; *Bucher* v. *Cheshire R. Co.* 125 U. S. 555 [31: 795]; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232 [33: 892]; *Lewis* v. *Monson*, 151 U. S. 545 [38: 265]; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194 [41: 683]; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685 [41: 1165].

If it be said that a lack of uniformity renders the statute obnoxious to that part of the 14th Amendment to the Federal Constitution which forbids a state to "deny to any person within its jurisdiction the equal protection of the laws," it becomes important to see in what consists the lack of uniformity. It is not in the terms or conditions expressed in the statute, but only in the possible results of its operation. Upon all bank shares, whether state or national, rests the ordinary state tax of 4 mills. To every bank, state and national, and all alike, is given the privilege of discharging all tax obligations by collecting from its stockholders and paying 8 mills on the dollar upon the par value of the stock. If a bank has a large surplus, and its stock is in consequence worth five or six times its par value, naturally it elects to collect and pay the 8 mills, and thus in fact it pays at a less rate on the actual value of its property than the bank without surplus, and whose stock is only worth par. So it is possible, under the operation of this law, that one bank may pay at a less rate upon the actual value of its banking property than another; but the banks which do not make this election, whether state or national, pay no more than the regular tax. The result of the election under the circumstances is simply that those electing pay less. But this lack of uniformity in the result furnishes no ground of complaint under the Federal Constitution. Suppose, for any fair reason affecting only its internal affairs, the state should see fit to wholly exempt certain named corporations from all taxation. Of course the indirect result would be that all other property might have to pay a little larger rate per cent in order to raise the revenue necessary for the carrying on of the state government, but this would not invalidate the tax on other property, or give any right to challenge the law as obnoxious to the provisions of the Federal Constitution.

Again it will be perceived that this inequality in the burden *results from a privilege [464 offered to all, and in order to induce prompt payment of taxes, and payment without litigation. To justify the propriety of such inducement, we need look no further than the present litigation. It is common practice in the states to offer a discount for payment before the specified time, and impose penalties for nonpayment at such time. This, of course, results in inequality of burden, but it does not invalidate the tax. The inequality of result comes from the election of certain taxpayers to avail themselves of privileges offered to all. It was well said by Mr. Justice Williams, speaking for the supreme court of Pennsylvania, in the opinion in the present case: "The argument is that inequality of burden establishes the unconstitutionality of the law under which the tax is levied. If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them, then, can stand." Indeed, this whole argument of a right under the Federal Constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237 [33: 892, 895], in which case Mr. Justice Bradley, speaking for the court, said:

"The provision in the 14th Amendment,

that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. . . . We think that we are safe in saying that the 14th Amendment was not intended to compel the states to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws **465**]of some of *the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every state, in one form or another, deems it expedient to adopt." See also *Jennings* v. *Coal Ridge Improv. & C. Co.* 147 U. S. 147 [37: 116].

The second ground upon which the statute is challenged is that, as claimed, it conflicts with the legislation of Congress, regulating the taxation of shares of stock in national banks. This legislation is found in U. S. Rev. Stat. § 5219, which provides "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere." The purpose of this, as often announced in this court, is to prevent any discrimination between national bank capital and other moneyed capital. *First Nat. Bank* v. *Chehalis County*, 166 U. S. 440 [41: 1069], and cases cited in opinion. But this section does not forbid discrimination between national banks, but only as between such banks and state banks, or other moneyed capital in the hands of private individuals. The legislation before us treats state banks and national banks alike; gives to each the same privileges; and there is no discrimination against national banks as such.

It is further insisted that the act is really one taxing the bank, and not taxing the shares of stock as the property of the stockholders; but this is obviously a misinterpretation of the statute. That simply makes the bank the agent to collect from the stockholders the tax imposed upon the shares. The language of § 7 in this respect is clear, for it provides that the national bank which fails to elect to collect and pay the 8 mills shall make a report to the auditor general "setting forth the full number of shares of the capital stock issued by such national bank, and the actual value **466**]*thereof, whereupon it shall be the duty of the auditor general to assess the same for taxation," and also that after such report is made to the auditor general "it shall be his further duty to hear any stockholder who may desire to be heard on the question of the valuation of the shares as aforesaid; and he shall have the right, by other evidence, to satisfy himself as to the correctness of the valuation of said shares of stock in said report contained, and to correct said valuation. The auditor general shall thereupon transmit to the said national banks a statement of the valuation and assessment so made by him, and the amount of tax due the commonwealth on all of said shares, which tax the said banks shall, within thirty days after receiving said statement, collect from their shareholders and pay over into the state treasury."

That the state has the right to make the bank its agent to collect the tax from the individual stockholders was settled in *First Nat. Bank* v. *Kentucky*, 76 U. S. 9 Wall. 353 [19: 701].

It is further urged that there is discrimination because as to those state banks that do not elect to pay the 8 mills the auditor general is required to look to the stockholders directly for the regular 4 mills tax, whereas as to national banks he reaches the stockholders through the bank itself, and hence it is said that some shareholders in state banks may escape taxation. But this is a mere matter of procedure. It is no objection to the law that it makes the national bank the agent to collect, and does not compel the state bank to do the same.

A final objection is that there is a lack of due process of law, in that the property of the shareholders is subjected to an ad valorem tax without an opportunity being given to them to be heard as to the value. It is true the statute contemplates no personal notice to the shareholder, but that has never been considered an essential to due process in respect to taxation. The statute defines the time when the bank shall make its report to the auditor general, and it specifically directs him to hear any stockholder who may desire to be heard. The statute, therefore, fixes the time and place, for official proceedings are always, in the absence of express provision to the contrary, *to be had at the office of the officer [**467** charged with the duties (*Andes* v. *Ely*, 158 U. S. 312, 323 [39: 996, 1002]); and a notice to all property holders of the time and place at which the assessment is to be made is all that "due process" requires in respect to the matter of notice in tax proceedings. As said in *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 710 [28: 569, 573]:

"The law in prescribing the time when such complaints will be heard gives all the notice required; and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law." See also *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237 [33: 892, 895]; *Spencer* v. *Merchant*, 125 U. S. 345 [31: 763]; *Palmer* v. *McMahon*, 133 U. S. 660, 669 [33: 772, 776]; *Lent* v. *Tillson*, 140 U. S. 316 [35: 419]; *Paulsen* v. *Portland*, 149 U. S. 30 [37: 637].

These are the only matters requiring notice. *We see no error in the judgment of the Supreme Court of Pennsylvania, and it is affirmed.*

Mr. Justice **Shiras** did not hear the argument or take part in the decision of this case.

JOHN D. WARNER, *Appt.*,
v.
CITY OF NEW ORLEANS.

(See S. C. Reporter's ed. 467-478.)

Questions certified to this court—defense to liability of a city—submission of whole case.

1. Only questions of law can be certified to this court by the courts of appeal; and, under the guise of certifying questions, the whole case cannot be transmitted to this court for consideration.
2. A city which purchases property, contracting to pay for it out of a particular fund, and issuing warrants therefor payable out of that fund which is yet partially to be created by the performance of a statutory duty by the city, cannot, after deliberately abandoning that duty and taking active steps to prevent the further creation of the fund, and when there is nothing in the fund, plead in defense to a liability on warrants drawn on that fund, that it had, prior to the purchase, paid off obligations theretofore created against the fund.
3. A question certified which puts the facts of one case over against the facts of another, and asks this court to search the record in each to see whether the one case operates to bar the other, is practically a submission of the whole case, and will not be considered as a distinct question of law.

[No. 282.]

Argued April 22, 1897. Decided May 24, 1897.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fifth Circuit certifying certain questions in a suit in equity brought by John D. Warner against the City of New Orleans for an accounting and to procure a decree that a certain fund is a trust fund applicable to the payment of drainage warrants. *First question answered, and the court declined to answer the second question.*

Statement by Mr. Justice **Brewer**:

This case comes on questions certified by the court of appeals of the fifth circuit. The statement of facts, the questions, and the order of the court, as found in the record, are as follows:

"The complainant, a citizen of the state of New York, filed his bill in said circuit court against the city of New Orleans, alleging substantially as follows:

"By act approved March 18, 1858, the legislature of the state of Louisiana undertook to provide for draining and reclaiming portions of the parishes of Orleans and Jefferson. The work was to be accomplished through boards of drainage commissioners appointed for each of the three districts into which the territory was divided.

"The funds to pay for work were to be raised as follows: Whenever the several boards were prepared to drain their districts they were required to cause a plan to be made of the proposed work, designating its subdivisions and the names of the proprietors of the land, etc. This plan was to be filed in the mortgage office, of which notice was required to be published once a week for four consecutive weeks. At the expiration of the notice the boards were to apply to a court specified in the act, which was required to decree that the district was subject to a first mortgage lien and privilege for such an amount as might be assessed upon the property. After the tax had been levied the court was authorized to render judgment against the several property owners for the amount due by them.

"By another act, approved March 17, 1859, the boards were authorized to issue bonds to the extent of $300,000 for *each district [**469** for the purpose of carrying on the work, redeemable out of drainage taxes.

"By an act approved March 1, 1861, the boards were authorized to apportion the amount which each taxpayer should be required to pay yearly to meet the annual interest and instalments due on the bonds. Other and more stringent provisions for the collection of these taxes were also made in the act, such as authorizing judgments to be rendered against the taxpayer and his property and the issuance of execution as in ordinary cases. The boards of commissioners for the first and second districts filed plans of the work they proposed to do, and obtained judgments decreeing the lands in those districts to be subject to liens and privileges for the proposed work; they levied assessments payable in instalments and obtained judgments for the amount of the rolls, and some money was collected thereon.

"By act 30 of 1871 the several boards of drainage commissioners were abolished and the work of drainage was transferred to the Mississippi & Mexican Gulf Ship-Canal Company, but the board of administrators of the city of New Orleans for all other purposes was made their successor, and was subrogated to all moneys, assessments, and other assets then belonging to them, and was required to collect such tax and assessments and to make and collect an additional tax of 2 mills per superficial foot on all lands where no tax had been levied for drainage purposes, and that all collections from these sources be placed to the credit of said Mississippi & Mexican Gulf Ship-Canal Company and held as a fund to be applied only to the drainage of the city of New Orleans and Carrollton.

"By the 8th section of the act it was made the duty of the administrator of accounts to draw a warrant on the administrator of finance against this fund for the payment of amounts due for all work done by that company.

"The board of administrators entered on the duties imposed on them under this act,

NOTE.—*As to jurisdiction of United States Supreme Court in cases certified on division of circuit court; on what division should be,*—see note to Webster v. Cooper, 13: 325.

procured the mortgages and liens to be decreed, assessments to be levied, and judgments to be rendered for the taxes assessed in the third and fourth drainage districts.

470] *"The whole amount of assessments that came under their administration was $1,699,637.37, and of this $1,003 342.28 was assessed against individuals and $696,394.30 against the city of New Orleans on the area of her streets and squares.

"The work was continued under this act until 1876 by Warner Van Norden, who had become transferee of the said Mississippi & Mexican Gulf Ship-Canal Company. He excavated some 5,000,000 cubic yards of earth and completed two thirds of the plan of drainage, when act No. 16, of February 24, 1876, was passed for the purpose of authorizing the city of New Orleans to assume exclusive control of all drainage work, and, if she desired it or deemed it advisable, to purchase from said canal company and its transferee, Van Norden, all the tools, boats, and apparatus appertaining to drainage work and the franchise of the company, upon an appraisement to be made by appraisers to be appointed by the city council. The act further provided that the price should be paid by the city of New Orleans in drainage warrants in the same form and manner as those theretofore issued under act 30 of 1871.

"Pursuant to this act the city council caused the property to be appraised. The valuation was fixed at $300,000, and on June 7, 1876, a formal act of sale and transfer was executed between Warner Van Norden and said canal company and said city of New Orleans, by which the former made a transfer of the drainage plant and franchise for said amount, payable in drainage warrants, and the city covenanted 'not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of drainage assessments, as provided by law, until said warrants have been fully paid, it being well understood and agreed by and between said parties thereto that collection of drainage tax assessments should not be diverted from the liquidation of said warrants and expenses under any pretext whatsoever until the full and final payment of the same.'

"Up to the date of this sale the city had collected on the assessments against private property $229,922.89, leaving $1,469,714.47 outstanding and uncollected, of which amount **471**] *the city owed $696,394.30 as assessed against the streets and squares. The drainage warrants issued prior to December 31, 1874, had been paid or taken up before said sale by the issue of bonds of the 'drainage series' to the amount of $1,672,105.21 under authority of act 73, approved April 26, 1872. The 13th section of this act, after providing for the issue of said bonds, further provided that 'all taxes collected for drainage, and not required for payment of drainage warrants, shall be devoted to the purchase from the lowest bidder of bonds issued for drainage.'

"Complainant sues on three of the drainage warrants of $2,000 each, given for the purchase price of the drainage plant and franchise sold to the city of New Orleans as above set forth. The bill, after setting out the foregoing state of facts in more amplified form, avers: (1) That the city of New Orleans, after she became possessed of the drainage franchise, sold some of the drainage machinery and suffered the rest to become rotten and valueless and abandoned all work of drainage; that by reason of the noncompletion of the drainage system the supreme court of Louisiana decided the drainage taxes could not be collected, inasmuch as no benefit had been conferred on the property. (2) That the city by various means impeded the collection of drainage taxes, and by her conduct, ordinances, and proclamations encouraged and induced people to refuse to pay the assessments, by reason whereof the drainage assessments due by private persons have become valueless. (3) That the city will plead that she has been discharged from all liability to account for the drainage taxes she has collected, or which she ought to have collected but has wasted, as well as her own indebtedness, by the issuance and delivery, between May 10, 1872, and December 31, 1874, of drainage bonds under authority of the act 73 of 1872. (4) That the city had never claimed, prior to the purchase of said property and franchise, that the issuance of said bonds operated as such discharge, and made no such plea, save in the case of *Peake* v. *New Orleans*, 139 U. S. 342 [35: 131], filed March 19, 1888. (5) That the act of 1876 was an authority for the city to make said purchase, as well as a legislative recognition that said drainage fund had *not been discharged by the [**472** issue of said bonds, and was an appropriation and dedication of so much thereof as was necessary to pay the purchase warrants without offset or impairment. (6) That the contract of sale was entered into by Van Norden in consideration of the provisions of said act of 1876 and its effects on his rights and remedies; that neither at the time of entering into the contract of sale nor when the warrants were delivered in discharge of the price did the city disclose to him that she would claim the issuance of said bonds as a discharge of her liability to account for and apply the drainage taxes, including those due by herself, to the payment of said purchase warrants; that he was ignorant that the city would claim such discharge, and would not have entered into said contract if he had been advised that any such claim would be made as aforesaid; that Van Norden has expressly and by a writing annexed to and made part of the bill subrogated complainant to all his rights and remedies growing out of said sale (Record, p. 145); the complainant therefore avers that the city is estopped in equity and good conscience from pleading or maintaining such defense.

"The bill closes with a prayer for an accounting of said drainage fund, and especially that the amount due by the city as assessee of the streets and squares be decreed to be a trust fund in the hands of the city applicable to the payment of said drainage warrants.

"Defendant demurred to the bill, especially asserting that the decision in the case of *Peake* v. *New Orleans* (reported in 139 U. S. 342 [35: 131]), is decisive of the issues in this case. The demurrer having been sustained by the circuit court, the complainant has removed the case to this court for review, assigning, among others, error in this respect.

"And it appearing that the suit of said Peake was based on drainage warrants given for work, all dated July 9, 1875, complainant insists that they were issued while the city was an involuntary and noncontractual trustee, and in this respect differ from those involved in this case, which were issued by the city as a voluntary and contractual trustee under the permissive authority of the legislature, and 473] that both on principle and owing *to the estoppel pleaded in the bill his rights are not affected by said decision.

"The case having been argued in this court on the errors assigned, and this court desiring the instruction of the honorable the Supreme Court for the proper decision of the questions arising herein touching the matter of estoppel aforesaid and the application of the decision of the Supreme Court to the issues involved in this suit, it is ordered that the following questions and propositions of law be certified to the Supreme Court in accordance with the provisions of § 6 of the act entitled 'An Act to Establish Circuit Courts of Appeal and Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes,' approved March 3, 1891, to wit:

"First. Is the city of New Orleans under the warranties, express and implied, contained in the contract of sale of June 7, 1876, by which she acquired the property and franchise from Warner Van Norden, and under the averments of the bill, estopped from pleading against the complainant the issuance of bonds to retire $1,672,105.21 of drainage warrants, issued prior to said sale, as a discharge of her obligation to account for drainage funds collected on private property and as a discharge from her own liability to that fund as assessee of the streets and squares?

"Second. Should the decision in the case of *Peake* v. *New Orleans*, 139 U. S. 342 [35: 131], be held to apply to the facts of this case and operate to defeat the complainant's action?

"It is further ordered that a copy of the printed record and the several acts of the legislature, together with copies of the briefs on file in this court, be sent to the honorable the Supreme Court with the transcript certifying the aforesaid questions."

Messrs. **William Grant, Wheeler H. Peckham,** *J. D. Rouse*, and *Richard De Gray* for appellant.

Mr. **Branch K. Miller** for appellee.

474] *Mr. Justice **Brewer** delivered the opinion of the court:

We had occasion in the recent case of *Cross* v. *Evans*, 167 U. S. 60 [*ante*, 77], to comment on the practice of certifying questions in such manner as to practically submit the entire case to this court for consideration. In addition to what was said in the opinion then filed, it may be proper to observe that the purpose of the act of 1891, creating the courts of appeal, was to vest final jurisdiction as to certain classes of cases in the courts then created, and this in order that the docket of this court might be relieved, and it be enabled with more promptness to dispose of the cases directly coming to it. In order to guard against any injurious results which might flow from having nine appellate courts, acting independently of each other, power was given to this court to bring before it for decision by certiorari any case pending in either of those courts. In that way it was believed that uniformity of ruling might be secured, as well as the disposition of cases whose gravity and importance rendered the action of the tribunal of last resort peculiarly desirable, but the power of determining what cases should be so brought up was vested in this court, and it was not intended to give to any one of the courts of appeal the right to avoid the responsibility cast upon it by statute by transmitting any case it saw fit to this court for decision. If such practice were tolerated it is easy to be perceived that the purpose of the act might be defeated, and the courts of appeal, by transferring cases here, not only relieve themselves of burden, but also crowd upon this court the very cases which it was the intent of Congress they should finally determine. It is true power was given to the courts of appeal to certify questions, but it is only "questions or propositions of law" which they are authorized to certify. And such questions must be, as held in the case just cited, "distinct questions or propositions of law, unmixed with questions of fact or of mixed law and fact." It is not always easy to draw the line, for, in order to present a distinct question of law, it may sometimes be necessary to present many facts upon *which [475 that question is based. But care must always be taken that under the guise of certifying questions the courts of appeal do not transmit the whole case to us for consideration. Here, in addition to the long preliminary statement of facts, the court ordered up the entire record; and counsel in their briefs, assuming that the whole case is before us, have entered into a discussion of many questions, such as the effect of certain limitations in the Constitution of Louisiana, which may have been in the case as it was presented to the court of appeals, but cannot be found in any distinct question of law certified to us.

With these preliminary observations, we pass to the consideration of the questions certified, or so much thereof as are distinct questions of law. The first question is one of estoppel. In order to a full understanding of it a brief review of the facts is essential; and for these facts we look simply to the statement prepared by the court of appeals, and not to the bill and exhibits, copies of which it ordered to be sent to this court. From that statement it appears that in 1858 the state of Louisiana undertook the work of draining and reclaiming portions of the parishes of Orleans and Jefferson; that this work was to be done under the direction and control of boards of drainage commissioners appointed for the several districts into which the territory was divided. Provision was made for assessing the cost and expenses of the work upon the property benefited. The work continued under these auspices until 1871, when, by an act of the legislature, the boards of drainage commissioners were abolished and the work of drainage transferred to a canal company. But the duty of collecting the assessments was

imposed upon the board of administrators of the city of New Orleans, and the administrator of accounts was directed to draw warrants on the administrator of finance against the drainage fund for the payments of amounts due for the work. Warner Van Nordon became the transferee of the canal company, and completed about two thirds of the work prior to February 24, 1876, when an act was passed authorizing the city of New Orleans to assume exclusive control of the drainage work, and, if **476]** it desired, to *purchase from the canal company and its transferee all the boats, tools, and apparatus pertaining to the work, and also the franchise of the company. This act further provided that the price should be paid by the city in drainage warrants in the same form and manner as those theretofore issued. The whole amount of assessments was $1 699,637.37. Of this, $1,003,312.28 was assessed against individuals, and the balance against the city of New Orleans on the area of its streets and squares. Of the assessment against private property the city had up to this time collected $229,922.89. The drainage warrants issued prior to December 31, 1874, had been paid or taken up before this act of 1876 by the issue of city bonds, to the amount of $1,672,105.21, under authority of an act approved April 26, 1872. The city elected to make the purchase of the property of the canal company and its transferee. It was appraised at $300,000, and on June 7, 1876, a formal sale and transfer was executed by the company and its transferee to the city for the amount named, payable in drainage warrants, and the city covenanted "not to obstruct or impede, but, on the contrary, to facilitate, by all lawful means, the collection of drainage assessments, as provided by law, until said warrants have been fully paid, it being well understood and agreed by and between said parties thereto that collection of drainage tax assessments should not be diverted from the liquidation of said warrants and expenses under any pretext whatsoever until the full and final payment of the same."

It will be seen that the bonds issued by the city more than covered in amount the assessments against its streets and public grounds and the amount it had collected from private property, and all this had taken place prior to the purchase of the property from the canal company and its transferee. Now, after the city had assumed exclusive control of the work, after it had voluntarily purchased from the canal company and its transferee their property and had given these warrants, payable out of the drainage fund, it sold some of the drainage machinery, suffered the rest to become rotten and valueless, and abandoned the work of drainage, so that by reason of the noncompletion of the drainage system, as held by the **477]** supreme *court of the state, drainage taxes could not be collected, inasmuch as no benefit had been conferred upon the property. Not only that; it by various means impeded the collection of the taxes, and by conduct, ordinances, and proclamations encouraged and induced the people to refuse to pay the assessments whereby those due by private persons became valueless.

And now the question is whether the city is not estopped to plead in defense of liability on these drainage warrants the fact of the prior issue of bonds to a larger amount than that assessed against the areas of its streets and squares and collected from private property. We think this question must be answered in the affirmative. The city, in respect to the purchase of this property from the canal company and its transferee, and in the obligations assumed by the warrants issued, acted voluntarily. It was not in reference to these matters, as it was to those considered in *Peake* v. *New Orleans*, 139 U. S. 342 [35: 131], a compulsory trustee, but a voluntary contractor; and the proposition which we affirm is, that one who purchases property, contracting to pay for it out of a particular fund, and issues warrants therefor payable out of that fund,—a fund yet partially to be created and created by the performance by him of a statutory duty,—cannot deliberately abandon that duty, take active steps to prevent the further creation of the fund, and then, there being nothing in the fund, plead in defense to a liability on the warrants drawn on that fund that it had prior to the purchase paid off obligations theretofore created against the fund. Whatever equity may do in setting off against all warrants drawn before this purchase from the canal company and its transferee the bonds issued by the city (and in respect to that matter we can only refer to *Peake* v. *New Orleans, supra*), it by no means follows that the city can draw new warrants on the fund in payment for property which it voluntarily purchases, and then abandon the work by which alone the fund could be made good, resort to means within its power to prevent any payments of assessments into that fund, and thus, after violating its contract promise not to obstruct or impede, but on the contrary to facilitate by all lawful *means, the collection of the as- [**478** sessments, plead its prior issue of bonds as a reason for evading any liability upon the warrants. One who purchases property and pays for it in warrants drawn upon a particular fund, the creation of which depends largely on his own action, is under an implied obligation to do whatever is reasonable and fair to make that fund good. He cannot certainly so act as to prevent the fund being made good, and then say to his vendor, You must look to the fund, and not to me. We are clear in the opinion, therefore, that the first question must be answered in the affirmative.

With reference to the second, we are of the opinion that it does not come within the rule in respect to certifying distinct questions of law. It invites an inquiry into all the matters considered in the case of *Peake* v. *New Orleans* (and there were many), and asks whether the matters there decided apply to the facts of this case and operate to defeat the plaintiff's action. In other words, the question puts the facts of the one case over against the facts of the other, and asks us to search the record in each to see whether the one case operates to bar the other. Surely that is practically submitting the whole case instead of certifying a distinct question of law. *Our decision therefore is that the first question must be answered in the affirmative, and the second we decline to answer.* Ordered accordingly.

Mr. Justice **White** and Mr. Justice **Peckham** took no part in the decision of this case.

479] INTERSTATE COMMERCE COMMISSION, *Appt.*,
v.
CINCINNATI, NEW ORLEANS, AND TEXAS PACIFIC RAILWAY COMPANY *et al.*

(See S. C. Reporter's ed. 479-512.)

Rates of carriers—Interstate Commerce Act—Interstate Commerce Commission cannot prescribe rates—mandamus—duties of Commission.

1. An inquiry whether rates of carriers are reasonable or not is a judicial act; but to prescribe rates for the future is a legislative act.
2. That Congress has transferred to any administrative body the power to prescribe a tariff of rates for carriage by a common carrier is not to be presumed or implied from any doubtful and uncertain language.
3. Incorporating into the Interstate Commerce Act the common-law obligation resting upon the carrier to make all its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the act, do not by implication carry to the Commission or invest it with power to exercise the legislative function of prescribing rates which shall control in the future. Section 6 of such statute expressly recognizes the right of the carrier to establish, increase, or reduce rates, on condition of publishing and filing them with the Commission.
4. The Interstate Commerce Commission has no power to prescribe a tariff of rates which shall control in the future, and therefore cannot invoke a judgment in mandamus from the courts to enforce any such tariff by it prescribed.
5. The important duties of the Interstate Commerce Commission in respect to railroad rates include the duty of inquiry as to the management of the business, with the right to compel complete and full information concerning it, and the duty of seeing that there is no violation of the long and short haul clause of the act, or any prohibited discrimination, rebate, or other device to give undue preferences, and also that the publicity required by § 6 is observed.

[No. 733.]

Argued March 22, 23, 1897. Decided May 24, 1897.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit certifying a question as to the power of the Interstate Commerce Commission to make a certain order adjudging certain rates in force over certain railroads to be unreasonable and unjust and fixing rates thereon for the future. *Question answered.*

See same case below, 76 Fed. Rep. 188.

Statement by Mr. Justice **Brewer:**

This case is before us on a question certified by the court of appeals for the sixth circuit. On May 29, 1894, the Interstate Commerce Commission entered an order, of which the following is a copy:

At a general session of the Interstate Commerce Commission held at its office, in Washington, D. C., on the 29th day of May, A. D. 1894.

Present: Hon. William R. Morrison, Chairman; Hon. Wheelock G. Veazey, Hon. Martin A. Knapp, Hon. Judson C. Clements, and Hon. James D. Yeomans, Commissioners.

FREIGHT BUREAU OF THE CINCINNATI CHAMBER OF COMMERCE
v.
CINCINNATI, NEW ORLEANS, & TEXAS PACIFIC RAILWAY COMPANY, Lessee of the Cincinnati Southern Railway; The Louisville & Nashville Railroad Company; The East Tennessee, Virginia, & Georgia Railway Company; The Western & Atlantic Railroad Company; The Alabama Great Southern Railroad Company; The Atlanta & West Point Railroad Company; The Central *Rail-[480 road & Banking Company of Georgia; The Georgia Railroad Company; The Georgia Pacific Railway Company; The Norfolk & Western Railroad Company; The Port Royal & Augusta Railway Company; The Richmond & Danville Railroad Company; The Savannah, Florida, & Western Railway Company; The Seaboard & Roanoke Railroad Company; The South Carolina Railway Company; The Western Railway of Alabama; The Wilmington & Weldon Railroad Company; The Wilmington, Columbia, & Augusta Railroad Company; The Baltimore, Chesapeake, & Richmond Steamboat Company; The Clyde Steamship Company; The Merchants' & Miners' Transportation Company; The Ocean Steamship Company; The Old Dominion Steamship Company.

CHICAGO FREIGHT BUREAU
v.
LOUISVILLE, NEW ALBANY, & CHICAGO RAILWAY COMPANY; The Chicago & Alton Railroad Company; The Chicago & Eastern Illinois Railroad Company; The Cincinnati, Hamilton, & Dayton Railroad Company; The Cleveland, Cincinnati, Chicago, & St. Louis Railway Company; The Evansville & Terre Haute Railroad Company; The Illinois Central Railroad Company; The Louisville, Evansville, & St. Louis Consolidated Railroad Company; The Peoria, Decatur, & Evansville Railway Company; The Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Company; The Terre Haute & Indianapolis Railroad Company; The Wabash Railroad Company; The Cincinnati, New Orleans, & Texas Pacific Railway Company, Lessee of

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Note.—*As to power of Congress to regulate commerce*, see notes to Gibbons v. Ogden, 6:23, and Brown v. Maryland, 6:678.

As to tonnage tax, see note to Inman Steamship Co. v. Tinker, 24:118.

As to interstate commerce; regulation of; power of Congress, how far exclusive,—see note to Gloucester Ferry Co. v. Pennsylvania, 29:158.

As to when mandamus will issue, see note to M'Cluny v. Silliman, 4:263.

As to mandamus to control inferior courts; discretion,—see note to *Ex parte* Morgan, 29:135.

As to mandamus to compel city, town, or county to levy tax to pay bonds or interest on bonds, see note in Davenport v. United States, 19:704.

the Cincinnati Southern Railway; The Louisville & Nashville Railroad Company; The East Tennessee, Virginia, & Georgia Railway Company; The Western & Atlantic Railroad Company; The Alabama Great Southern Railroad Company; The Atlanta & West Point Railroad Company; The Central Railroad & 481] Banking Company *of Georgia; The Georgia Railroad Company; The Georgia Pacific Railway Company; The Norfolk & Western Railroad Company; The Port Royal & Augusta Railway Company; The Richmond & Danville Railroad Company; The Savannah, Florida, & Western Railway Company; The Seaboard & Roanoke Railroad Company; The South Carolina Railway Company; The Western Railway of Alabama; The Wilmington & Weldon Railroad Company; The Wilmington, Columbia, & Augusta Railroad Company; The Baltimore, Chesapeake, & Richmond Steamboat Company; The Clyde Steamship Company; The Merchants' & Miners' Transportation Company; The Ocean Steamship Company; The Old Dominion Steamship Company.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved herein having been had, and the commission having on the date hereof made and filed a report and opinion containing its finding of fact and conclusions thereon, which said report and opinion is hereby referred to and made a part of this order, and the Commission having, as appears by said report and opinion, found and decided, among other things, that the rates complained of and set forth in said report and opinion as in force over roads operated by carriers defendant herein and forming routes or connecting lines leading southerly from Chicago or Cincinnati to Knoxville, Tennessee; Chattanooga, Tennessee; Rome, Georgia; Atlanta, Georgia; Meridian, Mississippi; Birmingham, Alabama; Anniston, Alabama; and Selma, Alabama,—are unreasonable and unjust and in violation of the provisions of the Act to Regulate Commerce:

It is ordered and adjudged that the above-named defendants and each of them, engaged or participating in the transportation of freight articles enumerated in the Southern Railway & Steamship Association classification as articles of the first, second, third, fourth, fifth, or sixth class, do from and after the 10th day of July, 1894, wholly cease and desist and *thenceforth abstain from charg- [482 ing, demanding, collecting, or receiving any greater aggregate rate or compensation per 100 pounds for the transportation of freight in any such class from Cincinnati, in the state of Ohio, or from Chicago, in the state of Illinois, to Knoxville, Tennessee; Chattanooga, Tennessee; Rome, Georgia; Atlanta, Georgia; Meridian, Mississippi; Birmingham, Alabama; Anniston, Alabama; or Selma, Alabama, than is below specified in cents per 100 pounds under said numbered classes respectively and set opposite to said points of destination—that is to say:

On shipments of freight from Cincinnati—

To—	Class 1, rates per 100 lbs.	Class 2, rates per 100 lbs.	Class 3, rates per 100 lbs.	Class 4, rates per 100 lbs.	Class 5, rates per 100 lbs.	Class 6, rates per 100 lbs.
	Cents.	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*
Knoxville	53	45	37	27	22	20
Chattanooga	60	54	40	30	24	22
Rome	75	64	54	44	34	24
Atlanta	86	73	60	45	35	27
Meridian	114	98	80	62	49	38
Birmingham	87	74	60	46	36	28
Anniston	86	73	60	45	35	27
Selma	108	92	78	60	48	36

On shipments of freight from Chicago—

To—	Class 1, rates per 100 lbs.	Class 2, rates per 100 lbs.	Class 3, rates per 100 lbs.	Class 4, rates per 100 lbs.	Class 5, rates per 100 lbs.	Class 6, rates per 100 lbs.
	Cents.	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*
Knoxville	93	79	62	44	37	32
Chattanooga	100	88	65	47	39	34
Rome	114	97	79	61	49	38
Atlanta	126	107	85	62	50	39
Meridian	114	98	82	60	47	38
Birmingham	111	95	72	52	44	34
Anniston	126	107	85	62	50	39
Selma	128	112	89	66	53	38

483] *And said defendants and each of them are also hereby notified and required to further readjust their tariffs of rates and charges so that from and after said 10th day of July, 1894, rates for the transportation of freight articles from Cincinnati and Chicago to southern points other than those hereinabove specified shall be in due and proper relation to rates put into effect by said defendants in compliance with the provisions of this order.

And it is further ordered that a notice embodying this order be forthwith sent to each of the defendant corporations, together with a copy of the report and opinion of the Commission herein, in conformity with the provisions of the 15th section of the Act to Regulate Commerce.

The railroad companies having failed to comply with the order, the Interstate Commerce Commission instituted this suit in the circuit court of the United States for the southern district of Ohio to compel obedience thereto. The court upon a hearing entered a decree dismissing the bill (76 Fed. Rep. 183) from which decree an appeal was taken to the court of appeals, and that court, reciting the order, submits to us the following question: "Had the Interstate Commerce Commission jurisdictional power to make the order hereinbefore set forth—all proceedings preceding said order being due and regular, so far as procedure is concerned?"

Mr. **Harlan Cleveland,** for appellant:

It is to be assumed, for the purposes of this argument:

1. That there were issues duly joined before the Commission and the court below.

2. That there was a full hearing and investigation.

3. That all the proceedings were regular.

4. That upon the evidence the rates complained of were unreasonable and unjust.

5. That the rates named by the Commission were as high as could reasonably or justly be demanded for the services rendered and benefit received.

6. That the Commission gave due weight to every fact, failed to consider no fact it should have considered, and committed no error of law, unless it be that it exercised a jurisdiction not conferred upon it when it made the order in question.

7. That the courts below upon the merits would have affirmed and enforced the order of the Commission according to its terms.

The circuit court summarily dismissed the petition in this case without examination of its merits, upon the supposition that this court in *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, (40:935), 5 Inters. Com. Rep. 391, commonly called the "Social Circle Case," had, at page 196*a* (939), decided that the Commission had no power, even in a case where, under § 1 of the Act to Regulate Commerce, the reasonableness and justice of a specific set of rates were in issue, the claim made that reasonable and just rates were not charged, a full hearing had, and a conclusion properly reached by the Commission that the rates were unreasonable and unjust, to declare, in conformity with the obligation conferred upon it by § 12, "to execute and enforce the provisions of the act," what would be reasonable and just rates, and to enforce that declaration.

If that case decided or was intended to decide that proposition in that way, and such is the settled judgment of this court, it ends this case so far as the question certified is concerned. It is submitted that the case did not so decide, that the language referred to does not necessarily bear that construction, and that, even if it can be so construed, the proposition was not necessarily involved in the decision of that case.

This court (*Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184 (40:935) 5 Inters. Com. Rep. 391), having disposed of the long and short haul feature of the case, at page 194 (938), said that: "The appeal [of the Commission] presents the question whether the circuit court of appeals erred in its holding in respect to the action of the Interstate Commerce Commission in fixing a maximum rate of charges for the transportation of freight of the first class in less than car loads from Cincinnati to Atlanta." And further: "This question may be regarded as two-fold, and is so presented in the assignment of error, filed on behalf of the Commission, *viz.*: Did the court err in not holding that, in point of law, the Interstate Commerce Commission had power to fix a maximum rate? And, If such power existed, did the court err in not holding that the evidence justified the rate fixed by the Commission and not decreeing accordingly?"

Without considering the first question of law, the court proceeded to consider the question of fact as to whether or not the Atlanta rate of $1.07, found to be reasonable by the circuit court and circuit court of appeals, was in fact reasonable and not excessive under the circumstances. If such was the fact, it rendered unnecessary the decision of the question of law, as to whether, conceding the rate of $1.07 to be unreasonable, the Commission had the right to determine what was a reasonable rate, and forbid charging more.

The language of the court in that case is not open to the construction that the Commission under no circumstances has the power to fix a reasonable rate and to compel a common carrier to charge it.

This appears from the decision of the court rendered at the same time in the case of *Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 216, 235 (40:940, 946, 953), 5 Inters. Com. Rep. 405.

Because the Commission has not power to promulgate general decrees or orders as it attempted to do prior to the case of *Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 234 (40:940, 952) 5 Inters. Com. Rep. 405, it by no means follows that, as said in the very case, its conclusions "in respect to what were proper rates to be charged" as the result of an inquiry "conducted on a proper basis," are either beyond the scope of its powers, or not necessarily a part of its duties.

It is a legal impossibility to find a way "to execute and enforce the provisions of the act," —when an unreasonable rate is being charged, without determining what is a reasonable rate;

when an unjust discrimination is being made, without declaring what would not be such a discrimination; when an undue preference is being given or an undue prejudice being inflicted, without indicating what would not fall within that category; when more is being charged for a short than a long haul, without requiring at least the same if not a less rate to be charged.

Does the Commission execute and enforce the provisions of the act by a simple declaration that $1 is an unreasonable rate in a given case without declaring what is reasonable, it being enacted that all rates shall be reasonable; that it is an unjust discrimination to charge A $1 and B $2 without saying that B should be charged also $1; that it is unduly preferential to A to be charged $1 and unreasonably prejudicial to B to be charged $2 without intimating where the preference to A would cease to be undue and the prejudice to B not unreasonable?

Had the Commission in this case confined itself to simply forbidding the charging of the present rates in controversy from Cincinnati and Chicago to the points designated as unreasonable, they could have been met by these defendants with the very objection it appears counsel for the carriers did make to such an order in the case of *Coxe Bros. & Co.* v. *Lehigh Valley R. R. Co.* 4 I. C. C. Rep. 577, 578, 3 Inters. Com. Rep. 477, 478.

The power of the Commission to fix maximum rates in a case like the one at bar is as clearly provided for in the act as its power to enforce the provisions of §§ 2, 3, 4, and § 1 is the only positive enactment of the four. It is there declared that rates shall be reasonable and just, and unjust and unreasonable rates are declared unlawful and prohibited. Section 2 defines and forbids unjust discrimination, and §§ 3 and 4 declare certain things unlawful. The decisions of this court leave undisputed the right of the Commission to enforce these sections, although negative in character. The same carriers are required to charge reasonable rates, and the Commission has the same power not only to enforce the negative side of § 1, which forbids unreasonable rates, but the positive side which commends reasonable rates.

This court has said that similar legislation by the Parliament of England renders profitable an examination of the decisions of the courts of that country construing its provisions.

Texas & P. R. Co. v. *Interstate Commerce Commission*, 162 U. S. 197, 222, 233 (40: 940, 948) 5 Inters. Com. Rep. 405.

Lord Esher, M. R., in the case of *Mansion House Asso.* v. *Great Western R. Co.* [1895] 2 Q. B. 141, decided by the court of appeals on a preliminary matter, used the following language at p. 145: "Now, what the act of 1894 has done is to add to these matters over which the commissioners had jurisdiction a new matter. They are to have jurisdiction when a railway rate is increased, although it is increased equally to everybody who comes under the rate."

The case does not appear as yet to have been decided on its merits, but from the action of the Commission in another case where damages were assessed by reason of an increase of a rate, there is little doubt that the jurisdiction to hear and determine any complaint arising under the act of 1894 will not be construed as limiting the power of the Commission to simply forbidding the increased rates in the event the increase is found unreasonable, but will also be construed to give the Commission power to decide how far such increase may or may not be reasonable.

The case referred to is that of *Rickett, S. & Co.* v. *Midland R. Co.* [1896] 1 Q. B. 260.

In the effort to limit the functions of the Commission and the courts under §§ 12–16 of the Act to Regulate Commerce to a simple restraint of an existing rate as unreasonable, the case of *Reagan* v. *Farmers' Loan & T. Co.* (*No. 1*), 154 U. S. 362, 399 (38: 1014, 1024) 4 Inters. Com. Rep. 560, is relied upon. That case has no application.

As the legislature has imposed upon the Commission and the courts the duty of dealing with such questions, their difficulty is immaterial.

Ransome v. *Eastern Counties R. Co.* 1 C. B. N. S. 437, 451.

Besides, it is not to be supposed that the Commission or the courts "will ever engage in a deliberate attempt to cripple or destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals."

Reagan v. *Farmers' Loan & T. Co* (*No. 1*), 154 U. S. 362, 395 (38: 1014, 1022), 4 Inters. Com. Rep. 560.

Congress attempted by the legislation in question to afford an adequate and complete remedy, so far as interstate traffic is concerned, for abuses perpetrated by the transportation lines of this country upon individuals, corporations, localities, and sections of the country.

If the question certified to is answered in the negative, it is plain that those abuses, where they still exist, can continue to flourish without any real restraint.

Mr. Edward B. Whitney, Assistant Attorney General, also filed a brief for appellant.

Mr. **Ed. Baxter,** for appellees:

In this case, the Commission undertook to fix rates on the hundreds or thousands of articles embraced in the six numbered classes, from Chicago and Cincinnati respectively, to Knoxville, Chattanooga, Rome, Atlanta, Meridian, Birmingham, Anniston, and Selma, respectively,—eight of the most important distributing points in the south.

If the Commission had the power to fix rates for the number of carriers that were made defendants in this case, and in the other case referred to above, and upon the vast number of articles upon which rates were fixed in this case, it seems to me that it would necessarily have the power to fix rates upon all classes of freight, and between all points, and for all carriers in the United States that are subject to the act.

Thatcher v. *Delaware & H. Canal Co.* 1 I. C. C. Rep. 155, 156, 1 Inters. Com. Rep. 357.

The functions of the Commission are those of referees or special commissioners, appointed to make preliminary investigation of and re-

port upon matters for subsequent judicial examination and determination.

Kentucky & I. Bridge Co. v. *Louisville & N. R. Co.* 37 Fed. Rep. 613, 2 L. R. A. 289, 2 Inters. Com. Rep. 351.

Congress did not intend to deprive carriers of the right to make rates.

The existing law does not undertake to prescribe anything more upon the subject of rates than that they shall be reasonable and just.

Kentucky & I. Bridge Co. v. *Louisville & N. R. Co.* 37 Fed. Rep. 634, 2 L. R. A. 289, 2 Inters. Com. Rep. 351.

In *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197 (40: 939), 5 Inters. Com. Rep. 391, this court said that "subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at the common law, free . . . to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

Cincinnati, N. O. & T. P. R. Co. v. *Interstate Commerce Commission*, 162 U. S. 197 (40: 939), 5 Inters. Com. Rep. 391; *Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 43 Fed. Rep. 53, 3 Inters. Com. Rep. 192; *Interstate Commerce Commission* v. *Louisville & N. R. Co.* 73 Fed. Rep. 426; *Interstate Commerce Commission* v. *Lehigh Valley R. Co.* 74 Fed. Rep. 787, 788; *Interstate Commerce Commission* v. *Alabama Midland R. Co.* 74 Fed. Rep. 722; *Rickett, S. & Co.* v. *Midland R. Co.* [1896] 1 Q. B. 264, 265.

In every case at circuit in which the question has arisen since the decision of this court in the *Social Circle Case*, said decision has been construed as denying to the Commission the power to fix rates.

Interstate Commerce Commission v. *Louisville & N. R. Co.* 73 Fed. Rep. 429; *Interstate Commerce Commission* v. *Lehigh Valley R. Co.* 74 Fed. Rep. 787, 788; *Interstate Commerce Commission* v. *Northern R. Co.* 74 Fed. Rep. 72, 73; *Interstate Commerce Commission* v. *Alabama Midland R. Co.* 74 Fed. Rep. 722; *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.* 76 Fed. Rep. 184.

The act requires that rates shall be reasonable and just. The 1st section requires that "all charges shall be reasonable and just."

The common law required that charges for transportation should be reasonable.

Interstate Commerce Commission v. *Baltimore & O. R. Co.* 145 U. S. 275 (36: 703), 4 Inters. Com. Rep. 92.

For more than a hundred years it has been the affirmative duty of the courts "to execute and enforce" the common-law requirement that all charges shall be reasonable and just;" and yet it has never been claimed that the courts, by implication, possessed the power to make rates for carriers.

The question of the reasonableness of an existing rate is eminently one for judicial investigation, requiring due process of law for its determination.

Chicago, M. & St. P. R. Co. v. *Minnesota*, 134 U. S. 458 (33: 981), 3 Inters. Com. Rep. 209.

But the power to fix rates to be charged in the future is a legislative power.

Munn v. *Illinois*, 94 U. S. 133 (24: 86); *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 178 (24: 98); *Memphis & L. R. R. Co.* v. *Southern Exp. Co.* 117 U. S. 29 (29: 803).

The power conferred upon the Interstate Commerce Commission is the quasi-judicial "power to pass upon the reasonableness of existing rates."

Cincinnati, N. O. & T. P. R. Co. v. *Interstate Commerce Commission*, 162 U. S. 196 (40: 939), 5 Inters. Com. Rep. 391.

But it cannot be implied from that quasi-judicial power that the Commission has the quasi-legislative power "to prescribe rates to be charged in the future."

Cincinnati, N. O. & T. P. R. Co. v. *Interstate Commerce Commission*, 162 U. S. 196 (40: 939), 5 Inters. Com. Rep. 391.

As said by this court in the *Import Case*, "Congress has not seen fit to grant legislative powers to the Commission."

Texas & P. R. Co. v. *Interstate Commerce Commission*, 162 U. S. 216 (40: 946), 5 Inters. Com. Rep. 405; *Reagan* v. *Farmers' Loan & T. Co.* (*No. 1*), 154 U. S. 362 (38: 1014), 4 Inters. Com. Rep. 560; *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 663 (39: 572).

The power to recommend reparation does not involve the power to prescribe future rates.

Under the 14th section, the reparation therein mentioned is to be made to the party who may be found "to have been injured;" and it evidently refers to an injury that has been done in the past.

The power of the Commission in regard to discrimination is the same as it is in regard to other alleged violations of the act. It is limited to making a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, "together with its recommendation as to what reparations, if any, should be made by the common carrier to any party or parties who may be found to have been injured" by such discrimination. The function of the Commission is confined to passing upon acts which have been done in the past, and does not extend to prescribing future rates.

Union P. R. Co. v. *Goodridge*, 149 U. S. 680 (37: 896).

The power to report whether an undue preference exists does not involve the power to prescribe future rates.

The power to notify carriers to desist from omitting to perform some duty does not involve the power to prescribe future rates.

The denial of power to the Commission to prescribe future rates will not nullify the remedies provided by the act.

The denial of the power to the Commission to prescribe future rates will not deprive the Commission of all useful power.

Mr. **George F. Edmunds**, for appellant:

I. The testimony before the Commission completely proved the complainant's case. There was the evidence of several witnesses

extensively engaged in various kinds of business, as well as railway gentlemen, showing beyond all fair dispute the unreasonableness in themselves of the rates from Cincinnati and Chicago to southern points, and also the undue preference given by the established rates to eastern cities and localities. The defendants evidently intended to lie by, as their custom had been, but they did introduce one or two witnesses whose testimony rather tended to support than to rebut the complainant's evidence; and the written documents of their agreements and proceedings furnish the key to the whole of the concerted tyranny that was established by the Southern Railway & Steamship Association and its allies.

There is submitted herewith a memorandum of the points of the testimony adduced before the Commission and of that adduced in court, including that in the private suit of Skinkle *et al.*, which is in by stipulation, which may be useful as a reference index. A few tables and documents are also collated. The proceedings of the Commission are a part of the bill of complaint.

II. As to the powers of the Commission to enforce the act (§ 12) and methods of doing it.

The United States may institute direct proceedings for the enforcement of its provisions and for punishment. These are two distinct powers. The first is to be exercised on notice and investigation and decision, as in any judicial tribunal; the second, in causing criminal procedure against offenders.

Suppose in this matter the Commission had found on its own inquiry that § 1 had been violated by the failure of the railway to maintain "reasonable" rates, and had instituted direct proceedings in the circuit court to compel obedience to the requirements of that section, could not the court have power to decree the observance of the prices it should find to be reasonable? Or could it only say that the prices exacted must not be continued, and stop there? Is this at all consistent with the requirements of another section of the act, that the court shall proceed in the enforcement of it as a court of equity, and in such a manner as to do justice? Such a question furnishes, we submit, its own answer.

III. If the foregoing be true, can it be doubted that the Commission, in exercising its duty in the enforcement of § 1, could require the railroad to do the same thing, and if it fail to do it, apply to this court to compel obedience?

IV. As to the action of the Commission in trying the matter, the 13th section declares that any person, etc., "complaining of anything done or omitted to be done" may apply; whereupon the Commission shall notify the carrier and call on him to satisfy the complaint, or answer. It then provides that if the carrier shall make a "reparation," etc., no further proceedings shall be had. Does not this mean that if the carrier shall have reduced his rates to a reasonable point no further proceeding shall be had? Could it be said that the carrier had made reparation if the extortion were 20 cents a hundred and he only reduced 5? Obviously not. It is clear then that the reparation required is the whole of that conduct which the word "reparation" principally means, and that short of doing that the proceeding shall go on, and that the Commission shall have power to require all that the carrier is bound by law and justice to do.

The 14th section provides that if such reparation shall not be voluntarily made by the carrier, the Commission shall decide and make "recommendation as to what reparation, if any, should be made." This is as clear as language can make it, that the Commission is to have power to determine what the carrier ought affirmatively to do, and not merely the power to say what the carrier ought not to do.

The 15th section provides that in such a case the Commission, if anything is found "to have been done or omitted to be done to the injury or damage of any person," etc., shall notify the carrier to "desist from such violation or to make reparation for the injury so found to have been done, or both." Here are two things that the Commission is to require the carrier to do: First, to desist from violation; and, second (if he has not already desisted), to make reparation. Here again, in clear language, is authority to require not only the stopping of the existing exaction, but the affirmative action on the part of the carrier to make his conduct conform to the law. The 1st section says that the charge must be reasonable. The Commission is to require that to be done, and of course it is impossible to decide that the carrier shall be reasonable without saying, as an inseparable part of such a decision, what is reasonable. To stop by saying that the carrier shall be reasonable would amount in substance only to a moral lecture.

Then § 16 provides for an application to the court in cases where the carrier refuses to obey the order of the Commission.

The words "lawful order" mean an order which the Commission has jurisdiction to make. An order may be lawful and at the same time erroneous, so that if the Commission made an order in a matter over which they had jurisdiction, which was merely an error in judgment as to precisely the degree of reparation, for instance, the carrier ought to make, the order would still be lawful. In such a case the court is to "hear and determine the matter"—that is, the whole subject, "as a court of equity . . . in such a manner as to do justice in the premises"—that is, complete justice in the whole premises. Premises is not merely the particular order that the Commission has made, but it is the whole subject that had been duly brought before the Commission and on due notice and hearing had been acted upon. It is that duty which rested with the circuit court which is now imposed upon this court.

V. All the preceding action described is not "fixing rates" in the sense that state commissioners of railways are authorized by their legislatures to establish general rates for all classes and for all railways, as is contended for by the defendants. We make no such claim. The action of the Commission and the action of this court on what is really an appeal from and a review of the judgment is the trial and determination of a particular case and determining for that particular case what the con-

duct of the carrier shall be in respect of the particular dispute involved in it. It is the exertion of no general power to prejudge or to fix rates, nor is it the exertion of any power to fix rates in general. If this distinction be observed, there is no difficulty whatever. This is precisely in accord with what Justice Shiras said. After stating what had happened before the Commission, and stating that in the circuit court evidence was introduced which had not been laid before the Commission, showing that the rate to Birmingham had been forced down by the coming in of a new competitive road, and that the circuit court had thereupon found that the evidence was sufficient to overcome the findings of the Commission, and that the rate complained of was not unreasonable; and after stating that the circuit court of appeals had adopted the views of the circuit court in respect of the reasonableness of the rate from Cincinnati to Atlanta, and "as both courts found the existing rate to have been reasonable, we do not feel disposed to review their finding on that matter of fact," he then condemned the conduct of the carriers in lying by. He then says, "Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates was mooted in the courts below and is discussed in the briefs of counsel." He says, "We do not find any provision of the act which expressly or by necessary implication confers such power," and so forth. He then says, "the reasonableness of the rate in a given case depends on facts, and the function of the Commission is to consider these facts and give them their proper weight. If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the Commission to be reasonable." In this proposition we entirely concur, but in this case the identical question was raised by the petitions, an issue was made, evidence was taken on both sides, and the facts found, so that the sum fixed as reasonable by the Commission was not prejudged. And he adds that, "subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue prejudice or disadvantage, persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at common law." Here, again, it will be seen that reasonableness and unreasonableness, justice and injustice, preference, advantage, prejudice, disadvantage, are the very subjects that he says are within the competence of the Commission to determine. If the Supreme Court had been of opinion that the action of the Commission in its decision in regard to the Atlanta rate was beyond its jurisdictional power, they would have so said, and affirmed the judgment on that ground; but in distinct terms they affirm the judgment of the circuit court and the court of appeals upon the express ground that the Commission was in error in its finding of fact.

VI. Section 3 provides against "any undue or unreasonable preference or advantage to any . . . locality, or any particular description of traffic," etc.

Section 3 is to be enforced by the Commission. How is this possibly to be done otherwise than by commanding action by their carriers suited to the nature of the case, so as to obliterate the whole "undue preference," etc.? And how possibly otherwise can "reparation" be made to a "locality?" Reparation means "restoration" of the right.

VII. The circuit court had full power to decree what the Commission ought to have required in any case within its jurisdiction, and this is precisely what the court of appeals did, and what the Supreme Court affirmed, in *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission* (*Social Circle Case*), 162 U. S. 184 (40: 935), 5 Inters. Com. Rep. 391. In the present case the Commission ordered two things: First, that the defendants desist from charging their then existing prices, and, second, that the defendants do not charge more than a named price, which the Commission found to be reasonable and nonpreferential. If what the Commission thus decided was right upon the whole facts of the case as they now appear, where is the want of power in this court to affirm their judgment; or, if the Commission was wrong in degree, why has not this court, under the positive command of the statute to do justice in the premises, the power to say what ought to be done? It is the duty of the courts to endeavor, so far as the language of the act will allow, to execute its spirit and purpose. The act is in all civil respects a remedial act, and is therefore entitled to be liberally construed, if a liberal construction to effect its purpose be necessary. But in this case we need invoke no such principles, for, we submit, the language of the act is clear.

VIII. Every essential and nearly every primary fact found by the Commission is really unchallenged, and, if challenged, is clearly supported by the whole tenor of the oral and documentary evidence. Only the conclusion of unreasonableness in price and the conclusion of undue preference are disputed.

The fundamental and detailed circumstances of the whole case were developed before the Commission. Witnesses were examined and documents produced on both sides. The additional evidence does not change any of the facts and circumstances appearing before the Commission. There are discussions and speculations and opinions in abundance from the defendants' witnesses, speaking under the strongest bias.

By their own account of the conduct of their own lines toward each other they are in the frequent habit of exercising bad faith and doing secretly what they had solemnly engaged they would not do. Testimony from such sources (particularly mere opinions) is not entitled to much consideration against the great leading facts of the Railway and Steamship Association contract and the contrivances attending them and their conduct appearing in the case.

The evidence of the complainant's witnesses before the Commission shows distinctly the

unreasonableness of the prices, and very distinctly the undue preference for eastern territory accomplished by the association contract and by the territorial lines which the carriers will not allow to be crossed.

The unreasonableness of the prices was attempted to be defended by the defendants' witnesses on the ground that the lines north of the Ohio fix their own rates and the lines south of the Ohio fix theirs, and that the shippers had no right to look at the distances, etc., traversed by the lines on both sides of the Ohio as one system. This contention is exploded by the decision in the *Social Circle Case*, where it was held that if the carriers went into the business of through traffic at all, the reasonableness, and so forth, of the whole rate from the point of shipment to the point of destination was to be considered together.

In spite of the assertions of some of the defendants' witnesses that distance has nothing to do with the fixing of prices for carriage, it appears from their own testimony, as well as all the other evidence, that in every transaction between themselves and in every aspect of carriage their results, divisions of receipts, and their management are based almost, if not quite, entirely upon that very thing. And in the internal considerations of every company we find that they make up their conclusions of gain or loss from statistics and accounts kept in respect of distance and mileage, and so forth. And it is obvious enough that the truth of the cost and profit of their operations can be ascertained only in that way, and out of that what the carrier may consider to be a reasonable price (from his point of view) for carriage is determined. We refer, as a matter of public knowledge, for illustration of this, to the printed annual reports of the Lake Shore system; and the same thing will be found in all, or nearly all, of the full and detailed printed reports of great numbers of railways of the country.

Applying these principles and practices to the case in hand, we will take from the undisputed record a single illustration to show the enormous disparity between the eastern and western traffic, based on the railway's own established constructive mileage.

New York to Knoxville: Constructive miles, 763; rate, 100 cents per 100 pounds; equals $\frac{13}{100}$ of a cent per mile.

Chicago to Knoxville: 560 miles; rate, 116 cents per 100 pounds; equals $\frac{20}{100}$ of a cent per mile.

Cincinnati to Knoxville: 290 miles; rate, 76 cents per 100 pounds; equals $\frac{30}{100}$ of a cent per mile.

On the New York rate the rate from Chicago to Knoxville would be $73\frac{8}{10}$ cents per 100 pounds instead of 116 cents per 100 pounds.

All the details of rates prove in general the same great disparity.

Again, the eastern distance is only computed from New York, so that the whole great territory to the north and east of New York gets the same rate that New York itself does. This operates in respect of a great many articles to give the territory one hundred or more miles further from the points of delivery that much greater advantage over the territory of which Chicago and Cincinnati are the typical points.

No witness for the defendants even has said that they cannot carry at a great profit at the prices fixed by the Commission.

IX. As to the undue preference, the principal and apparently only answer that the defendants' witnesses make is that if the western rates were reduced, the eastern rates would be reduced also. If this should be so, it furnishes no reason for this court hesitating to do justice. The consequences must take care of themselves. It is monstrous to maintain that, if the carriers are compelled to do right, they will, as between themselves, proceed (in the elegant language of the defendants' counsel) "to cut each other's throats." If they do, the eastern and western territory will stand on an equality, and the rates, it may be presumed, will not then be grossly unreasonable as against the shipper.

It is earnestly contended by the defendants that such a reduction as is required by the Commission will make a great diminution of revenue. This may or may not be so, but the stopping of every extortion necessarily diminishes the profits of the extortioner. It is submitted that this is no reason for the Commission or this court failing to require conduct on the part of the carriers that is right in itself.

X. The real key and fortress of this whole injustice on the part of the carriers is found in the treaty between the defendant lines known as the "Southern Railway & Steamship Traffic Association Contract." An agreement to maintain certain rates, so long as they shall be reasonable and so long as they shall not make undue discrimination between persons and localities, is perfectly lawful for carriers to make; but an agreement that carriers shall divide the country or any part of it into sections and make prohibitory rates, as they themselves say they have done, on business crossing the line, establishes an absolute monopoly, and it is submitted is as clearly a violation of the interstate commerce law and of the trust law as it is at common law. This was the very purpose as well as the effect of the contract. The resolutions adopted at the meetings and by the various committees all absolutely demonstrate this purpose.

It is said by the defendants that everything must be right because manufacturers in the west have increased. This does not follow at all. Manufacturers in the west have increased in spite of the injustice of these transactions between the carriers, and these manufacturers have been compelled to find their chief market in the great and growing Northwest, and have been kept out of the south in a very large degree in consequence of this monopolistic tyranny.

We refer on these subjects in general to the testimony of the complainant's witnesses, taken before the Commission, and to the testimony of the defendants' witnesses: Eger, pp. 197–199; Peck, p. 405; Davant, p. 208; Culp, p. 267; Smith, p. 784, and see especially complainant's witnesses before the Commission, Mann, pp. 16, 17; Reed, pp. 16–18.

XI. The alleged water competition set up to explain the obvious inequality of eastern and western rates is completely disposed of by the value and effect of the water competition having been by the railway and water carriers

themselves ascertained and defined by treating 3 miles of water as equal to 1 mile of rail transportation, and the contention that outside of that there are tramp and sailing vessels (pp. 212–279) is also disposed of, though these can have no real influence upon the subject, by the testimony of one or more of the defendants' witnesses stating that they do not allow these vessels to compete for the kind of traffic that can have any play in consideration of the present questions; and it is obvious enough that the difficulties attending shipments and unlading by tramp steamers to connect with the lines of these railways would make it impossible to accomplish anything; and as to sailing vessels, nothing but the coarsest and least valuable commodities, in respect of which time and safety play a very small part, can be carried at all.

493] *Mr. Justice **Brewer** delivered the opinion of the court:

A similar question was before us at the last term in *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184 [40: 935, 5 Inters. Com. Rep. 391], and in the opinion, on pages 196 and 197 [939] we said:

"Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates was mooted in the courts below, and is discussed in the briefs of counsel. We do not find any provision of the act that expressly, or by necessary implication, confers such a power. It is argued on behalf of the Commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate, in a given case, depends on the facts, and the function of the Commission is to consider these facts and give them their proper weight. If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the Commission to be reasonable. We prefer to adopt the view expressed by the late Justice Jackson, when circuit judge, in the case of the *Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 43 Fed. Rep. 37 [3 Inters. Com. Rep. 192], and whose judgment was affirmed by this court, 145 U. S. 263 [36: 699, 4 Inters. Com. Rep. 92]: 'Subject to the two leading prohibitions, that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.'"

494] *The views thus expressed have been vigorously and earnestly challenged in this and in other cases argued at the present term. In view of its importance, and the full arguments that have been presented, we have deemed it our duty to re-examine the question in its entirety, and to determine what powers Congress has given to this Commission in respect to the matter of rates. The importance of the question cannot be overestimated. Billions of dollars are invested in railroad properties. Millions of passengers, as well as millions of tons of freight, are moved each year by the railroad companies, and this transportation is carried on by a multitude of corporations working in different parts of the country and subjected to varying and diverse conditions.

Before the passage of the act it was generally believed that there were great abuses in railroad management and railroad transportation, and the grave question which Congress had to consider was how those abuses should be corrected and what control should be taken of the business of such corporations. The present inquiry is limited to the question as to what it determined should be done with reference to the matter of rates. There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable. There is nothing in the act fixing rates. Congress did not attempt to exercise that power, and if we examine the legislative and public history of the day it is apparent that there was no serious thought of doing so.

The question debated is whether it vested in the Commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, *the language [**495** by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication. Administrative control over railroads through boards or commissions was no new thing. It had been resorted to in England and in many of the states of this Union. In England, while control had been given in respect to discrimination and undue preferences, no power had been given to prescribe a tariff of rates. In this country the practice had been varying. It will be interesting to notice the provisions in the legislation of different states. We quote the exact language following some of the quotations with citations of cases in which the statute has been construed:

Alabama. Code 1886, p. 295, § 1130: "Exercise a watchful and careful supervision over all tariffs and their operations, and revise the same, from time to time, as justice to the public and the railroads may require, and increase or reduce any of the rates, as experience and business operations may show to be just."

California. In the Constitution, going into effect January 1, 1880, art. 12, § 22: "Said

commissioners shall have the power, and it shall be their duty, to establish rates of charges for the transportation of passengers and freight by railroad or other transportation companies, and publish the same from time to time, with such changes as they may make."

Florida. Session Laws 1887, p. 119, § 5: "Make and fix reasonable and just rates of freights and passenger tariffs, to be observed by all railroad companies doing business in this state, on the railroads thereof." *McWhorter* v. *Pensacola & A. R. Co.* 24 Fla. 417 [2 L. R. A. 504].

Georgia. Code 1882, p. 159, § 719: "Make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this state on the railroads thereof." *Georgia R. & Bkg. Co.* v. *Smith*, 70 Ga. 694.

Illinois. Stat. 1878, Underwood's ed. p. 114, § 93: "To make, for each of the railroad corporations doing business in this state, as soon as **496**] practicable, a schedule of *reasonable maximum rates of charges for the transportation of passengers and freights on cars on each of said railroads."

Iowa. Laws 1888, p. 43: "Make for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of freight and cars on each of said railroads." *Burlington, C. R. & N. R. Co.* v. *Dey*, 82 Iowa, 312 [12 L. R. A. 436, 446, 3 Inters. Com. Rep. 584].

Minnesota. Laws 1887, chap. 10, p. 55: "In case the Commission shall at any time find that any part of the tariffs of rates, fares, charges, or classifications so filed and published as hereinbefore provided, are in any respect unequal or unreasonable, it shall have the power, and is hereby authorized and directed, to compel any common carrier to change the same and adopt such rate, fare, charge, or classification as said Commission shall declare to be equal and reasonable." *State, Railroad & Warehouse Com.*, v. *Chicago, St. P. M. & O. R. Co.* 40 Minn. 267 [3 L. R. A. 238, 2 Inters. Com. Rep. 519].

Mississippi. Laws 1884, p. 34, § 6: "Shall so revise such tariffs as to allow a fair and just return on the value of such railroad, its appurtenances and equipments, . . . and to increase or reduce any of said rates according as experience and business operations may show to be just."

New Hampshire. Laws 1883, p. 79, § 4: "Fix tables of maximum charges for the transportation of passengers and freight upon the several railroads operating within this state, and shall change the same from time to time, as in the judgment of said board the public good may require; and said rates shall be binding upon the respective railroads." *Merrill* v. *Boston & L. R. Co.* 63 N. H. 259.

North Dakota. Laws 1890, p. 355: "In case the commissioners shall at any time find that any part of the tariffs of rates, fares, charges, or classifications, so filed and published, as herein provided, are in any respect unequal or unreasonable, they shall have the power and are hereby authorized and directed to compel any common carrier to change the same and adopt such rate, charge, or classification as said commissioners shall declare to be equitable and reasonable."

South Carolina. Laws 1888, p. 65: "Authorized and required to make for each of the railroad corporations doing *business in this [**497** state, as soon as practicable, a schedule of reasonable and just rates of charges for the transportation of freights and cars on each of said railroads."

On the other hand in—

Kansas. Laws 1883, p. 186, § 11, reads:

"No railroad company shall charge, demand, or receive from any person, company, or corporation, an unreasonable price for the transportation of persons or property, or for the hauling or storing of freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad company. And upon complaint in writing, made to the board of railroad commissioners, that an unreasonable price has been charged, such board shall investigate said complaint, and if sustained shall make a certificate under their seal, setting forth what is a reasonable charge for the service rendered, which shall be prima facie evidence of the matters therein stated."

Section 18 authorized an inquiry upon the application of parties named in reference to freight tariffs and an adjudication upon such inquiry as to the reasonable charge for such freights. Section 14 required a notice of the determination to be given to the railroad company, and a communication of a failure to comply with such determination in a report to the governor; and § 19 reads:

"Any railroad company which shall violate any of the provisions of this act shall forfeit for every such offense, to the person, company, or corporation aggrieved thereby, three times the actual damages sustained by the said party aggrieved, together with the costs of suit, and a reasonable attorney's fee, to be fixed by the court; and if an appeal be taken from the judgment, or any part thereof, it shall be the duty of the appellate court to include in the judgment an additional reasonable attorney's fee for services in appellate court or courts."

The effect of these provisions was to make the determination of the Commission prima facie evidence of what were reasonable rates, and to subject the railroad company failing to respect such determination or to prove error therein to the large penalties prescribed in § 19.

*Kentucky. The act of April 6, 1882, [**498** § 1 (Gen. Stat. p. 1021), provided that "if any railroad corporation shall wilfully charge, collect, or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state . . . it shall be guilty of extortion," etc. Further sections created a commission, and by § 19 the commissioners were authorized to hear and determine complaints under the 1st and 2d sections of this act, and upon such complaint and hearing file their award with the clerk of the circuit court, which might be traversed by any party dissatisfied, and the controversy thereafter submitted to the court for consideration and judgment.

Massachusetts. Pub. Stat. 1882, p. 603, § 14:

"The board shall have the general supervision of all the railroads and railways, and shall examine the same." Section 15: If it finds that any corporation has violated the provisions of the act, or any law of the commonwealth, it shall give notice thereof in writing, and, if the violation shall continue after such notice, shall present the facts to the attorney general, who shall take such proceedings thereon as he may deem expedient. By § 193 special authority is given to the board to revise the tariffs and fix rates for the transportation of milk. See *Litt'efield* v. *Fitchburg R. Co.* 158 Mass 1.

New York. 6 Rev. Stat. chap. 39, contains the railroad law of the state. By § 157, the board of railroad commissioners "shall have general supervision of all railroads." By § 161, if in the judgment of the board it appears necessary that "additional terminal facilities shall be afforded, or that any change of rates of fare for transporting freight or passengers or in the mode of operating the road or conducting its business, is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, the board shall give notice and information in writing to the corporation of the improvements and changes which they deem proper;" and by § 162 "the supreme court at special term shall have power in its discretion in all **499**]cases of *decision and recommendations by the board which are just and reasonable to compel compliance therewith by mandamus, subject to appeal," etc.

This last section was enacted in 1892 (Laws 1892, chap. 676), and prior thereto, in *People* v. *New York, L. E. & W. R. Co.* 104 N. Y. 58, 58 Am. Rep. 484, it was held that the judgment of the commissioners was not binding on the railroad company in respect to certain terminal facilities ordered, and could not be enforced by mandamus.

Vermont. Laws 1886, p. 20, § 7, provided that if any railroad company "unjustly discriminates in its charges for transporting passengers or freight, or usurps any authority not granted by its charter, or wilfully refuses to comply with any reasonable recommendations of said board of commissioners, or enters into any combination or conspiracy with any other person, persons, or corporation, whereby the rates of charge for the transportation of freight or passengers, or the cost of commodities, is unduly increased, said commissioners shall give notice thereof in writing to such corporation or person, and if the act complained of is continued after such notice the board shall report the same to the then next session of the general assembly, and if in their judgment such action is irregular, may at any time make application to the supreme or county court for any remedy warranted by law."

The legislation of other states is referred to in the 4th Annual Report of the Interstate Commerce Commission, Appendix E, pages 243 and following. It is true that some of these statutes were passed after the Interstate Commerce Act, but most were before, and they all show what phraseology has been deemed necessary whenever the intent has been to give to the commissioners the legislative power of fixing rates.

It is one thing to inquire whether the rates which have been charged and collected are reasonable,—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future,—that is a legislative *act. *Chicago, M. & St. P. R.* [**500** *Co.* v. *Minnesota*, 134 U. S. 418, 458 [33: 970, 8 Inters. Com. Rep. 209]; *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 362, 397 [38: 1014, 1023, 4 Inters. Com. Rep. 560]; *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649, 663 [39: 567, 572]; *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 196 [40: 935, 939, 5 Inters. Com. Rep. 391]; *Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 216 [40: 940, 946, 5 Inters. Com. Rep. 405]; *Munn* v. *Illinois*, 94 U. S. 113, 144 [24:77, 91]; *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 164, 178 [24: 97, 99]; *Memphis & L. R. Co.* v. *Southern Exp. Co.* (*"Express Cases"*), 117 U. S. 1, 29 [29: 791, 803].

It will be perceived that in this case the Interstate Commerce Commission assumed the right to prescribe rates which should control in the future, and their application to the court was for a mandamus to compel the companies to comply with their decision; that is, to abide by their legislative determination as to the maximum rates to be observed in the future. Now, nowhere in the Interstate Commerce Act do we find words similar to those in the statutes referred to, giving to the Commission power to "increase or reduce any of the rates;" "to establish rates of charges;" "to make and fix reasonable and just rates of freight and passenger tariffs;" "to make a schedule of reasonable maximum rates of charges;" "to fix tables of maximum charges;" to compel the carrier "to adopt such rate, charge, or classification as said commissioners shall declare to be equitable and reasonable." The power, therefore, is not expressly given. Whence then is it deduced? In the 1st section it is provided that "all charges . . . shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Then follow sections prohibiting discrimination, undue preferences, higher charges for a short than for a long haul, and pooling, and also making provision for the preparation by the companies of schedules of rates, and requiring their publication. Section 11 creates the Interstate Commerce Commission. Section 12, as amended March 2, 1889 (25 Stat. at L. 858), gives it authority to inquire into the management of the business of all common carriers, to demand full and complete information from them, and adds, "and the Commission is hereby authorized to execute and enforce the provisions of this act." And the argument is that in enforcing and executing the provisions of the act it *is to execute and enforce the [**501** law as stated in the 1st section, which is that all charges shall be reasonable and just, and that every unjust and unreasonable charge is prohibited; that it cannot enforce this mandate of the law without a determination of what are reasonable and just charges; and as no other tribunal is created for such determination, therefore it must be implied that it is authorized to make the determination, and, having made it, apply to the courts for a mandamus to compel the enforcement of such determina-

tion. In other words, that though Congress has not in terms given the Commission the power to determine what are just and reasonable rates for the future, yet as no other tribunal has been provided, it must have intended that the Commission should exercise the power. We do not think this argument can be sustained. If there were nothing else in the act than the 1st section commanding reasonable rates, and the 12th empowering the Commission to execute and enforce the provisions of the act, we should be of the opinion that Congress did not intend to give to the Commission the power to prescribe any tariff and determine what for the future should be reasonable and just rates. The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative. Pertinent in this respect are these observations of counsel for the appellees:

"Article 2, § 3, of the Constitution of the United States, ordains that the President 'shall take care that the laws be faithfully executed.' The Act to Regulate Commerce is one of those laws. But it will not be argued that the President, by implication, possesses the power to make rates for carriers engaged in interstate commerce. . . .

"The 1st section simply enacted the common-law requirement that all charges shall be reasonable and just. For more than a hundred years it has been the affirmative duty of the courts 'to execute and enforce' the common-law requirement that 'all charges shall be reasonable and just;' and yet it has never been claimed that the courts, by implication, possessed the power to make rates for carriers."

502] *But the power of fixing rates under the Interstate Commerce Act is not to be determined by any mere considerations of omission or implication. The act contemplates the fixing of rates and recognizes the authority in which the power exists. Section 6 provides, among other things, "that every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. . . . Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. . . .

"No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. Reductions in such published rates, fares, or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given.

"And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

*"Every common carrier subject to the[**503** provisions of this act shall file with the Commission hereinafter provided for, copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid, shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published.

"No advance shall be made in joint rates, fares, and charges, shown upon joint tariffs, except after ten days' notice to the Commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect. No reduction shall be made in joint rates, fares, and charges, except after three days' notice, to be given to the Commission as is above provided in the case of an advance of joint rates. The Commission may make public such proposed advances, or such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs.

"It shall be unlawful for any common carrier, party to any *joint tariff, to charge,[**504** demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon, than is specified in

the schedule filed with the Commission in force at the time.

"The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient."

Finally, the section provides that if any common carrier fails or neglects or refuses to file or publish its schedules as provided in the section, it may be subject to a writ of mandamus issued in the name of the people of the United States at the relation of the Commission. Now, but for this act, it would be unquestioned that the carrier had the right to prescribe its tariff of rates and charges, subject to the limitation that such rates and charges should be reasonable. This § 6 recognizes that right, and provides for its continuance. It speaks of schedules showing rates and fares and charges which the common carrier "has established and which are in force." It does not say that the schedules thus prepared, and which are to be submitted to the Commission, are subject, in any way, to the latter's approval. Filing with the Commission and publication by posting in the various stations are all that is required, and are the only limitations placed on the carrier in respect to the fixing of its tariff. Not only is it thus plainly stated that the rates are those which the carrier shall establish, but the prohibitions upon change are limited in the case of an advance by ten days' public notice, and on reduction by three days. Nothing is said about the concurrence or approval of the Commission, but they are to be made at the will of the carrier. Not only are there these provisions in reference to the tariff upon its own line; but further when two carriers shall unite in a joint tariff (and such union is nowhere made obligatory, but is simply permissive), the requirement is only that such joint tariff shall be filed with the Com-
505] mission, *and nothing but the kind and extent of publication thereof is left to the discretion of the Commission.

It will be perceived that the section contemplates a change in rates either by increase or reduction, and provides the conditions therefor; but of what significance is the grant of this privilege to the carrier if the future rate has been prescribed by an order of the Commission, and compliance with that order enforced by a judgment of the court in mandamus? The very idea of an order prescribing rates for the future, and a judgment of the court directing compliance with that order, is one of permanence. Could anything be more absurd than to ask a judgment of the court in mandamus proceedings that the defendant comply with a certain order unless it elects not to do so? The fact that the carrier is given the power to establish in the first instance, and the right to change, and the conditions of such change specified, is irresistible evidence that this action on the part of the carrier is not subordinate to and dependent upon the judgment of the Commission.

We have, therefore, these considerations presented: First. The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance. Second. That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct. Third. Incorporating into a statute the common-law obligation resting upon the carrier to make all its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the act, does not by *implication carry to [**506** the Commission or invest it with the power to exercise the legislative function of prescribing rates which shall control in the future. Fourth. Beyond the inference which irresistibly follows from the omission to grant in express terms to the Commission this power of fixing rates, is the clear language of § 6, recognizing the right of the carrier to establish rates, to increase or reduce them, and prescribing the conditions upon which such increase or reduction may be made, and requiring, as the only conditions of its action, first, publication, and, second, the filing of the tariff with the Commission. The grant to the Commission of the power to prescribe the form of the schedules, and to direct the place and manner of publication of joint rates, thus specifying the scope and limit of its functions in this respect, strengthens the conclusion that the power to prescribe rates or fix any tariff for the future is not among the powers granted to the Commission.

These considerations convince us that under the Interstate Commerce Act the Commission has no power to prescribe the tariff of rates which shall control in the future, and, therefore, cannot invoke a judgment in mandamus from the courts to enforce any such tariff by it prescribed.

But has the Commission no functions to perform in respect to the matter of rates; no power to make any inquiry in respect thereto? Unquestionably it has, and most important duties in respect to this matter. It is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business. And with this knowledge it is charged with the duty of seeing that there is no violation of the long and short haul clause; that there is no discrimination between individual shippers, and that nothing is done by rebate or any other device to give preference to one as against another; that no undue preferences are given to one place or places or individual or class of individuals, but that in all things that equality

of right, which is the great purpose of the In-
507] terstate Commerce *Act, shall be secured to all shippers. It must also see that that publicity, which is required by § 6, is observed by the railroad companies. Holding the railroad companies to strict compliance with all these statutory provisions and enforcing obedience to all these provisions tends, as observed by Commissioner Cooley in *Re Chicago, St. P. & K. C. R. Co.* 2 Inters. Com. Rep. 137, 2 I. C. C. Rep. 231, 261, to both reasonableness and equality of rate as contemplated by the Interstate Commerce Act.

We have not overlooked the statute of Nebraska, nor the decision of the supreme court of that state, in respect thereto. This statute was approved March 31, 1887, a few weeks after the passage of the Interstate Commerce Act (Neb. Laws 1887, p. 540), and was obviously largely patterned upon that act. The general obligations incorporated into that act in respect to reasonableness of rates, prohibitions of discrimination, undue preferences, etc., are all in the Nebraska statute. A commission, called "a board of transportation," is also provided for (§ 11), and is charged with the general duty of enforcing the act and supervising the railroad companies in the state. Section 17, which is more full and specific than any to be found in the Interstate Commerce Act, provides that "said board shall have the general supervision of all railroads operated by steam in the state, and shall inquire into any neglect of duty or violation of any of the laws of this state by railroad corporations. . . . It shall carefully investigate any complaint made in writing, and under oath, concerning any lack of facilities, . . . or against any unjust discrimination against either any person, firm, or corporation or locality, either in rates, facilities furnished, or otherwise; and whenever, in the judgment of said board . . . any change in the mode of conducting its business or operating its road is reasonable and expedient in order to promote the security and accommodation of the public, or in order to prevent unjust discriminations against either persons or places; it shall make a finding of the facts, and an order requiring said railroad corporation to make such repairs, improvements," etc.

508] *In *State, Board of Transportation*, v. *Fremont, E. & M. V. R. Co.* 22 Neb. 313, it appeared that the board of transportation had found that certain rates enforced upon the road of the defendant company were excessive, and that certain other rates less than those in force were reasonable and just. On application to the supreme court it was held that the state was entitled to a mandamus compelling obedience to such determination, the court observing, p. 329: "In the case under consideration the board found that the rates and charges of the respondent were excessive; in other words, that there was unjust discrimination against that part of the state, and, having so found, the board is clothed with ample power to require such railway company to reduce its rates and charges. The power of the board, therefore, to establish and regulate rates and charges upon railways within the state of Nebraska is full, ample, and complete."

Without criticising in the least the logic of this decision, it is enough to say that it is based upon a section which gives wider and more comprehensive power to the supervising board than is given in the Interstate Commerce Act to the Commission, and does not justify the inference that the latter has the same power in respect to prescribing rates that by such decision was declared belonging to the Nebraska board of transportation.

Some reliance was placed in the argument on this sentence, found in the opinion of this court in *Cincinnati, N. O. & T. P R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 196 [40: 935, 939, 5 Inters. Com. Rep. 391]: "If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the Commission as reasonable." And it is thought that this court meant thereby that while the Commission was not in the first instance authorized to fix a rate, yet that it could, whenever complaint of an existing rate was made, give notice and direct a hearing, and upon such hearing determine whether the rate established was reasonable or unreasonable, and also what would be a reasonable rate if the one prescribed was found not to be, and that such order could be made the basis of a judgment *in mandamus requiring the **[509** carrier thereafter to conform to such new rate. And the argument is now made, and made with force, that while the Commission may not have the legislative power of establishing rates, it has the judicial power of determining that a rate already established is unreasonable, and with it the power of determining what should be a reasonable rate, and enforce its judgment in this respect by proceedings in mandamus.

The vice of this argument is that it is building up indirectly and by implication a power which is not in terms granted. It is not to be supposed that Congress would ever authorize an administrative body to establish rates without inquiry and examination; to evolve, as it were, out of its own consciousness, the satisfactory solution of the difficult problem of just and reasonable rates for all the various roads in the country. And if it had intended to grant the power to establish rates, it would have said so in unmistakable terms. In this connection it must be borne in mind that the Commission is not limited in its inquiry and action to cases in which a formal complaint has been made, but, under § 13, "may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made." By § 14 whenever an investigation is made by the Commission, it becomes its duty to make a report in writing, which shall include a finding of the facts upon which its conclusions are based, together with a recommendation as to what reparation, if any, ought to be made to any party or parties who may be found to have been injured. And by §§ 15 and 16, if it appears to the satisfaction of the Commission that anything has been done or omitted to be done, in violation of the provisions of the act, or of any law cognizable by the Commission, it is made its duty to cause a copy of its report to be de-

livered to the carrier, with notice to desist, and failing that to apply to the courts for an order compelling obedience. There is nothing in the act requiring the Commission to proceed singly against each railroad company for each supposed or alleged violation of the act. In this very case the order of the Commission was directed against a score or more of companies
510] and determined the *maximum rates on half a dozen classes of freight from Cincinnati and Chicago respectively to several named southern points and the territory contiguous thereto, so that if the power exists, as is claimed, there would be no escape from the conclusion that it would be within the discretion of the Commission of its own motion to suggest that the interstate rates on all the roads of the country were unjust and unreasonable, notify the several roads of such opinion, direct a hearing, and upon such hearing make one general order, reaching to every road and covering every rate. It will never do to make a provision prescribing the mode and manner applicable to all investigations and all actions equivalent to a grant of power in reference to some specific matter not otherwise conferred.

Again, it is said that this court, in *Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 145 U. S. 263, 276 [36:699, 703, 4 Inters. Com. Rep. 92], declared that "the principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit," etc.; but this by no means carries with it any suggestion that the way by which unjust and unreasonable rates were to be prevented was by intrusting to the Commission the power to prescribe what should be charged.

Still again, it is urged that the Commission has decided that it possesses this power and has acted upon such decision, and an appeal is made to the rule of contemporaneous construction. But it would be strange if an administrative body could by any mere process of construction create for itself a power which Congress had not given to it. And, indeed, an examination of the decisions of the Commission discloses this curious fact. In the early case of *Thatcher* v. *Delaware & H. Canal Co.* 1 Inters. Com. Rep. 356, 1 I. C. C. Rep. 152, 156, a case heard and decided in July of the year in which the Commission was created, the Commission declined, for lack of evidence, to fix certain rates, saying: "It is therefore impossible to fix them in this case, even if the Commission had power to make rates generally, which it has not. Its power in respect to rates is to determine whether those which the roads impose are for any reason in conflict with the statute."

Again, it will be perceived that nowhere in the
511] act is there *any suggestion of a maximum or minimum rate. The 1st section declares that the rates shall be reasonable and just, and prohibits every unreasonable and unjust charge. Now the rate may be unreasonable because it is too low, as well as because it is too high. In the former case it is unreasonable and unjust to the stockholder, and in the latter to the shipper. It was declared by this court in *Covington & L. Turnp. Road Co.* v. *Sandford*, 164 U. S. 578, 597 [41:560, 566], that in determining the question of reasonableness "its duty is to take into consideration the interests both of the public and of the owner of the property;" but in *Re Chicago, St. P. & K. C. R. Co.* 2 Inters. Com. Rep. 137, 2 I. C. C. Rep. 231, 261, the Commission held that it had no power to order rates to be increased upon the ground that they were so low that persistence in them would be ruinous. The opinion in that case, prepared by Commissioner Cooley, and with his usual ability, while seeking to prove that under the provisions of the statute the Commission has no power to prescribe a minimum or to establish an absolute rate, but only to fix a maximum rate, goes on further to show how the operation of other provisions of the act tend to secure just and reasonable rates. Were it not for its length, we should be glad to quote all that he says on the subject. We think that nearly all of the argument which he makes to show that the Commission has no power to fix a minimum or establish an absolute rate goes also to show that it has no power to prescribe any tariff or fix any rate to control in the future.

Our conclusion, then, is that Congress has not conferred upon the Commission the legislative power of prescribing rates either maximum or minimum or absolute. As it did not give the express power to the Commission it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum, or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad company should follow the rates thus determined to have been in the past reasonable and just.

The question certified must be answered* **[512 *in the negative, and it is so ordered.*

Mr. Justice **Harlan** dissented.

SAVANNAH, FLORIDA, & WESTERN RAILWAY COMPANY, *Appt.*,
v.
FLORIDA FRUIT EXCHANGE.

(See S. C. Reporter's ed., 512.)

[No. 141.]

Argued November 5, 1896. Decided May 24, 1897.

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. **John E. Hartridge** and *R. G. Erwin* for appellant.

Mr. **Charles M. Cooper** for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

The conclusions announced in the case just decided dispose of this; and for the reasons stated in that opinion, *the judgment of the court of appeals is reversed*, and the case remanded to the circuit court, with instructions to enter a decree for the defendant, dismissing the bill without prejudice.

Mr. Justice **Harlan** dissented.

C. S. WIGHT, *Plff in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 512-518.)

Violation of Interstate Commerce Act —construction.

1. An allowance for cartage made by a railroad company to a shipper who had no siding connection with that line, although he had such connection with another competing line, is in violation of § 2 of the Interstate Commerce Act prohibiting rebates, drawbacks, and special rates, when a similar allowance was not made to another person who shipped goods over the same line, under the same circumstances except that he had no siding connection with either road.
2. The phrase, "under substantially similar circumstances and conditions" in § 2 of the Act to Regulate Commerce, refers to the matter of carriage, and does not include competition.

[No. 494.]

Argued November 5, 6, 1896. Decided May 24, 1897.

IN ERROR to the District Court of the United States for the Western District of Pennsylvania to review a judgment against C. S. Wight for a violation of § 2 of the Interstate Commerce Act. *Affirmed.*

Statement by Mr. Justice **Brewer:**

513] *Section 2 of the Interstate Commerce Act reads:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." 24 Stat. at L. 379.

Section 10 of the act as amended by the act of March 2, 1889 (25 Stat. at L. 855, chap. 382), makes the violations of any of the provisions of the act a misdemeanor and subject to punishment. On October 8, 1894, an indictment was found in the district court of the United States for the western district of Pennsylvania, charging the defendant with a violation of said § 2. The trial resulted in a verdict and judgment against him, to reverse which this writ of error was sued out.

In their brief his counsel make this statement of facts:

"The undisputed facts proved in evidence are as follows: F. H. Bruening was engaged, during the year 1892, in the business of a wholesale dealer in beer in the city of Pittsburg; he purchased his beer in Cincinnati in carload lots, from the Moerlein Brewing Company of that city; Bruening's place of business was situated on the track of the Pittsburg, Cincinnati, & St. Louis Railroad Company, known as the 'Pan-handle,' and had a siding connection with that road, so that Mr. Bruening could ship his beer from Cincinnati over the Pan-handle Railroad, and have it delivered and unloaded directly into his warehouse. The rate by the Pan-handle Railroad for this service from Cincinnati to the warehouse was 15 cents per 100 pounds. The station of the Baltimore & Ohio Railroad Company in Pittsburg was at *some distance from Bruen- [514 ing's warehouse, and there was no track connection between the Baltimore & Ohio Railroad and the warehouse, so that if Bruening shipped his beer from Cincinnati by the Baltimore & Ohio route it was necessary to haul it in wagons from the Baltimore & Ohio station to the warehouse. The rate charged by the Baltimore & Ohio route between Cincinnati and Pittsburg, on beer in carloads, was likewise 15 cents per 100 pounds.

"In the month of June, 1892, agents of the Baltimore & Ohio Railroad Company, subordinate to the plaintiff in error, made an arrangement with Mr. Bruening, by which it was agreed that, if Bruening would ship his beer *via* the Baltimore & Ohio route from Cincinnati to Pittsburg, the railroad company would make the same delivery at the door of his warehouse that was made by the Pan-handle Railroad; that is to say, the railroad company would haul the beer from its station to Bruening's warehouse without extra charge. When, afterward, it was found that the cost to the railroad company for this hauling would be 3½ cents per 100 pounds, Bruening offered to do the hauling himself for that price, and his offer was accepted. This arrangement was reported to the plaintiff in error by his subordinates, approved by him, and continued in effect during the months of June, July, August, and September, 1892. During these months Bruening made large shipments of beer in carloads *via* the Baltimore & Ohio route, paid the charge of 15 cents per 100 pounds on delivery, hauled the beer from the station to his warehouse, and at the end of each month presented and collected a bill for 3½ cents per 100 pounds for the hauling. At the trial there was no question made of the good faith of the arrangement with Bruening; it was not questioned that the 3½ cents was the fair cost of the hauling; that the sole object of the arrangement was to make the same delivery which was made by the Pan-handle Railroad, and at the same charge of 15 cents per 100 pounds.

"During the continuance of this arrangement with Bruening, as *shown in the evidence, [515 the Kaufman Brewing Company of Cincinnati made several shipments of beer in carloads by the Baltimore & Ohio route, on bills of lading in the form shown at pages 73, 74, and 75 of the record. Each of these shipments was consigned to the 'Kaufman Brewing Company, care of or notify Henry Wolf, Pittsburg, Pa., to order of shipper,' and was taken at the 5th class rate of 15 cents per 100 pounds, as shown on the face of the bill. Henry Wolf was a wholesale dealer in beer in Pittsburg, whose warehouse was near the station of the

Baltimore & Ohio Railroad Company, but was not connected by track with any railroad. The bills of lading for the Kaufman Brewing Company's shipments were transmitted through bank with draft attached, and Mr. Wolf testified that, after he received notice from the railroad company of the arrival of each shipment, he went to the bank and paid the draft, received the bill of lading, and, on presenting it and paying 15 cents per 100 pounds, received the beer, which he hauled to his warehouse at his own expense."

Messrs. **Hugh L. Bond, Jr.**, and *John K. Cowen* for plaintiff in error.

Mr. **Edward B. Whitney**, Assistant Attorney General, for defendant in error.

Mr Justice **Brewer** delivered the opinion of the court:

Accepting the statement of facts made by the defendant as correct (and there is nothing in the statement which makes to his prejudice, or omitted from that statement which would be to his advantage), we are of opinion that the verdict and judgment were right, and must be sustained. It is unnecessary to consider all the instructions given and those refused, or determine whether in those given there may or may not be some language open to criticism. In its general charge the court narrowed the case to the facts, which, as stated [516 by *counsel, are undisputed, and correctly stated the law applicable to those facts. Indeed, while the question of guilt or innocence was submitted to the jury and passed upon by them, it is one rather of law than of fact, and if the court properly stated the law applicable to the facts, then the verdict was right and ought to be sustained. With reference to all other matters it is enough to say that our attention is called to no errors in the admission of testimony, and we see nothing in the instructions asked and given or asked and refused which could injuriously affect the rights of the defendant or limit the specific interpretation by the court of the rules of law applicable to those facts.

It will be observed that, in order to induce Mr. Bruening to transfer his transportation from a competing road to its own line, the Baltimore & Ohio Railroad Company, through the defendant, in the first place, made an arrangement by which for 15 cents per hundredweight it would bring the beer from Cincinnati and deliver it at his warehouse; that afterwards this arrangement was changed, and it delivered the beer to Mr. Bruening at its depot, and allowed him 3½ cents per hundred for carting it to his warehouse. As Mr. Bruening had the benefit of a siding connection with the competing road and could get the beer delivered over that road at his warehouse for 15 cents, it apparently could not induce him to transfer his business from the other road to its own without extending to him this rebate. During all this time it was carrying beer for Mr. Wolf from the same place of shipment (Cincinnati) to the same depot in Pittsburg, and charging him 15 cents therefor. Mr. Wolf had no siding connection with the rival road, and therefore had to pay for his cartage by whichever road it was carried. His warehouse was in a direct line 140 yards from the depot, while Mr. Bruening's was 172 yards, though the latter generally carted the beer by a longer route, on account of the steepness of the ascent. Now, it is contended by the defendant that it was necessary for the Baltimore & Ohio Company to offer this inducement to Mr. Bruening in order to get his business, and not necessary to make the like offer to *Mr. [517 Wolf, because he would have to go to the expense of carting by whichever road he transported; that therefore the traffic was not "under substantially similar circumstances and conditions" within the terms of § 2. We are unable to concur in this view. Whatever the Baltimore & Ohio Company might lawfully do to draw business from a competing line, whatever inducements it might offer to the customers of that competing line to induce them to change their carrier, is not a question involved in this case. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another. Counsel insist that the purpose of the section was not to prohibit a carrier from rendering more service to one shipper than to another for the same charge, but only that for the same service the charge should be equal, and that the effect of this arrangement was simply the rendering to Mr. Bruening of a little greater service for the 15 cents than it did to Mr. Wolf. They say that the section contains no prohibition of extra service or extra privileges to one shipper over that rendered to another. They ask whether if one shipper has a siding connection with the road of a carrier it cannot run the cars containing such shipper's freight onto that siding and thus to his warehouse at the same rate that it runs cars to its own depot, and there delivers goods to other shippers who are not so fortunate in the matter of sidings. But the service performed in transporting from Cincinnati to the depot at Pittsburg was precisely alike for each. The one shipper paid 15 cents a hundred; the other, in fact, but 11½ cents. It is true he formally paid 15 cents, but he received a rebate of 3½ cents, and regard must always be had to the substance, and not to the form. Indeed, the section itself forbids the carrier "directly or indirectly by any special rate, rebate, drawback, or other device" to charge, demand, collect, or receive from any person or persons a greater or less compensation, etc. And § 6 of the act, as amended in 1889, throws light upon the intent of the *statute, for it requires the com- [518 mon carrier in publishing schedules to "state separately the termiual charges, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges." It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

It may be that the phrase "under substantially similar circumstances and conditions," found in § 4 of the act, and where the matter of the long and short haul is considered, may have a broader meaning or a wider reach than

the same phrase found in § 2. It will be time enough to determine that question when it is presented. For this case it is enough to hold that that phrase, as found in § 2, refers to the matter of carriage, and does not include competition.

We see no error in the record, and the judgment of the District Court is affirmed.

Mr. Justice **White** concurs in the judgment.

DANIEL A. CAMFIELD *et al.*, *Appts.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 518-528.)

Police power—public lands—unlawful inclosure of public lands.

1. The police power is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest.
2. The fact that public lands are within a state does not prevent the government from exercising the rights of an ordinary proprietor to maintain its possession and to prosecute trespassers.
3. The inclosure of public lands included in the even-numbered sections of a township, by a fence built entirely on the odd-numbered sections on the margin of the township and included within it or adjacent thereto, is in violation of the act of Congress of February 25, 1885, prohibiting "inclosures of any public lands," and constitutes a nuisance the abatement of which may be ordered by Congress notwithstanding such action may involve an entry upon the lands of a private individual.
4. The admission of a territory as a state does not deprive the government of the power of legislating for the protection of the public lands therein though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection.
5. The illegality of an inclosure of public lands is not affected by the fact that they were inclosed for irrigating as well as for pasturage purposes.

[No. 278.]

Submitted April 20, 1897. Decided May 24, 1897.

APPEAL from a judgment of the United States Circuit Court of Appeals for the Eighth Circuit affirming the decree of the Circuit Court of the United States for the District of Colorado in favor of the United States against Daniel A. Camfield *et al.*, for the removal and abatement of a fence erected and maintained by the defendants inclosing public lands and appropriating them to the exclusive use of defendants. *Affirmed.*

See same case below, 59 Fed. Rep. 562, 32 U. S. App. 42, 123.

Statement by Mr. Justice **Brown**:

519] *This was a bill in equity originally filed by the United States in the circuit court of the district of Colorado, to compel the removal and abatement of a fence erected and maintained by the defendants, whereby about 20,000 acres of public lands were inclosed, and appropriated to the exclusive use and benefit of the defendants.

The bill averred, in substance, that the defendants, Daniel A. Camfield and William Drury, with intent to encroach and intrude upon the lands of the United States in an illegal manner, and to monopolize the use of the same for their own special benefit, did on or about January 1, 1893, construct and maintain a fence, which inclosed and included about 20,000 acres of the public domain; that the effect of such inclosure was to exclude the United States and all other persons, except the defendants, therefrom; and that the lands thus wrongfully inclosed consisted of all of the even numbered sections in townships numbered 7 and 8 north, of range 63 west, of the sixth principal meridian. The bill further averred that said townships 7 and 8 lie within the limits of the grant made by the government to the Union Pacific Railroad Company; that the defendants had acquired from said railroad company the right to use all the odd numbered sections of land which lie within said townships 7 and 8 and outside thereof, immediately adjacent to the even-numbered sections lying within and on the margin of said townships, and that, in building the fence complained of, the defendants had constructed it entirely on odd-numbered sections, either within or without townships 7 and 8, so as to completely inclose all of the government lands aforesaid, but without locating the fence on any part of the public domain so included.

The subjoined diagram of one township will serve to illustrate the manner in which the fence was constructed so as to inclose the even-numbered sections. The fence is indicated by the dotted *lines. [520

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

NOTE.—*As to police power of states; instances of its exercise*,—see note to Barbier v. Connolly, 28: 923.

As to pre-emption rights, see note to United States v. Fitzgerald, 10: 785.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands, how construed, see note to Watts v. Lindsey, & 428.

As to measure of damages for nuisance, see note to Baltimore & P. R. Co. v. Fifth Baptist Church, 27: 739.

As to who maintains action for public nuisance, and when; special damage necessary; method of abatement,—see note to Georgetown v. Alexandria Canal Co. 9: 1012.

As to when injunction will be granted against a nuisance, see note to Irwin v. Dixion, 13: 25.

The defendants admitted by their answer that they had constructed a fence so as to inclose all of the even-numbered sections in townships 7 and 8, substantially as set out above in the plaintiff's complaint, save and except that at each section line a swinging gate had been placed to afford access to so much of the public domain as was inclosed by the aforesaid fence. By their answer the defendants sought to justify the erection of the fence in question, upon the ground that they owned all the odd numbered sections in townships 7 and 8, and that they were engaged in building large reservoirs for the purpose of irrigating the land by them owned, and much other land in that vicinity. They averred that, in carrying out such irrigation scheme, they found it necessary to fence their lands in townships 7 and 8 in the manner above described. They also denied that they had any intention of monopoliz-
521] ing *the even-numbered sections inclosed by said fence or to exclude the public therefrom; and further averred, in substance, that the work in which they were engaged was of great importance and utility, and would redound to the great advantage of the United States and its citizens.

An exception was filed to the answer upon the ground that it was insufficient to constitute a defense to the bill. This exception was sustained (59 Fed. Rep. 562), and, as the defendants declined to plead further, a decree was entered in favor of the government, from which decree the defendants appealed to the court of appeals, which affirmed the judgment of the circuit court. (32 U. S. App. 42, 123.) Whereupon defendants appealed to this court.

Messrs. **James W. McCreery, C. W. Bunn,** and *Charles W. Bates* for appellants.

Mr. **Holmes Conrad,** Solicitor General, for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

This case involves the construction and application of the act of Congress of February 25, 1885, entitled "An Act To Prevent Unlawful Occupancy of the Public Lands." 23 Stat. at L. 321, chap. 149. The 1st section of the act reads as follows:

"That all inclosures of any public lands in any state or territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made,—are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the asser-
522] tion of a *right to the exclusive use and occupancy of any part of the public lands of the United States in any state or any of the territories of the United States, without claim, color of title, or asserted right, as above specified as to inclosure, is likewise declared unlawful and hereby prohibited."

By § 2 of said act, it is made the duty of the district attorney of the United States for the proper district, when complaint is made to him by affidavit by any citizen of the United States that § 1 of the act is being violated, to institute a civil suit in the name of the United States in the proper United States district or circuit court against the person or persons in charge of or controlling the unlawful inclosure complained of. By this section jurisdiction is also conferred upon any United States district or circuit court, or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity by writ of injunction, to restrain violations of the provisions of the act. It is also made the duty of said courts in case any inclosure shall be found to be unlawful, to make the proper order, judgment, or decree for the destruction of the same, in a summary way, unless the inclosure shall be removed by the parties complained of within five days after they are ordered to do so.

Defendants are certainly within the letter of this statute. They did inclose public lands of the United States to the amount of 20,000 acres, and there is nothing tending to show that they had any claim or color of title to the same, or any asserted right thereto under a claim made in good faith under the general laws of the United States. The defense is in substance that, if the act be construed so as to apply to fences upon private property, it is unconstitutional.

There is no doubt of the general proposition that a man may do what he will with his own, but this right is subordinate to another, which finds expression in the familiar maxim: *Sic utere tuo ut alienum non lædas.* His right to erect what he pleases upon his own land will not justify him in maintaining a nuisance, or in carrying on a business or trade that is offensive to his neighbors. Ever since *Aldred's Case,* Coke, Rep. pt. 9, p. 57, it has been *the [523 settled law, both of this country and of England, that a man has no right to maintain a structure upon his own land, which, by reason of disgusting smells, loud or unusual noises, thick smoke, noxious vapors, the jarring of machinery, or the unwarrantable collection of flies, renders the occupancy of adjoining property dangerous, intolerable, or even uncomfortable to its tenants. No person maintaining such a nuisance can shelter himself behind the sanctity of private property.

It is true that a man may build a fence upon his own land as high as he pleases, even though it obstructs his neighbor's lights, and the weight of authority is that his motives in so doing cannot be inquired into, even though the fence be built expressly to annoy and spite his neighbor; and that in this particular the law takes no account of the selfishness or malevolence of individual proprietors (*Mahan* v. *Brown,* 13 Wend. 261 [28 Am. Dec. 461]; *Chatfield* v. *Wilson,* 28 Vt. 49; *Frazier* v. *Brown,* 12 Ohio St. 294; *Pickard* v. *Collins,* 23 Barb. 444; *Clinton* v. *Myers,* 46 N. Y. 511 [7 Am. Rep. 373]; *Phelps* v. *Nowlen,* 72 N. Y. 39 [28 Am. Rep. 93]; *Walker* v. *Cronin,* 107 Mass. 555, 564).

although there are many strong intimations to the contrary.

But the injustice of the prevailing doctrine upon this subject, in its practical operation, became so manifest that, in 1887, the legislature of Massachusetts passed a statute declaring that any fence "unnecessarily exceeding 6 feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property," should be deemed a private nuisance, and that any such owner or occupant who was thereby injured in his comfort, or in the quiet enjoyment of his estate, might have an action of tort for the damage. The constitutionality of this statute was attacked in the case of *Rideout v. Knox*, 148 Mass. 368 [2 L. R. A. 81], but upon full consideration, the supreme judicial court was of opinion that the statute was within the limits of the police power, and was constitutional; and, although the fence was not directly injurious to the public at large, there was a public interest to restrain this kind of aggressive annoyance of one neighbor by another, and to mark a definite limit, beyond which it was not lawful to go. The court also held the statute to be constitutional with refer-
524 ence*to fences already in existence when the act was passed; that although it involved, to a certain extent, the taking of property without compensation, yet, "having regard to the smallness of the injury, the nature of the evil to be avoided, the quasi accidental character of the defendant's right to put up a fence for malevolent purposes, and also to the fact that police regulations may limit the use of property in ways which greatly diminish its value," the court was of opinion that the act was constitutional to the full extent of its provisions. The case is authority for the proposition that the police power is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguard of the public interests. Apparently the principal doubt entertained by the court was whether the maintenance of a private fence could be said to be "injurious to the public at large," but it seems to have been of opinion that such a nuisance might give rise to disputes and bickerings prejudicial to the peace and good order of the community.

While the lands in question are all within the state of Colorado, the government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale. It may grant them in aid of railways or other public enterprises. It may open them to pre-emption or homestead settlement; but it would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain, and thereby practically drive intending settlers from the market. It needs no argument to show that the building of fences upon public lands with intent to inclose them for private use would be a mere trespass, and that such fences might be abated by the officers of the government or by the ordinary processes of courts of justice. To this extent no legislation was necessary to vindicate the rights of the government as a landed proprietor.

But the evil of permitting persons who owned or controlled the alternate sections, to inclose the entire tract, and thus to exclude *or frighten off intending settlers, finally [**525** became so great that Congress passed the act of February 25, 1885, forbidding all inclosures of public lands, and authorizing the abatement of the fences. If the act be construed as applying only to fences actually erected upon public lands, it was manifestly unnecessary, since the government as an ordinary proprietor would have the right to prosecute for such a trespass. It is only by treating it as prohibiting all "inclosures" of public lands by whatever means that the act becomes of any avail. The device to which defendants resorted was certainly an ingenious one, but it is too clearly an evasion to permit our regard for the private rights of defendants as landed proprietors to stand in the way of an enforcement of the statute. So far as the fences were erected near the outside line of the odd-numbered sections, there can be no objection to them; but so far as they were erected immediately outside the even numbered sections, they are manifestly intended to inclose the government's lands, though, in fact, erected a few inches inside the defendants' line. Considering the obvious purposes of this structure, and the necessities of preventing the inclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual. The general government doubtless has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. If it be found to be necessary for the protection of the public, or of intending settlers, to forbid all inclosures of public lands, the government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage. The inconvenience, or even damage, to the individual proprietor, does not authorize an act which is in its nature a purpresture of government lands. While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a state, which it would have within a territory, we do not think the admission of a territory as a state deprives *it of the power of [**526** legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of state legislation.

We are not convinced by the argument of counsel for the railway company, who was permitted to file a brief in this case, that the fact that a fence, built in the manner indicated, will operate incidentally or indirectly to inclose public lands, is a necessary result, which Congress must have foreseen when it made the grants, of the policy of granting odd sections and retaining the even ones as public lands;

and that if such a result inures to the damage of the United States it must be ascribed to their improvidence and carelessness in so surveying and laying off the public lands that the portion sold and granted by the government cannot be inclosed by the purchasers without embracing also in such inclosure the alternate sections reserved by the United States. Carried to its logical conclusion, the inference is that, because Congress chose to aid in the construction of these railroads by donating to them all the old-numbered sections within certain limits, it thereby intended incidentally to grant them the use for an indefinite time of all the even-numbered sections. It seems but an ill return for the generosity of the government in granting these roads half its lands to claim that it thereby incidentally granted them the benefit of the whole.

The government has the same right to insist upon its proprietorship of the even numbered sections that an individual has to claim the odd sections, and if such proprietor would have the right to complain of the government fencing in his lands in the manner indicated and leasing them for pasturage, the government has the same right to complain of a similar action upon his part. If there be any general impression that in dealing with public lands the rights are altogether those of the individual proprietors, and that such rights as the government has exist only by their sufferance, the act in question will do much to rectify this misapprehension.

527] *These grants were made in pursuance of the settled policy of the government to reserve to itself the even numbered sections for sale at an increased price; and if the defendants in this case chose to assume the risk of purchasing the odd numbered sections of the railroad company for pasturage purposes, without also purchasing or obtaining the consent of the government to use the even-numbered sections, and thereby failed to derive a benefit from the odd numbered ones, they must call upon their own indiscretion to answer for their mistake. The law and the practice of the government were perfectly well settled, and if it had chosen in the past to permit by tacit acquiescence the pasturage of its public lands, it was a policy which it might change at any moment, and which became the subject of such abuses that Congress finally felt itself compelled to pass the act of February 25, 1885, and thereby put an end to them. It was not intended, however, to prohibit altogether the pasturage of public lands, or to reverse the former practice of the government in that particular. Indeed, we know of no reason why the policy, so long tolerated, of permitting the public lands to be pastured, may not be still pursued, provided herdsmen be employed, or other means adopted by which the fencing in and the exclusive appropriation of such land shall be avoided. The defendants were bound to know that the sections they purchased of the railway company could only be used by them in subordination to the right of the government to dispose of the alternate sections as it seemed best, regardless of any inconvenience or loss to them, and were bound to avoid obstructing or embarrassing it in such disposition. If practices of this kind were tolerated, it would be but a step further to claim that the defendants, by long acquiescence of the government in their appropriation of public lands, had acquired a title to them as against every one except the government, and perhaps even against the government itself.

It is no answer to say that, if such odd-numbered sections were separately fenced in, which the owner would doubtless have the right to do, the result would be the same as in this case, to practically exclude the government from the even-numbered *sections, since [**528** this was a contingency which the government was bound to contemplate in granting away the odd-numbered sections. So long as the individual proprietor confines his inclosure to his own land, the government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor; but when, under the guise of inclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to inclose the lands of the government, he is plainly within the statute, and is guilty of an unwarrantable appropriation of that which belongs to the public at large. It may be added, however, that this is scarcely a practical question, since a separate inclosure of each section would only become desirable when the country had been settled, and roads had been built which would give access to each section.

It is equally immaterial that the defendants have undertaken to build large reservoirs for water to be supplied for the irrigation of its lands, or that they have proceeded in accordance with the act of Congress in acquiring the necessary sites to be used in the construction of such reservoirs, or that they have expended large sums of money in providing for this improvement. If they have inclosed the public lands in violation of the statute it is no answer to say that they have inclosed them for irrigating as well as for pasturage purposes. The violation of the statute is none the less manifest from the fact that the defendants had an ulterior purpose, or a purpose other than that of pasturage.

We are of opinion that, in passing the act in question, Congress exercised its constitutional right of protecting the public lands from nuisances erected upon adjoining property; that the act is valid, and that *the judgment of the Circuit Court of Appeals must be affirmed.*

JOEL PARKER WHITNEY *et al.*, [**529**
Appts.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 529-548.)

Pasturage, when evidence of possession of lands —judicial notice—title under Spanish grant —burden of proof.

1. In order to make pasturage on lands of any

NOTE.—*As to Missouri private land claims*, see note to Les Bois v. Bramell, 11: 1051.

As to want of change of possession; evidence of fraud,—see note to Brooks v. Marbury, 6: 423.

particular weight as evidence of possession it should be shown to have been exclusive, and that no other person pastured or had the same right to pasture on the lands.

2. Judicial notice may be taken of the notorious fact that mere pasturage upon western lands is very slight evidence of possession.

3. A judicial ruling made in 1785 by an alcalde ousting a person from certain lands claimed by heirs of a grantee, in a case to which the Crown was not a party, is not conclusive to the title to such lands under a Spanish grant.

4. The burden of proving the larger grant is upon the claimants where the description in a Spanish grant is reconcilable with a smaller boundary.

[No. 271.]

Argued April 9, 1897. Decided May 24, 1897.

ON APPEAL from a decree of the Court of Private Land Claims in favor of Joel Parker Whitney *et al.*, that they were entitled to a part of lands claimed by them situated on the Rio Grande river in the territory of New Mexico, in a suit brought by said claimants against the United States. *Reversed*, and case remanded for further proceedings.

Statement by Mr. Justice **Brown**:

This was a petition by Joel Parker Whitney and others filed in the court of private land claims for the confirmation of what is commonly known and called the "Cañada de Cochiti grant," containing over 100,000 acres, and situated on the Rio Grande river, in the county of Bernalillo, territory of New Mexico. On the day following, Manuel Hurtado and José Antonio Gallegos filed a suit against the United States for the confirmation of the same land, claiming under the same title. It appearing to the court that these two suits were for the same property and under the same original title, the court ordered them to be consolidated, and to proceed as one cause.

The petition set forth that, on August 2, 1728, the King of Spain, by Juan Domingo de Bustamente, governor of the Royal Province of New Mexico, upon the petition of one Antonio Lucero, made a grant of a certain tract of land, bounded and described as follows: On the north by the old pueblo of Cochiti; on the east by the Rio del Norte (otherwise called the Rio Grande); on the south by the lands of the Cochiti Indians, and on the west by the Jemez mountain, with its entrances and exits, watering places, uses, and customs. That the granting decree for said land was signed by the governor on said date, and countersigned by Antonio de Cruciaga, his secretary of state and war, and it directed that the grantee should be placed in royal and personal possession under the boundaries described in said petition, and under the conditions prescribed by the royal ordinances in that behalf as to the settlement of the same. It also directed that, after the possession of the land had been given [530] to the grantee, the original *expediente should be returned to the governor, to the end that duplicates thereof might be given to the grantee; that in execution of said decree, Captain Andres Montoya, chief alcalde of the pueblos of Cochiti, Santo Domingo, and San Felipe, gave to the said Lucero juridical possession of the land on August 6, 1728, executing and delivering the act of juridical possession on the premises in due form of law in the presence of his attending witnesses.

The petition also alleged that the granting decree and act of juridical possession were returned to the governor and placed in the royal archives at Santa Fé, New Mexico, and that a testimonio, or duplicate thereof, was delivered to the grantee; and that the said testimonio was not in the possession, custody, or control of the petitioners, but that the same was deposited in the governmental archives at Santa Fé upon the cession of New Mexico to the United States, and has ever since been in its custody.

It was also alleged that Antonio Lucero settled upon, occupied, improved, enlarged, and claimed the land in fee simple openly, continuously, and uninterruptedly from the date of the act of possession, August 6, 1728, for a period much longer than four years, and up to the time of his death, and that he died fully seised and possessed of the same; that his heirs at law and legal representatives have ever since continued under the same claim of title, peaceably occupying and possessing the same, save only in the year 1785, when it was intruded upon by one Antonio Gallego, a lieutenant in the military service at the place called Cañada del Medio, under pretense of authority from Governor de Anza to occupy and use the cañada for the pasturage of the royal cavalry; whereupon, in the month of November, 1785, Antonio Lucero de Godoi and numerous others, descendants and heirs at law of said origiual grantee, presented their petition to Antonio de Armenta, chief alcalde and war captain, having, as alleged, judicial and administrative jurisdiction in the premises, complaining of the said intrusion by the Lieutenant Gallego, and asking for relief in the premises. It was alleged that, in view of said petition, Armenta, the said chief alcalde, reported said petition and the *subject mat- [531 ter thereof to the governor; and, upon due consideration of the petition, the governor found and determined, and so declared in substance to the chief alcalde and war captain, that, inasmuch as the petitioners were in all respects the legal heirs of the said tract of land, they were entitled to occupy the same in preference to any other individuals, and the said intrusion by the said Lieutenant Gallego was unjust and unfounded.

That thereupon the chief alcalde and war captain, under full authority in that behalf conferred upon him by the said governor, duly made his order and judgment, reciting the petition, report to the governor, and the determination of the superior authority thereon, adjudging and declaring that the said order and judgment, being an instrument in writing signed by the said chief alcalde and his witnesses, should remain as conclusive evidence of the rightful title of the said heirs to the said land granted and its rightful acquisition by them and their descendants from the King of Spain; and by the said instrument the said alcalde, in the exercise of the judicial jurisdiction legally vested in him, declared that the same should remain before any tribunal as evidence for all time of the title of the heirs to the tract of land granted.

That the originals of said petition and adjudicatory instrument were in the possession of the respondent and kept in the archives at Santa Fé.

That the petitioners are interested in said tract under the original grantee by divers mesne conveyances from his heirs and legal representatives; and

That all conditions, precedent and subsequent, of the grant at any time incumbent upon the said grantee, his heirs or assigns, have been fully performed and discharged.

The answer of the United States put in issue the allegations of the petition generally, and specifically denied that the alleged granting decree and act of possession were returned to the governor and placed in the royal archives at the city of Santa Fé, New Mexico; denied that a testimonio or duplicate thereof was delivered to the said original grantee under and by virtue of the direction of the governor; denied **532**] that the *alleged testimonio or duplicate was ever placed in the governmental archives at Santa Fé upon the cession of New Mexico to the United States, for the reason that there was no necessity for nor any law authorizing the same, but that the owners or alleged owners of the grant were the only proper custodians of said alleged testimonio. It denied specifically that Lucero ever entered upon the tract of land sued for, and occupied or appropriated the same, as alleged in said petition, for the reason that it was impossible and impracticable for him so to do, because, under the conditions of the country at the time and for more than a century thereafter, it was impossible for Lucero or any one else to occupy, appropriate, or use, directly or indirectly, the grant described in the petition; all of which Lucero knew at the time he applied for said grant.

As to the allegation that, in 1785, Antonio Gallego intruded upon the Cañada del Medio, an alleged portion of said tract, upon the pretense that he had authority from the governor to use the same for the pasturage of the royal stock, the government alleged that it had no knowledge or information; nor as to whether in said year Antonio Lucero de Godoi and others, claiming as descendants of Lucero, presented a petition to Armenta, chief alcalde, complaining of said intrusion, and asking for an investigation of the same or for relief. Nor had it any knowledge or information as to whether Antonio Armenta, alcalde, reported said petition or the subject-matter thereof to the governor of New Mexico; nor as to whether, in passing on said matters, the said alcalde had any authority to act in that behalf under the authority of said governor; nor as to whether said alcalde undertook to make a finding in said matter; nor as to whether he undertook to or did attempt to make the allegation set forth in the petition; but it was alleged that if he did do so, the same was without warrant or authority of law, and without any direct order from the governor, and that the said alcalde had no power or authority in that behalf except such as might be conferred upon him for that purpose by direct order of the governor of the province, and the govern- **533**] ment therefore denied that said *alcalde had jurisdiction in the premises, and denied that any jurisdiction was shown in that behalf.

It denied that the originals of said petition and adjudicatory instrument, dated in the year 1785, before referred to, were or ever had been in the said archives; and alleged that if the same were in the possession of the surveyor general they were filed with him under the law of July 22, 1854, which provided for the adjustment of private land claims in the territory of New Mexico, and that they never constituted part of the archives of the Spanish or Mexican governments; that no action was ever taken upon said alleged acts of said justice by the governor of the province; and, therefore, it constituted neither adjudication nor admission on the part of the Spanish government, but was simply an unauthorized and unapproved act of an alcalde.

Further answering, the government alleged that the petition by Antonio Lucero was one for a small piece of land on which to cultivate 10 fanegas of wheat and 2 of corn, and to pasture small stock and horses; that the boundaries designated in said petition were only to indicate the district of country within which said small piece of land was located; that in acting upon said petition, if he ever did, the said governor did not make a grant, but specially reserved that act until after the alcalde should have placed the petitioner in possession of the property and returned the expediente to him for final action, which was never done, and therefore no grant, either legal or equitable, was ever made.

Upon a hearing upon pleadings and proofs the court of private land claims was of opinion that the petitioners were not entitled to the grant to the full extent demanded of 104,554.24 acres, but that they were entitled to a grant of land "bounded on the north by the old pueblo of Cochiti, which is situated on the mesa of Cochiti, on the south side of the cañada of Cochiti, which point is about 8,190 feet in a northerly direction from the northwest corner of the lands of the Indians of the pueblo of Cochiti, as the same has been fixed and determined by the survey and patent of the same by the United States of *America; [**534** on the east by the Rio del Norte (otherwise called the Rio Grande); on the south by the lands of the Cochiti Indians, as the same has been fixed and located by the survey and patent thereof to the Indians of the pueblo of Cochiti by and under the authority of the United States of America, and on the west by the same old pueblo first above referred to as the northern boundary of the grant hereby confirmed, which said grant of lands contains in area about 5,000 acres of land;" and that such claim was entitled to confirmation in the name of the original grantee, Antonio Lucero, for the use and benefit of all parties in interest, claiming by, through, or under him, by the same title. Whereupon petitioners prayed and were allowed an appeal to this court.

Mr. **John H. Knaebel** for appellants.

Messrs. **Matthew G. Reynolds**, Special Assistant to the Attorney General, and **Holmes Conrad**, Solicitor General, for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

Some difficulty in this case arises from the mutilated and fragmentary condition of the

original petition in Spanish, and the grant of the land prayed for, purporting to be of the same date, and supposed to have been made by Bustamente, goveruor and captain general of New Mexico. The original petition, as it now appears, reads as follows, the stars indicating the illegible portions:

"Antto. Lusero . . . querque ante . . . resco por aqu . . . que el derech . . . por quanto . . . familia y no . . . ante V. SSa. . . . so de tierra . . . en la Mesa de Cochiti donde estubieron retirados los indios que se sublebaron para en el sembrar i cabra [labrar] en dicho pedaso de tierra, dies anegas de trigo y dos de mais, y para apastar mi ganado menor y Cavallada, y luida dicha tierra por la parte del norte con el Pueblo Viejo de Cochiti, y por el oriente con el Rio del Norte, **535]** *y por el Sur con tierras de las naturales dicho pue . . . el poniente con . . . de Xemes con sus . . . salidas abreva . . . y Servi dumbres . . . lo en perjuisio de . . . de serbir V. SSa. de . . . ersed en nombre . . . gestad por todo . . . lico provea y mau . . . do que resivire . . . rsed y juro por Dios Nuestro Señor no ser de malicia en lo necesario &a. Antto. Lucero."

The description of the land prayed for, which is the only part of the petition material to this case, may be represented in trauslation as follows:

" . . . cel of land . . . on (or at) the mesa of Cochiti where the Indians who rebelled retreated, to sow thereon, and to cultivate on said piece of land about ten fanegas of wheat and two of corn, and to pasture my sheep and horse herd; and the said land is bounded on the north by the old pueblo of Cochiti, and on the east by the Del Norte river, and on the south by the lands of the natives of said pue . . . the west with . . . of Jemez."

The grant, which appears immediately at the foot of the petition, is also partly mutilated, but so far as it is legible and can be translated reads as follows:

"Village of Santa Fé, August 2, 1728.

"This petition was presented by the party therein before His Excellency the governor and captain general of this kingdom of New Mexico.

"And the same being examined by his excellency he treated the same as presented and regis . . . the land which the party asks, and for which purpose he ordered . . . ed that the chief alcalde of San Felipe Santo Dom . . . and Cochiti to proceed and examine said piece of land by . . . tation of the natives of said pueblos and others who may live near, and there being any opposition to suspend, and there being no impediment and it being without prejudice to a third party having a better right the grant is made to him in the name of His Majesty, and he will be placed in **536]** royal and personal possession *under the boundaries he refers to and of which having acquired it . . ."

This grant was probably signed by Bustamente, and countersigned by Antonio de Cruciaga, his secretary of state and war, although these signatures do not now appear upon the original documents.

These documents are produced by the petitioners themselves, and not, as usual, by a testimonio or copy certified by the proper officer.

As this grant refers to the land demanded in the petition for a description, it throws no light upon the controversy in this case, which turns, not upon the validity of the grant, which is admitted, but upon the identification of the cause or objects described as boundaries, and therefore of the extent of the grant. As the grant is bounded upon the east by the Rio del Norte or Rio Grande, of course there can be no uncertainty so far as to what is meant. As the boundary upon the south is "by the lands of the natives of said Pue . . ." meaning, evidently, thereby the Pueblo of Cochiti, and as this boundary appears to have been fixed and located by the survey and patent to the Indians of this pueblo, by and under the authority of the United States, no question is made with regard to its correctness. The difficulties arise from the uncertainty as to what is meant by the "Old Pueblo of Cochiti," described as the northern boundary, and by the western boundary, described as "the west with . . . of Xemes (Jemes)."

The chief contention is over the northern boundary, owing to the fact that there are two pueblos of Cochiti, one of which is 7 miles to the northeast of the other. The court below adopted the southernmost one, known as the Peublo Vicjo de Cochiti, as answering the call in the grant of the Old Pueblo of Cochiti, while the petitioners insist upon locatiug the north boundary by what was, and still is, known as the Pueblo Viejo, which is supposed to have long antedated the other.

There are other calls, however, which tend to identify the description with greater certainty:

*1. The land is described as *en la mesa* **[537** *de Cochiti donde estubieron retirados los indios que se sublebaron*, in or upon (or perhaps *at*, the difference being immaterial) the mesa (tableland) of Cochiti, where the Indians who rebelled retreated.

The location of this mesa is perfectly well settled. It lies upon the southerly side of the cañon or cañada (water course) of Cochiti, its northerly side forming the wall of the cañon. It is evident, however, that the grant was not intended to be limited to the mesa itself (notwithstanding the use of the word "en"), which appears to have been comparatively small, as the grant extended easterly across the Cochiti cañon, the Cañada José Sanchez, and the lower waters of the Cañada de en Medio, some 5 miles to the Rio Grande, and included about 5,000 acres of land, a considerable part of which seems to have been arable.

Upon this mesa is a ruined pueblo commonly known as the Pueblo de Cochiti. Whether it was also known as the "Old Pueblo of Cochiti" is one of the points in dispute here. It seems that the Spanish, who settled this territory as far to the north as Santa Fé, during the middle and latter half of the sixteenth century, were, about 1680, driven out by the Indians, whom they had reduced to a virtual condition of slavery; and that, for about thirteen years, the latter continued to control the country, defeating successive Spanish expeditions, until, in 1693, they were reconquered by Diego de Vargas; and the Cochiti Indians,

or a portion of them, took refuge in the pueblo upon the mesa of Cochiti. We do not understand this fact to be questioned; and it goes a long way toward identifying this pueblo as the "Old Pueblo of Cochiti," mentioned in the same description as the northern boundary of the grant. It does not seem very probable that, after having mentioned the mesa of Cochiti, upon which it is admitted there was a pueblo, and then proceeding to bound the land on the north by the "Old Pueblo of Cochiti," Lucero intended a wholly different pueblo, situated 7 miles to the northeast of the other.

The very fact that such prominence was given 538] to the mesa of *Cochiti indicates that it was mentioned for some purpose, the subsequent description of the grant by boundaries being complete in itself. Upon the theory of the claimants it is difficult to see why this mesa was mentioned at all. Upon that theory it was not named as a boundary, since both the north and west boundaries are claimed to be miles from this pueblo, and as a local object it seemed to have been no more prominent or worthy of mention than several other pueblos within the alleged limits of the grant. Assuming that Lucero stood there, and from that spot made a mental image of what the extent of his claim should be, does not aid the matter, since it is quite as likely that he intended to claim the comparatively fertile land between himself and the Rio Grande, as the vast territory now claimed by his heirs and assigns. In view of the fact that there was a pueblo upon this mesa—a pueblo still known as the Pueblo of Cochiti—the natural inference is that he desired to connect this mesa with the "Old Pueblo of Cochiti," named as one of the boundaries.

2. That Lucero did not intend to claim an extensive grant is also evident from his express purpose, *para en el sembrar i cabra (labrar) en dicho pedaso de tierra dies anegas (fanegas) de trigo y dos de mais, y para apastar mi ganado menor y Cavallada*, "to sow thereon, and to cultivate on said piece of land ten fanegas of wheat and two of corn, and to pasture my stock of small cattle and horses." The words "ganado menor" are used to indicate, not a small herd of cattle, but a herd of small cattle (sheep), as distinguished from a "ganado mayor," or herd of large cattle. The word "fanega" is used both as a dry measure and as a measure of land, and in its former sense it appears to have been somewhat uncertain in quantity, varying from 1½ to 2½ bushels; or, to speak more accurately, about one hundredweight of grain. As a measure of land it appears to have been even more uncertain, indicating, not the quantity of land necessary to raise a fanega of wheat, but that quantity which requires a fanega of wheat to sow it. The fanega of wheat differs again from the fanega of corn. It is agreed, however, in this case that the 12 fanegas called 539] for would *be about 33 acres. Under any method of determining what a fanega was intended to represent, it would seem that 5,000 acres of land, if any of it were cultivable, would be amply sufficient, while the 104,000 acres claimed would be out of all proportion to the calls of the grant. How much land would be necessary to pasture his stock of sheep and horses would depend so much upon the character of the land and of the size of his herd that it throws no light whatever upon the intended limits of the grant.

3. All these conjectures, however, are preliminary to and as throwing light upon the more important question as to what is meant by the "Pueblo Viejo de Cochiti," mentioned in the petition as the northern boundary. Lucero apparently had been a soldier in the Spanish army; had taken part in putting down the rebellion of the Indians, and had a somewhat numerous family. Claimants' argument in this connection is that, by these words "Pueblo Viejo de Cochiti" must be understood a pueblo about 7 miles to the northeast of the mesa of Cochiti, and commonly known as the Pueblo Viejo, on the Potrero de las Vacas—the farm or mesa of the cows. It appears that when the Cochiti Indians, after being defeated by the Spaniards, retreated to the historical mesa of Cochiti, in the latter part of the seventeenth century, they built there the pueblo which has now, after the lapse of upwards of two centuries, become known as the old Pueblo of Cochiti, although at the time of the grant it was not in reality an old pueblo, having been burned by the Spaniards not much more than thirty years prior thereto. It is possible, however, that Lucero did not refer to this particular pueblo as the old Pueblo of Cochiti, since it appears from Professor Bandelier's work upon Archæological Investigations in the Southwest, pt. 2, p. 178, that the oldest ruins on the mesa of Cochiti are those of a prehistoric Queres pueblo, although the best preserved are those of the pueblo built after the year 1683, when the Indians retreated there, and abandoned April, 1694. In virtue of these older ruins the pueblo may well have acquired the name of the Old Pueblo of Cochiti without reference to the later ruin. We do not regard this as of any *decisive weight, however, as it does not [540 take long for a deserted village or house to become known as "the old house," etc. It also appears that the Pueblo Viejo is of much greater antiquity than that of Cochiti, and at the time of the grant was a conspicuous object in Cochiti traditions, and so much venerated by the Indians in that vicinity as to be resorted to for religious or semi-religious purposes. This fact is the basis of the main argument for the claimant.

We have, however, carefully considered the testimony upon this point, and have come to the conclusion that while the Pueblo Viejo may have been much the older of the two, it was never commonly known as the Pueblo Viejo de Cochiti, and that while the southerly of the two pueblos was generally known as the Pueblo de Cochiti, it was also known as the Pueblo Viejo de Cochiti.

4. The uncertainty regarding the western boundary arises from the blank in the description et poniente con . . . de Xemes—"the west with . . . of Jemez." That a word is torn off is perfectly obvious from an inspection of the original document. That this word related to something connected with Jemez is equally evident. The claimants insist that these words must be explained by the

context, the topography of the country, the customary adoption in royal grants of prominent natural objects, or conspicuous artificial objects, as landmarks, the significance of names used as descriptive of well-known places, and by the reasonable probabilities of the case. As the boundaries of this grant, like those of Spanish land grants generally, were fixed by such landmarks—upon the east by a river, upon the north by a pueblo, upon the south by the lands of another pueblo—it is natural to suppose that the western boundary was fixed, either by reference to a river, a cañada, a pueblo, or a range of mountains (sierra), also a most common boundary. As the Jemez river is far to the westward of the sierra of that name, it is very improbable that this was intended. There was also an ancient Indian village or pueblo of that name, whose inhabitants did not belong to the Queres stock from which the Cochiti Indians sprang, and were in no respect affiliated with them. The **541**] languages of *the two communities were different; they could not even converse together, except in Spanish; the two villages of the two nations were quite distinct; each inhabited, cultivated, pastured, and hunted over a district into which the other tribe did not intrude unless by favor; and the Jemez country, with its fields and mesas, streams and mountains, lay far to the west of the Cochiti country. The village occupied by the Indians of the Jemez was called the pueblo de Jemez. The river that flowed about its lands was called the Rio de Jemez, and its cañon the cañon of Jemez, while the mountains adjacent were called the Sierra de Jemez. As this sierra was the first natural object to which the name of Jemez was affixed, lying to the westward of the mesa of Cochiti, we think the grant must have referred to that sierra; or if there were more than one range of mountains known as the Sierra de Jemez, then to the one most easterly. Perhaps this will not extend the grant beyond the mountains immediately west of the mesa.

There was also some evidence tending to show that the west boundary was reputed to he the sierra, and some to the effect that the stock of Lucero and his descendants grazed as far west as the Jemez mountains. It must be confessed that this evidence is not entitled to great weight, but, such as it is, it supports the inference that one would naturally derive from an inspection of this mutilated grant.

So, also, in the admitted reproduction or restoration of these documents, made by the alcalde de Baca in 1817, to which reference will hereafter be made more in detail, the words "la Sierra" are imported before "de Jemez." If this restoration of the mutilated documents be of no other value, it tends, at least, to show the opinion of an intelligent native of that region, familiar with the topography of the country and the customary boundaries of Spanish and Mexican grants, as to what this grant probably intended to refer to as the westward boundary. If Lucero had intended to fix the western limit at the pueblo or mesa of Cochiti, it is probable that he would have used the word "Cochiti," instead of the word "Jemez," which, as above stated, in **542**] dicated clearly that some *natural object, to which the word "Jemez" was affixed, must have been within his contemplation. The very fact that he made the pueblo the northern boundary, without also making it the western boundary, indicates that another boundary to the westward was intended. We are, therefore, of opinion that the court below erred in locating the western boundary by the pueblo of Cochiti, and that it should be extended westward to the nearest sierra or other natural object that bears the name of Jemez.

Certain proceedings, subsequent to the grant, are also called to our attention as tending to throw light upon the identification of the old pueblo de Cochiti.

5. The first of these, in the order of time, is an appeal made by the alcalde mayor, Don Bartolomé Fernandez, "in favor of the republic of the Indians of the pueblo of Cochiti against some residents called Romero, who claimed to settle the place called El Capulin," which was probably in the Cañon Capulin, in the northeasterly portion of the tract claimed in this proceeding.

In this appeal, Fernandez brought to the notice of the governor that at the place commonly called El Capulin, contiguous to the pueblo of Cochiti, the Romeros were settled, and, in view of the fact that during all the time he had lived in this country, he had never seen said tract settled, which was the pasture land of the horses and stock of the said pueblo, and other residents of the kingdom, and not knowing of any grant having been made to authorize such settlement, he informed the governor and captain general of the fact.

In answer to this, an order, in the nature of an order *nisi*, seems to have been made, directing the alcalde to eject the settlers, unless they showed cause to the contrary. The document is a very peculiar one, but this seems to have been its purport.

Romero thereupon appeared before the governor by petition, stating that he had been notified by Fernandez to vacate the Capulin, and that he had obeyed immediately; but that he had not removed his property, as he had held it for five years and six months without objection until this year (1765), when it was *made known that he had purchased [**543** parts which did not belong to him by law, from parties claiming under a grant to one Andres Montoya, which instrument he presented with due formality, stating that he saw no reason for his being interfered with or deprived of his purchase. Thereupon the governor and captain general of the kingdom, under date of April 18, 1765, ordered that the previous order be carried into effect, and that the parties be again notified not to settle by building or cultivation at the said place of Capulin, "they being permitted only to have their stock on the said place of the Capulin as crown land, as the other residents do, but without prejudice to the pueblos and republics of the Indians of Cochiti and San Ildefonso," which the alcalde mayor of the city of Santa Fé was directed to notify to them, and which he accordingly did, and made return thereof.

Attached to these papers is the grant to Andres Montoya, which covers a tract between the orchards or gardens of Cochiti on the south, and on the north by the orchards of

San Ildefonso. This grant, which was made in 1739, seems to have been subsequently canceled as fraudulent, because there did not appear to be any citation of the adjoining land holders.

The litigation seems to have been terminated by an order of April 25, 1767, made by Don Fermin de Mendinueta, governor and captain general, reciting the nullity of the grant to Montoya, and that the attempted settlement by Romero was in 1765, twenty-six years after the grant was made (1739), declaring the grant to Montoya to be of no value; that the only rights which Romero had were those enjoyed and used by the natives of Cochiti and the adjoining residents, as *crown lands*, and ordering that neither Romero nor anybody else should settle or have ownership in the said tract of the Capulin, and "that it shall be held and esteemed as crown land for the common benefit of all those who may desire to pasture their stock on the same, without excluding the said Romero."

Of course, these proceedings cannot be considered in the light of *res judicata*, since neither the Spanish crown, the predecessor in title of the United States, nor Lucero were 544] *parties thereto. The only weight that can be given to them is that of a general reputation that the lands upon the Cañada de Capulin were considered and treated as crown lands, over which the Cochiti Indians and other residents of the neighborhood had some indefinite rights of pasturage. As these lands were within the asserted grant to Lucero, it is somewhat singular that he made no resistance to the claim of Romero; put forward no title in himself, and left the litigation to be carried on by the natives and other residents of that neighborhood, who were allowed to pasture upon these lands as crown lands.

6. Similar considerations apply to the adjudication of 1785, which arose from an alleged intrusion by one Antonio Gallego upon lands in the Cañada de en Medio. The proceedings opened by a petition by the heirs of Lucero to the chief alcalde and war captain, Antonio de Armenta, claiming to be residents of the jurisdiction of the Cañada de Cochiti, and heirs of the place, and claiming that their lieutenant was seeking to possess for himself for the purposes of pasturing "the few cavalry we have for the royal service of His Majesty, whom may God preserve, and for better protection concerning which we declare, sir, that that favor of our lieutenant is very grievous," the petition terminating with a prayer that the matter be examined into, and their rights protected.

Upon this petition, the alcalde made an order reciting the injury done to the heirs of Lucero in desiring that the Cañada de en Medio remain reserved for cavalry upon the petition of Gallego, and finding that the petitioners were, in all respects, the legal heirs to the tract.

The proceedings in this litigation undoubtedly form a strong item of testimony in favor of the claimants' theory of this case, and we are by no means disposed to deny their weight. At the same time they are by no means conclusive. The Crown was not a party to nor represented in the litigation. There was no attempt to adjudicate that the northern boundary was the pueblo Vlejo, or that the Luceros had a good title to the cañada against any one but Gallego, who seems to have been little better than a trespasser, and put forward no title to the *land himself. Indeed, it would [545 appear from the order of the alcalde that such right as he had was "by favor only" to "raise a few sheep . . . without having any title or document which might accredit its being his."

7. The next item of testimony upon which the claimant relies is that of the so-called *testimonio por concuerda*, which purports to have been made in 1817 by Juan Antonio Cabesa de Baca, chief alcalde of the jurisdiction of Cochiti, and is certified to be "a true, faithful, and legal copy of the documents of grant to which they refer, of which, as they are incomplete and very badly treated [*truncos y muy mal tratados*], this copy has been made with great labor before the witnesses of my attendance, who saw it made, corrected, and amended from the original instruments." The first paper is a restored petition of Lucero, at the foot of which is a grant by the governor and captain general, Bustamente, countersigned by his secretary of state and war. Following this is the certificate of Andres Montoya, chief alcalde, to the effect that on August 6, 1728, he gave to Lucero possession of the lands "expressed and mentioned in this grant," and, having registered the same, took Lucero by the hand and "conducted him over said land in sign of lawful possession, and there being no person whatever, who, under a better right might claim the same, I deemed it good."

The court below was of opinion that this proceeding was wholly void; that it was in the nature of a case against the Crown; that the effect of it would be to create evidence to deprive the Crown of title to its land, and that alcaldes had no jurisdiction of that kind. We do not find it necessary, however, to determine this question, since, so far as we can judge, this testimonio, or official copy, does not differ in any essential particular from the original, except so far as making more definite the westerly boundary of the grant at Sierra de Jemez. That a grant was actually made to Lucero is not disputed. So far as the erasures and mutilations of the original are supplied in the restored grant, they are immaterial, except as connected with the description, which is an exact reproduction of the description in the original grant, except as to the *western [546 boundary, which is declared to be the Sierra de Jemez; and, as we have already found that this is what was intended by the parties, this alleged copy is only a confirmation of the opinion we had already reached from an inspection of the original grant, and from the probabilities of the case. We do not regard this copy as affecting at all the conclusions to be reached from the other evidence in the case.

8. The claimants also rely upon a long-continued adverse possession of this land, maintained for nearly 170 years from the date of the grant, and nearly eighty years from the date of the testimonio issued by the alcade Mayor de Baca. Had it been shown that this possession was complete, adverse, and undisputed during the whole life of this grant, such

possession would probably be regarded as complete evidence of title. Nor are we disposed to deny that the fact that the Luceros and their descendants pastured stock upon these lands is evidence of such possession, but in order to make it of any particular weight it should be shown to have been exclusive, and that no other person pastured or had the same right to pasture upon these lands. The proceedings in the case, first above mentioned, of the intrusion by the Romeros, indicate the lands to have been held in common and to have been subject to pasturage by the Indians and other residents of that neighborhood. Under such circumstances, it should be made to appear that the rights of Lucero and his descendants were exclusive in this particular. In addition to this, however, it is a fact, so notorious that we may take judicial notice of it, that mere pasturage upon these western lands is very slight evidence of possession. The court below was of opinion that "from a practical standpoint the grazing of stock in this country has no value as evidence of practical location." In view of the fact that all, or nearly all, of this testimony respecting possession is given by witnesses who are descended from Lucero, or connected with his family, or are interested in the litigation, and the possession relied upon is not shown to have been exclusive, or inconsistent with the use of this vast tract as a pasturage common to all dwellers in that neighborhood, we think the court did not err in refusing to give it weight as evidence of title.

547] *Other ancient documents offered by the claimants may be laid out of consideration. They consist principally of conveyances, to some of which members of the Lucero family were parties, but the descriptions of the lands are too uncertain to afford any definite information upon the extent of the grant, or even of what was claimed by Lucero in that connection.

Upon the whole, we have come to the conclusion that the claimants have not made out their case by a fair preponderance of evidence, or such weight of testimony as is necessary to establish their title to this large tract of land. We should have reached this conclusion without hesitation had it not been for the proceedings connected with the ouster of Antonio Gallego from the Cañada de en Medio in 1785, which is really the only item of testimony at all inconsistent with the government's theory of the case; but, after all, this is but evidence of a general reputation, or of a judicial ruling in a case to which the Crown was not a party; and it is not at all improbable that the alcalde may have considered Lucero's title to be good as against one who had no title at all beyond a mere permit to pasture a few horses or raise a few sheep thereon, "without having any title or document which might accredit its being his." It does not follow that, if the government itself had attacked the grant or the extent of it, his ruling upon that point would not have been different; in fact, the ruling in the prior case between the Indians of the pueblo and the Romeros is about as strong evidence that the lands at El Capulin, also within the assumed limits of the grant, were crown lands, as the judgment in this case was that the lands upon the Cañada de en Medio belonged to the Luceros.

These judgments are really of little value except as throwing light upon the occupation, or attempted occupation by Lucero of that portion of the tract lying nearest to the Rio Grande, and of the general reputation as to the extent of his grant. The chief reliance must be upon the terms of the petition itself, and it is fortunate that the most important part of this petition, namely, the description of the boundaries, has been best preserved. The only real difficulty in its interpretation is the ambiguity arising from the words "Pueblo *Vicjode Cochiti." The burden of prov- **[548** ing the larger grant is upon the claimants. So long as the description is reconcilable with the smaller grant, and with a pueblo located upon the mesa of Cochiti, the government is entitled to the benefit of that construction. The location of that pueblo 7 miles to the northeast is supported by testimony too shadowy to be a safe basis for a legal adjudication in favor of the claimants.

While we agree with the court below upon the main question involved, the different view we have taken regarding the western boundary requires that *its decree be reversed*, and the case remanded for further proceedings in conformity with this opinion.

CHARLES H. BAUMAN *et al.*, *Appts.*,
v.
JOHN W. ROSS, George Truesdell, and Charles F. Powell, Commissioners of the District of Columbia.

JOHN W. ROSS *et al.*, Commissioners of the District of Columbia, *Appts.*,
v.
CHARLES H. BAUMAN, John H. Jolly, Charles G. Shoemaker, *et al.*

BUTLER F. ABBOTT, *Appt.*,
v.
JOHN W. ROSS *et al.*, Commissioners of the District of Columbia.

JOHN W. ROSS *et al.*, Commissioners of the District of Columbia, *Appts.*,
v.
CHARLES H. ARMES *et al.*

(See S. C. Reporter's ed. 548–599.)

Condemnation of highway in the District of Columbia—contingent and speculative benefits—right of taxation—assessments upon lands benefited—extent of district benefits—proportional assessment—commission of assessment—power of Congress—double assessment—other highways—assessment a lien—recording of map—effect of recording—reference in deed—highways not in conformity with the map—appropriation for damages.

1. Any special and direct benefits capable of present estimate and reasonable computation,

NOTE.—*Payment for private property taken for public use; 5th Amendment to Constitution applies only to Federal government, and not to states,*—see note to Withers v. Buckley, 15: 816.

As to eminent domain; damages to easements,

which may be caused to the remainder of a parcel of land of which a part only is taken by the establishment of a highway in the District of Columbia, may be authorized by Congress to be considered in the assessment of compensation or damages due to the owner, whether for the value of the part taken or for injury to the rest, since there is no constitutional prohibition against considering benefits in estimating just compensation.

2. Contingent and speculative benefits to arise in the future from the actual opening of the highways are not to be considered in reduction of damages in condemnation proceedings under the act of Congress of March 2, 1893, chap. 197, § 11,

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smoke, etc.; owners of lots abutting on streets; damages to access, light, and air; vibration; depreciation in value; use of street; telegraph poles; what constitutes taking; consequential injury,—see note to Osborne v. Missouri P. R. Co. 37: 156.

As to what constitutes a public highway, see note to Manchester v. Ericsson, 26: 1099.

As to liability of third persons to city or town for damages recovered against it for injuries from obstructions or defects in streets,—see note to Chicago v. Robbins, 17: 298.

Highways, compensation for laying out; assessments for benefits and damages; lien of assessments of benefits; payment of same; local improvements; award of damages; review of proceedings; damages for change of grade of highway; compensation, when payable; rule of damages; statute must provide for compensation; when title passes.

Proceedings upon proper notice to ascertain damages must precede the actual opening of a section-line road under an order establishing the same made by the county board without petition or notice, under Neb. Comp. Stat. chap. 78, § 46. Barry v. Deloughrey, 47 Neb. 354.

A town may order the entry *nunc pro tunc* of the report of assessors of benefits and damages caused the property of a designated person by the opening of a street, which has been inadvertently omitted from the records. Holland v. Spell, 144 Ind. 561.

An order of highway commissioners laying out a public highway across a railroad without any agreement as to compensation and damages, or a release of the same, or an ascertainment of their amount by verdict of a jury as prescribed by statute, is void, although the damages may have been merely nominal. Illinois C. R. Co. v. Mattoon Highway Comrs. 161 Ill. 247.

A town in Pennsylvania is not liable for damages necessarily caused to an abutting owner by the widening of a highway under an order of the court of quarter sessions on a petition of inhabitants. Winner v. Graner, 173 Pa. 43.

One who signs a petition which is granted for the establishment of a street across his land cannot recover damages for the land taken or for cutting down the street in front of the remainder of his tract. Bail v. Tacoma, 9 Wash. 592.

Property owners through whose premises a road is laid out are entitled to payment for fencing done by them, as soon as the financial condition of the road district in which the road is situated is such as to warrant it, under the provision of the order of the board of supervisors declaring the road a public highway, that the road is granted without fencing until in the opinion of the board such time arrives, and that the owners may fence the road at their own expense and shall be reimbursed for the expense thereof whenever such board shall provide for fencing; and such owners are not required to wait for the action of the board. Hopkins v. Contra Costa County, 106 Cal. 566.

The lien of assessments of benefits from the construction of a free gravel road is prior to the lien of a mortgage executed before the passage of Ind. Rev. Stat. 1894, § 6860, providing that such assessments shall be a "first lien on the real estate assessed, in the same manner as other taxes are." Murphy v. Beard, 138 Ind. 560.

The award of damages for laying out a street cannot be set aside or its execution prevented by a repeal of the original ordinance, and the institution of a new proceeding to open such street under another statute. *Re* Pringle Street, 7 Kulp, 346.

The facts that six freeholders have appealed to the circuit court from an order establishing a free gravel road, and that such court has found that the petition was not signed by a majority of the resident landowners, and was not represented by a majority of the acres, and that the order was void, do not relieve a freeholder who took no appeal from paying his assessment for the construction of the road. Cason v. Harrison, 135 Ind. 350.

An assessment for benefits from the opening of a street may be made notwithstanding an old street existed on the same place, and was vacated, but continued to be used by the public notwithstanding the vacation. *Re* Chestnut Street, 3 Pa. Dist. R. 497.

The assessment for the cost of grading, paving, and curbing a part of a street in a city, upon properties not situated upon the portion of the street to be improved, but within the neighborhood, if authorized by Pa. act May 16, 1891, providing for the assessment of the cost upon the properties benefited, and that the viewers shall inspect the properties in the neighborhood supposed to be damaged or benefited,—is invalid, since local assessment can only be constitutional when imposed to pay for local improvements conferring peculiar local benefits. *Re* Morewood Ave. 159 Pa. 20.

The special provisions of the New York consolidation act, §§ 677, 958, as to assessments for street opening in the twenty-third ward, are not repealed by § 970, containing the general provision in reference to the assessment district in street opening proceedings; and when buildings are taken, such property as the commissioners may deem benefited by the improvements may be assessed, although lying beyond the center line of the block adjacent to the street opened. *Re* Street Opening & I. Bd. 74 Hun, 561.

The legislature may pass an act authorizing compensation by a city to the owner of half a double house for damages from the destruction of the other half in opening a street, although no part of her property was actually taken. *Re* Reynolds, 48 N. Y. S. R. 627.

An award confirmed by the court under a special act authorizing compensation to a landowner for damages from the opening of a street not otherwise the subject of compensation is not affected by the repeal of the act before its payment, but must be paid. People, Reynolds, v. Buffalo, 48 N. Y. S. R. 632, Affirmed in 2 Misc. 7.

The question whether certain damages are allowable upon the taking of land for a highway is one of law which may be reviewed by the supreme court of Vermont, under Vt. Rev. Laws, § 1387, providing that questions of law arising in such proceedings may pass to the supreme court for final decision, as in other cases, but no judgment of the county court shall be revised which has been rendered in such proceedings, unless the supreme court would have granted a certiorari for the same cause; but questions resting in the discretion of the commissioners will not be reviewed. Prince v. Braintree, 64 Vt. 540.

A statute authorizing the issuance of warrants to persons damaged by the opening of a highway, prior to the levy of a tax to pay them, does not permit their sale to strangers to raise money to pay the landowners. Highway Comrs. v. Deboe, 43 Ill. App. 25.

providing for a consideration of the benefit that "the purpose for which it is taken" may be to the owner of the land, but the benefits as well as the damages are to be estimated as of the date of appropriation.

3. The assessment of benefits for public improvement to pay for lands taken or damaged by condemnation proceedings is to be referred to the right of taxation, and not to the right of eminent domain.

4. The legislature in the exercise of the right of taxation has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, or

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The New York commissioners of street opening and improvement may in their final report increase the assessment upon property benefited by the opening of a street, above the preliminary estimate, for the purpose of covering an amount left unprovided for by the fact that the preliminary estimate as to some of the property benefited exceeded the amount to which assessments thereon are limited by law, where such increased assessment does not exceed the benefit from the street to the property upon which it is levied. Re Street Opening & Improv. Bd. 20 N. Y. Supp. 563.

The statutory authority of a court to modify an assessment for the benefit of opening a street does not authorize a summary change in a copy of the assessment roll which was admitted in evidence in the absence of the original, and an apportionment of the amount to several tracts not included by the commissioners in the original assessment roll. Morrison v. Chicago, 142 Ill. 600.

All property owners on the whole line of a street in a borough, a portion of which is opened, and not merely those on the line of such portion, are liable for the damages, under Pa. act April 22, 1856, which provides for assessments upon properties benefited. McClure's Appeal, 137 Pa. 590.

Before damages can be assessed for land taken for a public highway, the survey of the proposed road must be filed as required by Ill. Rev. Stat. chap. 121, § 36. Trainer v. Lawrence, 36 Ill. App. 90.

Proceedings to open a street in a city are void as to part of a lot to which the board of public works assessed the damages and benefits as one lot or parcel, where the owner had contracted to convey such part, of which the board had notice after the assessment but before its confirmation. Brennan v. St. Paul, 44 Minn. 464.

The requirement of N. Y. Laws 1873, chap. 531, as amended by N. Y. Laws 1874, chap. 264, § 9, providing for the opening and improving of Gravesend avenue in Kings county, that the commissioners shall certify that the apportionment and assessment directed are stated in the column designated "Assessment for Construction," is mandatory and not merely directory, and a sale without a compliance therewith is void. Stebbins v. Kay, 123 N. Y. 31, Reversing 51 Hun, 589.

A change in the grade of a highway, made by the county commissioners, is an invasion of private property with respect to an abutting owner who had made improvements with direct reference to the then existing grade, and gives him a right of action for damages against such commissioners. Cheseldine v. Hamilton County, 6 Ohio C. C. 450.

The proviso of the Philadelphia consolidation act of Feb. 2, 1854 (P. L. 37), for payment of damages to private property by alteration of regulations as to streets, sewers, and grades, applies only to grades already legally established, and is not a general and continuing provision for future changes in the grades of streets. *Re* Plan 166, 143 Pa. 414.

The remedy of a private owner for damages from a change of the grade of a street is confined to an action on the case, except that where, under the statute, the quarter sessions has jurisdiction, as in the case of opening a street, it will retain the case for the purpose of awarding damages for a change of grade. *Re* Plan 166, 143 Pa. 414.

A city which in grading a street piles up earth and rocks against the retaining wall of a lot on a lower level, which slide down upon the lot and overturn the wall, is liable to the owner for the injury thereby done. Gardner v. Scranton, 1 Pa. Dist. R. 805.

A change of a street grade by the construction of an approach to a levee by government engineers authorized by a city in granting the right of way for the levee, and controlled by the city to some extent in its construction, renders the city liable for damages to an abutting owner, under Ind. Rev. Stat. 1881, § 3073, providing that an established grade shall not be changed until the damages occasioned shall be assessed and tendered. Jeffersonville v. Myers, 2 Ind. App. 532.

Injuries to abutting property caused by a change of grade do not necessarily result from the opening of a street to public travel; and separate damages may be recovered therefor where the grading occurs as a separate act so long after the opening that the assessment of damages at the time of the appropriation cannot include those resulting from the grading. Jones v. Bangor, 144 Pa. 638.

It has never been deemed necessary that the compensation which the Constitution requires to be made for private property taken for public use should be actually paid before entering upon or taking possession of the property, if legal provision for compensation has been made. Bloodgood v. Mohawk & H. R. Co. 14 Wend. 51, and cases cited, same case, 18 Wend. 9, 31 Am. Dec. 313; Smith v. Helmer, 7 Barb. 416; Chapman v. Gates, 54 N. Y. 132.

The apprehended damage which a toll bridge company may sustain, in a diminution of its tolls by a diversion of the travel from its bridge to a public avenue authorized to be opened, is not a grievance for which the company is entitled to redress, where the statute granting the franchise does not confer an exclusive right upon the company. *Re* Hamilton Avenue, 14 Barb. 405.

In making appraisals of this kind, the true rule, the only rule, which will do equal justice to all parties, is to determine what will be the effect of the proposed change upon the market value of the property. The proper inquiry is, What is it now fairly worth in the market, and what will it be worth after the improvement is made? The question is not, What estimate does the owner put upon it? but What is its real worth in the judgment of honest, competent, and disinterested men? *Re* Furman Street, 17 Wend. 649; Troy & B. R. Co. v. Lee, 13 Barb. 169.

As to how the value of a leasehold is to be estimated, see *Re* Central Park Comrs. 54 How. Pr. 313.

No law can be valid which assumes to take a person's property without yielding fair compensation, since without compensation there is not "due process of law." Durham v. State, Anderson, 117 Ind 477; State, Hovey, v. Noble, 118 Ind. 350, 361, 4 L. R. A. 101; Cooley, Const. Lim. 5th ed. 73.

Private property cannot be taken for a public use without paying or securing to the owner just compensation. Although it is not uniformly held that compensation should always precede the appropriation, yet it is almost universally held that compensation must be so certainly provided that the owner can secure it by the aid of the courts without unnecessary or unreasonable delay. Long v. Fuller, 68 Pa. 170; Bloodgood v. Mohawk & H. R. Co. 18 Wend. 9, 31 Am. Dec. 313; Calking v. Baldwin, 4 Wend. 667, 21 Am. Dec. 168; Taylor v. Marcy, 25 Ill. 518; Callison v. Hedrick, 15 Gratt. 244; Jackson

widening, or grading, or the repair of a street, to be assessed upon the owners of land benefited thereby.

5. Failure to define the district or territory within which the benefits may be assessed does not render § 15 of said act too uncertain to be put into execution, as it leaves the question what parcels of lands within that district are benefited to be determined by the tribunal which makes the assessment.

6. An assessment proportional to the benefit, and not to the market value or any other test, is required by said act, as it provides that the jury shall assess against each parcel of land benefited "its proportional part of" the whole sum to be assessed.

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v. Winn, 4 Litt. 323; Gardner v. Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526; Haverhill Bridge Proprs. v. Essex County Comrs. 103 Mass. 120, 4 Am. Rep. 518; Langford v. Ramsey County Comrs. 16 Minn. 375.

Where the Constitution of the state permits the seizure of property without the concurrent payment of compensation, the security provided must be certain, adequate, and safe. The provision securing compensation, and providing for its assessment and payment, should be contained in the statute authorizing the appropriation, otherwise, as has been justly said, it should be regarded "as no better than so much blank paper." Long v. Fuller, 68 Pa. 170; State, Gaines, v. Hudson County Ave. Comrs. 37 N. J. L. 12; State, Mulligan, v. Perth Amboy, 52 N. J. L. 132.

There are cases which assert a different doctrine, but they cannot be sustained on principle or authority. Jerome v. Ross, 7 Johns. Ch. 315, 11 Am. Dec. 484; Rogers v. Bradshaw, 20 Johns. 735; Bonaparte v. Camden & A. R. Co. Baldw. 205, 226; Elliott, Roads & Streets, 181.

Some of the courts declare that statutes which make no provision for the payment of compensation are void, and this seems to be the sound doctrine. People, Harvey, v. Loew, 39 Hun, 490, 102 N. Y. 471; Tuckahoe Canal Co. v. Tuckahoe R. Co. 11 Leigh, 42, 36 Am. Dec. 374; Wheelock v. Young, 4 Wend. 647.

The authorities sustain the doctrine that the statute must contain the provision for compensation, and that courts cannot supply the omission. Connecticut River R. Co. v. Franklin County Comrs. 127 Mass. 50, 34 Am. Rep. 338; Boston & L. R. Corp. v. Salem & L. R. Co. 2 Gray, 1; Pearson v. Johnson, 54 Miss. 259; Thompson v. Grand Gulf R. & B. Co. 3 How. (Miss.) 240, 34 Am. Dec. 81; Thacher v. Dartmouth Bridge Co. 18 Pick. 501; Ash v. Cummings, 50 N. H. 591; Chicago v. Barbian, 80 Ill. 482; Bensley v. Mountain Lake Water Co. 13 Cal. 318, 73 Am. Dec. 575; South western R. Co. v. Southern & A. Teleg. Co. 46 Ga. 43, 12 Am. Rep. 585; Watson v. Pleasant Twp. Trustees, 21 Ohio St. 667; People, Cook, v. Nearing, 27 N. Y. 306; Weaver v. Mississippi & R. R. Boom Co. 28 Minn. 534; Watkins v. Walker County, 18 Tex. 585, 70 Am. Dec. 298; Gardner v. Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526; Mt. Washington Road Co.'s Petition, 35 N. H. 134; Ames v. Lake Superior & M. R. Co. 21 Minn. 241; Sage v. Brooklyn, 89 N. Y. 189; Chapman v. Gates, 54 N. Y. 145; People v. Hayden, 6 Hill, 359; Carbon Coal & Min. Co. v. Drake, 26 Kan. 345; Trenton Water Power Co. v. Raff, 36 N. J. L. 335; *Ex parte* Martin, 13 Ark. 198, 58 Am. Dec. 321; Curran v. Schattuck, 24 Cal. 427.

It is not enough that an action at law is given to the owner for the value of the land seized; something more effective, speedy, and certain than an ordinary judgment at law must be provided. Shepardson v. Milwaukee & B. R. Co. 6 Wis. 605; Wallace v. Karlenowefski, 19 Barb. 118; Walther v. Warner, 25 Mo. 277; Curran v. Schattuck, 24 Cal. 427; Memphis & B. R. Co. v. Payne, 37 Miss. 700; Henry v. Dubuque & P. R. Co. 10 Iowa, 540; Carr v. Georgia R. & B. Co. 1 Ga. 524.

The landowner cannot be made to depend upon the contingency of the collection of a special assessment provided by statute. Sage v. Brooklyn, 89 N. Y. 189; Chapman v. Gates, 54 N. Y. 140; Lafayette v. Shultz, 44 Ind. 97; *Re* Church, 92 N. Y. 1.

Title does not pass until the compensation has been paid. New Orleans, O. & G. W. R. Co. v. Lagarde, 10 La. Ann. 150; Gillan v. Hutchinson, 16 Cal. 153; Ring v. Mississippi River Bridge Co. 57 Mo. 496; Sanborn v. Belden, 51 Cal. 266.

Where the state undertakes the payment of the compensation an adequate and sure provision is deemed to have been made. Talbot v. Hudson, 16 Gray, 417.

A statute which provides for payment out of the earnings of a railroad owned by the state is however, unconstitutional. Connecticut River R. Co. v. Franklin County Comrs. 127 Mass. 50, 34 Am. Rep. 338.

There are cases declaring that an undertaking by a county or city is sufficient. Lowcree v. Newark, 38 N. J. L. 151; Yost's Report, 17 Pa. 524; Commissioners' Court v. Bowie, 34 Ala. 461.

The compensation must be paid or tendered, in all cases where private corporations seek to appropriate the property, before the domain over it is taken from the owner. Jones v. New Orleans & S. R. Co. & Immigration Asso. 70 Ala. 227; Bohlman v. Green Bay & L. P. R. Co. 30 Wis. 105; Powers v. Bears, 12 Wis. 215, 78 Am. Dec. 733; Southwestern R. Co. v. Southern & A. Teleg. Co. 46 Ga. 43, 12 Am. Rep. 585; Brown v. Powell, 25 Pa. 229; Ray v. Atchison & N. R. Co. 4 Neb. 439; Henry v. Dubuque & P. R. Co. 10 Iowa, 540; Cox v. Louisville, N. A. & C. R. Co. 48 Ind. 178; Bensley v. Mountain Lake Water Co. 13 Cal. 306, 73 Am. Dec. 575, and note.

The compensation must be a pecuniary one. Central Ohio R. Co. v. Holler, 7 Ohio St. 220; State, Butler, v. Ravine Road Sewer Comrs. 39 N. J. L. 665; Sanborn v. Belden, 51 Cal. 266; Com. v. Peters, 2 Mass. 125; Hill v. Mohawk & H. R. Co. 7 N. Y. 152; Memphis v. Bolton, 9 Heisk. 508; Henry v. Dubuque & P. R. Co. 2 Iowa, 288; State v. Beackmo, 8 Blackf. 246, 2 Dill. Mun. Corp. § 477.

In cases where benefits are not deemed a compensation, it must be paid in money. Carson v. Coleman, 11 N. J. Eq. 106; Sutton v. Louisville, 5 Dana, 28; Alabama & F. R. Co. v. Burkett, 42 Ala. 83; Vanhorne v. Dorrance, 2 U. S. 2 Dall. 304 (1:391).

Where benefits are allowed at all, they should be restricted to such as are special and peculiar to the estate of the owner, and benefits to him or to his estate which are common to the public should be excluded from consideration. Carpenter v. Landaff, 42 N. H. 218; Vicksburg, S. & T. R. Co. v. Calderwood, 15 La. Ann. 481; Penrice v. Wallis, 37 Miss. 172; Meacham v. Fitchburg R. Co. 4 Cush. 291; Carli v. Stillwater & St. P. R. Co. 16 Minn. 260; Lipes v. Hand, 104 Ind. 503; Roberts v. Brown County Comrs. 21 Kan. 247; Springfield v. Schmook, 68 Mo. 394; Palmer Co. v. Ferrill, 17 Pick. 58; 2 Dill. Mun. Corp. 3d ed. § 624; Elliott, Roads & Streets, 178.

Benefits peculiar to the owner may, in a just sense, be said to constitute a compensation, because they add to the value of the property and thus increase the owner's estate. Whitman v. Boston & M. R. Co. 3 Allen, 133; Com. v. Middlesex County Justices, 9 Mass. 388; Livingston v. New York, 8 Wend. 85, 22 Am. Dec. 622; Page v. Chicago, M. & St. P. R. Co. 70 Ill. 324; Putnam v. Douglas County, 6 Or. 328, 25 Am. Rep. 527; Jackson County v. Waldo, 85 Mo. 637; Atlanta v. Green, 67 Ga. 386; Nichols v. Bridgeport, 22 Conn. 189; Livermore v. Jamaica, 23 Vt. 361.

7. Committing the assessment of benefits from opening a highway to the same inquest or commission, consisting of only seven men although designated as a "jury," which estimates the compensation of damages, does not make § 15 of said act invalid.

8. By the United States Constitution the estimate of compensation for property taken for public use under the right of eminent domain may be intrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer than an ordinary jury.

9. The landowner may not be subjected to a double assessment because § 2 of said act authorizes a deduction of benefits in assessing damages, and § 15 authorizes an assessment for benefits, as the sections are reasonably construed to mean that the former relates to special and direct benefits to the portion of the land not taken, and the latter relates to the general benefits accruing to all lands in the neighborhood, and allowance is to be made for the amount, if any, which shall have been deducted from the value of the part taken on account of the benefit to the remainder of the tract.

10. An assessment for benefits on the opening of a highway is not made objectionable because the same land may be subject to assessment for the opening of other highways in the future, since it may be separately benefited by each highway.

11. A provision that an assessment for benefits shall be a lien upon the land payable in instalments, with interest from the date of confirmation, is not invalid.

12. The recording of a map showing proposed highways under § 2 of said act, without any provision for compensation to the landowners until future proceedings of condemnation are taken to obtain the land, does not render such section unconstitutional because it does not constitute a taking of the land, or interfere with the owner's use and enjoyment thereof.

13. The provision that after the recording of a map provided for by said act, no other subdivision not in conformity with the map shall be admitted to record, is within the authority of Congress to prevent anything being placed upon the public records which may tend to defeat its object to secure uniformity in the entire system of highways in the District of Columbia.

14. The provision of § 3 of said act, that any deed or will duly recorded which refers to a subdivision made by the map, shall have the same effect as if the subdivision had been made by the grantor or testator, tends to promote the same object of uniformity, and benefits rather than injures the landowners.

15. The provision of § 2 of said act that commissioners of the District of Columbia and all other public officers or agents shall not accept, improve, repair, or assume any responsibility in regard to, highways not in conformity with the map, does not touch the rights of the landowners, but was intended to prevent the District of Columbia from being held responsible to travelers upon such highways under the law as declared by this court.

16. The fact that Congress has made no appropriation for the immediate payment of compensation that may be assessed on the condemnation of the lands under said act does not render the act invalid, since it does not provide for the transfer of title to the United States until the damages are paid, and, in addition to that, provides that the proceedings shall be void if appropriation is not made by Congress after being in session six months after judgment of condemnation.

[Nos. 631-634.]

Argued December 16, 17, 1896. Decided May 10, 1897.

APPEALS from a judgment in said cases of the Court of Appeals of the District of Columbia reversing the judgment of the Supreme Court of that District and remanding the cause with directions to modify the judgment in so far as it dismissed the petition and to reinstate the cause for further proceedings, etc.; the judgment of the Supreme Court having ordered that the petition be dismissed. *Judgments of Court of Appeals and of the Supreme Court of the District of Columbia reversed,* and cases remanded for further proceedings.

See same case below, 24 Wash. L. Rep. 65-71, 8 App. D. C. 393.

The facts are stated in the opinion.

Statement by Mr. Justice **Gray:**

These were appeals in proceedings commenced by petition of the commissioners of the District of Columbia for the condemnation of a permanent right of way for the public over certain subdivisions of lands in the District of Columbia, outside the limits of the cities of Washington and Georgetown, under the act of March 2, 1893, chap. 197 (27 Stat. at L. 532). The cases involved the constitutionality of that act. They were argued together, and are stated in the opinion.

Messrs. **A. S. Worthington,** *S. T. Thomas, A. B. Duvall,* and *Samuel Maddox* for Ross *et al.*, Commissioners of the District of Columbia.

Messrs. **Nathaniel Wilson, Chapin Brown,** and *Arthur H. O'Connor* for Bauman *et al.*

Messrs. **W. L. Cole** and *C. H. Armes* for Armes *et al.*, appellees.

Mr. Justice **Gray** delivered the opinion of the court:

The original plan of the city of Washington, established in 1791, under the direction of President Washington, and by authority of Congress, with its symmetrical arrangements of squares and lots, streets, avenues, circles, and public reservations, did not extend north of Boundary street, or affect the roads and highways in the rest of the District of Columbia.

By an act of 1809, the proprietor of any lot or square in the city of Washington was authorized to have it subdivided upon submitting a plat thereof to the surveyor of the District of Columbia, to be certified and recorded in his office upon his being satisfied that its dimensions corresponded with the original lots. Act of January 12, 1809, chap. 8 (2 Stat. at L. 511); D. C. Rev. Stat. §§ 477-481.

At a comparatively recent period, owners of lands outside the northern boundary of the city of Washington, from time to time, laid out streets over their lands, and made and recorded subdivisions thereof, as they pleased, often not conforming to each other, or to the general plan of the city of Washington; and

Congress at last found it necessary to take measures to have the streets throughout the District of Columbia laid out upon a uniform plan.

Congress accordingly, by the act of August 27, 1888, entitled "An Act To Regulate the Subdivision of Land within the District of Columbia," authorized the commissioners of the District of Columbia to make and publish general orders regulating the platting and subdividing of all lands and grounds in the District, and required any plat of subdivision made in pursuance of such orders to be approved by them before being admitted to record in the office of the surveyor; and, in § 5 provided that "no future subdivision of land 551] *in the District of Columbia, without the limits of the cities of Washington and Georgetown, shall be recorded in the surveyor's office of the said District, unless made in conformity with the general plan of the city of Washington." 25 Stat. at L. 451, chap. 916; D. C. Comp. Stat. chap. 58, §§ 39–43.

It was in order the more completely to carry out the same object that Congress passed the act of March 2, 1893, entitled "An Act To Provide a Permanent System of Highways in that Part of the District of Columbia Lying Outside of Cities," the constitutionality of which is now impugned. 27 Stat. at L. 532, chap. 197.

The parts of the act chiefly attacked are §§ 11 and 15. But the record discloses such differences of opinion in the courts below, and the solution of the questions involved depends so much upon a view of the act as a whole, that it will be convenient to state its various provisions somewhat fully.

The first five sections of the act relate to the making, the recording, and the effect of plans for the extension of a permanent system of highways, in conformity, as nearly as practicable, with the general plan of the city of Washington, over all that part of the District of Columbia which lies outside the cities of Washington and Georgetown.

The act begins by enacting that "the commissioners of the District of Columbia are hereby authorized and directed to prepare a plan for the extension of a permanent system of highways over all that portion of said district not included within the limits of the cities of Washington and Georgetown. Said system shall be made as nearly in conformity with the street plan of the city of Washington as the commissioners may deem advisable and practicable."

By § 2 "the said plans shall be prepared from time to time in sections, each of which shall cover such an area as the commissioners may deem advisable to include therein; and it shall be the duty of the commissioners in preparing such plans by sections, as far as may be practicable, to select first such areas as are covered by existing suburban subdivisions not in conformity with the general plan of the city of Washington. The commissioners, in mak- 552] ing such plans, shall adopt *and conform to any then existing subdivisions which shall have been made in compliance with the provisions of the act" of August 27, 1888, chap. 916, "or which shall, in the opinion of the commissioners, conform to the general plan of the city of Washington. . . . Whenever the plan of any such section shall have been adopted by the commissioners, they shall cause a map of the same to be made, showing the boundaries and dimensions of and number of square feet in the streets, avenues, and roads established by them therein; the boundaries and dimensions of and number of square feet in each, if any, of the then existing highways in the area covered by such map; and the boundaries and dimensions of and number of square feet in each lot of any then existing subdivisions owned by private persons; and containing such explanations as shall be necessary to a complete understanding of such map. In making such maps, the commissioners are further authorized to lay out, at the intersections of the principal avenues and streets thereof, circles or other reservations corresponding in number and dimensions with those now existing at such intersections in the city of Washington." A copy of such map, duly certified by the commissioners, is to be delivered to a commission created by this act, composed of the Secretary of War, the Secretary of the Interior, and the Chief of Engineers, for the time being, who may adopt or alter it, or make a new map instead; and the map which that commission shall adopt and approve in writing is to be delivered to the commissioners of the District of Columbia, and be at once filed and recorded in the office of the surveyor of the District of Columbia.

The same section proceeds: "And after any such map shall have been so recorded, no further subdivision of any land included therein shall be admitted to record in the office of the surveyor of said district, or in the office of the recorder of deeds thereof, unless the same be first approved by the commissioners, and be in conformity to such map. Nor shall it be lawful, when any such map shall have been so recorded, for the commissioners of the District of Columbia, or any other officer or person representing the United States or the District of Columbia, *to thereafter improve, re- [553 pair, or assume any responsibilty in regard to, any abandoned highway within the area covered by such map, or to accept, improve, repair, or assume any responsibility in regard to any highway that any owner of land in such area shall thereafter attempt to lay out or establish, unless such landowner shall first have submitted to the commissioners a plat of such proposed highway, and the commissioners shall have found the same to be in conformity to such map, and shall have approved such plat, and caused it to be recorded in the office of said surveyor."

The section concludes with a provision that the commissioners of the District of Columbia, "in order to enable the said commissioners to proceed speedily and efficiently to carry out the purposes of this act," may, with the approval of the commission before named, appoint two civilian assistants to the engineer commissioner, who, with him, under the direction of the commissioners, shall have immediate charge of the work to be done under this act.

Section 3 provides that "when any such map shall have been recorded as aforesaid in the office of the surveyor of the district, it shall be lawful for the owner of any land included within such map to adopt the subdivision,

thereby made by a reference thereto and to this section in any deed or will which he shall thereafter make; and when any deed or will containing any such reference shall have been made and recorded in the proper office, it shall have the same effect as though the grantor or grantors in such deed, or the maker of such will, had made such subdivision and recorded the same in compliance with law."

By § 4, "for the purpose of making surveys for such plans and maps, the commissioners, and their agents and employees necessarily engaged in making such surveys, are authorized to enter upon any lands through or on which any projected highway or reservation may run or lie." And by § 5, "the commissioners of the District of Columbia are authorized to name all streets, avenues, alleys, and reservations laid out or adopted under the provisions of this act."

Then follow §§ 6 to 14 inclusive, containing 554] provisions *for the condemnation of a permanent right of way for the public, and for the assessment of compensation or damages to the owners of lands by a jury of seven men, as follows:

By § 6, "within thirty days after any such map shall have been recorded as aforesaid, which shall alter any highway or highways in any then existing subdivision in the area included in such map, or which shall dispense with any highway or highways, or any part thereof, in any such subdivision, the commissioners of the District of Columbia shall make application to the supreme court of the District of Columbia, holding a special term as a district court of the United States, by written petition, praying the condemnation of a permanent right of way for the public over all the land lying within the limits of such subdivision, not already owned by the United States or the District of Columbia or dedicated to public use as a highway, which shall be included within the highways or reservations laid out by the commissioners and indicated on such map. Upon the filing of such petition, the said court in special term shall proceed to condemn a permanent right of way for the public over said land, in the manner hereinafter provided."

By § 7, "as to any highway or highways, or part of any highway or highways, laid down upon any such map, which shall not lie within the limits of any existing subdivision, the commissioners at any time thereafter, when in their judgment the public convenience shall require the opening of the same, or of any part thereof, may make application as aforesaid to the supreme court of the District of Columbia, holding a special term as aforesaid, for the condemnation and opening of the same; and said court in special term as aforesaid shall thereupon proceed, in the manner hereinafter provided, to condemn a permanent right of way for the public over all the land, not already owned by the United States or the District of Columbia or dedicated to public use as a highway, included within the highway or highways, or part of a highway or highways, described in such application: *Provided*, that in such case the court, after public notice shall have been given as hereinafter directed, shall 555] first hear evidence *as to whether the public convenience does in fact require the immediate opening of the highway or highways, or part of any highway or highways, described in such application, and shall determine that question on the evidence submitted to it; and if the court shall, as to any part of the land sought to be condemned, decide such question in the negative, it shall proceed no further as to such part at that time. And if the court, after such notice and hearing, shall determine that the public convenience does not in fact require the immediate opening of any highway or highways or any part thereof described in such application, no further proceedings shall be had under such application."

Section 8 provides "that when any application shall have been filed in said court in special term under the preceding sections of this act," the court shall cause public notice of not less than thirty days to be given of such application, "which notice shall warn all persons having any interest in the proceedings to attend the court at a day to be named in said notice, and to continue in attendance until the court shall have made a final order in the premises;" and, "after such notice shall have been given, shall take no further step until the time limited thereby shall have expired, and shall afford all parties in interest a reasonable opportunity to be heard during the proceedings;" and shall, whenever it is practicable to do so, cause a similar notice to be served upon each of the owners of the land sought to be condemned, and upon the attorney of the United States for the District of Columbia.

Section 9 provides "that when the object of any such application to said court shall be, in whole or in part, to rectify or change an existing subdivision, the court, immediately after the expiration of the time limited in such notice, shall proceed without delay to make the required condemnation, so far as it shall relate to any lands within such subdivision; and as to any land not lying within the limits of an existing subdivision which is sought to be rectified or changed, the court shall proceed in like manner only after it shall have determined, as hereinbefore provided, that the public convenience requires the *con- [556 demnation, and then only to the extent which the public convenience shall require."

Section 10 is as follows: "When any right of way is to be condemned under this act, said court in special term shall cause a jury of seven judicious, disinterested men, not related to any person interested in the proceedings, and not in the service or employment of the District of Columbia or of the United States, to be summoned by the marshal; and shall administer to the jury an oath or affirmation that they will, without favor or partiality to any one, to the best of their judgment, determine such questions as may be submitted to them by the court during the proceedings. The court, before accepting the jury, shall hear any objections that may be made to any member thereof, and shall have full power to decide on all such objections, and to excuse any juror, and to cause any vacancies in the jury to be filled. When the jury shall have been organized, the court and the jury shall hear and receive such evidence as may be offered or submitted on behalf of the District of Columbia, or on behalf of the United States, or by

any person having any interest in the proceedings; and the proceedings shall be conducted, as nearly as may be, as civil cases triable by jury are now conducted in said District; but the order of proof shall be in the discretion of the court. Upon the motion of any party in interest, the court may direct the jury to view the premises under consideration, under such regulations as the court may prescribe. When the hearing is concluded, the jury, or a majority thereof, shall render a written verdict in such form as may be prescribed or submitted to the jury by the court, which verdict shall be signed by the jurors, or by a majority of them, and filed in the court. The court shall have power to set aside such verdict, when satisfied that the same is unjust or unreasonable. One jury may be sworn, and one trial had, as to all or any of the parcels of land involved in the proceeding, at the discretion of the court; and where the jury shall have rendered a verdict as to more than one parcel of land, the court may set aside the verdict as to one or more parcels, and confirm it as to the others. When the verdict of the jury, in **557**] whole *or in part, shall have been so set aside, a new jury shall be summoned, and the proceedings continued, until the court shall have confirmed a verdict as to all the land involved in the proceeding."

Section 11 provides that "where the use of a part only of any parcel or tract of land shall be condemned in such a proceeding, the jury, in assessing the damages therefor, shall take into consideration the benefit [that] the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same, and shall give their verdict accordingly; and the court may require, in such case, that the damages and the benefits shall be found and stated separately."

Section 12 provides "that no trial under this act shall fail by reason of the death or disability of any juror occurring during the proceedings," provided the verdict is "concurred in by a majority of a complete jury."

Section 13 is as follows: "No evidence shall be offered or received by the jury as to the persons who will be entitled to receive the compensation that may be awarded as to any parcel of land. If any question shall arise as to whether any person claiming a right to be heard is in fact interested in the proceedings, the court shall hear and determine the question in a summary way, and in cases of doubt shall permit the party to be heard. The verdict of the jury shall state, as to each parcel of land involved in the proceeding, only the amount of compensation, less the benefits, if any, which it shall award in respect thereof, and shall not contain any finding as to the ownership of the land, or the persons entitled to the compensation."

Section 14 fixes the compensation of each juror at $5 a day.

Section 15 provides for assessing and charging the amount awarded as damages, one half upon the lands benefited, and the other half upon the District of Columbia, as follows: "That the amount awarded by said court as damages for each highway or reservation, or part thereof, condemned and established under this act, shall be one half assessed against the land benefited *thereby, and the other half shall [**558** be charged up to the revenues of the District of Columbia; that one half of the amount awarded by said court as damages for each highway or reservation, or part thereof, condemned and established under this act, shall be charged upon the lands benefited by the laying out and opening of such highway or reservation, or part thereof, and the remainder of said amount shall be charged to the revenues of the District of Columbia. The same jury which shall assess the damages caused by the opening of any highways or reservation, or part thereof, or by the abandonment of an existing highway or part thereof, shall ascertain and determine what property is thereby benefited, and shall assess against each parcel which it shall find to be so benefited its proper proportional part of the whole of said one half of the damages: *Provided*, that in making such assessment for benefits the jury shall, as to any tract a part of which shall have been taken for such highway or reservation, or part thereof, make due allowance for the amount, if any, which shall have been deducted from the value of the part taken, on account of the benefit to the remainder of the tract. The proceedings of the court and the jury, in making assessments for benefits under this section, shall conform as nearly as is practicable to the foregoing provisions of this act relating to the assessment of damages; and the verdict of the jury, making an assessment under this section as to any parcel of land, shall not be conclusive until the same shall have been confirmed by the court. When confirmed by the court, the assessment so made shall be a lien upon the land assessed, and shall be collected as special improvement taxes in the District of Columbia have been collected since February 21, 1871 [that is to say, as all other taxes are collected. Act of February 21, 1871 (16 Stat. at L. 427, chap. 62, § 37); D. C. Rev. Stat. § 151], and shall be payable in five equal annual instalments, with interest at the rate of 4 per cent per annum from the date of the confirmation of the assessment by the court. That no expense for the improvement of any street, circle, reservation, or avenue laid out under the provisions of this act, outside the *cities of Washington [**559** and Georgetown, shall be chargeable to the Treasury of the United States, but such expense shall be paid solely out of the revenues of the District of Columbia."

Section 16 prescribes the mode of ordering the payment and distribution of the compensation or damages to and among the persons entitled to receive the same, as follows: "When said court shall have assessed the damages to be paid as to any parcel of land the use of which shall have been condemned, or which shall have been injured by the abandonment of a previously existing highway, and there shall be no controversy as to the persons who are entitled to receive the same, or as to the distribution of the same among them, said court shall decree such payment to be made; and upon presentation of a duly certified copy of such decree to the Treasurer of the United States, he shall report the same to Congress for consideration and action, and shall make such payment to the person or persons appearing by

such decree to be entitled thereto, as Congress may provide. But where any such controversy shall exist, or where there shall be any doubt as to the proper disposition of the compensation awarded, the court shall order that the damages assessed by it, involved in such controversy or doubt, shall be paid into the registry of the court; and upon the presentation of a duly certified copy of such order to the Treasurer of the United States, he shall, when the necessary money is appropriated, pay the amount therein mentioned to the clerk of said court; and the claims of the respective parties thereto shall thereupon be heard and decided by the court as in interpleader suits in equity, under such general rules as may be prescribed by said court in general term."

Section 17, as originally passed, provided for appeals from the supreme court of the District of Columbia in special term to the same court in general term; but, as amended by the act of January 21, 1896, provides that any party aggrieved may appeal to the court of appeals of the District of Columbia, upon questions of law only, from "the final order or decree of said court in special term, fixing the amount of damages, or the assessment for benefits, as to 560]any *parcel of land;" and, upon questions both of law and of fact, "from a final decree of said court in special term under this act, distributing the damages among contending claimants;" and further provides that "from any judgment or order of said court of appeals, involving any question as to the constitutionality of this act, or of any part thereof," any party aggrieved may appeal to this court, and this court "shall determine only the question of constitutionality involved in the case." 29 Stat. at L. 2, chap. 5.

Section 18 makes payment of the damages to the parties or into court an absolute condition of the taking possession of the land by the commissioners, and of the validity of the proceedings, and is as follows: "Whenever any final decree shall have been made by said court, under the provisions of this act, for the payment of the damages to the parties, or into the registry of the court, and when the money has been appropriated and paid, the commissioners shall be entitled to take immediate possession of the parcel of land in regard to which said order of payment shall have been made, and the court shall enforce such right of possession by proper order, and by process addressed to the marshal of the United States for the District of Columbia. In case the court shall enter judgment of condemnation in any case, and appropriation is not made by Congress for the payment of such award within the period of six months, Congress being in session for that time after such award, or for the period of six months after the meeting of the next session of Congress, the proceedings shall be void, and the land shall revert to the owners."

The 19th and concluding section requires the commissioners of the District of Columbia to include in their annual report a full statement of their action, and an estimate of necessary expenditures under this act.

Pursuant to §§ 1 and 2 of the act of 1893, a plan, in sections, was prepared and adopted by the commissioners of the District of Columbia, and a map thereof was approved by the commission named in § 2, and was filed and recorded in the surveyor's office, for the extension of a permanent system of highways in so much of the area of the District of *Columbia [561 as is bounded on the east by North Capitol street, on the west by Rock creek, on the north by the boundary line of the District, and on the south by Florida avenue, formerly Boundary street, and containing forty-seven existing suburban subdivisions.

On September 27, 1895, within thirty days after the recording of the map, the commissioners presented to the supreme court of the District of Columbia a separate petition, under § 6, for the condemnation of a permanent right of way for the public over all the land lying within the limits of each of those subdivisions, among which were one known as Dennison and Leighton's subdivision of a part of Mount Pleasant and Mount Pleasant plains, and through which Sixteenth street, if extended, would pass; and another known as the Ingleside subdivision, through parts of which would pass extensions of Seventeenth, Eighteenth, and Nineteenth streets. Upon the petition relating to each of these two subdivisions, due publication of notice was made, as required by § 6, and some owners of lands appeared and filed answers, alleging that the act was unconstitutional.

Upon the petition relating to the Dennison and Leighton subdivision, a jury of seven was summoned and organized, pursuant to § 10; and, after a trial before Justice Cox and the introduction of evidence by the petitioners and by the respondents, rendered a verdict in the form prescribed by the court, setting forth a description of each parcel of land affected; the number of square feet in the parcel; the number of square feet taken; the number of square feet not taken; the compensation for land taken; the compensation for buildings taken; the damages to the remainder of the parcel, including damages to the buildings; the benefits to the remainder of the parcel; and the award, being for compensation and damages, less benefits.

On February 5, 1896, on motion of the respondents, Justice Cox ordered and adjudged that the verdict be set aside, and the petition dismissed, on the ground that the act of 1893 was unconstitutional and void, for the reasons stated in his opinion filed on the same day. In that opinion, the learned judge *admitted [562 it to be established by the weight of authority that, under the right of eminent domain, the special benefits to an individual lot, of which a part was condemned, could properly be set off against or deducted from the amount found due as the value of the land appropriated and as special damage to the remainder of the tract or parcel; and that, under the legislative power of taxation, an assessment might be laid upon such remainder and other lands in the neighborhood, for the general benefits derived from the existence of the new street. But he held that either a deduction for special benefits, or an assessment for general benefits, should be for benefits which, if not immediately realized, should be at least so far present as to be certain and presently ascertainable; that the act of 1893, in a proceeding (such as this was) under § 6, relating to a highway

through an existing subdivision, simply required a condemnation of the right of way, and did not, as in a proceeding under § 7 relating to lands not within an existing subdivision, also require an immediate opening of the highway; that the act authorized the taking of private property for public use, and attempted to pay for it partly in future and contingent benefits, and failed to provide for the just compensation required by the Constitution to be made, and was therefore an unconstitutional appropriation of private property, which the courts could not carry out; and consequently that § 11, as applied to the case, was unconstitutional and void, and the whole proceeding must be set aside. He further suggested, although not deciding, that § 15, providing for an assessment of half the damages upon the lands deriving a general benefit from the highway, could not be carried out, because, while committing that assessment to the same jury, it fixed neither the taxing district, nor the rule of apportionment; and also observed that "the recording of the map by the commissioners, if nothing is done in pursuance of this step, is only a less injury to the lotowners than taking their property without paying for it." *Re Condemnation of Lands*, 24 Wash. L. Rep. 65–71.

From that judgment, the commissioners appealed to the court of appeals of the District [563]of Columbia, which in an *opinion delivered by Justice Shepard, Justice Morris concurring, reached the following conclusions:

1st. That under the last clause of the 5th Amendment to the Constitution of the United States, "nor shall private property be taken for public use without just compensation," this just compensation means "the actual value of the property taken, payable in money, and without diminution on account of benefits general or special," although special benefits might be considered in respect of a claim for damages done to the adjacent land not actually taken; and therefore that "so much, at least, of § 11 as provides for the diminution of the just compensation for the value of the land taken to the extent of benefits accruing to the remainder, is beyond the power of Congress, and therefore void."

2d. That, "in so far as the general principle of the assessment established by § 15 of this act is concerned, there can be no substantial objection; it is fair, liberal, and regular;" but that § 15 is inoperative by failure to conform to the necessary operation of §§ 6 and 7. To accomplish the object of speedy condemnation and rectification of streets in localities, where important, some provision should have been made for the creation of definite taxing districts, including one or several subdivisions and sections adjacent, where it might appear to be expedient and just, so that the work of condemnation, laying off, and assessment of expense, of streets could take place promptly without complication with others. Another defect is that the assessments, when confirmed by the court, shall bear interest from the date of such confirmation, notwithstanding the fact that Congress may not accept them, if at all, for a year, possibly, under the provisions of § 18."

3d. "That Congress has made no appropriation for the immediate payment of the compensation that may be assessed does not render the act invalid."

4th That the invalidity of §§ 11 and 15 does not make the act as a whole inoperative and void.

5th. That the record of the maps, provided for in the act, does not amount to "a taking of the land, in the sense that it interferes with *the enjoyment thereof by the owners to[564 an injurious extent, beyond the power of Congress, without a provision for compensation."

The result was that the judgment was reversed, and the cause remanded with directions to modify the judgment in so far as it dismissed the petition, and to reinstate the cause for further proceedings not inconsistent with the opinion of the court of appeals. *District of Columbia* v. *Armes*, 8 App. D. C. 393.

Chief Justice Alvey filed a separate opinion, holding § 11 to be constitutional and valid, and in this respect dissenting from his associates; but substantially concurring in the rest of their opinion, and holding § 15 to be "impossible of execution," and "nugatory for the want of certainty," in the following respects: "This power of assessment for benefits, as given in this section of the act, is without territorial limitation, and may extend into other subdivisions, and the same lots or parcels of land may be subject to assessments by other juries thereafter called upon to make assessments upon land benefited. . . . It entirely fails to define or prescribe the district or territory within which the benefits may be assessed. Whether confined to the particular subdivision in which the highway or street may be condemned and established, or whether such benefits may be assessed against land beyond the limits of such subdivision along the line of such improvement, as extended into or through adjoining subdivisions, the act is entirely silent. Nor is there any provision conferring authority upon commissioners, or upon the court, to define such taxing district. And the act wholly fails to provide how the assessment shall be apportioned—whether with reference to the existing value of the land, or to the amount of benefit only that may be derived from the improvement when made." 8 App. D. C. 427–429.

The supreme court of the District of Columbia, upon receiving the mandate of the court of appeals, set aside the verdict, so far as it allowed or assessed any benefits, and gave judgment thereon, so far as it awarded compensation and damages to the owners of lands. From this judgment the commissioners, as well as one of the landowners, appealed to the *court of appeals, which affirmed the judg-[565 ment. Both parties took appeals to this court, being Nos. 633 and 634.

Immediately after the original trial of the case of the Dennison and Leighton subdivision, the case of the Ingleside subdivision was submitted to the same jury, and a verdict was returned in similar form, which, after the first decision of the court of appeals above mentioned, and in accordance with that decision, was partly set aside, and partly affirmed, by a final judgment of the supreme court of the District of Columbia. The commissioners, as well as some of the landowners, appealed to

the court of appeals, which affirmed the judgment; and both parties took appeals to this court, being Nos. 631 and 632.

The effect of the decision of the court of appeals is that the owner of a parcel of land, a right of way over part of which is condemned under this statute, is entitled to recover the full value of the part taken, free of any deduction for special benefits to the remainder, or of any assessment for the general benefits received by it in common with other lands in the neighborhood.

In entering upon the consideration of the correctness of that conclusion, the precedents in the District of Columbia bearing upon the subject, are significant,—especially as showing the practical construction by Congress of the constitutional provision.

In the city of Washington, the lines of streets and avenues and public squares and reservations were defined and established by the original plan of the city; and the absolute and unqualified title in fee in the lands within those lines was vested in the United States by deeds of conveyance from the proprietors of the lands, or by proceedings of condemnation under statutes of Maryland, upon the original laying out of the city. Burch Dig. 217–224, 330, 337; D. C. Comp. Stat. pp. 654–660; *Van Ness* v. *Washington*, 29 U. S. 4 Pet. 232 [7: 842]; *Potomac S. B. Co.* v. *Upper Potomac S. B. Co.* 109 U. S. 672, 680, 681 [28: 1070, 1073]; *District of Columbia Comrs.* v. *Baltimore & P. R. Co.* 114 U. S. 453, 460 [29: 216, 220]. Congress, therefore, had little or no occasion to provide for the taking of lands, under the right **566**]*of eminent domain, for streets and highways within the city of Washington.

But Congress early began to legislate on the subject of laying out streets and highways in other parts of the District of Columbia, and to provide both for taking into consideration benefits, as well as injuries in the assessment of damages sustained by owners of lands, and for assessing and charging upon the persons and lands benefited the amount of such damages.

Georgetown was incorporated under the statute of Maryland of 1789, chap. 23, amended by the statute of 1797, chap. 56. 2 Kilty, Stat. Two early acts of Congress, amending the charter of Georgetown, contained provisions for the opening and extension of streets, as follows:

By the act of Congress of March 3, 1805, the corporation of Georgetown was empowered, in general terms, "to open, extend, and regulate streets within the limits of the said town; provided they make to the person or persons who may be injured by such opening, extension, or regulation, just and adequate compensation, to be ascertained by the verdict of an impartial jury to be summoned and sworn by a justice of the peace of the county of Washington, and to be formed of twenty-three men, who shall proceed in like manner as has been usual in other cases where private property has been condemned for public use." 2 Stat. at L. 335, chap. 32 § 12. The usual manner, under the statutes of Maryland thus referred to, of estimating the compensation or damages to be awarded to the owners of land for opening or extending a street, had been by inquiring what damages they would "actually suffer from the passing of the road over the land, . . . taking into consideration all conveniences and inconveniences, advantages and disadvantages, arising thereby," or "all benefits and inconveniences." Herty, Dig. (1799) p. 459; Md. Stat. 1790, chap. 32, § 8; Md. Stat. 1798, chap. 77, § 4; Md. Stat. 1799, chap. 32, § 2; Md. Stat. 1792, chap. 27, § 3; Md. Stat. 1798, chap. 19, § 3; 2 Kilty, Stat.

The supplementary act of March 3, 1809, chap. 30, after defining anew the limits of Georgetown, provided in § 4 as follows: "The said corporation shall have power to lay out, open, extend, and regulate streets, lanes, and alleys, within the limits *of the town, as [**567** before described, under the following regulations, that is to say: The mayor of the town shall summon twelve freeholders, inhabitants of the town, not directly interested in the premises, who, being first sworn to assess and value what damages would be sustained by any person or persons by reason of the opening or extending of any street, lane, or alley (taking all benefits and inconveniences into consideration), shall proceed to assess what damages would be sustained by any person or persons whomsoever, by reason of such opening or extension of the street, and shall also declare to what amount in money each individual benefited thereby shall contribute and pay towards compensating the person or persons injured by reason of such opening and extension; and the names of the person or persons so benefited, and the sums which they shall respectively be obliged to pay, shall be returned under their hands and seals to the clerk of the corporation, to be filed and kept in his office; and the person or persons benefited by opening or extending any street, and assessed as aforesaid, shall respectively pay the sums of money so charged and assessed to them, with interest thereon at the rate of 6 per cent per annum, from the time limited for the payment thereof until paid; and the sums of money assessed and charged in manner aforesaid to each individual benefited in manner aforesaid shall be a lien upon and bind all the property so benefited to the full amount thereof. *Provided always*, that no street, lane, or alley shall be laid out, opened, or extended, until the damages assessed to individuals in consequence thereof shall have been paid, or secured to be paid." 2 Stat. at L. 537, 538.

That provision of that act, in its leading features, was singularly like the act of 1893 now in question. Like this act, it provided that the jury, in assessing the damages sustained by any person by reason of the opening or extension of a street, should take into consideration the benefits to him; that the same jury which assessed the damages should also ascertain what landowners were benefited by the opening or extension, and what sums they should respectively pay towards the damages; that these sums should be a lien on the property benefited, and should bear interest until paid; and that the street should not be laid out, *opened, or extended, until the damages [**568** were paid or secured. The act of March 3, 1809, has more than once been brought before this court, without a doubt of its constitutionality being expressed. *Goszier* v. *Georgetown* (1821) 19 U. S. 6 Wheat. 593 [5: 339]; *Hanne-*

winkle v. *Georgetown* (1872) 82 U. S. 15 Wall. 547 [21: 231].

In later acts authorizing the laying out of highways, or the construction of other public improvements in the District of Columbia, Congress has repeatedly made provision for the deduction of benefits in estimating the compensation to be paid to an owner of land, whether for the value of the part taken, or for damages to the rest, even if the result should be to leave nothing payable to the owner.

The act of Congress of July 1, 1812, authorized the corporations of Washington and Georgetown, or either of them, to build a bridge across Rock creek, and the mayor to summon a jury of twelve disinterested freeholders, each of whom should be sworn to "justly, faithfully, and impartially value all the ground held as private property and intended and required to be used or occupied by reason of the contemplated erection of the permanent bridge, and the amount of damages the proprietor or proprietors of said ground will sustain (taking into view at the same time the benefits which the said proprietor or proprietors will derive from the erection of said bridge), according to the best of his skill and judgment; and the inquisition and valuation thereupon taken shall be signed by the mayor and seven or more of the said jury, and shall be binding and conclusive upon all parties concerned." 2 Stat. at L. 773, 774, chap. 117, § 13.

A statute of Virginia of January 27, 1824, incorporating the Chesapeake & Ohio Canal Company, approved and accepted by a statute of Maryland of January 31, 1825, and ratified and confirmed, for the purpose of enabling the corporation to carry into effect the provisions thereof in the District of Columbia, by the act of Congress of March 3, 1825, chap. 52, provided in § 15 that a jury of not less than 12 out of 18 summoned for the purpose should "value the land and all damages the owner thereof [569] shall sustain *by cutting the canal through such land, or the partial or temporary appropriation, use, or occupation of such land;" and that, "in every such valuation and assessment of damages," the jury should be "instructed to consider, in determining and fixing the amount thereof, the actual benefit which will accrue to the owner from conducting the said canal through, or erecting any of said works upon, his land, and to regulate their verdict thereby; except that no assessment shall require any such owner to pay or contribute anything to the said company where such benefit shall exceed, in the estimate of the jury, the value and damages ascertained as aforesaid." 4 Stat. at L. 101, 793, 798, 801.

An inquisition under that act, condemning land in Georgetown for the use of the canal, having been returned into the circuit court of the United States for the District of Columbia, was objected to by the owner of the land upon the ground that no provision had been made for just compensation, as required by the Constitution. Chief Justice Cranch, in overruling the objection, said:

"It is contended that the Constitution provides a positive, not a conjectural, compensation; that under the provisions of this charter it may happen that no compensation at all may be made; that the expected benefits which the jury shall have estimated may never arrive; and that, therefore, the jury should not have been required, by the charter, to consider them in their estimate of value and damages.

"But the Constitution only provides for the general principle. The means of ascertaining the just compensation were left to be decided by the public authority, which should give the power to take the private property for public use. All the states, prior to the adoption of the Constitution, exercised this right, and still continue to exercise it where it is necessary to condemn land for roads and other public uses; and they have generally provided for compensation through the intervention of a jury.

"It is impossible for the legislature to fix the compensation in every individual case. It can only provide a tribunal to examine the circumstances of each case, and to estimate the just *compensation. If the jury had not been [570] required by the charter to consider the benefit, as well as the damage, they would still have been at liberty to do so, for the Constitution does not require that the value should be paid, but that just compensation should be given. Just compensation means a compensation that would be just in regard to the public, as well as in regard to the individual; and if the jury should be satisfied that the individual would, by the proposed public work, receive a benefit to the full value of the property taken, it could not be said to be a just compensation to give him the full value. If the jury would have a right to consider the benefit, as well as the damage, without the provision of the charter which requires them to do so, the same objection would still exist, namely, that under the provisions of the charter it might happen that no compensation at all, or, at most, a nominal compensation, would be made. The insertion, therefore, of that provision in the charter which requires the jury to do what they would be competent to do without such a provision, and which, in order to ascertain a compensation which should be just towards the public as well as just towards the individual, they ought to do, cannot be considered as repugnant to the Constitution." *Chesapeake & O. Canal Co.* v. *Key* (1829) 3 Cranch, C. C. 599, 601.

A year later, a similar inquisition returned into the same court was objected to, because the jury had not found the value of the land and the damages separately, but had included both in one sum. To which Chief Justice Cranch, after reading the provision of the statute, above quoted, answered: "The benefits to be derived, therefore, may be as well set off against the value of the land as against the damages, and we see no reason why the jury may not find the result in one entire sum." *Chesapeake & O. Canal Co.* v. *Union Bank* (1830) 4 Cranch, C. C. 75, 80.

The very words of that provision were repeated in § 13 of the act of Congress of May 26, 1830, incorporating the Alexandria Canal Company. 6 Stat. at L. 419, 424, chap. 104.

This legislation of Congress, and these decisions of the circuit court of the District of Columbia, authorizing the setting off *of [571] benefits against the value of land taken as well as against additional damages, for the construction of a canal, are in accord with the statement of Chief Justice Waite, speaking for this

court, in 1881, that the construction of a canal "might confer benefits that would be a just compensation for the private property taken for its use." *Kennedy* v. *Indianapolis*, 103 U. S. 599, 605 [26: 550, 553].

From 1812 to 1890, a period of more than three quarters of a century, the general acts of Congress, authorizing the laying out or altering of public roads in the District of Columbia, outside the cities of Washington and Georgetown, expressly provided for the deduction of benefits in the assessment of damages to the owners of lands.

By § 2 of the act of July 1, 1812, the levy court of the county of Washington was authorized to lay out, straighten, and repair such public roads; and by § 3 a warrant might be issued to the marshal of the District of Columbia to summon a jury of twelve disinterested freeholders, and to administer to each of them an oath to "justly, faithfully, and impartially value the land and all damages the owner thereto will sustain by the road passing through the same, having regard to all circumstances of convenience, benefit, or disadvantage, according to the best of his skill and judgment; and the inquisition thereupon taken shall be signed by the marshal and seven or more of the said jury, and shall be conclusive." 2 Stat. at L. 771, 772, chap. 117. Like proceedings for the condemnation of lands were provided for in the similar act of May 3, 1862 (12 Stat. at L. 384, chap. 63, § 5).

In 1863, the same court, whenever it should "deem it conducive to the public interests to open a new road, or change the course of an old one," was authorized to order the route to be surveyed, and the road to be recorded and opened; and to direct the marshal "to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on a day specified to assess the damages, if any, which each owner of land through which the road is to pass may sustain by reason thereof, . . . but in doing this they shall take into consideration the bene-

572] fit it may *be to him or her by enhancing the value of his or her land, or otherwise, and give their verdict accordingly," signed by the jury, or by a majority of them, and attested by the marshal. If the court or any landowner was dissatisfied with that verdict, the matter might be submitted to a jury of twelve, proceeding as before, the verdict of whom, or of a majority of whom, was final. Act of March 3, 1863 (12 Stat. at L. 801, 802, chap. 106, § 8).

By the act of May 9, 1866, empowering the levy court "to declare and locate as public highways such roads known and used as military roads in said District during the rebellion, as said court may deem advisable, . . . the damages which the owners of the land over which said roads pass shall sustain by reason of said roads being declared public highways" were to be assessed as provided in the act of July 1, 1812, chap. 117, § 3, above quoted. 14 Stat. at L. 45, chap. 76.

In 1871, upon the creation of a government for the District of Columbia, with a governor and a legislative assembly, the levy court was abolished, and its powers over public roads under the act of 1863 were vested in the board of public works. Act of February 21, 1871 (16 Stat. at L. 419, 423, 428, chap. 62, §§ 1, 18, 40); D. C. Laws 1871, chap. 76, § 2. In 1874, when all provisions of law providing for a governor, a legislative assembly, and a board of public works in the District of Columbia were repealed, the provisions of the act of 1863 upon the subject of highways were substantially re-enacted, substituting "the proper authorities" for the levy court, in D. C. Rev. Stat. chap. 11, §§ 252–265; it being provided in § 260 of these statutes that the jury should "decide what damages, if any, each owner may sustain by reason of running the road through his premises," and in § 261 that "in making their decision the jury shall take into consideration the benefit such road may be to each owner by enhancing the value of his land, or otherwise, and shall give their verdict accordingly." By subsequent acts, the powers of the board of public works have been vested in the commissioners of the District of Columbia. *Acts of June 20, 1874 (18 Stat. at [**573** L. 116, chap. 337, §§ 1, 2); June 11, 1878 (20 Stat. at L. 103, chap. 180, § 2); D. C. Comp. Stat. chap. 29.

Again, by the act of April 15, 1886, authorizing the construction of the Congressional Library Building, the damages occasioned by the taking of land for that purpose were to be ascertained and assessed "in the manner provided with reference to the taking of land for highways in the District of Columbia," that is to say, according to chapter 11 of the Revised Statutes of the District. 24 Stat. at L. 13, chap. 50, § 4.

By the act of August 30, 1890, it was provided that "the value of the interests of all persons, respectively," in land taken for the enlargement of the Government Printing Office, should be appraised by three commissioners appointed by the supreme court of the District of Columbia, upon the application of the special board created by the act; and it was further provided that thereafter, "in all cases of the taking of property in the District of Columbia for public use," the like proceedings should be had upon the application of the proper officers. 26 Stat. at L. 413, chap. 837, § 3. But the object of these provisions would appear to have been to make a change only in the persons who should assess the compensation, not in the rule of assessment. And by the act of August 7, 1894, it was enacted that § 3 of the act of 1890 should "not be construed to apply to the condemnation of land for public highways, nor to repeal U. S. Rev. Stat. chap. 11, relating to the District of Columbia, in regard to public highways, roads, and bridges." 28 Stat. at L. 251, chap. 232.

The power of Congress, exercising the right of eminent domain within the District of Columbia, to provide for the deduction of benefits from the compensation or damages for taking part of a parcel of land and injuring the rest, does not appear ever to have been judicially questioned until it was denied by a majority of the court of appeals of the District of Columbia within the last two or three years. *District of Columbia* v. *Prospect Hill Cemetery*, 5 App. D. C. 497; *Maryland & W. R. Co.* v. *Hiller*, 8 App. D. C. 289; *District of Columbia* v. *Armes*, 8 App. D. C. 393.

The position thus assumed by the majority
574] of that court is *not only against the uniform course of previous legislation and decision in the District of Columbia, but it is opposed to the great preponderance of the authorities elsewhere.

In the 5th article of the earliest Amendments to the Constitution of the United States, in the nature of a bill of rights, the inherent and necessary power of the government to appropriate private property to the public use is recognized, and the rights of private owners are secured, by the declaration, "nor shall private property be taken for public use without just compensation."

The right of eminent domain, as was said by this court, speaking through the Chief Justice, in a recent case, "is the offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law. It cannot be exercised, except upon condition that just compensation shall be made to the owner; and it is the duty of the state, in the conduct of the inquest by which the compensation is ascertained, to see that it is just, not merely to the individual whose property is taken, but to the public which is to pay for it." *Searl* v. *Lake County School Dist. No. 2*, 133 U. S. 553, 562 [33: 740, 746]. The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.

Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of the compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened. If, for example, by the widening of a street, the part
575] which lies next the street, *being the most valuable part of the land, is taken for the public use, and what was before in the rear becomes the front part, and upon a wider street, and thereby of greater value than the whole was before, it is neither just in itself, nor required by the Constitution, that the owner should be entitled both to receive the full value of the part taken, considered as front land, and to retain the increase in value of the back land, which has been made front land by the same taking.

Of the overwhelming number of decisions in the courts of the several states, which support this view, a few of the most important may conveniently be referred to.

By the Declaration of Rights prefixed to the Constitution of Massachusetts, established in 1780, "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Mass. Const. pt. 1, art. 10. By the statute of Massachusetts of 1786, chap. 67, § 4, the court of sessions, upon determining it "to be of common convenience or necessity" that a new highway or common road should be laid out, or an old one altered, was authorized to appoint "a committee of five disinterested sufficient freeholders, in the same county, to lay out such highway or road," "according to their best skill and judgment, with most convenience to the public, and least prejudice or damage to private property;" and it was provided that "if any person be damaged in his property, by the laying out or altering such highway," the town in which the way was should make him "reasonable satisfaction, according to the estimation of the committee, or the major part of them;" and any person "aggrieved by the doings of the said committee in locating said way, or in estimating damages," might have their doings, in both respects, reviewed by a sheriff's jury. Although that statute made no mention of benefits, the supreme judicial court of the state, in 1807, speaking by Chief Justice Parsons, and laying down "the principles of law which ought to direct these proceedings," said: "In estimating the damages, the committee are not confined to the value of the land covered by the road, and the expense of fencing the ground. The [576 owner may suffer much greater damage by the road depriving him of water, or by otherwise rendering the cultivation of his farm inconvenient and laborious; or it may happen that the new highway may essentially benefit his farm, and that he may suffer very little or no injury by the location. The estimation ought, therefore, to be according to the damage which the owner will, in fact, sustain in his property by the opening of the road." *Com.* v. *Coombs*, 2 Mass. 489, 491.

The same rule was recognized in *Com.* v. *Norfolk County Ct. Sessions*, 5 Mass. 435, and in *Com.* v. *Middlesex County Justices*, 9 Mass. 388; and, after being constantly acted on in Massachusetts, was embodied in the Revised Statutes of 1836, in this form: "In estimating the damages sustained by any person in his property, by the laying out, altering, or discontinuing of any highway, the jury shall take into consideration all the damage done to the complainant, whether by taking his property, or by injuring it in any manner; and they shall also allow, by way of set-off, the benefit, if any, to the property of the complainant by reason of such laying out, alteration, or discontinuance." Those statutes also provided that damages occasioned by the laying out and maintaining of a railroad should be estimated in the manner provided in the case of laying out highways. Mass. Rev Stat. chap. 24, § 31; Mass. Rev. Stat. chap. 39, § 56. And both provisions have been re-enacted in successive revisions of the statutes Mass. Gen. Stat. 1860, chap. 43, § 16; Mass. Gen. Stat. 1860, chap. 63, § 21; Mass. Pub. Stat. 1882, chap. 49, § 16; Mass. Pub. Stat 1882, chap. 112, § 95.

In 1849, the supreme judicial court of Massachusetts, in an opinion delivered by Mr. Justice Dewey, with the concurrence of Chief Justice Shaw and Justices Wilde, Metcalf, and Fletcher, held that, in estimating the damages

for the taking of land for a railroad, any direct and peculiar benefit, or actual increase of value, thereby caused to land of the same owner adjoining or connected with the land taken and forming part of the same parcel or tract, was to be considered and allowed by way of set off, and in reduction of damages; but not any general benefit or increase of value to be occasioned 577] *to such land, in common with all the lands in the neighborhood, by the establishment of the railroad and the facilities connected therewith. The conclusion of the court was summed up as follows: "The respondents are not to have the benefit of any increase in value of the petitioner's adjacent land, so far as he has been benefited by the railroad, merely in common with all the citizens of the neighborhood or village, by the anticipated general rise of property, by reason of the railroad's passing through the town and in the vicinity of their lands. It is only the increased value of the land of the petitioner, arising from the location of the road over some part of it, which is to be taken into consideration. If such location over the land of the petitioner has raised the value of his adjacent lands, then a reduction or offset is to be allowed the respondents on that account. It is the increase of value occasioned by the location, and of course has reference to the state of things existing at the time when the land is taken by the location." *Meacham* v. *Fitchburg R. Co.* 4 Cush. 291, 298, 299. The rule as thus qualified has ever since been applied in Massachusetts to highways. *Allen* v. *Charlestown*, 109 Mass. 243; *Hilbourne* v. *Suffolk County*, 120 Mass. 393 [21 Am. Rep. 522]; *Cross* v. *Plymouth County*, 125 Mass. 557.]

In New York the courts have gone beyond this in allowing benefits to be taken into consideration in diminution of compensation or damages for land taken for a highway. The Constitution of 1821, art. 7, § 7, declared, in the very words of the 5th Amendment of the Constitution of the United States, "nor shall private property be taken for public use without just compensation." The court of errors, in 1831, affirming a judgment of the supreme court of the state, held that the benefit accruing to the owner of land taken for a street in the city of New York by the increased value of adjacent lands belonging to him, might be set off against the loss or damage caused to him by the taking, and, if equal to such loss or damage, was a just compensation for the land taken; and Chancellor Walworth, delivering the leading opinion, said: "The owner of the property taken is entitled to a full compensation for the damage he sustains thereby, but if 578]the taking of his *property for the public improvement is a benefit rather than an injury to him, he certainly has no equitable claim to damages. Besides, it is a well-settled principle that where any particular county, district, or neighborhood is exclusively benefited by a public improvement, the inhabitants of that district may be taxed for the whole expenses of the improvement, and in proportion to the supposed benefit received by each. In this case, if the whole value of the property taken for a street in the city of New York is allowed to the individual owner the proprietors of the adjacent lots must be assessed for the purpose of paying that amount, and if the individual whose property is taken is the owner of a lot adjacent, that lot must be assessed ratably with others. It therefore makes no difference whether he is allowed the whole value of the property taken in the first instance, and is assessed for his portion of the damage, or whether the one sum is offset against the other in the first place, and the balance only is allowed." *Livingston* v. *New York*, 8 Wend. 85, 101, 102 [22 Am. Dec. 622]. That decision appears to have since been considered as establishing that both special and general benefits from the laying out of a street may be set off against the value of the part taken, as well as against the damages to the remainder. *Re Furman Street*, 17 Wend. 649, 659, 671; *People* v. *Brooklyn*, 4 N. Y. 419, 435 [55 Am. Dec. 266]; *Granger* v. *Syracuse*, 38 How. Pr. 308; *Genet* v. *Brooklyn*, 99 N. Y. 296, 305; *Eldridge* v. *Binghamton*, 120 N. Y. 309, 313; *Bohm* v. *Metropolitan Elev. R. Co.* 129 N. Y. 576, 586 [14 L. R. A. 344].

In New Jersey, in a very recent case, a statute authorizing the taking of land for a highway and directing the commissioners "to make a just and equitable estimate and appraisement of the compensation and damages each owner of the real estate and land to be taken will sustain by reason of such taking, considering in such appraisal the condition in which each owner's parcel will be left after taking so much thereof as will be necessary for said opening, and the benefits that will result from such road to the owner or owners of such land and real estate," was held by the supreme court, in an opinion delivered by Mr. Justice Dixon, to be consistent* with the provision [579 of the Constitution of 1844, art. 1, § 16, that "private property shall not be taken for public use, without just compensation," for these reasons: "Just compensation for taking part of an entire tract of land for public use cannot, we think, be ascertained, without considering all the proximate effects of the taking. These are, the withdrawal of the part taken from the dominion of the former owner, the damage done to the residue by the separation, and the benefit immediately accruing to the residue from the devotion of the part taken to a certain public use. Just compensation is ascertained by combining the pecuniary value of all these facts; if any be excluded, what is given is more or less than is just. The value of the land taken is no more essential to just compensation than is satisfaction for the damage done to the residue, nor is it more exempt from diminution on account of benefits conferred. There is, however, a possibility of benefit to accrue from certain public uses for which land is taken, like the opening of highways, which should not be considered, for two reasons: *first*, because this benefit is to arise, if at all, in the indefinite future, while the compensation must be such as is just at the time of the taking; *second*, because it is so uncertain in character as to be incapable of present estimation. Such benefit is that which may spring from the growth of population, if it should be attracted by the public improvement for which the land is taken, and from similar sources. It is usually styled general benefit, because it affects the whole community or neighborhood.

But any benefit which accompanies the act of taking the land for the contemplated use, and which admits of reasonable computation, may enter into the award." [*State*] *Mangles*, v. *Hudson County Board of Chosen Freeholders*, 55 N. J. L. 88, 92 [17 L. R. A. 785]. The like rule has been upheld by the court of errors in the case of a railroad. *Packard* v. *Bergen Neck R. Co.* 54 N. J. L. 553.

In Pennsylvania, the Constitution of 1790, art. 9, § 10, declared, "nor shall any man's property be taken or applied to public use," "without just compensation being made;" and that provision, without material change, has **580**] been retained in the Constitution *of 1838, art. 9, § 10, and in that of 1873, art. 1, § 10. The rule of compensation was tersely stated by Chief Justice Gibson, in 1821, as follows: "The jury are to consider the matter just as if they were called on to value the injury at the moment when compensation could first be demanded; they are to value the injury to the *property*, without reference to the person of the owner, or the actual state of his business; and in doing that, the only safe rule is, to inquire what would the property unaffected by the obstruction have sold for, at the time the injury was committed? What would it have sold for as affected by the injury? The difference is the true measure of compensation." *Schuylkill Nav. Co.* v. *Thoburn*, 7 Serg. & R. 411, 422. The rule, as thus stated, was recognized by Mr. Justice Strong in *Watson* v. *Pittsburg & C. R. Co.* 37 Pa. 469, 481; and in accordance therewith it has been uniformly held that when part of a parcel of land is taken, direct and special benefits to the rest of the same parcel, beyond the general increase in the value of the property in the neighborhood, are to be deducted. *Plank Road Co.* v. *Rea*, 20 Pa. 97; *Pittsburg, B. & B. R. Co.* v. *McCloskey*, 110 Pa. 436; *Setzler* v. *Pennsylvania S. S. R. Co.* 112 Pa. 56; *Long* v. *Harrisburg & P. R. Co.* 126 Pa. 143.

In Ohio, under the Constitution of 1802, art. 8, § 4, which declared, "Private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner," the supreme court of the state, in 1846, held that in assessing the compensation for the taking of part of a lot of land for the widening of a street benefits resulting from the improvements to the residue of the lot might be set off; and said: "That just, full, and adequate *compensation* must be made, and *in money*, is certain; more cannot be required; but if, in appropriating property of the value of $4,000, when, by the same appropriation, the value of what remains is increased $2,000, and the value of the property taken is the rule of damages, the owner actually takes $2 000 without the least consideration, and receives more than the Constitution enjoins to be paid, be-**581**]cause *it is more than a *compensation*. . . . The word 'compensation' imports that a wrong or injury has been inflicted, and which must be redressed in money. Money must be paid to the extent of the injury, whether more or less than the value of the property; and then, in our view, is the language of the Constitution satisfied. We are confirmed in our opinion of the correctness of the construction we place on the word 'compensation,' as employed in the Constitution, from the fact that such construction has obtained and been acquiesced in, from a period not far short of the organization of the state government. In the opening of roads, constructing turnpikes, and appropriating lands for canals, benefits conferred have been constantly and unceasingly deducted from the value of the property, or damages otherwise sustained. Long contemporaneous construction of an instrument is seldom erroneous, and is always deserving of great consideration, when the meaning of the instrument is obscure." *Symonds* v. *Cincinnati*, 14 Ohio, 147, 174, 175 [45 Am. Dec. 529]. The same rule was followed so long as the Constitution of 1802 was in force. *Brown* v. *Cincinnati*, 14 Ohio, 541; *Kramer* v. *Cleveland & P. R. Co.* 5 Ohio St. 140; *Columbus, P. & I. R. Co.* v. *Simpson*, 5 Ohio St. 251.

The rule upon the subject was expressed by Mr. Justice Brewer, when a member of the supreme court of the state of Kansas, as follows: "Outside of any special constitutional or statutory restrictions, the right of the state to take private property for public use, and the corresponding right of the individual to receive compensation for the property thus taken, may be assumed. . . . But this compensation is secured if the individual receive an amount which, with the direct benefits accruing, will equal the loss sustained by the appropriation. We of course exclude the indirect and general benefits which result to the public as a whole, and therefore to the individual as one of the public; for he pays in taxation for his share of such general benefits. But if the proposed road or other improvement inure to the direct and special benefit of the individual out of whose property a part is taken, he receives something which none else of the public receive, and it is just *that this [**582** should be taken into account in determining what is compensation. Otherwise, he is favored above the rest, and instead of simply being made whole, he profits by the appropriation, and the taxes of the others must be increased for his special advantage. Upon general principles, then, and with due regard to right and justice, it should be held that the public may show what direct and special benefits accrue to an individual claiming road damages, and that these special benefits should be applied to the reduction of the damages otherwise shown to have been sustained. . . . The word 'damages' is of general import, and is equivalent to compensation. It includes more than the mere value of the property taken, for often the main injury is not in the value of the property absolutely lost to the owner, but in the effect upon the balance of his property of the cutting out of the part taken. He is damaged, therefore, more than in the value of that which is taken. Conversely, the appropriation of the part taken to the new uses for which it is taken may operate to the direct and special improvement and benefit of that not taken. Surely, this direct increase in value, this special benefit resulting from the improvement the public is making, and for which it must be taxed, reduces the damages he has sustained." *Pottawatomie County Comrs.* v. *O'Sullivan*, 17 Kan 58–60. And the rule has been applied

where the special benefit equaled or exceeded the damages, so that the owner of the land received nothing. *Tobie* v. *Brown County Comrs.* 20 Kan. 14; *Trosper* v. *Sabine County Comrs.* 27 Kan. 391.

Nothing inconsistent with this view was decided or intimated in the opinion of this court, delivered by Mr. Justice Brewer, in *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312 [37: 463]. All that was there said upon this subject was as follows: "The 'just compensation' is to be a full equivalent for the property taken. This excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated; and leaves it to stand as a declaration that no private prop-**583**] erty *shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner. We do not in this refer to the case where only a portion of a tract is taken, or express any opinion on the vexed question as to the extent to which the benefits or injuries to the portion not taken may be brought into consideration." 148 U. S. 326 [37: 468]. And on the next page the opinion of the supreme court of Mississippi in *Isom* v. *Mississippi C. R. Co.* 36 Miss. 300, was referred to and quoted from, not by way of indorsing the peculiar views expressed by that court in another part of its opinion upon the subject of benefits, but only in support of the general proposition that, while the question what property is needed for public purposes is to be determined by the legislature, the ascertainment of what is just compensation is a judicial inquiry. See *Marchant* v. *Pennsylvania R. Co.* 153 U. S. 380, 385 [38: 751, 755]; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 [*ante*, 600].

The case, just decided, of *Spokane Falls & N. R. Co.* v. *Ziegler*, 167 U. S. 65 [*ante*, 79], in which the owner of a tract of land, part of which was taken for a railroad, and the rest thereby injured, was allowed to recover against the railroad corporation the full value of the land taken, and also the difference in market value of the part left, "irrespective of the effect on the market value by reason of the building of the road," was governed by the express provision of § 2456 of the Code of Washington territory, afterwards embodied in art. 1, § 16, of the Constitution of the state of Washington, requiring, in such a case, compensation to be made, "irrespective of any benefit from any improvement proposed by such corporation." See *Spokane Falls & N. R. Co.* v. *Ziegler*, 15 U. S. App. 472, 478; *Enoch* v. *Spokane Falls & N. R. Co.* 6 Wash. 393.

The careful collection and classification of the cases upon this subject in Lewis, Em. Dom. §§ 465–471, shows that in the greater number of the states, unless expressly forbidden by Constitution or statute, special benefits are allowed to be set off, both against the value of the part taken, and against damages to the **584**] remainder: that in some of those *states general benefits also are allowed to be thus set off; that in comparatively few states both kinds of benefits, or at least special benefits, are allowed to be set off against damages to the remainder, but not the value of the part taken; and that in Mississippi alone benefits are not allowed to be considered at all. See also Cooley, Const. Lim. 6th ed. 697–702; 2 Dill. Mun. Corp. 4th ed. §§ 624, 625; Randolph, Em. Dom. §§ 254–273.

The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and for the reasons and upon the authorities above stated, no such prohibition can be implied; and it is therefore within the authority of Congress, in the exercise of the right of eminent domain, to direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits capable of present estimate and reasonable computation caused by the establishment of the highway to the part not taken.

The suggestion, made at the bar, that § 11 of the act in question, as applied to a proceeding under § 6 relating to an existing subdivision, allows the jury to deduct contingent and speculative benefits to arise in the future from the actual opening and improvement of the highways, may be best met by recurring to the general scope of the act.

In the 1st section, Congress directed the commissioners of the District of Columbia to prepare a plan for the extension of a permanent system of highways, throughout that part of the district lying outside of the cities of Washington and Georgetown, in conformity as nearly as practicable, with the general plan of the city of Washington.

But Congress evidently recognized the importance, for the efficient execution of its scheme, and for the avoidance of *unnec- [**585** essary expenditures, to begin by dealing with those localities where subdivisions had been made and streets laid out by the owners of the land, regardless of the general plan; and to leave the completion of the system through other parts of the District, in which the land had not been subdivided, and comparatively few streets had been laid out, to be dealt with afterwards.

The commissioners, therefore, by § 2, were required to prepare their plan of extension in sections, beginning with the areas covered by existing suburban subdivisions not in conformity with the general plan of the city of Washington, and to prepare maps of those sections; and, by § 6, were required, within thirty days after the record of any such map which should alter or dispense with any highway in any then existing subdivision in the area included in the map, to present a petition to the court for condemnation of a permanent right of way for the public over all lands within that subdivision, not already owned by the United States or the District of Columbia or dedicated to public use as a highway. And by § 7, petitions as to lands not within existing subdivisions might be presented to the court at any time thereafter.

The only substantial difference between proceedings for condemnation of a public right of way over lands within an existing subdivision, under § 6, and over lands not within an existing subdivision, under § 7, is that, as to lands within an existing subdivision, the petition to the court must be presented within thirty days after the recording of the map, and the court is then to proceed with the condemnation—Congress, in effect, itself determining that the public convenience requires the immediate establishment of the new highways—while as to lands not within any existing subdivision, the petition to the court may be presented at any time thereafter, and is not to be presented, nor any condemnation made, until the commissioners and the court, respectively, have determined that the public convenience requires the immediate opening of the highways in question. Although the word "opening" does not occur in § 6, while it is used
586] *in § 7, yet the authority of the court, as defined in either section, is only "to condemn a permanent right of way for the public" over the lands in question, and does not include the actual laying out and construction of the new highways. Condemnation, and nothing more, is likewise mentioned in the corresponding provisions of § 9.

The provisions of § 8, as to notice to parties interested, and of §§ 10-13, as to the summoning and organization of a jury of seven, and as to their duties in assessing the compensation or damages to landowners, including the provision of § 11 for considering benefits in the assessment of damages, are in terms applicable alike to proceedings under § 6 and under § 7.

So are the provisions of § 15, which direct the compensation awarded to be assessed and charged, one half upon the lands benefited, and the other half upon the District of Columbia; and which, in the use of the various phrases, "highway condemned and established under this act," "laying out and opening of such highway," or simply "opening of any highways," evidently treat condemnation, establishment, laying out, and opening of a highway as denoting one and the same thing, the appropriation or setting apart of land for a highway and throwing it open to public travel, and have no regard to the actual grading or construction of the highway.

The provisions of the act which relate to the deduction of benefits in assessing compensation or damages are as follows:

Section 11 provides that, "where the use of a part only of any parcel or tract of land shall be condemned in such a proceeding, the jury, in assessing the damages therefor, shall take into consideration the benefit the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the value of the remainder of the same, and shall give their verdict accordingly; and the court may require, in such case, that the damages and the benefits shall be found and stated separately."

Section 13 provides that "the verdict of the jury shall state, as to each parcel of land involved in the proceeding, only the amount of
587] compensation, less the benefits, if *any, which it shall award in respect thereof." And § 15 speaks of the benefits, so deducted, as "the amount, if any, which shall have been deducted from the value of the part taken, on account of the benefit to the remainder of the tract."

Construing § 11 in connection with the rest of the act, the words "the purpose for which it is taken," in the provision that, when the use of a part only of any parcel or tract of land is condemned, the jury, in assessing the damages therefor, shall take into consideration the benefit that "the purpose for which it is taken may be to the owner or owners of such tract or parcel by enhancing the remainder of the same," clearly signify the purpose for which it is condemned, the appropriation of the land for a highway, which is distinct from, and necessarily antecedent to, the actual construction and completion of the way; and the benefits, as well as the damages, to be taken into consideration, are to be estimated as of the date of such appropriation. The damages assessed as of that date constitute the entire compensation for such appropriation of land for a highway, including all injuries resulting from any change of the natural grade required in the actual construction of the highway, and also, it would seem, unless expressly provided otherwise by constitution or statute, any which may be caused by a future change of the grade by the public authorities. *Goszler* v. *Georgetown*, 19 U. S. 6 Wheat. 593 [5: 339]; *Smith* v. *Washington Corp.* 61 U. S. 20 How. 135, 149 [15: 858, 861]; *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635 [25: 336]; *Chicago* v. *Taylor*, 125 U. S. 161 [31: 638]; *Wabash R. Co.* v. *Defiance*, 167 U. S. 88 [*ante*, 87].

The necessary conclusion is that there is nothing unusual or unconstitutional in the provision of § 11, requiring benefits to be taken into consideration in assessing the compensation or damages to be awarded to the owners of land affected by the establishment of new highways.

The other principal question in the case is of the constitutionality of § 15, which directs "the amount awarded by said court as damages for each highway or reservation, or part thereof, condemned and established under this act," to be assessed and charged, one half upon the lands benefited *thereby, and the other
588] half upon the District of Columbia; and, as to the first half, enacts that it "shall be charged upon the lands benefited by the laying out and opening of such highway or reservation, or part thereof;" that "the same jury which shall assess the damages caused by the opening of any highways or reservation, or part thereof, or by the abandonment of an existing highway, or part thereof, shall ascertain and determine what property is thereby benefited, and shall assess against each parcel which it shall find to be so benefited its proper proportional part of the whole of said one half of the damages: *Provided*, that in making such assessments for benefits the jury shall, as to any tract a part of which shall have been taken for such highway or reservation, or part thereof, make due allowance for the amount, if any, which shall have been deducted from the value of the part taken, on account of the benefit to the remainder of the tract;" that "the proceedings of the court and the jury, in making assessments for benefits under this section, shall conform as nearly as is practicable to

the foregoing provisions of this act relating to the assessment of damages; and the verdict of the jury, making an assessment under this section as to any parcel of land, shall not be conclusive until the same shall have been confirmed by the court," and that, "when confirmed by the court, the assessment so made shall be a lien upon the land assessed," and shall be collected as other taxes are collected, "and shall be payable in five equal annual instalments, with interest at the rate of 4 per cent per annum from the date of the confirmation of the assessment by the court."

The provisions of this section are to be referred, not to the right of eminent domain, but to the right of taxation; and the general principles applicable to this branch of the case have been affirmed by a series of decisions of this court.

It was contended by some of the owners of lands that the public improvement proposed was not of a local character, but was for the advantage of the whole country, and should be paid for by the United States, and not by the District of Columbia, or by the owners of the 589]lands affected by the improvement. *But it is for the legislature, and not for the judiciary, to determine whether the expense of a public improvement should be borne by the whole state, or by the district or neighborhood immediately benefited. The case, in this respect, comes within the principle upon which this court held that the legislature of Alabama might charge the county of Mobile with the whole cost of an extensive improvement of Mobile harbor; and, speaking by Mr. Justice Field, said: "The objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole state. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless constrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties or other particular subdivisions of the state, or lay the greater share or the whole upon that county or portion of the state specially and immediately benefited by the expenditure." *Mobile County* v. *Kimball*, 102 U. S. 691, 703, 704 [26: 238, 242].

The legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street, to be assessed upon the owners of lands benefited thereby. *Davidson* v. *New Orleans*, 96 U. S. 97 [24: 616]; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701 [28: 569]; *Spencer* v. *Merchant*, 125 U. S. 345, 355, 356 [31: 763, 767]; *Walston* v. *Nevin*, 128 U. S. 578, 582 [32: 544, 546]; *Lent* v. *Tillson*, 140 U. S. 316, 328 [35: 419, 426]; *Illinois C. R. Co.* v. *Decatur*, 147 U. S. 190, 198, 199 [37: 132, 135]; *Paulsen* v. *Portland*, 149 U. S. 30 [37: 637]. This authority has been repeatedly exercised in the District of Columbia by Congress, with the sanction of this court. *Willard* v. *Presbury*, 81 U. S. 14 Wall. 676 [20: 719]; *Mattingly* v. *District of Columbia*, 97 U. S. 687 [24: 1098]; *Shoemaker* v. *United States*, 147 U. S. 282, 286, 302 [37: 170, 178, 186].

The class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the *legislature to the determination of com [590 missioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited. *Spencer* v. *Merchant*, and *Shoemaker* v. *United States*, above cited; *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 112, 167, 168, 175, 176 [41:369, 391, 392, 394]; *Ulman* v. *Baltimore*, 165 U. S. 719 [4 : 1184]. See also the very able opinion of the court of appeals of New York, delivered by Judge Ruggles, in *People* v. *Brooklyn*, 4 N. Y. 419, 430 [55 Am. Dec. 266].

The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners. *Mattingly* v. *District of Columbia*, *Spencer* v. *Merchant*, *Walston* v. *Nevin*, *Shoemaker* v. *United States*, *Paulsen* v. *Portland*, and *Fallbrook Irrig. Dist.* v. *Bradley*, above cited.

If the legislature, in taxing lands benefited by a highway, or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law. *Davidson* v. *New Orleans*, *Spencer* v. *Merchant*, *Walston* v. *Nevin*, *Lent* v. *Tillson*, *Paulsen* v. *Portland*, and *Fallbrook Irrig. Dist.* v. *Bradley*, above cited.

The whole sum directed by § 15 to be assessed upon lands benefited is one half of "the amount awarded by said court as damages for each highway or reservation, or part thereof, condemned and established under this act." This fixing of the gross sum to be assessed was clearly within the authority of Congress, according to the above cases.

The class of lands to be assessed is defined by directing that the aforesaid sum "shall be charged upon the lands benefited by the laying out and opening of such highway or reservation, or part thereof," and that the jury "shall ascertain and determine what property is thereby benefited." And the rule of assessment is defined by the further direction that the jury "shall assess against each parcel which it shall find *to be so benefited its proper [591 proportional part of" the sum aforesaid, with a proviso that, as to any tract, part of which only has been taken, due allowance shall be made "for the amount, if any, which shall have been deducted from the value of the part taken, on account of the benefit to the remainder of the tract."

It was argued that § 15 was too uncertain to be put in execution, because it failed to define the district or territory within which the benefits might be assessed, and did not even specify whether the assessment should or should not be confined to lands within the particular sub-

division in which a new highway was established. But in either alternative the assessment could not include lands outside of the District of Columbia; and the section would be equally constitutional whether the district of assessment was the particular subdivision, or the whole District of Columbia. And there does not appear to be any uncertainty as to which alternative was in the contemplation of Congress. The lands to be assessed being described generally as "the lands benefited," by the condemnation and establishment of the new highway or by the abandonment of an existing highway, and again as the "property thereby benefited," and as the lands which the jury "find to be so benefited," without any words of restriction to lands in the particular subdivision, the reasonable inference is that all lands so benefited, lying within the exclusive jurisdiction of Congress over the District of Columbia, may be included in the assessment. The question what parcels of lands, within the district so ascertained, are benefited and therefore liable to be assessed, might justly and constitutionally, as appears by the cases above cited, be committed by Congress to the determination of the tribunal intrusted with the authority of making this assessment.

Nor can we entertain any serious doubt as to the rule of assessment which is to govern. The directions that the jury "shall ascertain and determine what property is benefited" by the establishment of the highway, and "shall assess against each parcel which it shall find to be so benefited its proper proportional part of" the whole sum directed to be assessed, **592**]*making due allowance, when part only of a tract has been taken, for any deduction already made, in the assessment of damages for such taking, "on account of the benefit to the remainder of the tract," reasonably, if not necessarily, imply that the assessment is to be proportional to the benefit, and not to the market value or any other test; and are equivalent to the words in the Rock Creek Park act, directing lands in the District of Columbia to be assessed, "as nearly as may be, in proportion to the benefits resulting to such real estate." Act of September 27, 1890 (26 Stat. at L. 493, chap. 1001, § 6); *Shoemaker* v. *United States*, 147 U. S. 282, 286, 302 [37: 170, 178, 186].

In support of the judgment below, much reliance was placed upon the opinion of the supreme court of New Jersey, delivered by Chief Justice Beasley, in *State, Gaines*, v. *Hudson County Ave. Comrs.* 37 N. J. L. 12. But the statute there held unconstitutional left it wholly uncertain whether the cost of the public improvement, or only an undefined part thereof, should be assessed upon the owners of lands benefited; and directed the amount assessed to be apportioned among several townships, without prescribing or indicating any rule of apportionment. Some expressions in the opinion, if wrested from their context, can hardly be reconciled with the decisions of this court, above cited, or with the judgment of the court of errors of New Jersey, delivered by Chief Justice Beasley in a later case, adjudging a statute to be constitutional which directed the expenses of improving certain public roads to be estimated by commissioners, and to be by them assessed upon lands found by them to be benefited, in proportion to, and to the extent of, the benefit received, and the rest of the expense to be assessed upon the county. *State, Hudson County Board of Chosen Freeholders*, v. *Hudson County Inf. Ct. C. P.* 42 N. J. L. 608.

It was objected to the validity of § 15, that it commits the assessment of benefits upon lands, whether within or without the particular subdivision benefited by the establishment of a new highway, to "the same jury" which estimates the compensation or damages, under the previous sections, for taking lands within the subdivision for the purpose of the highway. Some confusion has perhaps arisen from designating *the tribunal of seven men, [**593** which is to estimate the damages and to assess the benefits, as "a jury" when it is in truth an inquest or commission, appointed by the court under authority of the act of Congress, and differing from an ordinary jury in consisting of less than twelve persons, and in not being required to act with unanimity. *American Pub. Co.* v. *Fisher*, 166 U. S. 464 [41: 1079]; *Springville* v. *Thomas*, 166 U. S. 707 [41: 1172].

By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury; but may be intrusted by Congress to commissioners appointed by a court or by the executive, or to an inquest consisting of more or fewer men than an ordinary jury. *Justiss* v. *Georgetown & A. Turnp. Co.* 10 U. S. 6 Cranch, 233 [3: 209]; *Secombe* v. *Milwaukee & St. P. R. Co.* 90 U. S. 23 Wall. 108, 117, 118 [23: 67, 69]; *United States* v. *Jones*, 109 U. S. 513, 519 [27: 1015, 1017]; *Shoemaker* v. *United States*, 147 U. S. 282, 300, 301 [37: 170, 185]; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685 [41: 1165].

Likewise, in the matter of assessing benefits, under the right of taxation, it is within the discretion of the legislature, as shown by the authorities already referred to upon this subject, to commit the ascertainment of the lands to be assessed, as well as the apportionment of the assessment among the different parcels, to the determination of commissioners appointed as the legislature may prescribe. See also *People, Lehigh Valley R. Co.*, v. *Buffalo*, 147 N. Y. 675.

Whether the estimate of damages and the assessment of benefits shall be intrusted to the same or to different commissioners, is a matter wholly within the decision of the legislature, as justice and convenience may appear to it to require. And there are many precedents for intrusting the performance of both duties to the same persons. Act of March 3, 1809 (2 Stat. at L. 538, chap. 30, § 4), above cited; Cooley, Taxn. 2d ed. 612; *Re Pittsburg Dist.* 2 Watts & S. 320; *Re Amsterdam Common Council*, 126 N. Y. 158.

It was suggested in argument that § 11, authorizing a deduction of benefits in assessing damages, and § 15, authorizing an assessment for benefits, both fail to make it *certain [**594** what benefits are intended, and may subject the landowner to a double assessment. But, upon a view of all the provisions relating to these matters, the reasonable construction is that the benefits to be taken into consideration and de-

ducted, in estimating the compensation or damages under §§ 10, 11, and 13, are the special and direct benefits which the appropriation of part of a tract of land for a highway may cause to the remainder of the tract; and that the benefits for which an assessment is to be made under § 15, upon such remainders and upon all other lands benefited, are the general benefits accruing to all lands in the neighborhood from the establishment of the highway; and § 15 carefully guards against the possibility of a double assessment, by directing the jury, in assessing benefits under this section, "to make due allowance for the amount, if any, which shall have been deducted from the value of the part taken, on account of the benefit to the remainder of the tract." Both the award of damages and the assessment of benefits are to be made by the jury of seven under the supervision of the supreme court of the District of Columbia; neither is conclusive upon the parties until confirmed by that court; and both are subject to revision in matter of law by the court of appeals. The instructions given at the trial upon the proper elements of benefits in either stage or aspect of the case have not been, and could not be, brought before this court for revision,—the jurisdiction of this court being limited by § 17 of the act of 1893, as amended by the act of January 21, 1896, chap. 5, to the determination of the question whether the act of 1893, or any part thereof, is unconstitutional.

All the parties to these proceedings had due notice of the assessment of benefits under § 15, as well as of the assessment of damages under the earlier sections, by the publication of notice, in accordance with § 8, warning them to attend the court, "and to continue in attendance until the court shall have made a final order in the premises." If the lands of any other persons should be sought to be assessed for benefits under § 15, notice would be required to them by the provision thereof that [596] "the proceedings of the court and the jury in making assessments for benefits under this section, shall conform as nearly as is practicable to the foregoing provisions of this act relating to the assessment of damages."

The objection that the owners of lands assessed for benefits under these proceedings will be left liable to be assessed anew under future proceedings for establishing other highways in other subdivisions is without force. Whenever it has been provided by a general law that a part of the expense of establishing any highway shall be assessed upon all lands in the neighborhood benefited thereby, it may often happen that the same land may be benefited by each of two highways laid out at successive periods of time, and be liable to be assessed accordingly. Take a simple example by way of illustration: Suppose a highway is laid out from north to south increasing the value of the lands through which it runs and of all other lands in the neighborhood, and assessments of a portion of the cost are made upon all such lands and collected; and another highway is subsequently laid out from east to west, crossing the first highway at right angles; it may well happen that thereby the same, or some of the same, parcels of land benefited by the first highway, may be further increased in value, in common with other lands in the neighborhood, by the laying out of the second highway; and, to the extent to which they are so increased in value, they may justly and lawfully be subjected to a new assessment. The like result may take place when a highway, established at first through one subdivision only, is afterwards extended through another subdivision.

Objection was made to that part of § 15, which provides that the assessment, when confirmed by the court, shall be a lien upon the land and be collected like other taxes, and "be payable in five equal annual instalments, with interest at the rate of 4 per cent per annum from the date of the confirmation of the assessment by the court." But it is within the commonly exercised and indisputable power of the legislature to make taxes of any kind, assessed upon real estate, payable forthwith, and an immediate lien thereon. In the leading case of *Davidson* v. *New Orleans*, the objection that the *assessment was actually[596] made before, instead of after, the work was done, was held to be untenable; and Mr. Justice Miller, speaking for this court, said: "As a question of wisdom—of judicious economy—it would seem better in this, as in other works which require the expenditure of large sums of money, to secure the means of payment before becoming involved in the enterprise." 96 U. S. 100 [24: 618].

In coming to the conclusion that both § 11 and § 15 are in all respects constitutional, we do not find it necessary to invoke the familiar rule of construction, well expressed in Chief Justice Alvey's opinion in the present case as follows: "Every reasonable intendment should be indulged in order to maintain the act in its entirety, and if there be any reasonable mode of construction by which the entire act, and every provision thereof, may be sustained, as against a mere plausible construction tending to a contrary result, the former mode of construction must prevail. It is only when no other reasonable construction can be supported, that an act of Congress, or any part of it, can be declared to be unconstitutional and void, or invalid for any cause." *District of Columbia* v. *Armes*, 8 App. D. C. 421, 422.

The objections taken in argument to the constitutionality of other parts of the act may be more briefly disposed of.

The recording of the map under § 2 does not constitute a taking of any land, nor in any way interfere with the owner's use and enjoyment thereof. The provision of that section that after the map has been recorded, no further subdivision, not in conformity with the map, shall be admitted to record, goes no farther than the earlier acts of Congress of January 12, 1809, chap. 8, and August 27, 1888, chap. 916, cited at the beginning of this opinion, and is clearly within the authority of Congress to prevent anything being placed upon the public records which may tend to defeat its object of securing uniformity in the entire system of highways in the District. The provision of § 3, giving to any deed or will, duly recorded, which refers to the subdivision made by the map, the same effect as if such subdivision had been made and recorded by the grantor or testator, tends to promote the same

597] object, and *benefits rather than injures owners of lands. The provision of § 2, forbidding the commissioners of the District of Columbia and all other public officers or agents to accept, improve, repair, or assume any responsibility in regard to, highways not in conformity with the map, does not touch the rights of owners of lands, but was evidently intended to prevent the District of Columbia from being held responsible to travelers upon such highways, under the law prevailing in the District, as declared by this court, and suffered to remain unchanged by Congress. *Barnes* v. *District of Columbia*, 91 U. S. 540 [23: 440]; *Detroit* v. *Osborne*, 135 U. S. 492, 498 [34: 260, 262]; *District of Columbia* v. *Woodbury*, 136 U. S. 450, 457 [34: 472, 475]. The object of the recording of the map is to give notice to all persons of the system of highways proposed to be established by subsequent proceedings of condemnation. It does not restrict in any way the use or improvement of lands by their owners before the commencement of proceedings for condemnation of lands for such highways, nor does it limit the damages to be awarded in such proceedings. The recording of the map, therefore, did not of itself entitle the owners of lands to any compensation or damages. *Shoemaker* v. *United States*, 147 U. S. 282, 321 [37: 170, 188]; *Prosser* v. *Northern P. R. Co.* 152 U. S. 59 [38: 352]; *Re Pittsburg Dist.* 2 Watts & S. 320; *Re Forbes Street*, 70 Pa. 125; *Re Furman Street*, 17 Wend. 649; *Forster* v. *Scott*, 136 N. Y. 577 [18 L. R. A. 543]; *Steuart* v. *Baltimore*, 7 Md. 500, 516.

The act throughout clearly manifests the intention of Congress that, especially with regard to the highways in existing subdivisions, all the proceedings, from the preparation of a general plan by the commissioners of the District of Columbia to the award and payment of damages for lands taken or injured, the assessment of the amount of those damages upon lands benefited, the taking possession of the land condemned, and the actual construction of the highways, shall go on without unnecessary delay. By § 2 the commissioners are directed to make the plan in sections, beginning with areas covered by existing subdivisions, and, as soon as the map of any section

598] has been approved, to record it; and, *in order to enable them "to proceed speedily and efficiently to carry out the purposes of this act," are authorized to employ assistant engineers to have immediate charge of the work; and by § 4 the commissioners and their agents are authorized to enter upon lands to make surveys. By § 6, within thirty days after a map has been recorded which changes highways in an existing subdivision, the commissioners are to present to the court a petition for the condemnation of a permanent right of way over all lands included within the highways laid out upon the map. By § 10, the damages to all the parcels of lands involved in the proceedings may be estimated by one jury; and by § 15 the same jury may be intrusted with the assessment of those damages upon lands benefited. By § 16, when damages have been assessed, the court is to order payment thereof to the parties or into its registry, and a copy of the order is to be presented to the Treasurer of the United States, to be reported by him to Congress. And by § 18, as soon as the damages have been assessed and paid, the commissioners are to take immediate possession of the land; but if Congress, during six months of its session, omits to make the necessary appropriation, the proceedings are to be void, and the lands to belong to the owners.

Under the Constitution, and by the express provision of § 18 of this act, the United States are not entitled to possession of the land until the damages have been assessed and actually paid. The payment of the damages to the owner of the land and the vesting of the title in the United States are to be contemporaneous. The Constitution does not require the damages to be actually paid at any earlier time; nor is the owner of the land entitled to interest pending the proceedings. *Shoemaker* v. *United States*, 147 U. S. 282, 321 [37: 170, 188]; *Sweet* v. *Rechel*, 159 U. S. 380 [40: 188].

The last clause of § 18, which provides that if the court enters judgment of condemnation in any case, and appropriation for the payment of the award of damages is not made by Congress after being six months in session, "the proceedings shall be void and the land shall revert to *the owners," clearly means, by [599 the words "the proceedings," all the proceedings, not merely the award of damages, but also the assessment of benefits; for if the award of damages is void, there remains no sum to be assessed for benefits. The phrase, "and the land shall revert to the owners," is not happily chosen, for, the damages not having been paid, the title in the land has never passed out of them; but the clear meaning is that the title to the land shall be held to have remained in the owners as if no proceedings for condemnation had been had. This provision secures the owners from being compelled to part with their lands without receiving just compensation, and is within the constitutional authority of the legislature. *Baltimore & S. R. Co.* v. *Nesbit*, 51 U. S. 10 How. 395 [13: 469]; *Garrison* v. *New York*, 88 U. S. 21 Wall. 196 [22: 612].

The result is that there is nothing in the act of March 2, 1893, chap. 197, inconsistent with the Constitution, and therefore the judgments of both of the courts of the District of Columbia must be reversed. So far as the cases are disclosed by the records sent up, it would seem that judgment should be entered upon each of the verdicts as originally returned. But the appellate jurisdiction conferred upon this court being restricted to the determination of the question whether the act of 1893, or any part thereof, is unconstitutional, the safer and more proper form of judgment appears to this court to be *judgments of the Court of Appeals and of the Supreme Court of the District of Columbia reversed*, and cases remanded for further proceedings not inconsistent with this opinion.

THE J. P. DONALDSON.

General average—contribution against steam tugs.

(See S. C. Reporter's ed. 599 606.)

1. A contribution in general average cannot be had against a steam tug for the casting off and abandonment by her master of her tow of barges, with the intention and with the effect of saving the tug: the tug and barges do not constitute a single maritime adventure.
2. The fact that the sum to be paid to a tug for towing each barge is measured by a certain proportion of the freight to be earned by that barge does not have the effect of combining the tug and barges into a single maritime adventure, within the law of general average.

[No. 29.]

Argued April 1, 1896. Decided May 24, 1897.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit seeking the instruction of this court as to the right of the owners of barges to recover against the propeller J. P. Donaldson upon the principles of general average contribution. *Question answered in the negative.*

See same case below, 19 Fed. Rep. 264, 21 Fed. Rep. 671.

The facts are stated in the opinion.

Messrs. **F. S. Masten,** *Francis J. Wing, S. H. Holding,* and *Harvey D. Goulder,* for appellant:

The master represents the owners of the ship and cargo as their agent arising from necessity, in which capacity and by virtue of which representative authority he binds them by his general average act; but, if the necessity did not exist, the consequences of the act falls on the master himself, or on the shipowner, whose agent he is at all times.

Maclachlan, Shipping, 3d ed. 664.

A steamer is not a common carrier or an insurer of her tow, and the law of these relations has no application to a steamer and tow. The uniform measure of liability requires of each the exercise of ordinary care and skill in the performance of the contract, and nothing more.

The Webb v. *Barling*, 81 U. S. 14 Wall. 406 (20: 774); *The Margaret* v. *Bliss*, 94 U. S. 494 (24: 146); *Eastern Transp. Line* v. *Hope*, 95 U. S. 297 (24: 477); *The Burlington* v. *Ford*, 137 U. S. 386 (34: 731).

For the purpose of observing the rules of navigation they have been held to constitute one vessel under steam.

The Civilta v. *Perry*, 103 U. S. 699 (26: 599).

But as between themselves they are separate and independent vessels and, where the controversy is between the owners of the steam tug and the owners of the tow, the owners of the former are not liable if the disaster was occasioned by the fault or misconduct of those in charge of the other vessel.

Dutton v. *The Express*, 3 Cliff 462.

The master of the barge is charged with the duties respecting even the immediate navigation, and cannot shield himself behind an order from the tug when the danger was so imminent that common sense and common prudence admonished him to postpone obeying the order.

The J. H. De Graff, 66 Fed. Rep. 351–353; *The Maria Martin* ("*Martin* v. *Northern Transp. Co.*") 79 U. S. 12 Wall. 31–44 (20: 251–254).

There is no possession or control of the barge by the steamer further than is necessary to enable it to carry out the contract of towage.

Eastern Transp. Line v. *Hope*, 95 U. S. 297–300 (24: 477, 478).

The steamer or her master does not become the agent of the tow in any sense. In a case where the tow was lashed alongside and there was no one on the tow participating in the navigation, which is the closest association imaginable between steamer and tow, this court decided that there was no agency.

Sturgis v. *Boyer*, 65 U. S. 24 How. 110–123 (16: 591–595).

The legal connection and relation is completely sundered also when the danger involves the tow alone, and the steamer, without fault, casts off the line.

The John M. Nicol, 63 Fed. Rep. 275.

In every contract of towage there is implied an engagement that each party, their agents and servants, will perform his duty in completing the contract; that proper skill and diligence will be used on board both the vessel towed and the tug; and that neither, by negligence or by mismanagement, will unnecessarily imperil the other, or increase any risk incidental to the service undertaken.

News on Salvage & Towage, 136; Maclachlan, Shipping, 293; *The Julia*, 14 Moore, P. C. C. 210; *Dutton* v. *The Express*, 3 Cliff. 462; *The Quickstep* v. *Byrne*, 76 U. S. 9 Wall. 670 (19: 768); *The Clematis*, Brown, Adm. 499.

But the law does not imply a warranty that the tug will tow the vessel to her destination at all hazards but merely to use competent skill and best endeavors to perform the service.

The W. J. Keyser, 13 U. S. App. 489.

The terms of the contract, the purpose of which is to fix the measure of compensation, does not enlarge the power of the master of the steamer over tow or cargo on board thereof, or bring the vessels in any closer association.

It is difficult to conceive of any basis for the right of contribution between the cargo of a steamer and the cargo of her tow, or between either vessel and the cargo of the other.

The captain is master and he must act because the law imposes upon him the authority and clothes him with the power to judge and determine.

The Star of Hope v. *Annan*, 76 U. S. 9 Wall. 203–230 (19: 638–645).

There was no general average sacrifice. The master of the steamer was without authority to make selection.

Burton v. *English*, L. R. 12 Q. B. Div. 220.

The barges went ashore at the time and place and in the manner they would had the tow line not been cut.

Shoe v. *Low Moor Iron Co.* 1 U. S. App. 39.

It was not the casting off of the line that stranded the vessels nor was that result hastened

NOTE.—*As to general average*, see note to Columbian Ins. Co. v. Ashby, 10: 186.

or retarded by the act, there was not, for either tug or tow, any choice of perils. The severance of the towline was a necessary step to rescue the steamer, but in the condition and circumstances of the vessels, it did not lessen or vary their chance of safety. The stranding was not intentional, nor the result of the general agency of the master of the steamer.

The Star of Hope v. *Annan*, 76 U. S. 9 Wall. 203 (19: 638); *Fowler* v. *Rathbone*, 79 U. S. 12 Wall. 102 (20: 281).

All of the tow were being driven on shore in spite of every effort. It was a case, not of voluntary stranding, but of shipwreck.

Emery v. *Huntington*, 109 Mass. 431–436, 12 Am. Rep. 725; *Crockett* v. *Dodge*, 12 Me. 190, 28 Am. Dec. 170; Emerigon, Ins., chap. 12. p. 473, § 41

Messrs. **Frank H. Canfield** and **George L. Canfield,** for appellees:

Where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger, or incurs extraordinary expenses to promote the safety of all the associated interests, common justice requires that the sacrifice so made, or the extraordinary expenses so incurred, should be assessed upon all the interests which were so exposed to the impending peril, and which were saved, by those means, from the threatened danger, in proportion to the share of each in the joint adventure.

Fowler v. *Rathbone*, 79 U. S. 12 Wall. 102 (20: 281); *McAndrews* v. *Thatcher*, 70 U. S. 3 Wall. 347, 366 (18: 155, 159); *The Star of Hope* v. *Annan*, 76 U. S. 9 Wall. 203–228 (19: 638–645); *Hobson* v. *Lord*, 92 U. S. 397 (23: 613); *Ralli* v. *Troop*, 157 U. S. 386 (39: 742)

As a general rule a ship in tow is under the direction of the tug, and, if obedient, and a collision occurs, the latter will be held responsible for the damage.

The Lyon, Brown, Adm. 59; *The Zouave & Rich*, Brown, Adm. 110; *The Morton*, Brown, Adm. 137; *The Clematis*, Brown, Adm. 499; *The Quickstep* v. *Byrne*, 76 U. S. 9 Wall. 670 (19: 768).

Barges in tow are considered as being under the control of the tug and the latter is liable for the collision unless she can show that it was not occasioned by her fault.

Sturgis v. *Boyer*, 65 U. S. 24 How. 110 (16: 591); *Hancox* v. *The Syracuse*, 76 U. S. 9 Wall. 672 (19: 783).

A tug with vessels in tow is bound to consult their safety as well as her own. She must see that what clears her of danger does not put them in peril. For many purposes they may be regarded as part of herself.

Eastern Transp. Line v. *Hope*, 95 U. S. 297 (24: 477); *The Merrimac*, 2 Sawy. 587; *The Adelia*, 154 U. S. 593 (21: 672).

An extraordinary expenditure incurred by the master of a ship for the safety of a common maritime adventure is to be treated as a general average loss and is to be contributed for by the several interests saved thereby.

McAndrews v. *Thatcher*, 70 U. S. 3 Wall. 347, 370 (18: 155, 160); *The Star of Hope* v. *Annan*, 76 U. S. 9 Wall. 203, 228 (19: 638, 645); *Fowler* v. *Rathbone*, 79 U. S. 12 Wall. 102, 118 (20: 281, 284); Lowndes, General Average, 148; Carver, Carriage by Sea, § 391.

The master of a ship has authority, in case of need, to engage the services of salvors, and to bind both the ship and cargo to the fulfilment of any reasonable contracts he may make for their remuneration.

Lowndes, General Average, 150; Carver, Carriage by Sea, §§ 396, 397; McArthur, Insurance, 171.

Someone must exercise such authority in such emergencies. The master of the propeller is the only person who can exercise it. The authority is cast upon him by reason of the necessity.

The Star of Hope v. *Annan*, 76 U. S. 9 Wall. 230 (19: 638); Lowndes, General Average, 26.

To bring the case within the rules of general average it is not necessary that the propeller should have assumed the obligations of a common carrier. The right to contribution does not depend upon the contract of carriage or transportation.

The Roanoke, 46 Fed. Rep. 297, 53 Fed. Rep. 270, 59 Fed. Rep. 161, 18 U. S. App. 407; *Whitecross Wire Co.* v. *Savill*, L. R. 8 Q. B. Div. 653; *Potter* v. *Ocean Ins. Co.* 3 Sumn. 27.

A steamer cannot lawfully abandon her tow merely because a storm is encountered, or because the tow breaks adrift or becomes stranded. She is still bound to do all she can, consistent with her own safety, to save the tow.

Newson, Salvage & Towage, 149; *The Clematis*, Brown, Adm. 432.

Mr. Justice **Gray** delivered the opinion of the court:

Two libels in admiralty in the district court of the United States for the eastern district of Michigan, against the propeller J. P. Donaldson, by the owners of the barges Eldorado and George W. Wesley, for the loss of the barges, having been consolidated and dismissed in that court; and its decree having been reversed by the circuit court upon the ground that the libellants were entitled to recover against the propeller for the loss of the barges as a general average contribution, and a decree accordingly having been rendered for the libellants; and the causes having been taken by appeal from the circuit court to the circuit court of appeals; that court, desiring the instruction of this court, as to the right of the owners of the barges to recover against the propeller upon the principles of general average contribution, certified to this court the question whether they could so recover upon the following facts:

"The J. P. Donaldson was towing the said barges Eldorado and George W. Wesley from Buffalo, New York, to Bay City, Michigan, having no other connection with them than that she was to tow them and to receive for her services a portion of freight which the said barges would earn on the trip, according to the custom and usage which prevails upon the Great Lakes. By a violent storm, and without negligence on the part of the J. P. Donaldson, she, with her tow, were driven on a lee shore, and all were in imminent, if not certain, peril

of being blown ashore and lost. The J. P. Don-
601 aldson struggled *against the storm to the last moment she could with safety to herself; and then, in order to prevent her from going ashore and being lost, her master, after first giving notice with her steam whistle of his intention to do so, and without negligence on his part, cut the towline connecting said barges to her, and the said barges were driven on shore and were wrecked and lost, and the J. P. Donaldson, by reason of being thus disencumbered of her tow, was enabled to reach a port of safety."

By the order of that court there were transmitted to this court, together with the above certificate, copies of the pleadings and decrees, and of the opinions of the district and circuit courts, reported in 19 Fed. Rep. 264, and 21 Fed. Rep. 671.

This case presents a novel question in the law of general average, which, briefly stated, is whether a contribution in general average can be had against a steam tug for the casting off and abandonment, by her master, of her tow of barges, with the intention, and with the effect, of saving the tug.

The decision of this court in the recent case of *Ralli* v. *Troop*, 157 U. S. 386 [39: 742], and the reasons upon which that decision was based, go far towards determining this question.

In that case, upon full review of the authorities, it was held that the right of contribution in general average, whether considered as resting upon natural justice, or upon implied contract, or upon a rule of the maritime law known to and binding upon all owners of ships and cargoes, could only arise out of the exercise of the power of the master, or of one occupying his place, as the agent by necessity of the owners of ship and cargo, and charged by law with the duty, in case of emergency, of sacrificing part of the property for the safety of the rest. This court there said: "Whether the master is considered as acting under an implied contract between the owners of the vessel and the shippers of the cargo, or as the agent of all from the necessity of the case, or as exercising a power and duty imposed upon him by the law as incident to his office —whatever may be considered the source of his authority—the power and the duty of determining what part of the common adventure shall be sacrificed for the safety of the rest,
602 *and when and how the sacrifice shall be made, appertain to the master of the vessel, *magister navis*, as the person intrusted with the command and safety of the common adventure, and of all the interests comprised therein, for the benefit of all concerned, or to some one who, by the maritime law, acts under him, or succeeds to his authority." 157 U. S. 400 [39: 749]. "There can be no general average unless there has been a voluntary and successful sacrifice of part of the maritime adventure, made for the benefit of the whole adventure, and for no other purpose, and by order of the owners of all the interests included in the common adventure, or the authorized representative of all of them. The safety of any property, on land or water, not included in that adventure, can neither be an object of the sacrifice, nor a subject of the contribution." 157 U. S. 403 [39: 750]. It was likewise shown that by the general law, unless modified by local statute or custom, the right of contribution is limited to the particular ship and cargo, and the sacrifice of one ship for the safety of another does not give rise to any claim of general average. 157 U. S. 404, 406, 408 [39: 750, 752].

The question then, is whether the steam tug and her tow of barges were so connected by the contract of towage as to make the tug and the tow, while navigated under and in accordance with that contract, a single maritime adventure; to intrust the master of the tug with the authority, in case of unforeseen emergency, of sacrificing any of the barges, or the whole or part of the cargo of any of them, for the safety of the rest of the barges and their cargoes, or of the tug, or of her cargo, if any; and, if such safety is thereby secured, to give the owners of the interest sacrificed a right of contribution in general average against the interests saved, or their owners.

While the tug is performing her contract of towing the barges, they may indeed be regarded as part of herself, in the sense that her master is bound to use due care to provide for their safety as well as her own, and to avoid collision, either of them or of herself, with other vessels. *Hancox* v. *The Syracuse* ("*The Syracuse*") 76 U. S. 9 Wall. 672, 675, 676 [19: 783, 784]; *The Civilta* v. *Perry* ("*The Civilta*" 103 U. S. 699, 701 [26: 599, 600].

*But the barges in tow are by no means **603** put under the control of the master of the tug to the same extent as the tug herself and the cargo, if any, on board of her.

A general ship carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier; and the ship and her owners, in the absence of a valid agreement to the contrary, are liable to the owners of the goods carried as insurers against all losses, excepting only such irresistible causes as the act of God and public enemies. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 437 [32:788,790]. But a tug and her owners are subject to no such liability to the owners of the vessels towed, or of the cargoes on board of them. The owners of those vessels or cargoes cannot maintain any action for the loss of either against the tug or her owners, without proving negligence on her part. As was said by Mr. Justice Strong, and repeated by the present Chief Justice, "An engagement to tow does not impose either an obligation to insure, or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence or unskilfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services." *The Webb* v. *Barling* ("*The Webb*") 81 U. S. 14 Wall. 406, 414 [20: 774, 775]; *The Burlington* v. *Ford* ("*The Burlington*") 137 U. S.

386, 391 [34: 731, 733]. See also *McNally* v. *The L. P. Dayton* ("*The L. P. Dayton*") 120 U. S. 337, 351 [30: 669, 675].

The master of a vessel is appointed by her owners, and is their agent, and they are responsible for injuries caused to third persons by his negligence in navigating the vessel. The master of the tug is appointed by and is the agent of the owners of the tug; he is not appointed by the owners of the vessel towed; and if, by mismanagement of the tug, without any negligence on the part of the tow, the tow is brought into collision with another vessel, the **604**] tug, and not the *tow, is responsible. *The John Fraser*, 62 U. S. 21 How. 184 [16: 106]; *The Hector* [*Sturgis* v. *Boyer*], 65 U. S. 24 How. 110 [16: 591]. As was said by this court in *The Hector* [*Sturgis* v. *Boyer*]: "By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug, nor ship the crew; nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation." 65 U. S. 24 How. 123 [16: 595].

In *Eastern Transp. Line* v. *Hope*, 95 U. S. 297 [24: 477], in which the owner of a barge maintained an action against the owner of a tug for negligence of the master of the tug, by which the barge was totally lost, this court, while holding that the tug "had the supreme control of the barge, so far as it was necessary to enable it to fulfil its contract to tow the barge," recognized that the tug "did not occupy the position of a common carrier, and did not have that exclusive control of the barge which that relation would imply; it did not employ or pay the master and the men in charge of her; nor did it exercise that internal control of her cargo, its storage, its protection, and the like, which belonged to a bailee." 95 U. S. 300 [24: 478].

It is solely for the purpose of performing the contract of towage that the vessels towed are put under the control and management of the master of the tug. In all other respects, and for all other purposes, they remain under the control of their respective masters; and, in case of unforeseen emergency, it is upon the master of each that the duty rests of determining what shall be done for the safety of his vessel and of her cargo. If the question arises whether it is safer for one of the barges to continue in tow, or to cut loose and anchor, the decision of that question ultimately belongs to her own master, and not to the master of the tug. And if the question presented is either whether the barge should be run ashore for the **605**] *purpose of saving her cargo, or else whether a part or the whole of the cargo of the barge should be sacrificed in order to save the rest of her cargo or the barge herself, the decision of the question whether such stranding or jettison should or should not be made is within the exclusive control of the master of the particular barge, and in no degree under the control of the master of the tug; and, in either case, any right of contribution in general average cannot extend beyond that barge and her cargo.

The suggestion of the counsel for the libellants, that the barges had no means of self-propulsion and were powerless for any purpose of navigation, is unsupported by the statement of facts in the certificate of the circuit court of appeals, and is inconsistent with the allegations of the libellants themselves. Each of the libels alleged that the barge was "in every respect well manned, tackled, apparelled, and appointed." One of the libels alleged that the George W. Wesley was a schooner barge, and on the night before the loss "carried her mainsail, foresail, and stay-sail," and that early in the morning "said sails were taken in" because "the sails would not draw in the course that they were then running." And the other libel alleged that on the day after the loss the master and crew of the Eldorado returned on board of her, and proceeded to strip the wreck "and save from it all that could be saved of her sails, rigging, etc." And each answer alleged that after the storm began the master of the tug signaled the barges "to make sail and get their anchors ready."

The master of the tug, having no authority to decide, as between a barge and her cargo, what part shall be sacrificed for the safety of the rest, and thereby to subject what is saved to contribute in general average for what is lost, can surely have no greater authority, by abandoning all the barges with their cargoes, to subject the tug to a general average contribution.

The fact that the sum to be paid to the tug for towing each barge was measured by a certain proportion of the freight to be earned by that barge is immaterial. It did not create a partnership between the owners of the tug and the owners of the *barges. *Meehan* v. [**606** *Valentine*, 145 U. S. 611 [36: 835]. Nor could it have the effect of combining the tug and the barges into a single maritime adventure, within the scope of the law of general average.

For the reasons above stated, this court concurs in the opinion expressed in this case by Mr. Justice Brown, when district judge, that "the law of general average is confined to those cases wherein a voluntary sacrifice is made of some portion of the ship or cargo for the benefit of the residue, and that it has no application to a contract of towage." 19 Fed. Rep. 272.

Question certified answered in the negative.

Mr. Justice **Brown** took no part in this decision.

THE GLIDE.

Lien upon vessel for repairs not enforced in state court by admiralty process in rem.

(See S. C. Reporter's ed. 606-624.)

A lien given by state statute upon a vessel for repairs made in her home port under a contract with her owners or their agent cannot be enforced against her in a state court by proceedings in the nature of admiralty process *in rem*, as the contract and lien are maritime and the jurisdiction of the Federal courts of admiralty is exclusive.

[No. 39.]

Argued May 1, 1896. Decided May 24, 1897.

IN ERROR to the Superior Court of the State of Massachusetts to review a judgment of that court in favor of the Atlantic Works, a corporation of that state, enforcing a lien upon the tugboat Glide for labor and materials in repairing her at the port of Boston, and ordering a sale of the vessel in accordance with the public statute of Massachusetts; exceptions to the rulings of said court having been overruled by the Supreme Judicial Court on appeal.

See same case below, 157 Mass. 525, 159 Mass. 60.

Statement by Mr. Justice **Gray:**

This was a petition to the superior court of the county of Suffolk and state of Massachusetts, under § 17 of chapter 192 of the Public Statutes of Massachusetts (the material provisions of which are copied in the margin†), by the Atlantic *Works, a corporation established[607 by the laws of that state and having its usual place of business at Boston in that county, to enforce a lien upon the tugboat Glide, whose home port was Boston, for labor performed and materials furnished repairing *her at[608 that port, under a contract between the petitioner and Jonathan Chase, one of her owners, all of whom resided in Boston and were named in the petition.

Upon the filing of the petition, the court issued a writ commanding the sheriff to attach the vessel and to summon her owners to answer. The vessel was attached accordingly, and her owners appeared, and moved to dismiss the petition for want of jurisdiction because the subject-matter was a matter of admiralty and maritime jurisdiction, and therefore within the exclusive jurisdiction of the courts of the United States. The court granted the motion, and dismissed the petition. The petitioner appealed to the supreme judicial court of the state, the majority of which held that the state court had jurisdiction of the proceedings under the statute, and therefore reversed the order dismissing the petition. 157 Mass. 525.

The respondents thereupon filed an answer, without waiving their motion to dismiss, and at the trial requested the court to rule that it had no jurisdiction for the reason stated in that motion. But the superior court ruled that it had jurisdiction, rendered judgment for the petitioner, and ordered a sale of the vessel in accordance with the statute; and exceptions to the ruling were overruled by the supreme judicial court. 159 Mass. 60. The

†Sec. 14. When by virtue of a contract, expressed or implied, with the owners of a vessel, or with the agents, contractors, or subcontractors of such owners, or with any of them, or with a person who has been employed to construct, repair, or launch a vessel, or to assist therein, money is due for labor performed, materials used, or labor and materials furnished in the construction, launching, or repairs of, or for constructing the launching ways for, or for provisions, stores, or other articles furnished for or on account of such vessel in this commonwealth, the person to whom such money is due shall have a lien upon the vessel, her tackle, apparel, and furniture, to secure the payment of such debt, and such lien shall be preferred to all others on such vessel, except that for mariners' wages, and shall continue until the debt is satisfied.

Sec. 15. Such lien shall be dissolved unless the person claiming the same files, within four days from the time when the vessel departs from the port at which she was when the debt was contracted, in the office of the clerk of the city or town within which the vessel was at such time, a statement, subscribed and sworn to by him, or by some person in his behalf, giving a just and true account of the demand claimed to be due to him, with all just credits, and also the name of the person with whom the contract was made, the name of the owner of the vessel, if known, and the name of the vessel, or a description thereof sufficient for identification; which statement shall be recorded by such clerk in a book kept by him for that purpose, and for such recording the clerk shall receive the same fees as for recording mortgages of equal length.

Sec. 16. If the vessel is partly constructed in one place and partly in another, either place shall be deemed the port at which she was when the debt was contracted, within the meaning of this chapter; and the validity of the lien shall not be affected by any inaccuracy in the description of the vessel, if she can be recognized thereby, nor by any inaccuracy in stating the amount due for labor or materials, unless it appears that the person filing the statement has wilfully and knowingly claimed more than is due.

Sec. 17. Such lien may be enforced by petition to the superior court for the county where the vessel was at the time when the debt was contracted, or in which she is at the time of instituting proceedings. The petition may be entered in court, or filed in the clerk's office in vacation, or may be inserted in a writ of original summons with an order of attachment, and served, returned, and entered like other civil actions, and the subsequent proceedings for enforcing the lien shall, except as hereinafter provided, be as prescribed in chapter 191 for enforcing liens on buildings and land, so far as the provisions of said chapter are applicable. At the time of entering or filing the petition, a process of attachment against such vessel, the tackle, apparel, and furniture, shall issue and continue in force, or may be dissolved like attachments in civil cases, but such dissolution shall not dissolve the lien.

Sec. 18. The petition shall contain a brief statement of the labor, materials, or work done or furnished, or of the stores, provisions, or other articles furnished, and of the amount due therefor, with a description of the vessel subject to the lien, and all other material facts and circumstances, and shall pray that the vessel may be sold and the proceeds of the sale applied to the discharge of the demand.

Sec. 19. Any number of persons having such liens upon the same vessel may join in a petition to enforce the same; and the same proceedings shall be had in regard to the respective rights of each petitioner, and the respondent may defend as to each petitioner, in the same manner as if they had severally petitioned for their individual liens.

NOTE.—*As to high seas, meaning of*, see note to United States v. Wiltberger, 5: 37.

As to what places the jurisdiction of admiralty is confined, see note to Allen v. Newberry, 16: 110.

As to jurisdiction of state and United States courts, as to territory and offenses; ebb and flow of tide, as to criminal and civil jurisdiction,—see notes to United States v. Bevans, 4: 404, and The Thomas Jefferson, 6: 358.

As to conclusiveness of judgments in admiralty; when may be re-examined, see note to Williams v. Armroyd, 3: 392.

respondents sued out this writ of error addressed to the superior court in which the record remained.

Messrs. **Edward E. Blodgett** and *Eugene P. Carver* for plaintiffs in error.

Messrs. **Ralph W. Foster** and *Joshua H. Millett* for defendant in error.

609] *Mr. Justice **Gray** delivered the opinion of the court:

The question in this case is whether the lien given by a statute of Massachusetts for repairs made upon a vessel in her home port, under a contract with her owners or their agent, may be enforced against her by petition in a court of the state, as provided in that statute, or can be enforced only in an admiralty court of the United States. The diverse inferences drawn from the previous judgments of this court, in the careful opinions of the supreme judicial court of Massachusetts and of the dissenting judges in the case at bar, have induced us to state with some fulness the reasons and authorities which have influenced our conclusion.

The most convenient way of tracing the development of the law upon the subject will be to consider the principal decisions of this court in chronological order, first referring to the provisions of the Constitution and statutes of the United States which lie at the foundation of the whole matter.

By the Constitution of the United States, art. 3, § 2, "the judicial power shall extend" "to all cases of admiralty and maritime jurisdiction." And by provisions, still in force, of the judiciary act of 1789, the district courts of the United States "shall have, exclusively of the courts of the several states," "original cognizance of all civil causes of admiralty and maritime jurisdiction," "saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." Act of September 24, 1789, chap. 20, § 9; 1 Stat. at L. 76; U. S. Rev. Stat. § 563, cl. 8; § 711, cl. 3.

The leading case in this court upon the subject of admiralty jurisdiction over suits by materialmen is *The General Smith*, decided at February term, 1819, in which a decree of the circuit court of the United States for the district of Maryland, sustaining a libel *in rem* filed in the district court for supplies furnished to a ship in Baltimore, her home port, was reversed by this court, for the reasons stated in its opinion, delivered by Mr. Justice Story, as follows:

"No doubt is entertained by this court that **610**] the admiralty *rightfully possesses a general jurisdiction in cases of materialmen; and if this had been a suit *in personam*, there would not have been any hesitation in sustaining the jurisdiction of the district court. Where, however, the proceeding is ***in rem*** to enforce a specific lien, it is incumbent upon those who seek the aid of the court to establish the existence of such lien in the particular case. Where repairs have been made, or necessaries have been furnished to a foreign ship or to a ship in a port of the state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security; and he may well maintain a suit *in rem* in the admiralty to enforce his right. But in respect to repairs and necessaries in the port or state to which the ship belongs, the case is governed altogether by the municipal law of that state; and no lien is implied, unless it is recognized by that law. Now, it has been long settled, whether originally upon the soundest principles it is now too late to inquire, that by the common law, which is the law of Maryland, materialmen and mechanics furnishing repairs to a domestic ship have no particular lien upon the ship itself for the recovery of their demands. A shipwright, indeed, who has taken a ship into his own possession to repair it, is not bound to part with the possession until he is paid for the repairs, any more than any other artificer. But if he has once parted with the possession, or has worked upon it without taking possession, he is not deemed a privileged creditor, having any claim upon the ship itself. Without, therefore, entering into a discussion of the particular circumstances of this case, we are of opinion that here there was not, by the principles of law, any lien upon the ship; and, consequently, the decree of the circuit court must be reversed." 17 U. S. 4 Wheat. 438, 443 [4: 609, 611].

The law there stated, as to repairs or supplies in a foreign port, has been since constantly recognized and never doubted. *The St. Jago de Cuba*, 22 U. S. 9 Wheat. 409, 417 [6: 122, 124]; *The Virgin* v. *Vyfhius*, 33 U. S. 8 Pet. 538, 550 [8: 1036, 1041]; *The Laura* [*Thomas* v. *Osborn*], 60 U. S. 19 How. 22, 28 [15: 534, 537]; *The Grapeshot* v. *Wallerstein* (*"The Grapeshot"*), 76 U. S. 9 Wall. 129, 136 [19: 651, 653]; *Hazelhurst* v. *The Lulu* (*"The Lulu"*), 77 U. S. 10 Wall. 192 [19: 906]; *Pendergast* v. *The Kalorama* (*"The Kalorama"*), 77 U. S. 10 Wall. 204 [19: 942]; *The Patapsco* v. *Boyce* (*"The Patapsco"*), 80 U. S. 13 Wall. 329 [20: 696]; *Pritchard* v. *Beatty* (*"The Emily Souder"*), 84 U. S. 17 Wall. 666 [21: 683]; *The Kate*, 164 U. S. 458, 466 [41: 512, 516].

*The only point directly adjudged in [**611** *The General Smith* was that there was no lien for repairs or supplies in the home port, which could be enforced *in rem* in admiralty, unless such a lien was recognized by the local law of the state. But the opinion clearly implied that, if so recognized, the lien could be enforced *in rem* in a court of the United States sitting in admiralty.

Accordingly, in the case of *The Planter* [*Peyroux* v. *Howard*], at January term, 1833, it was decided that a lien upon a vessel, given by the local law, for repairs in her home port, could be enforced by suit *in rem* in admiralty in the district court of the United States. Mr. Justice Thompson, delivering the unanimous opinion of the court, said: "The proceeding is *in rem* against a steamboat, for materials found and work performed in repairing the vessel in the port of New Orleans, as is alleged in the libel, under a contract entered into between the parties for that purpose. It is therefore a maritime contract; and if the service was to be performed in a place within the jurisdiction of the admiralty, and the lien given by the local law of the state of Louisiana, it will bring the case within the jurisdiction of the court. By the Civil Code of Louisiana, art. 2748, workmen employed in the construction

or repair of ships and boats enjoy the privilege established by the Code, without being bound to reduce their contracts to writing, whatever may be their amount; but this privilege ceases if they have allowed the ship or boat to depart without exercising their right. The state law, therefore, gives a lien in cases like the present." He then referred to the case of *The General Smith* as having "decided that the jurisdiction of the admiralty in such cases, where the repairs are upon a domestic vessel, depends upon the local law of the state;" and, after substantially repeating part of the opinion of Mr. Justice Story, above quoted, ending with the statement that for repairs or supplies of a ship in her home port no lien is implied unless recognized by local law, he added: "But if the local law gives the lien, it may be enforced in the admiralty." 32 U. S. 7 Pet. 324, 341 [8: 700, 706].

The principle of the decision in the case of *The Planter* [*Peyroux* v. *Howard*], was stated by Mr. Justice Story, at January term, 1837, **612**] *as follows: "In that case, the repairs of the vessel for which the state laws created a lien were made at New Orleans, on tide waters. The contract was treated as a maritime contract; and the lien under the state laws was enforced in the admiralty upon the ground that the court, under such circumstances, had jurisdiction of the contract as maritime; and then the lien, being attached to it, might be enforced according to the mode of administering remedies in the admiralty. The local laws can never confer jurisdiction on the courts of the United States. They can only furnish rules to ascertain the rights of parties, and thus assist in the administration of the proper remedies, where the jurisdiction is vested by the laws of the United States." *The Orleans* v. *Phœbus*, 36 U. S. 11 Pet. 175, 184 [9: 677, 680]. The libel against the Orleans was dismissed upon the ground that the vessel was not engaged in maritime trade or navigation, and that the admiralty had no jurisdiction of the claims made by a part owner and by the master.

In the case of *The Yankee Blade* [*Vanderwater* v. *Mills*], at December term, 1856, the nature of a maritime lien was clearly and exactly defined by Mr. Justice Grier, speaking for this court, as follows: "The maritime 'privilege' or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a '*jus in re*,' without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and devested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings *in rem*, are evidently not within the category." 60 U. S. 19 How. 82, 89 [15: 554, 556]

The question of the extent of the admiralty jurisdiction of the courts of the United States over cases like that now before the court became at one time entangled in the question of the effect of the regulation of pleading and procedure in admiralty by this court under the power conferred upon it by the Acts of Congress of May 8, 1792, chap. 36, § 2, and August 23, 1842, chap. 188, § 6. 1 Stat. at L. 276; 5 Stat. at L. 518.

*The 12th of the "rules of practice of [**613** the courts of the United States in causes of admiralty and maritime jurisdiction on the instance side of the court—in pursuance of the act of August 23, 1842, chap. 188"—promulgated by this court at December term, 1844, to take effect September 1, 1845, was as follows:

"In all suits by materialmen for supplies or repairs or other necessaries for a foreign ship or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or the owner alone *in personam*. And the like proceeding *in rem* shall apply to cases of domestic ships, where by the local law a lien is given to materialmen for supplies, repairs, or other necessaries." 3 How. iii, vi, xiv.

The last clause of that rule was in accord with the previous judgments of this court as to such proceedings *in rem* in the cases of *The General Smith*, *The Planter* [*Peyroux* v. *Howard*, and *The Orleans* v. *Phœbus*, above cited.

At December term, 1858, this court made an order, to take effect May 1, 1859, by which Rule 12 was repealed, and a new rule substituted in its place, differing from it only in making the last clause read as follows: "And the like proceeding *in personam*, but not *in rem*, shall apply to cases of domestic ships, for supplies, repairs, or other necessaries." 21 How. iv.

The effect of that change in the rule was that where the only right created by local statutes was a lien upon the ship, *jus in re*, without in any way affecting personal liability, this new right in the thing could not be enforced in admiralty *in rem*, but only *in personam*, and that much difficulty and embarrassment were thereby created in proceedings in admiralty, which were not wholly removed by the explanations, in succeeding opinions of this court, of the purpose of the change.

In the case of *The Goliah* [*Maguire* v *Card*], at December term, 1858, decrees of the circuit and district courts of the United States for the district of California, sustaining a libel *in rem* by the assignee of a claim for coal furnished to a vessel at Sacramento, her home port, for which claim a lien existed under the *statutes of [**614** California, were reversed by this court and the libel ordered to be dismissed. The principal reason assigned was that the vessel was engaged in the business of navigation and trade in the Sacramento river, in the purely internal commerce of the state, not within the power of Congress to regulate, and therefore not subject to the admiralty jurisdiction. Mr. Justice Nelson, in delivering the opinion, suggested this additional reason. "We have at this term amended the 12th rule of the admiralty, so as to take from the district courts the right of proceeding *in rem* against a domestic vessel for supplies and repairs, which had been assumed upon the authority of a lien given by state laws, it being conceded that no such lien existed according to the admiralty law, thereby correcting an error which had its origin in this court in the case of *The General Smith*," "applied and enforced in the case of" *The Planter* [*Peyroux* v. *Howard*], "and afterwards partially cor-

ected in the case of" *The Orleans* v. *Phoebus*. 'We have determined to leave all these liens depending upon state laws, and not arising out of the maritime contract, to be enforced by the state courts." 62 U. S. 21 How. 248, 250, 251 [16: 118]. It appears by the report and by the briefs on file that the question of jurisdiction was not argued by counsel, and by the records and docket of this court that the case was decided by this court February 7, 1859, nearly three months before the rule of 1858 took effect, and in the district and circuit courts about three years before.

But that decision, in so far as concerned its principal ground, was expressly overruled in *The Belfast* v. *Boon* ("*The Belfast*"), 74 U. S. 7 Wall. 624, 640–642 [19: 266, 271], as inconsistent with the series of decisions from *The Genesee Chief* v. *Fitzhugh*, 53 U. S. 12 How. 443 [13: 1058], to *The Ad. Hine* v. *Trevor*, 71 U. S. 4 Wall. 555 [18: 451], declaring the admiralty jurisdiction to extend over all navigable waters; and was not followed in *The Eagle* v. *Fraser*, 75 U. S. 8 Wall. 15, 21 [19: 365, 368], in which the opinion was delivered by Mr. Justice Nelson. And, in so far as it rested on the suggestion of error in *The General Smith* and *The Planter* [*Peyroux* v. *Howard*], or on the change in the 12th rule, it was in effect overruled by *The St. Lawrence* [*Meyer* v. *Tupper*] 66 U. S. 1 Black, 522 [17: 180], and *The Potomac* [*Simpson* v. *Baker*], 67 U. S. 2 Black, 581 [17: 263].

In *The St. Lawrence*, at December term, 1861, this court adjudged that the rule of 1858 had no **615**] effect upon a libel filed while *the rule of 1844 was in force, and affirmed a decree against a vessel for supplies furnished in her home port, for which the statutes of New York gave a lien; and, in the opinion delivered by Chief Justice Taney, said that in the case of *The General Smith*, 17 U. S. 4 Wheat. 438, 443 [4: 609, 611], "the court held that where, upon the principles of the maritime code, the supplies are presumed to be furnished on the credit of the vessel, or where a lien is given by the local law, the party is entitled to proceed *in rem* in the admiralty court to enforce it;" that that case was decided in 1819, and had ever since been followed and regarded as a leading case in the admiralty courts; that its authority had been recognized in the cases of *The Planter* [*Peyroux* v. *Howard*], and *The Orleans* v. *Phoebus*, and other cases; that while process against the vessel was denied in the case of *The General Smith*, because the laws of Maryland gave no lien or priority, it was used and supported in the case of *The Planter*, upon the ground that the party had a lien upon the vessel by the law of Louisiana, and as the contract was within its jurisdiction it ought to give him all the rights he had acquired under it; and that "when this court framed the rules in 1844, it, of course, adhered to the practice adopted in the previous cases, and by the 12th rule authorized the process *in rem* where the party was entitled to a lien under the local or state law." 66 U. S. 1 Black, 529, 530 [17: 184]. And the court treated the rules of 1844 and 1858 as mere regulations of procedure, under the power conferred upon this court by Congress, and liable to be changed from time to time, at the discretion of the court, as convenience might require, so far as regarded the future.

Although, as early as February term, 1816, it had been assumed that the admiralty and maritime jurisdiction vested by the Constitution in the courts of the United States was exclusive, and could not be exercised by the courts of a state (*Martin* v. *Hunter*, 14 U. S. 1 Wheat. 304, 337, 373 [4: 97, 105, 114], yet the question whether a claim of a maritime nature could be enforced in the courts of a state by process *in rem* under a statute of the state creating a right in the thing itself, and providing for its enforcement by process essentially like proceedings *in rem* in the admiralty, was not brought into judgment in this court until *December term, 1866, when the [**616** question was directly presented in two cases, and was determined in the negative. *The Moses Taylor* v. *Hammons*, 71 U. S. 4 Wall. 411 [18: 397]; *The Ad. Hine* v. *Trevor*, 71 U. S. 4 Wall. 555 [18: 451].

The case of *The Moses Taylor* arose under a statute of the state of California, enacting that claims against any vessel for supplies or materials furnished for her use or repair, and for breaches of contracts for transportation of persons or property, and certain other classes of claims, shall constitute liens upon the vessel; that actions upon such claims might be brought directly against the vessel, and the summons served upon the master or any one in charge; that the vessel might be attached as security for the satisfaction of any judgment that might be recovered; and that if the attachment was not discharged, and a judgment was recovered, the vessel might be sold and the proceeds applied to the payment of the judgment. Upon a writ of error from this court to the highest court of the state to which the case could be taken, it was held that a contract for the transportation of a passenger upon an ocean voyage, relating exclusively to a service to be performed on the high seas, and pertaining solely to the business of commerce and navigation, was a maritime contract, and a breach of it an appropriate subject of maritime jurisdiction; and that the statute of the state, in so far as it authorized process *in rem* in the courts of the state against the vessel, was unconstitutional as interfering with the exclusive admiralty jurisdiction of the courts of the United States.

The case of *The Ad. Hine* arose under a statute of the state of Iowa, providing for similar proceedings in the courts of the state in the case of any injury to persons or property by a vessel, her officers, or crew; and that statute, so far as it gave such process *in rem* for a collision between two vessels, was held to be unconstitutional under the decision in *The Moses Taylor*. Mr. Justice Miller, in delivering the opinion, declared it to be "the settled law of this court that wherever the district courts of the United States have original cognizance of admiralty causes by virtue of the act of 1789, that cognizance is exclusive, and no other court, state or national, can exercise it, with the *exception always of [**617** such concurrent remedy as is given by the common law." 71 U. S. 4 Wall. 568, 569 [18: 455].

Each of those two cases was sought to be

brought within the saving clause in § 9 of the judiciary act of 1789. As to which Mr. Justice Field, in *The Moses Taylor*, said: "That clause only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common-law courts, which is saved; but a common-law remedy. A proceeding *in rem*, as used in the admiralty courts, is not a remedy afforded by the common law, it is a proceeding under the civil law. When used in the common-law courts, it is given by statute." 71 U. S. 4 Wall. 431 [18: 402]. And Mr. Justice Miller, in *The Ad. Hine*, said: "But the remedy pursued in the Iowa courts, in the case before us, is in no sense a common-law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding *in rem*. The statute provides that the vessel may be sued and made defendant, without any proceeding against the owners, or even mentioning their names, that a writ may be issued and the vessel seized, on filing a petition similar in substance to a libel; that after a notice in the nature of a monition, the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued. Such is the general character of the steamboat laws in the western states. While the proceeding differs thus from a common-law remedy, it is also essentially different from what are in the west called suits by attachment, and in some of the older states foreign attachments. In these cases there is a suit against a personal defendant by name, and because of inability to serve process on him on account of nonresidence, or for some other reason mentioned in the various statutes allowing attachments to issue, the suit is commenced by a writ directing the proper officer to attach sufficient property of the defendant to answer any judgment which may be rendered against him. This proceeding may be had against an owner or part owner of a vessel, and his interest thus subjected to sale in a common-law court of the state. Such actions may also be maintained *in personam* against a **618**]defendant in the common-law courts, *as the common law gives; all in consistence with the grant of admiralty powers in the 9th section of the judiciary act. But it could not have been the intention of Congress, by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by state statutes; for this would have enabled the states to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal courts would be defeated." 71 U. S. 4 Wall. 571, 572 [18: 456].

Again, at December term, 1868, in the case of *The Belfast* v. *Boon* ("*The Belfast*"), a statute of Alabama, giving a lien upon the vessel under a contract of affreightment, was held unconstitutional so far as it provided for the enforcement of the lien in the courts of the state by proceedings *in rem* in the nature of proceedings in admiralty, because the lien of the shipper was a maritime lien, and, as was said by Mr. Justice Clifford in delivering the opinion, "authority does not exist in the state courts to hear and determine a suit *in rem* in admiralty to enforce a maritime lien;" "but in all cases where a maritime lien arises, the original jurisdiction to enforce the same by a proceeding *in rem* is exclusive in the district courts of the United States, as provided in the 9th section of the judiciary act." 74 U. S. 7 Wall. 624, 645, 646 [19: 266, 272]. The *dictum* uttered by the learned justice towards the end of the opinion, and afterwards repeated by him in *Leon* v. *Galceran*, 78 U. S. 11 Wall. 185, 192 [20: 74, 77], and in *Norton* v. *Switzer*, 93 U. S. 355, 365 [23: 903, 907], that "such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts it is competent for the states, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement," if understood, as contended by the defendants in error, to imply that the states may authorize such liens to be enforced in their own courts by proceedings in the nature of admiralty process *in rem*, is unsupported by the decisions there referred to, or by any other decision of this *court, and is [**619** inconsistent with several recent opinions of this court in which the subject was fully considered.

On May 6, 1872, this court ordered the 12th rule in admiralty to be amended so as to read as follows: "In all suits by materialmen for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*." 13 Wall. XIV.

This amendment of the rule left the law in this respect in the same condition in which, as declared by this court in cases above cited, it had been before the promulgation of any rule upon the subject.

In *The Lottawanna*, at October term, 1874, the purpose and effect of the amendment were stated by Mr. Justice Bradley (who had taken part in making it), as follows: "As to the recent change in the admiralty rule referred to, it is sufficient to say that it was simply intended to remove all obstructions and embarrassments in the way of instituting proceedings *in rem* in all cases where liens exist by law, and not to create any new lien, which, of course, this court could not do in any event, since a lien is a right of property, and not a mere matter of procedure." "We have now restored the rule of 1844, or, rather, we have made it general in its terms, giving to material men in all cases their option to proceed either *in rem* or *in personam*. Of course this modification of the rule cannot avail where no lien exists; but where one does exist, no matter by what law, it removes all obstacles to a proceeding *in rem*, if credit is given to the vessel." *The Lottawanna* [*Rodd* v. *Heartt*], 88 U. S. 21 Wall. 558, 579, 581 [22: 654, 663, 664].

In *The Lottawanna*, this court allowed to a mortgage of a ship precedence over claims of materialmen in the home port, because they had no lien by the maritime law of the United States, as declared in the case of *The General Smith*, and because their claim had not been

recorded as required by the law of the state of Louisiana, which gave them a lien. The decree of the district court was rendered before the admiralty rule of 1858 was superseded by the rule of 1872. Mr. Justice Bradley, in delivering the opinion of this court, said: "Had the 620]*lien been perfected, and had the rule not stood in the way, the principles that have heretofore governed the practice of the district courts exercising admiralty jurisdiction, and which have been repeatedly sanctioned by this court, would undoubtedly have authorized the materialmen to file a libel against the vessel or its proceeds. It seems to be settled in our jurisprudence that, so long as Congress does not interpose to regulate the subject, the rights of materialmen furnishing necessaries to a vessel in her home port may be regulated in each state by state legislation. State laws, it is true, cannot exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts, so as to enable them to proceed *in rem* for the enforcement of liens created by such state laws, for it is exclusively conferred upon the district courts of the United States. 88 U S. 21 Wall. 579, 580 [22: 663, 664].

In that opinion, as appears by the passages above quoted, this court distinctly affirmed the following positions: (1) The admiralty rule of 1872 was intended to remove all obstructions and embarrassments in the way of instituting proceedings *in rem* in all cases where liens exist by law; (2) a lien is a right of property, and not a mere matter of procedure; (3) where a state statute has given to materialmen in the home port a lien upon the vessel, to be enforced by proceedings like those in admiralty, the district courts of the United States have jurisdiction to enforce it by libel *in rem*; (4) their jurisdiction *in rem*, in such a case, is exclusive of that of the courts of the state.

At the same term, a process *in rem* to enforce a lien given by a statute of New Jersey for building a ship was held to be within the jurisdiction of the courts of the state, solely because, as previously adjudged by this court, a contract for building a ship was not a maritime contract, but a contract made on land and to be performed on land, and therefore not a subject of admiralty jurisdiction. *Edwards* v. *Elliott*, 88 U. S. 21 Wall. 532, 553–556 [22: 487, 491, 492]; *People's Ferry Co.* v. *Beers*, 61 U. S. 20 How. 393 [15: 961]; *The Capitol* [*Roach* v. *Chapman*], 63 U. S. 22 How. 129 [16: 294].

Likewise, in *Johnson* v. *Chicago & P. Elev. Co.* 621] decided *at October term, 1886, the remedy given by the statute of Illinois was *in personam*, and the cause of action was not a maritime tort, but an injury done by a steam tug to a building on land, of which an admiralty court of the United States would have no jurisdiction; and, as was said by Mr. Justice Blatchford in delivering judgment: "This being so, no reason exists why the remedy for the wrong should not be pursued in the state court, according to the statutory method prescribed by the law of the state, even though that law gives a lien on the vessel. The cases in which state statutes have been held void by this court, to the extent in which they authorized suits *in rem* against vessels, because they gave to the state courts admiralty jurisdiction, were only cases where the causes of action were cognizable in the admiralty." "There being no lien on the tug, by the maritime law, for the injury on land inflicted in this case, the state could create such a lien therefor as it deemed expedient, and could enact reasonable rules for its enforcement, not amounting to a regulation of commerce. Liens under state statutes, enforceable by attachment in suits *in personam*, are of every day occurrence, and may even extend to liens on vessels, when the proceedings to enforce them do not amount to admiralty proceedings *in rem* or otherwise conflict with the Constitution of the United States. There is no more valid objection to the attachment proceeding to enforce a lien in a suit *in personam*, by holding the vessel by mesne process to be subjected to execution on the personal judgment when recovered, than there is in subjecting her to seizure on the execution. Both are incidents of a common-law remedy which a court of common law is competent to give." 119 U. S. 388, 397, 399 [30: 447, 450, 451].

In the case of *The J. E. Rumbell*, decided at October term, 1892, since the first decision of the present case in the supreme judicial court of Massachusetts, this court, referring to many of the cases above cited, stated the general principles of law upon the subject now before us as follows:

"In the admiralty and maritime law of the United States as declared and established by the decisions of this court, the following propositions are no longer doubtful: (1) For necessary *repairs or supplies furnished [622 to a vessel in a foreign port, a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty; (2) for repairs or supplies in the home port of the vessel no lien exists, or can be enforced in admiralty, under the general law, independently of local statute; (3) whenever the statute of a state gives a lien to be enforced by process *in rem* against the vessel for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States; (4) this lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States sitting in admiralty. The fundamental reasons on which these propositions rest may be summed up thus: The admiralty and maritime jurisdiction is conferred on the courts of the United States by the Constitution, and cannot be enlarged or restricted by the legislation of a state. No state legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. But when a right, maritime in its nature and to be enforced by process in the nature of admiralty process, has been given by the statute of a state, the admiralty courts of the United States have jurisdiction, and exclusive jurisdiction, to enforce that right ac-

cording to their own rules of procedure." 148 U. S. 1, 11-13 [37: 345, 347, 348].

In that case, it is true, the single question presented for decision was whether a lien upon a vessel for necessary supplies and repairs in her home port, given by the statute of a state, and to be enforced by proceedings *in rem* in the nature of admiralty process, took precedence of a prior mortgage recorded as required by act of Congress. But the decision of that question, as in the similar case of *The Lottawanna*, above cited, really depended upon the question whether the contract and the lien of the materialmen, on the one side, or those of the mortgagee, on the other, were in their nature maritime, and therefore entitled to be enforced **623**] *in rem* in a court *of admiralty. The conclusion of this court as to the nature of the claims respectively was that "the lien created by the statute of a state, for repairs or supplies furnished to a vessel in her home port has the like precedence over a prior mortgage that is accorded to a lien for repairs or supplies in a foreign port under the general maritime law as recognized and adopted in the United States. Each rests upon the furnishing of supplies to the ship, on the credit of the ship herself to preserve her existence and secure her usefulness for the benefit of all having any title or interest in her. Each creates a *jus in re*, a right of property in the vessel, existing independently of possession, and arising as soon as the contract is made, and before the institution of judicial proceedings to enforce it. The contract in each case is maritime, and the lien which the law gives to secure it is maritime in its nature, and is enforced in admiralty by reason of its maritime nature only. The mortgage, on the other hand, is not a maritime contract, and constitutes no maritime lien, and the mortgagee can only share in the proceeds in the registry after all maritime liens have been satisfied." 148 U. S. 19 [37: 350].

The form of proceeding against the vessel, provided for in the statute of Massachusetts now in question, is clearly in the nature of admiralty process *in rem*, and is indistinguishable from the proceedings provided for in statutes of other states, which have been held by this court to be exclusively within the admiralty jurisdiction of the courts of the United States. The lien upon the vessel is created as soon as money is due for labor performed or materials furnished, and continues until the debt is satisfied, unless the lien is dissolved by failure to record a statement of the claim, as required by the statute; the petition is to be served by an attachment of the vessel, and a summons to the owners, if known; a dissolution of the attachment does not dissolve the lien; and any number of persons having such liens upon the same vessel may join in one petition to enforce them. Mass. Pub. Stat. chap. 192, §§ 14-19.

In conclusion, the considerations by which this case must be governed may be summed up **623**] as follows: The maritime* and admiralty jurisdiction conferred by the Constitution and laws of the United States upon the district courts of the United States is exclusive. A lien upon a ship for repairs or supplies, whether created by the general maritime law of the United States, or by a local statute, is a *jus in re*, a right of property in the vessel, and a maritime lien, to secure the performance of a maritime contract, and therefore may be enforced by admiralty process *in rem* in the district courts of the United States. When the lien is created by the general maritime law for repairs or supplies in a foreign port, no one doubts at the present day that, under the decisions in *The Moses Taylor* and *The Ad. Hine*, 71 U. S. 4 Wall. 411, 555 [18: 397, 451], above cited, the admiralty jurisdiction *in rem* of the courts of the United States is exclusive of similar jurisdiction of the courts of the state. The contract and the lien for repairs or supplies in a home port, under a local statute, are equally maritime and equally within the admiralty jurisdiction, and that jurisdiction is equally exclusive.

The necessary result is that the petition ought to have been dismissed; but, in accordance with the usual practice upon reversing a judgment of the highest court of a state, the proper form of judgment is—

Judgment reversed, and case remanded for further proceedings not inconsistent with the opinion of this court.

Mr. Justice **Brewer** did not hear the argument or take any part in the decision of this case

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EZRA J. PECK and Leo Simmons, Trustees, *Pffs. in Err.*,
v.
CHRISTIAN HEURICH.

(See S. C. Reporter's ed. 624-632.)

Champertous deed void—cotrustee—action not maintainable on such deed.

1. A deed to trustees to enable one of them, who is an attorney at law, to conduct litigation for the title and possession of real estate on his own account and at his own cost and expense, in consideration of one third of the property recovered, is void for champerty.
2. The joinder of another person as cotrustee in a champertous deed, made to enable the other trustee to conduct litigation on his own account and at his own cost and expense, for a part of land to be recovered or the proceeds thereof, does not make the deed valid.
3. An action by trustees claiming under a champertous deed cannot be maintained, although a similar action might be maintained by the grantors in their own name.

[No. 289.]

Argued April 26, 27, 1897. Denied May 24, 1897.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment of that court affirming the judgment of the

NOTE.—*As to champerty, what is; how it differs in maintenance; purchase of land in suit,*—see note to Lewis v. Bell, 15: 203.

As to attorney's compensation contingent on success or from proceeds of suit; a fixed sum or a percentage; purchase of interest in the suit or subject of litigation by attorney,—see note to McMicken v. Perin, 15: 504.

Supreme Court of that District in favor of the defendant, Christian Heurich, in an action of ejectment brought by Ezra J. Peck *et al.* to recover land in said district. *Affirmed.*

See same case below, 6 App D C. 273.

Statement by Mr. Justice **Gray**:

This was an action of ejectment, brought September 20, 1892, in the supreme court of the District of Columbia by Ezra J. Peck and Leo Simmons, trustees, against Christian Heurich, to recover land in the District of Columbia. The defendant pleaded the general issue.

At the trial the plaintiffs, as stated in the bill of exceptions, offered in evidence a deed dated and recorded November 8, 1828, from William A. Bradley, purporting to convey to Ann Bartlett in fee simple the real estate described in the declaration, together with other real estate, in consideration of the sum of $2,150; "and thereupon counsel for plaintiffs announced to the court that they proposed to prove that the plaintiffs and defendant traced their respective titles to the land in controversy from said Ann Bartlett as a common source of title—which defendant, by his counsel, then and there denied."

The plaintiffs then called three witnesses who testified that Anna L Peck and ten other persons named were the heirs of Ann Bartlett. These witnesses were an uncle and aunt of Anna L. Peck, and her husband, Ezra J. Peck. Upon their cross-examination it appeared that the heirs of Ann Bartlett were first informed that they had any title to these lands by Leo Simmons in 1890.

The plaintiffs then offered in evidence the record of a deed dated October 20, 1891, from the persons before shown to be the heirs of Ann Bartlett, and from the husbands and wives of those who were married, describing themselves as all the heirs of Ann Bartlett, and **626**] reciting that they executed this *deed, "believing it to be for their interest and convenience to do so," and purporting, for the consideration of $5, to convey to Peck and Simmons, trustees, in fee simple, all the real estate in the District of Columbia of which Ann Bartlett died seised, and especially the land conveyed to her by Bradley by the deed of November 8, 1828. The conveyance by the heirs of Ann Bartlett to the plaintiffs was expressed to be upon the following trusts:

"In trust, nevertheless, to and for the following uses and purposes, namely: to take and hold possession of the said real estate, and to institute and prosecute to a final conclusion in their own names any and every action, suit, or proceeding, in law and in equity or otherwise however, for the possession of said real estate, if in their judgment expedient, and to compromise, pay for, and purchase any outstanding claim or title against said real estate, if in their judgment expedient, and generally to do any and every thing in their judgment expedient, which may be necessary to vest in them a perfect and unencumbered title in fee simple to, and the recovery of possession of, said real state; and upon the vesting in them of a perfect and unencumbered title in fee simple, and the recovery of the possession of said real estate, or before and without the same, and without such proceedings, acts, and doings, as they may think best, and at any time, to sell and convey said real estate, or any part thereof, in fee simple, or in any quantity of estate or estates, to any person or persons, and for such price and upon such terms as they may in their best judgment consider for the interest of the parties concerned, and upon such sale or sales to convey the title sold to the purchaser or purchasers without liability on the part of the purchaser or purchasers to see to the application of the purchase money; and out of the purchase moneys or the full amount said property may sell for it is distinctly understood between the parties to this indenture, that the said Leo Simmons, one of the trustees or parties of the second part shall retain 33⅓ per cent, or one third, after paying all expenses, costs, and expenditures of the said parties of the second part, in the execution of this trust, out of the same, and the *other two thirds or 66⅔ per cent, [**627** of said purchase money, clear of any cost or charges whatever, to pay the heirs of said Ann Bartlett, their heirs or assigns, according to their respective interest; and it is further understood between the parties to this indenture that should Leo Simmons die after suit has been begun for the recovery of any said property, and before a settlement shall have been made, then in that case the court having jurisdiction shall appoint a trustee to act in his stead and pay over to the heirs or assigns of the said Simmons such profits as he would have been entitled to after paying said costs and expenditures."

The plaintiffs also offered in evidence records of deeds dated June 22, 1892, of the same real estate from Mr. and Mrs. Peck to H. Austin Clark, as trustee, and from Clark to Peck and Simmons, as trustees under the deed of October 20, 1891.

The defendant objected to the admission of the records of the deeds of October 20, 1891, and June 22, 1892, upon three grounds: First, That they were not recorded until after this suit was brought. Second. That the deed of October 20 1891, was not recorded within six months after its date. Third. That both deeds were champertous on their face.

The presiding judge sustained the third objection, and declined to admit records of the deeds in evidence, on the ground that they were champertous on their face; and expressed no opinion upon the other objections.

The bill of exceptions stated that "thereupon the plaintiffs' counsel announced to the court that the refusal of the court to admit the aforesaid records of said three deeds in evidence broke the continuity of plaintiffs' title, and that they would therefore rest their case. Whereupon the court instructed the jury to render a verdict for the defendant, which was done."

Judgment was rendered on the verdict; and the plaintiffs duly excepted to the ruling excluding the deeds, and to the instruction to return a verdict for the defendant, and appealed to the court of appeals, which, without considering the first and second objections made to the deeds at the trial, affirmed the judgment upon two grounds: First. That the deeds were champertous. Second. That

628] the plaintiffs had not introduced *any evidence that William A. Bradley, the grantor of Ann Bartlett, had any title, or was ever in possession, or had any right to the possession, or that the state had ever granted the property; and the plaintiffs therefore had not been prejudiced by the exclusion of the deeds even if they were valid. 6 App. D. C. 273. The plaintiffs sued out this writ of error.

Messrs. **Franklin H. Mackey** and **Arthur A. Birney,** for plaintiffs in error:

The deeds are plain and unambiguous and require no evidence to explain them.

Seitz v. *Brewers' Refrigerating Mach. Co.* 141 U. S. 510 (35: 837); *Van Ness* v. *Washington*, 29 U. S. 4 Pet. 232 (7: 842).

The deed to Peck and Simmons is not champertous.

Slywright and Page's Case, Leonard, 167; *Roberts* v. *Cooper*, 61 U. S. 20 How. 483 (15: 974); *Schaferman* v. *O'Brien*, 28 Md. 565, 92 Am. Dec. 708; *Cain* v. *Monroe*, 23 Ga. 82; *Wright* v. *Meek*, 3 G. Greene, 472; *Stoever* v. *Whitman*, 6 Binn. 416; *Bentinck* v. *Franklin & G. City Co.* 38 Tex. 458; *Vancourt* v. *Moore*, 26 Mo. 92; *Hall* v. *Ashby*, 9 Ohio, 96. 34 Am. Dec. 424; *Matthews* v. *Heener*, 2 App. D. C. 349; *Stanley* v. *Jones*, 7 Bing. 369; *Moore* v. *Ringo*, 82 Mo. 468; *Small* v. *Mott*, 22 Wend. 405; *Lytle* v. *State*, 17 Ark. 608.

If effect may be given the deed by any reasonable construction that construction should be adopted; all presumptions are in favor of the validity of the conveyance.

Bender v. *Fromberger*, 4 U. S. 4 Dall. 436, 440 (1: 898, 900); *Foxcroft* v. *Mallett*, 45 U. S. 4 How. 353, 376 (11: 1008, 1018).

Messrs. **William F. Mattingly** and **Leon Tobriner,** for defendant in error:

The deeds are champertous. The law against champerty, and the doctrine that when a deed is clearly champertous it is void, prevail in the District of Columbia.

Stanton v. *Haskin*, 1 MacArth. 558; *Johnson* v. *Van Wyck*, 4 App. D. C. 294; *Matthews* v. *Heener*, 4 App. D. C. 380, 396.

Champerty is the unlawful maintenance of a suit in consideration of an agreement to have a part of the thing in dispute.

1 Hawk, P. C. 545; Co. Litt. 368; *Stanley* v. *Jones*, 7 Bing. 369; *Roberts* v. *Cooper*, 61 U. S. 20 How. 467-484 (15: 969-975).

The law against champerty is enforced in most of the states; in some strictly, in others with more or less modifications.

3 Am. & Eng. Enc. Law, 78 *et seq.*; *Brown* v. *Bigne*, 21 Or. 260; *Martin* v. *Clarke*, 8 R. I. 389, 5 Am. Rep. 586; *Belding* v. *Smythe*, 138 Mass. 530; *Laney* v. *Havender*, 146 Mass. 615; *Gilbert* v. *Holmes*, 64 Ill. 548; *Boardman* v. *Thompson*, 25 Iowa, 487; *Barker* v. *Barker*, 14 Wis. 142; *Weakly* v. *Hall*, 13 Ohio, 167, 42 Am. Dec. 194; *Backus* v. *Byron*, 4 Mich. 535; *Gruber* v *Baker*, 20 Nev. 453, 9 L. R. A. 302.

Mr. Justice **Gray** delivered the opinion of the court:

One ground taken in the opinion of the court of appeals and at the argument in this court, in support of the judgment for the defendant, was that, independently of the question of the validity of the deeds to the plaintiffs, they could not maintain this action, because they had not complied with the rule of the law of Maryland, in force in the District of Columbia, by which, in order to maintain an action of ejectment, the plaintiff must show that he has the legal title in the land and the right of possession, and cannot establish this without first showing that the land had been granted by the state, unless both parties are shown to claim title from the same source. *Mitchell* v. *Mitchell*, 1 Md. 44; *Anderson* v. *Smith*, 2 Mackey, 275.

But this ground is not open to the defendant upon the record. No such objection to the introduction of the deed in evidence was made at the trial. The course of things at the trial, so far as regards this point, was as follows: The plaintiffs gave in evidence, without objection, the deed from William A. Bradley to Ann Bartlett, and said in open court that they proposed to prove the fact that the plaintiffs and the defendant traced their respective titles to the land in controversy from Ann Bartlett as a common source of title; and the *defend- **[629** ant denied that fact. The plaintiffs, by way of proving their own title under Ann Bartlett, which was a necessary step towards proving the fact so controverted, introduced evidence that the grantors in the deed of October 20, 1891, were the heirs of Ann Bartlett, and then offered that deed in evidence, and, upon the court's ruling it out as void for champerty, declared to the court that this ruling broke the continuity of their title, and that they therefore rested their case. The plaintiffs at the outset having given notice of their intention to prove that Ann Bartlett was the common source of the titles both of themselves and of the defendant, and having been prevented from tracing their own title from her, any amount of proof that the defendant derived his title from her became wholly immaterial, and there was no occasion for the plaintiffs to make a specific offer of such proof. It was more respectful to the presiding judge, and sufficient to preserve the plaintiffs' rights in the appellate court, to take the course, which they did, of resting their case, and taking an exception to the exclusion of evidence without which they could not possibly recover. The plaintiffs, by reason of the ruling excluding the deed to them, had never been permitted to introduce the first step in the proof of their case, and, so long as that ruling was unreversed, had no interest in offering any evidence of the defendant's source of title. It cannot be assumed that the plaintiffs would not have introduced such evidence, if the court had given them a standing in the case which would have made it avail them to do so. A judgment cannot be affirmed upon a ground not taken at the trial, unless it is made clear beyond doubt that this could not prejudice the rights of the plaintiff in error. *Deery* v. *Cray*, 72 U. S. 5 Wall. 795, 808 [18: 653, 657]; *Vicksburg & M. R. Co.* v. *O'Brien*, 119 U. S. 99, 103 [30: 299, 300]; *Jones* v. *Sisson*, 6 Gray, 288; *Jones* v. *Wolcott*, 15 Gray, 541.

We are then brought to the consideration of the principal question in the case, whether the deeds to the plaintiffs were void for champerty.

In many parts of the United States, and

probably in Maryland and consequently in the
630] District of Columbia, the ancient *English statutes of champerty and maintenance have either never been adopted, or have become obsolete, so far as they prohibited all conveyances of lands held adversely. 4 Kent, Com. 447; *Roberts* v. *Cooper*, 61 U. S. 20 How. 467 [15: 969]; *Schaferman* v. *O'Brien*, 28 Md. 565 [92 Am. Dec. 708]; *Matthews* v. *Hevner*, 2 App. D. C. 349.

But according to the common law, as generally recognized in the United States, wherever it has not been modified by statute, and certainly as prevailing in the District of Columbia, an agreement by an attorney at law to prosecute at his own expense a suit to recover land in which he personally has and claims no title or interest, present or contingent, in consideration of receiving a certain proportion of what he may recover, is contrary to public policy, unlawful and void, as tending to stir up baseless litigation. 4 Kent, Com. 447, note; *McPherson* v. *Cox*, 96 U. S. 404, 416 [24: 746, 750]; *Stanton* v. *Haskin*, 1 McArth. 558 [29 Am. Rep. 612]; *Johnson* v. *Van Wyck* 4 App. D. C. 294; *Brown* v. *Beauchamp*, 5 T. B. Mon. 413 [17 Am. Dec. 81]; *Belding* v. *Smythe*, 138 Mass. 530; *Stanley* v. *Jones*, 7 Bing. 369, 377, 5 Moore & P. 193, 206.

The trust declared in the deed under which these plaintiffs claim title is to take possession of the real estate, to bring all suits necessary for that purpose, to pay off outstanding claims if deemed by the trustees to be expedient, and to do everything necessary to vest in them a perfect and unencumbered title and the possession of the lands, and after getting, with or without suit, the title and possession, to sell and convey the lands. The deed states that "it is distinctly understood between the parties" that, out of the purchase money received, "Leo Simmons, one of the trustees or parties of the second part, shall retain 33⅓ per cent or one third, after paying all expenses, costs, and expenditures of the said parties of the second part in the execution of the trust, out of the same;" that the other two thirds of the purchase money, "clear of any costs or charges whatever," shall be paid to the heirs of Ann Bartlett, their heirs or assigns, according to their respective interests; and "that should Leo Simmons die after suit has been begun for the recovery of any said property, and before a settle-
631] ment *shall have been made, then in that case the court having jurisdiction shall appoint a trustee to act in his stead and pay over to the heirs or assigns of the said Simmons such profits as he would have been entitled to after paying said costs and expenditures."

The deed clearly expresses the intention of the parties that Simmons shall receive one third, and the grantors two thirds, of the gross proceeds of the real estate conveyed. The intention that all costs and expenses of obtaining title and possession of the lands, by suit or purchase or otherwise, shall be borne wholly by Simmons, and in no part by the grantors, is clearly shown, in the first place, by the stipulation that he shall receive one third of the proceeds "after paying all expenses, costs, and expenditures of" the trustees in the execution of the trust "out of the same"—evidently meaning out of his third part. But any possible doubt which might arise upon this clause, taken by itself, is removed by the next clause, which stipulates that the two other thirds of the proceeds shall be paid to the heirs of Ann Bartlett, "clear of any costs or charges whatever," as well as by the final clause, which stipulates that, should Simmons die after bringing suit and before making a settlement, there shall be paid to his heirs or assigns "such profits as he would have been entitled to after paying said costs and expenditures."

Upon the nature and effect of the agreement made by the attorney with the grantors in this deed, this court concurs in the opinion expressed by the court of appeals of the District of Columbia, as follows: "He agreed to pay the costs of the litigation; he agreed to take as his compensation a part of the land which was the subject of the suit, or a part of the proceeds of sale of it, which amounts to the same thing; and his compensation was not a fixed sum of money, payable out of the proceeds of sale, but a contingent share of the very thing to be recovered or of the money that might be received by way of settlement or compromise; and the character of the enterprise on the part of the attorney was so plainly a speculative one, that in the deed the net results to him are mentioned as 'profits.' If this be not champerty, we fail to see wherein *there can be champerty. . . . We [632 must regard an agreement by any attorney to undertake the conduct of a litigation on his own account, to pay the costs and expenses thereof, and to receive as his compensation a portion of the proceeds of the recovery, or of the thing in dispute, as obnoxious to the law against champerty; and that this was the character of the arrangement in the present case we are entirely satisfied. The very thing in dispute was conveyed, or sought to be conveyed, in advance, to the attorney and an associate, for the express purpose of enabling the attorney to conduct the litigation on his own account and at his own cost and expense; and in consideration of this he was to retain at the end of the litigation one third of what had been conveyed to him, and was to account to his clients for the other two thirds. This was certainly an agreement on his part to take as his compensation a part of the thing in dispute, and it does not alter the case at all that the land when recovered was to be sold. That was only the practical mode for a division of proceeds between the parties to the enterprise." 6 App. D. C. 283, 284.

The deed, as appears upon its face, having been made to carry out the champertous agreement, was unlawful, and passed no title; and the joinder of Peck as cotrustee in the deed could not give it validity.

The result is that this action cannot be maintained by the trustees claiming under the deed, although a similar action might have been maintained by the grantors in their own names. *Burnes* v. *Scott*, 117 U. S. 582, 590 [29: 991, 994], and *Hilton* v. *Woods*, L. R. 4 Eq. 432, 439, there cited.

Judgment affirmed.

633] INTERSTATE COMMERCE COMMISSION, *Appt.*,
v.
DETROIT, GRAND HAVEN, & MILWAUKEE RAILWAY COMPANY.

(See S. C. Reporter's ed. 633-646.)

Violation of the Act to Regulate Commerce—free cartage.

1. Furnishing free cartage on delivery of goods at one town, but not at another to which the same rates are charged for a shorter haul, is not equivalent to charging a greater compensation for the shorter distance in violation of § 4 of the Act to Regulate Commerce, since that section relates only to the transportation by rail and the charges therefor.
2. The failure of a railroad company to publish in its schedules of rates the fact of free cartage at a certain place where it has been openly and notoriously granted to shippers and consignees for a quarter of a century is not a violation of § 6 of the Act to Regulate Commerce,—at least when the Interstate Commerce Commission has not made any general order requiring free cartage to be included in such schedules.

[No. 539.]

Argued March 16, 1897. Decided May 24, 1897.

APPEAL from a decree of the United States Circuit Court of Appeals for the Sixth Circuit reversing the decree of the Circuit Court of the United States for the Western District of Michigan for an injunction against the Detroit, Grand Haven, & Milwaukee Railway Company commanding it to refrain from affording free cartage at Grand Rapids unless a like service be afforded at Ionia, etc. *Affirmed.*

See same case below, 57 Fed. Rep. 1005, 4 Inters. Com. Rep. 722.

Statement by Mr. Justice **Shiras**:

The Detroit, Grand Haven, & Milwaukee Railway Company, a corporation of the state of Michigan, operates a railroad wholly within that state, running westwardly from Detroit to Grand Haven. In connection with eastern roads it is engaged in interstate commerce. Upon its line are the cities of Ionia and Grand Rapids, distant 124 and 157½ miles from Detroit respectively. It has an established tariff of freight rates to these points from New York, Philadelphia, and other points east of Detroit.

On September 18, 1888, Stone & Carten, retail merchants at Ionia, filed a petition before the Interstate Commerce Commission, **634]** *complaining that said railroad company was unduly discriminating against Ionia and preferring Grand Rapids, in violation of certain provisions of the Interstate Commerce Act.

The company filed an answer, and the case was heard upon a written stipulation of facts, which constituted the whole evidence on which the case was submitted to the Commission for decision.

The facts found by the Commission were as follows:

"1. The complainants are copartners, doing business under the firm name of Stone & Carten, and are engaged in the sale at retail of goods, wares, and merchandise in the city of Ionia, county of Ionia, and state of Michigan, purchasing said goods, wares, and merchandise at Philadelphia, Pa., New York, N. Y., Boston, Mass., and points east of Detroit, Mich.

"2. That the respondent railway company is a corporation existing under and pursuant to the laws of the state of Michigan, and is a common carrier of passengers and property for hire between the city of Detroit and the city of Grand Haven, both of said places and its entire line of railroad being in the state of Michigan, but it does not own and control a line of steamboats plying across Lake Michigan between Grand Haven and Milwaukee, Wis., but there is a line of steamboats engaged in the transportation of persons and property across Lake Michigan between Grand Haven and Milwaukee, from which the respondent receives traffic consigned over its road from Milwaukee, and to which it delivers traffic from its road destined to Milwaukee; that all of said boats are under the control and direction of an independent corporation, organized under the laws of the state of Michigan, by the name of the Grand Haven & Milwaukee Transportation Company; that the management of the business of the last-named company is under the management and control of the same officers as those which manage and control the road and business of the respondent.

"3. The respondent, for its services as a common carrier for continuous shipment, under a common arrangement, of property from Detroit to its stations on its line of transportation, established and published a schedule of rates and **635]** charges, *a tariff of freights which makes on all freights from Philadelphia, New York, and Boston, and all other points east of Detroit, consigned over the respondent's road, the same rates and charges for the complainants which are made and charged for the same class of freights to the merchants doing business at the city of Grand Rapids, a copy of which schedule or tariff is hereto annexed and made and deemed a part of this stipulation.

"4. The shipments of freight from Philadelphia, New York, Boston, and points east of Detroit, which are delivered to the respondent's road at said city of Detroit and transported by it over its line of railway, pass through the city of Ionia before reaching the city of Grand Rapids; that it is a shorter distance from Detroit to Ionia than from Detroit to Grand Rapids, and over the same line, in the same direction, the shorter being included in the longer distance.

"5. That the respondent provides, at its own expense, drays, carts, and trucks, at the city of Grand Rapids, for the service of transporting merchandise and freight generally, as

NOTE.—*As to power of Congress to regulate commerce*, see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.

As to tonnage tax, see note to Inman Steamship Co. v. Tinker, 24: 118.

As to interstate commerce; regulation of; power of Congress, how far exclusive,—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

well as merchandise and freight consigned from Philadelphia, New York, Boston, and points east of Detroit between its station at Grand Rapids and the places of business of merchants, traders, and other patrons of its road at that place, which service it performs without additional charge to the owner or shipper of property on account thereof; that this service is not furnished to complainants or other merchants, traders, and patrons of its road at the city of Ionia; that this service at Grand Rapids has been openly and notoriously rendered for a long period of time, to wit, for twenty-five years and upwards; that its station at the said city of Grand Rapids is within the corporate limits thereof, and is, on an average, 1¼ miles from the business sections of said city where the traffic of the places tributary to respondent's road originates and terminates, while respondent's station for receiving and discharging freight and property at the city of Ionia is not to exceed ¼ of a mile from the business center of said city; that at the city of Grand Rapids there are two other railroads, the Michi-
636] gan Central Railroad and the *Grand Rapids, Lansing, & Detroit [Detroit, Lansing, & Northern?] Railroad, both of which are immediately and directly in competition with respondent's road for the business of Grand Rapids, that the stations of both of said roads for receiving and discharging freight and property at Grand Rapids are near the business center of said city, requiring only short haul to and from their stations, on an average, about ¼ of a mile; that respondent did the carting of freight to and from its station at Grand Rapids substantially in the same manner as at present, long prior to the time when either said Michigan Central or Grand Rapids, Lansing, & Detroit Railroad was constructed to that place.

"6. That the actual cost of carting or draying freight from respondent's warehouse in the said city of Ionia to the several places in said city of Ionia to and from which traffic is to be hauled is 2 cents per cwt.; that the cost of carting or draying freight transported over respondent's line to and from the places of business of the merchants, traders, and other patrons of its road at Grand Rapids is 2 cents per cwt.

"7. That there is but slight competition encountered by the complainants and other persons, firms, and corporations engaged in business at the city of Ionia interested in shipping over respondent's road, with similar business at the city of Grand Rapids.

"9. That complainants have not brought any suit for the recovery of money or damage for which the respondent is alleged to be liable under the provisions of the Act to Regulate Commerce, but have elected to adopt this procedure as the sole means of obtaining relief.

"10. The city of Grand Rapids has a population of about 70,000. The city of Ionia has a population of about 6,000. The freight traffic to and from Grand Rapids by all roads in 1887 amounted to 982,685 tons. The freight traffic to and from Ionia by all roads for the same time amounted to about 55,000 tons.

"11. Cartage by railway companies in a similar manner to that at Grand Rapids is conducted
637] by other railway companies *at exceptional stations in the state of Michigan, and more or less extensively practised by companies in other states at exceptional stations."

On April 26, 1890, the Commission decided the case, which is reported in 3 I. C. C. Rep. 613 [3 Inters. Com. Rep. 60], and made the following order:

"It is ordered and adjudged that the defendant, the Detroit, Grand Haven, & Milwaukee Railway Company, be and is hereby required, within thirty days from and after the services of a copy of the report and opinion in this proceeding and of this order, to wholly cease and desist from furnishing free cartage of freights at Grand Rapids, in the state of Michigan, whereby rebates from its lawfully published schedule of rates, fares, and charges at its station or office in Grand Rapids are given to shippers and consignees, and charges for the transportation over its line of property shipped from eastern points to Grand Rapids, aforesaid, are made less than charges for the transportation over its line of like kinds of property shipped from the same eastern points to Ionia, in the state of Michigan.

On November 2, 1891, the Commission, having been informed that the company would not comply with the order until the judgment of the commission should be judicially confirmed, filed a petition in the circuit court of the United States for the western district of Michigan, seeking to enforce the order. To this an answer was filed by the company, admitting the facts to be as found by the Commission, and alleging certain additional facts, to support which testimony was adduced.

The circuit court on August 7, 1894, entered a decree in the following terms:

"It is hereby ordered, adjudged, and decreed that the mandatory writ of injunction of this court do issue to said respondent, the Detroit, Grand Haven, & Milwaukee Railway Company, commanding it and its officers and agents to forthwith desist and refrain from affording free cartage at said city of Grand Rapids, unless a like service or its equivalent in value by reduced rates be at the same time afforded at said city of Ionia, and unless the fact that such free cartage, or such *equivalent reduced [**683** rate afforded at both points, shall be noted on the established tariffs of freights and charges published as required by law." *Interstate Commerce Commission* v. *Detroit, G. H. & M. R. Co.* 57 Fed. Rep. 1005 [4 Inters. Com. Rep. 722].

From this decree an appeal was taken to the circuit court of appeals for the sixth circuit, and that court, on April 14, 1896, entered a decree reversing the decree of the circuit court, and directing the dismissal of the Commission's petition. And from the decree of the circuit court of appeals an appeal was taken and allowed to this court.

Mr. **Edward B. Whitney,** Assistant Attorney General, for appellant.

Messrs. **Harrison Geer** and *E. W. Meddaugh* for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

The petition of Stone & Carten, retail merchants at Ionia, addressed to the Interstate Commerce Commission alleged violations by

the railway company of §§ 2, 3, and 4 of the Interstate Commerce Act.

The opinion of the Commission sustained the petition avowedly under § 4 of the act, but their order or decree appears to have been based upon both §§ 4 and 6. The circuit court, as we gather from the opinion of Circuit Judge Taft and the dissenting opinion of District Judge Severens, treated the case as arising under alleged violations of §§ 2, 3, and 4. 57 Fed. Rep. 1005 [4 Inters. Com Rep. 722].

The opinion of the circuit court of appeals discusses the case at large. 43 U. S. App. 308.

But the assistant attorney general, who appears in this court as counsel of the Interstate Commerce Commission, dispenses, in his elaborate brief, with any consideration of §§ 2 and 3, and confines his attention to §§ 4 and 6. His language is as follows:

"Section 2 of the statute is referred to in the **639**] petition of *Stone & Carten, but is not the basis of the decision of either commission or court. Section 3 also (the undue preference clause) is immaterial at the present stage of the case. Undoubtedly a preference is granted to Grand Rapids over Ionia, but whether the preference is undue or unreasonable within the meaning of the clause in question, was not decided by the Commission. Their decision was based upon other sections of the act. Nor did the circuit court base its decision at all upon this provision. Hence we shall submit no argument upon it.

"This leaves for consideration § 4 (the long and short haul clause) and § 6 (the schedule clause). Under § 4 we seek to protect the shippers of Ionia. Under § 6 we seek to protect the humbler and more ignorant shippers of Grand Rapids, that they may not suffer through lack of publicity of the privileges which their larger rivals enjoy."

In our disposition of the case we shall, therefore, consider only the contention now made on behalf of the Commission, namely, that the conduct of the railway company, in furnishing cartage free of charge to the merchants of Grand Rapids, and in not furnishing similar service to the merchants of Ionia, a town 33 miles distant, and in failing to publish such free cartage in the schedule published at Grand Rapids, constituted a violation of the provisions of § 4 and § 6 of the Interstate Commerce Act.

One of the findings of the Commission is that the railroad company, as a common carrier for continuous shipment, under a common arrangement, of property from Detroit to its stations on its line of transportation, established and published a schedule of rates and charges, a tariff of freights which makes on all freights from Philadelphia, New York, and Boston, and all other points east of Detroit, consigned over the company's road, the same rates and charges for the complainants which are made and charged for the same class of freights to merchants doing business at the city of Grand Rapids. But there is no complaint made of that fact. Indeed, it is conceded by the Commission that so-called "group rates" are not in violation of the long and short haul clause; **640**] and, *therefore, if there were nothing else in the case, except that the company's charges were the same for like kind of property transported to and from Ionia as those charged to and from Grand Rapids, to and from points outside of the state, no complaint would have been made or entertained.

The sole complaint urged is that the railway company cart goods to and from its station or warehouse at Grand Rapids without charging its customers for such service, while its customers at Ionia are left themselves to bring their goods to and take them from the company's warehouse, and that, in its schedules posted and published at Grand Rapids, there is no notice or statement by the company of the fact that it furnishes such cartage free of charge. These acts are claimed to constitute violations of §§ 4 and 6 of the Interstate Commerce Act.

The language of § 4 is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which said designated common carrier may be relieved from the operation of this section of this act."

The Detroit, Grand Haven, & Milwaukee Railway Company is a corporation of the state of Michigan, and its road lies wholly within that state. In addition to its local business it is engaged as a common carrier in interstate commerce, by *arrangements made with con- | **641** necting railroads. For a period of upwards of twenty five years before these proceedings this company has openly and notoriously, at its own expense, transferred goods and merchandise to and from its warehouse to the places of business of its patrons in the city of Grand Rapids. The station of the company, though within the limits of the city, is distant on an average 1¼ miles from the business sections of the city where the traffic of the places tributory to the company's road originates and terminates.

Section 3 of the Compiled Laws of the state of Michigan of 1871 is as follows:

"Every railway company in this state is authorized to make personal delivery of every parcel, package, or quality of goods or property, if the consignee of such property shall reside within 2 miles of the terminus or railway station or other terminus of the carriage of such property by the main line of such carrier, and they are hereby authorized to employ or own all the means necessary to perform such duty, and to place the men and vehicles therefor under the government and sole regulation of the superintendent or other principal

officers of such companies. Such delivery shall be at the house, shop, office, or other place of business of the consignee, according to the nature of such property, and where the owner or consignee desires to have the same."

The theory of this enactment evidently is that the duties and powers of a railway company reached no further than the carriage of goods and merchandise, intrusted to it, to its station or warehouse, and that an additional grant of power was needed to enable the company to act as a carrier between its station or warehouse and the house or office of the owner or consignee. However this may be, this record exhibits the case of a Michigan railroad company engaged, for a quarter of a century, in collecting and delivering goods and merchandise at and to the houses and business places of its customers without any charges beyond those made for the railway service.

642] *Undoubtedly, in the case of the Detroit, Grand Haven, & Milwaukee Railway Company, during all that period, no just objection could have been made, and no objection was made, to this mode of doing business in the city of Grand Rapids. Nor can it now be pretended that it is unlawful for that company to continue to so receive and deliver goods and merchandise in that city in all cases in which the goods and merchandise are transported by its railway between points within the state. Has the passage of the Interstate Commerce Act rendered it no longer lawful for this company to continue its long-time method of receiving and delivering at Grand Rapids goods and merchandise which form that part of its business which belongs to interstate traffic? Or, rather, is such mode of business an infraction of the 4th section of that act?

It must be conceded that a state railroad corporation, when it voluntarily engages as a common carrier in interstate commerce by making an arrangement for a continuous carriage or shipment of goods and merchandise, is subjected, so far as such traffic is concerned, to the regulations and provisions of the act of Congress. *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184 [40: 935, 5 Inters. Com. Rep. 391]. So, likewise, it is settled that when a state statute and a Federal statute operate upon the same subject-matter and prescribe different rules concerning it, and the Federal statute is one within the competency of Congress to enact, the state statute must give way. *Gulf, C. & S. F. R. Co.* v. *Hefley*, 158 U. S. 98 [39: 910].

Accordingly, the Commission contends that while it may be lawful for the railway company to collect and deliver articles of domestic commerce without making a charge for cartage, and while it is likewise lawful for the company to establish the same rates of freight and charges for like kind of property carried to Ionia and to Grand Rapids, yet it is unlawful for the company to collect and deliver goods and merchandise free from charge for cartage in Grand Rapids, while it only receives and delivers like goods and merchandise at Ionia at its station or warehouse. And the reason given for this contention is that the 4th 643] section of the Interstate *Commerce Act provides that "it shall be unlawful for any common carrier, subject to the provisions of the act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than a longer distance over the same line in the same direction, the shorter being included within the longer distance."

Under the facts as found and the concessions as made, the Commission's proposition may be thus stated: There is, conventionally, no difference, as to distance, between Ionia and Grand Rapids, and the same rates and charges for like kinds of property are properly made in the case of both cities. But as there is an average distance of 1¼ miles between the station at Grand Rapids and the warehouses and offices of the shippers and consignees, such average distance must be regarded as part of the railway company's line, if the company furnishes transportation facilities for such distance; and if it refrains from making any charge for such transportation facilities, and fails to furnish the same facilities at Ionia, this is equivalent to charging and receiving a greater compensation in the aggregate for the transportation of like kind of property for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance.

The circuit court of appeals was of opinion that this proposition is based on a false assumption, namely, that the distance between the company's station and the warehouses of the shippers and consignees is part of the company's railway line, or is made such by the act of the company in furnishing vehicles and men to transport the goods to points throughout the city of Grand Rapids. The view of that court was that the railway transportation ends when the goods reach the terminus or station and are there unshipped, and that anything the company does afterwards, in the way of land transportation, is a new and distinct service, not embraced in the contract for railway carriage. The court, in a learned opinion by District Judge Hammond, enforced this view by a reference to numerous English cases, which hold that the collecting and delivery of *goods is a separate and distinct business [644 from that of railway carriage; that when railroad companies undertake to do for themselves this separate business, they thereby are subjected to certain statutory regulations and restrictions in respect to such separate business; and that they cannot avoid such restrictions by making a consolidated charge for the railway and cartage service. 43 U. S. App. 308.

We agree with the circuit court of appeals in thinking that the 4th section of the Interstate Commerce Act has in view only the transportation of passengers and property by rail, and that, when the passengers and property reached and were discharged from the cars at the company's warehouse or station at Grand Rapids, for the same charges as those received for similar service at Ionia, the duties and obligations cast upon this company by the 4th section were fulfilled and satisfied. The subsequent history of the passengers and property, whether carried to their places of abode and of business by their own vehicles or by those furnished by the railway company,

would not concern the Interstate Commerce Commission.

It may be that it was open for the Commission to entertain a complaint of the Ionia merchants that such a course of conduct was in conflict with §§ 2 and 3 of the act; but, as we have seen, such questions, if they really arose in the proceedings before the Commission and in the circuit court, have been withdrawn from our consideration in this appeal from the decree of the circuit court of appeals.

This disposition of the questions arising under § 4 renders it unnecessary to consider whether, upon the facts disclosed, the services rendered by the railway company at Grand Rapids and Ionia respectively were rendered under "substantially similar circumstances and conditions," and whether that phrase when used in § 4 may not have a broader meaning and a wider reach than when used in § 2; and, also, whether if the circumstances and conditions were substantially dissimilar, the railway company could only avail itself of such a situation by an application to the Commission under the terms of the proviso to § 4.

645] *The remaining question is whether, when a railway company furnishes free cartage facilities, even lawfully, that is, in circumstances and conditions that would relieve the company from charges of violating §§ 2, 3, and 4, the provisions of § 6 apply. That section is in the following terms:

"That every common carrier subject to the provisions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established, and which are in force at the time upon its railroad. . . . The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, upon such railroad, and shall also state separately the terminal charges, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges."

It is not claimed that the railway company has not otherwise complied with the provisions of this section, but the complaint is that there was no statement in its schedules, printed and kept open to public inspection at Grand Rapids, of the privilege of free cartage. It is contended for the Commission that this failure to publish the fact of free cartage in the schedules might result in ignorance by some shippers of the existence of such a privilege, and that thus the knowing ones would enjoy an advantage not possessed by others.

In view of the finding, that this privilege had been openly and notoriously granted to the shippers and consignees at Grand Rapids for a period of twenty-five years, it is difficult to suppose that this practice was not well known to all who would have occasion to rely upon it. It should also be noticed that no complaint is made, in the present case, by any resident of Grand Rapids. It may well be doubted whether cartage, when furnished without charge, comes within the meaning of the phrase "terminal charges," or can be regarded as "a rule or regulation," which, in anywise "changes, affects, or determines" *any part or the aggregate of the rates, [646 fares, and charges.

Judge Cooley, in expressing the opinion of the Commission, well said: "It must be conceded, however, that cartage is not in general a terminal expense, and is not in general assumed by the carrier. The transportation as between the carrier and its patrons ends when the freights are received at the warehouse, and the charge made is for a service which ends there." 3 I. C. C. Rep. 613 [3 Inters. Com. Rep. 60].

We are informed by an extract from the annual report of the Commission for 1889 (3 I. C. C. Rep. 309), that there are many railroad companies throughout the country which furnish free cartage at some of their stations, but that in no instance do the rate sheets or schedules contain any statement to that effect.

However, in a matter of this kind, much shall be left to the judgment of the Commission, and should it direct, by a general order, that railway companies should thereafter regard cartage when furnished free as one of the terminal charges, and include it as such in their schedules, such an order might be regarded as a reasonable exercise of the Commission's powers.

But we are not persuaded, by anything we see in this record, that the defendant company has acted in any intentioual disregard of the 6th section.

The decree of the Circuit Court of Appeals is affirmed.

AUGUSTUS F. SHAPLEIGH, *Plf. in Err.*,

v.

SAN ANGELO.

(See S. C. Reporter's ed. 646-659

Contracts of a dissolved corporation — when binding upon it on its reincorporation — impairment of obligation of contracts — irregularity in formation of corporation — debts, when due.

1. Disincorporation of a municipality by legal proceedings does not avoid its legally subsisting contracts, but on the reincorporation of the same inhabitants, and of a territory including street improvements for which bonds were given, the obligation to pay them devolves upon the new corporation.

2. A statute making a vote of taxpaying voters necessary to the assumption by a new municipality of a debt of its predecessor, which has been abolished, is an unconstitutional attempt to impair the obligation of the contract, if a liability existed without such vote before the statute.

3. Irregularity in the formation of a municipal corporation which is organized under a general statute does not prevent its authorities from m-

NOTE.—*As to municipal bonds: how affected by change of ruling of highest court of state, or by change in Constitution,*—see note to Mitchell v. Burlington, 18: 350.

As to municipal bonds; reference to statute in,—see note to Ogden v. Daviess County, 26: 263.

As to municipal bonds; construction and validity,—see note to Harper County Comrs. v. Rose, 35: 344.

As to what laws are void as impairing obligation of contracts, see note to Fletcher v. Peck, 3: 162.

ing a valid contract for municipal purposes, which will be continued against its successor lawfully incorporated after the former corporation is abolished.

The outstanding obligations of a municipal corporation which is abolished by decree cannot be enforced against its successor before their maturity, on the theory that the liability of the latter is of an equitable character, but they can be enforced only as existing legal obligations in manner and form as they would have been enforceable had there been no change of organization.

(No. 287.)

Submitted April 26, 1897. Decided May 24, 1897.

IN ERROR to the Circuit Court of the United States for the Western District of Texas to review a judgment in favor of defendant in an action brought by Augustus F. Shapleigh, plaintiff, against the city of San Angelo, defendant, for the recovery of the amount of certain unpaid coupons for interest on bonds issued by said city and for the amount of said bonds. *Reversed*, and cause remanded for further proceedings.

Statement by Mr. Justice **Shiras**:

This was an action brought by Augustus F. Shapleigh, a citizen of the state of Missouri, against the city of San Angelo, a city incorporated on February 10, 1892, under the laws of the state of Texas. The plaintiff's amended petition, filed in the circuit court of the United States for the western district of Texas on March 9, 1895, contained two counts, the first asking judgment for the amount of certain unpaid coupons for interest on bonds issued by a municipal organization, styled "the city of San Angelo," which, from January 18, 1889, to December 15, 1891, exercised the powers of an incorporated city, within the territorial limits inclusive of all the territory afterwards embraced within the limits of the defendant corporation; and the second count seeking to recover, as money had and received to the use of the plaintiff, the amount paid by him for the bonds.

The essential allegations of the first count were that on January 18, 1889, the county judge of the county of Tom Green, Texas, made an entry upon the records of the commissioners' court of the said county, setting forth that the inhabitants of the town of San Angelo, in that county, were then and there incorporated as a city, within certain described boundaries; that on the said date the city con-[648]tained more than *one thousand inhabitants; that immediately after that date an election was held in the city, pursuant to an order of the county judge, at which election a mayor, a marshal, and five aldermen were chosen, who thereupon organized a government for the city and entered upon the performance of their duties as such officers; that on May 16, 1889, the city council passed an ordinance entitled, "An Ordinance Authorizing the Issuing of Bonds for the Purpose of Improving the Streets and Public Highways in the City of San Angelo, and to Provide for the Interest and Create a Sinking Fund for the Principal of Said Bonds," empowering the mayor and secretary of the city to execute, under the corporate seal, coupon bonds of the denomination of $1,000 each, and to negotiate the same, and providing that for the payment of interest on the bonds, and to create a sinking fund for the redemption of the same, there should be levied and collected an annual *ad valorem* tax on all property within the city at the rate of 25 cents on the $100 of valuation; that in pursuance of the ordinance the mayor signed and the secretary countersigned ten bonds, and the mayor sold the same, sealed with the corporate seal of the city; that attached to each of the bonds were forty coupons, each for the sum of $30, or one semi-annual instalment of interest; that before the bonds were issued the mayor forwarded the same to the comptroller of public accounts of the state of Texas, who registered the same in a book kept for the purpose in his office, and indorsed upon each of the bonds his certificate that the same was so registered; that at the time the bonds were issued the assessed value of the property in the city amounted to $1,500,000, and that the bonds were issued and their proceeds used for the purpose of making streets in the city. It was further stated that at the fall term, 1890, of the district court of the said county, the county attorney, at the instance of a citizen and taxpayer of the city, filed an information against the mayor and the members of the city council of said city, alleging that the city was never legally incorporated and that the defendants were unlawfully exercising the functions of such officers, and praying that the defendants might be cited to appear and *show [649] cause why they should not be ousted from office, and that the incorporation of the city might be declared null and void; that thereupon proceedings were had in the said court which resulted in the entry of a decree on December 15, 1891, ousting the said defendants from their said offices, and declaring the incorporation of the city of San Angelo null and void. It was further alleged that on February 10, 1892, the defendant city was duly incorporated within certain described boundaries; that the territory of the new corporation was all embraced within the boundary lines of the old organization, and, although smaller in area than the territory of that organization, included all the lands thereof actually occupied and inhabited as a town, and all the streets and public buildings of the old city. The plaintiff averred that he was the bearer and owner of sixty of the coupons attached to the said bonds, which were due and unpaid, and asked judgment for the sum of $1,800, with interest on the amount of each of the coupons from the maturity thereof.

In the second count the plaintiff repeated the above allegations, and further alleged that prior to December 15, 1891, the city of San Angelo, as first organized in 1889, sold and delivered the said ten bonds to certain persons residing in St. Louis, Missouri, for the sum of $10,000; that the proceeds of the sale were used by the said city of San Angelo in making its streets; that thereafter the said persons sold, for valuable consideration, some of the bonds to the plaintiff and the remaining ones to certain other persons, from whom the plaintiff subsequently purchased the same; that the plaintiff thus became the owner of all of the

bonds, and of the entire claim against the defendant on account thereof as for money had and received to the plaintiff's use. Upon this cause of action the plaintiff asked judgment for the sum of $10,000, with interest.

The defendant filed its second amended answer on April 2, 1895, which contained various averments of fact, a denial of all the essential allegations of the petition, defenses in the nature of pleas of *non est factum* and of the statute of limitations, and a demurrer, of which nine special causes were stated. Two of the causes of demurrer were as follows:

650]*"2d. Because the said amended petition shows that the corporation which is alleged to have issued the bonds the interest of which is the subject-matter of this suit had been, before the institution of the same, declared null and void by a court of competent jurisdiction, and, as shown by the allegations of said fact, was null and void, and that said corporation as organized in 1889 has therefore ceased to exist and was, in fact, void, and said petition fails to show or aver that any subsequent corporation has ever assumed the debt sued upon or become liable for the payment of same, or that the requisite number of qualified voters of the city of San Angelo ever at any election voted in favor of or received any property of the old corporation or ever voted to assume or pay for the debt of the old or defunct corporation of the city of San Angelo, and said petition wholly fails to show that the necessary and proper elections and each of them were held as a prerequisite to any liability of said defendant."

"4th. Because said amended petition shows that the territory included in the corporation of 1889 was entirely different from that embraced in the new incorporation of 1892, and which is covered by the defendant in this suit, and fails to state any facts which would make said last incorporation liable for said bonds and interest or the debts of the old and first incorporation mentioned therein."

Replication having been filed by the plaintiff, to which the defendant demurred, the case was heard in the said circuit court upon the demurrer to the amended petition, and on April 5, 1895, the demurrer, as to the second and fourth specifications, was sustained. The plaintiff elected to abide by the amended petition, and subsequently judgment having been entered in favor of the defendant, he sued out a writ of error, bringing the case here.

Mr. **T. K. Skinker** for plaintiff in error.
No counsel for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

651] *In January, 1889, the city of San Angelo was existing and acting as an organized municipal corporation, with a mayor, a board of aldermen, and other functionaries. In pursuance of an ordinance of the city council in May, 1889, there were issued the bonds in question in this case. It was not denied that the proceedings were regular in form, that the bonds were duly executed and registered as required by law, that the proceeds of their sale were properly applied to improving the streets and public highways of the city, and that the plaintiff was a bona fide holder for value.

As things then stood, it is plain that the city could not have set up to defeat its obligations any supposed irregularity or illegality in its organization. The state, being the creator of municipal corporations, is the proper party to impeach the validity of their creation. If the state acquiesces in the validity of a municipal corporation, its corporate existence cannot be collaterally attacked.

This is the general rule, and it is recognized in Texas: "If a municipality has been illegally constituted, the state alone can take advantage of the fact in a proper proceeding instituted for the purpose of testing the validity of its charter." *Graham* v. *Greenville*, 67 Tex. 62.

But in 1890, at the fall term of the district court of Tom Green county, an information was filed by the county attorney against named persons, who were exercising and performing the duties, privileges, and functions of a mayor and city council of the city of San Angelo, claiming the same to be a city duly and legally incorporated under the laws of the state, and alleging that said city was not legally incorporated, and that said named persons were unlawfully exercising said functions. Such proceedings were had that on December 15, 1891, the said district court entered a decree ousting the said persons from their said offices, and adjudging that the incorporation of said city of San Angelo be, and the same was thereby, abolished and declared to be null and void. The record does not distinctly disclose the ground upon which the court proceeded in disincorporating said city, but enough appears to justify the inference that the incorporation included *within [652 its limits unimproved pasture lands outside of the territory actually inhabited, and that the incorporation was declared invalid for that reason.

Subsequently, on February 10, 1892, the city of San Angelo was again incorporated, excluding the unimproved lands, but including all the improved part of the prior incorporation, and in which existed the streets and highways in the construction of which the proceeds of the said bonds had been expended.

What was the legal effect of the disincorporation of the city of San Angelo and of its subsequent reincorporation as respects the bonds in suit? Did the decree of the district court of Tom Green county, abolishing the city of San Angelo as incorporated in 1889, operate to render its incorporation void *ab initio*, and to nullify all its debts and obligations created while its validity was unchallenged? Or can it be held, consistently with legal principles, that the abolition of the city government, as at first organized, because of some disregard of law, and its reconstruction so as to include within its limits the public improvements for which bonds had been issued during the first organization, devolved upon the city so reorganized the obligations that would have attached to the original city if the state had continued to acquiesce in the validity of its incorporation?

Such a question was presented in *Broughton* v. *Pensacola*, 93 U. S. 266 [23: 896], and was answered in the following language:

"Although a municipal corporation, as far as it is invested with subordinate legislative powers for local purposes, is a mere instrumentality of the state for the convenient administration of government, yet, when authorized to take stock in a railroad company and issue its obligations in payment of the stock, it is to that extent to be deemed a private corporation, and its obligations are secured by all the guaranties which protect the engagements of private individuals. The inhibition of the Constitution, which preserves against the interference of a state the sacredness of contracts, applies to the liabilities of municipal corporations created by its permission; and although the repeal or modification of the charter of a corporation of that kind is not within **653**] the inhibition, yet it *will not be admitted, where its legislation is susceptible of another construction, that the state has in this way sanctioned an evasion of, or escape from, liabilities the creation of which it authorized. When, therefore, a new form is given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking, in its new organization, the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs; and, in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization. . . . The principle which applies to the state would seem to be applicable to cases of this kind. Obligations contracted by its agents continue against the state, whatever changes may take place in its Constitution or government. 'The new government,' says Wheaton, 'succeeds to the fiscal rights, and is bound to fulfill the fiscal obligations of the former government. It becomes entitled to the public domain and other property of the state, and is bound to pay its debts previously contracted.' So a change in the charter of a municipal corporation, in whole or part, by an amendment of its provisions, or the substitution of a new charter in place of the old one, should not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation, or to relieve it from its previous liabilities." *Mount Pleasant* v. *Beckwith*, 100 U. S. 520 [25: 699].

In *Mobile* v. *Watson*, 116 U. S. 289 [29: 620], it was held that when a municipal corporation with fixed boundaries is dissolved by law, and a new corporation is created by the legislature for the same general purposes, but with new boundaries, embracing less territory but containing substantially the same population, the great mass of the taxable property, and the corporate property of the old corporation, which **654**] passes without consideration *and for the same uses, the debts of the old corporation fall upon the new as its legal successor; and that powers of taxation to pay them, which it had at the time of their creation and which entered into the contracts, also survive and pass into the new corporation.

There are other cases declaring the same views, but which it is needless to cite. The conclusions reached by this court may be thus expressed: The state's plenary power over its municipal corporations to change their organization, to modify their method of internal government, or to abolish them altogether, is not restricted by contracts entered into by the municipality with its creditors or with private parties. An absolute repeal of a municipal charter is therefore effectual so far as it abolishes the old corporate organization; but when the same or substantially the same inhabitants are erected into a new corporation, whether with extended or restricted territorial limits, such new corporation is treated as in law the successor of the old one, entitled to its property rights, and subject to its liabilities. 1 Dill. Mun. Corp. 4th ed. § 172.

This view of the law has been accepted and followed by the supreme court of the state of Texas.

The city of Corpus Christi, organized under the laws of the state of Texas, entered into a contract with Morris and Cummings, a private firm or partnership, whereby the latter were to make certain improvements and works in the bay of Corpus Christi, and the city was to issue bonds in payment, with authority to the holders to collect tolls on vessels passing through the bay until the bonds were paid. The contract was so far executed that the improvements were made and the bonds issued and delivered. Subsequently, by an act of the legislature of the state, the act incorporating the city of Corpus Christi and all other acts relating to the incorporation and franchises of the same were repealed. It was contended that this repeal operated to extinguish all right on the part of Morris and Cummings to collect tolls for the use by vessels of the channel they had constructed; but the court *held:* That, while the power of the legislature to alter or repeal an act *chartering a mu-[**655** nicipal corporation is undoubted, yet that this power cannot be exercised to the injury of creditors of the corporation or of persons holding contracts with it, especially when fully performed on their part so as to entitle them to the compensation provided for in the contract—citing *Mount Pleasant* v. *Beckwith*, 100 U. S. 514 [25: 699]; that the repealing act must be considered in reference to the provision of the Constitution of the United States forbidding the states to pass laws impairing the obligation of a contract, and also to a similar provision in the state Constitution: that the same obligation to perform its contracts rests upon a corporation as upon a natural person; that whilst the legislature may deprive the corporation of its charterial rights and forbid its exercising any of the governmental powers, it must not be presumed that it intended also to absolve it from its liabilities to creditors, or to contractors whose rights to compensation have become vested; and that, accordingly, the act of the legislature, repealing the charter of the city of Corpus Christi, cannot be construed to interfere with

the rights of Morris and Cummings to collect tolls, without violating both the Constitution of the United States and of Texas. *Morris* v. *State, Gussett*, 62 Tex. 730.

This decision was published in 1884, before the transactions in the present case.

The conclusion which is derivable from the authorities cited, and from the principles therein established, is that the disincorporation by legal proceedings of the city of San Angelo did not avoid legally subsisting contracts, and that upon the reincorporation of the same inhabitants and of a territory inclusive of the improvements made under such contracts, the obligation of the old devolved upon the new corporation.

The doctrine successfully invoked in the court below by the defendant, that where a municipal incorporation is wholly void *ab initio*, as being created without warrant of law, it could create no debts and could incur no liabilities, does not, in our opinion, apply to the case of an irregularly organized corporation, which had obtained, by compliance with [656] a general law *authorizing the formation of municipal corporations, an organization valid as against everybody, except the state acting by direct proceedings. Such an organization is merely voidable, and if the state refrains from acting until after debts are created, the obligations are not destroyed by a dissolution of the corporation, but it will be presumed that the state intended that they should be devolved upon the new corporation which succeeded, by operation of law, to the property and improvements of its predecessor.

We come now to consider the legal effect of the act entitled "An Act To Amend Article 541, Chapter 11, Title 17, of the Revised Civil Statutes of the State of Texas," approved April 13, 1891. That act was in the following terms:

"Section 1. When any corporation is abolished, as provided in the preceding article, or if any *de facto* corporation shall be declared void by any court of competent jurisdiction, or if the same shall cease to operate and exercise the functions of such *de facto* corporation, all the property belonging thereto shall be turned over to the county treasurer of the county, and the Commissioners' court of the county shall provide for the sale and disposition of the same and for the settlement of the debts due by the corporation, and for this purpose shall have the power to levy and collect a tax from the inhabitants of said town or village in the same manner as the said corporation would be entitled to under the provisions of this chapter: *Provided*, That when any town or city shall reincorporate under chapters 1 to 11 of title 17 of the Revised Civil Statutes upon a majority of the legal voters tax-paying property holders of said town or city, all property, real and personal, of the old or *de facto* corporation, shall be vested in the new one: *And provided further*, That the new corporation shall assume all the legal indebtedness, contracts, and obligations of the old corporation: *Provided*, Where cities and towns have reincorporated under chapters 1 to 11 of title 17 of the Revised Civil Statutes, prior to the adoption of this act, upon a majority vote of the tax-paying property owners of said city or town, all property, real and personal, of the old or *de facto* corporation shall be vested in the new one: *And provided further*, *That the [657] new corporation shall assume all the legal indebtedness, contracts, and obligations of the old corporation.

"Section 2. In all cases where the commissioners court shall be vested with the authority conferred on them by this act, it shall be the duty of such court to appoint a suitable person to perform the duty of tax collector, whose duty it shall be to collect the tax within the territory comprised in the dissolved corporation, until such legal indebtedness of such corporation has been paid off or until such city or town has been reincorporated, and shall fix his bond in sufficient penalties to protect any fund collected: *Provided*, That such appointee may be removed at any time for carelessness or insufficiency or other good cause." Texas Gen. Laws 1891, chap. 77, p. 95.

The provisions of this act might be reasonably interpreted as consistent with the principles heretofore stated, and as providing a method of enforcing the rights of creditors. But it appears that the supreme court of Texas has construed the act as requiring a vote of the taxpaying voters in favor of assuming the debt before the new incorporation can be held for it. *White* v. *Quanah* (Tex.) 28 S. W. 1065.

If this, indeed, be so,—and it is difficult to reconcile such a view with those previously expressed by that court,—then it would follow, as we think, that said act so construed must be regarded, as respects prior cases, as an act impairing the obligations of existing contracts. If the law, before the passage of the act of 1891, was that, by a voluntary reincorporation and a taking over of the property rights of the old corporation, the existing obligations devolved upon the new corporation, it would plainly not be a legitimate exercise of legislative power, as affecting such prior obligations, to substitute an obligation contingent upon a vote of the taxpayers.

When the bonds in question were issued and became the property of the plaintiff he was entitled, not merely to the contract of payment expressed in the bonds, but to the remedies implied by existing law. *Bronson* v. *Kinzie*, 42 U. S. 1 How. 311 [11: 143]; *Seibert* v. *United States*, 122 U. S. 284 [30: 1161]; *Barnitz* v. *Beverly*, 163 U. S. 118 [41: 93].

*It is unnecessary to restate what is [658] fully expressed in those cases.

As the city of San Angelo was organized under a general statute, which provided for the offices of mayor and secretary for all cities organized under it (1 Sayles's Civ. Stat. title 17, chaps. 2, 11), and if our conclusion be sound that said city, acting as a municipal corporation, though irregularly formed, was competent to contract for municipal purposes, and that the obligations of such contracts devolved by operation of law upon the new corporation, the official action and character of the mayor and secretary in signing and sealing the securities cannot be challenged. Such objection raises merely the same question in another form.

Norton v. *Shelby County*, 118 U. S. 425 [30: 178], is not to the contrary. There certain persons who undertook to act as county com-

missioners were adjudged to be usurpers as against others who were lawful officers, and it was held that, as the act of the legislature which created the board of commissioners was unconstitutional, there were no *de jure* offices, and therefore, no *de jure* officers. But the general rule was recognized that "where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office and executes its powers and functions."

We conclude that the circuit court erred in sustaining the defendant's general exception and special exceptions second and fourth, and that the judgment of that court must be reversed and a new trial awarded. But it is proper that we should observe that we do not desire to be understood as holding that the plaintiff can maintain that count of his amended petition whereby he claims to recover the principal amount of bonds which have not matured. The theory of that count apparently is that the liability of the defendant is of an equitable character, and that the outstanding obligations of the old corporation can be regarded as presently due.

When we hold that the new corporation, under the facts disclosed by this record, is sub-**659**] ject to the obligations of the *preceding corporation, we mean subject to them as existing legal obligations, in manner and form as they would have been enforceable had there been no change of organization.

The judgment of the Circuit Court is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

ST. JOSEPH & GRAND ISLAND RAILROAD COMPANY, *Appt.*,

v.

R. M. STEELE, Sheriff of Doniphan County, Kansas.

(See S. C. Reporter's ed. 659–664.)

Federal question—what is—diverse citizenship—railroad company, when citizen.

1. The power of county and township authorities to tax as a toll bridge for local purposes a railroad bridge built under authority of Congress, with a franchise from Congress to exact tolls, does not present a Federal question which will give jurisdiction to a circuit court of the United States, where the power of the state to tax the property is not denied.
2. A Federal question to confer original jurisdiction on a circuit court of the United States must be a real substantive question upon which the case may be made to turn.
3. An allegation in the complaint that plaintiff is a corporation created and subsisting under and by virtue of the laws of Kansas and Nebraska, and that defendant is a citizen of Kansas, does not show that the parties are citizens of different states.
4. A corporation owning a railroad running through several states in which it receives and exercises powers granted by each is not thereby made a citizen of each for the purpose of giving jurisdiction to a Federal court of an action between it and a citizen of one of those states.

[No. 256.]

Argued March 31 and April 1, 1897. Decided May 24, 1897.

ON APPEAL from a decree of the United States Circuit Court of Appeals for the Eighth Circuit affirming the decree of the Circuit Court of the United States for the District of Kansas dismissing a suit in equity brought by the St. Joseph & Grand Island Railroad Company, plaintiff, against R. M. Steele, sheriff of Doniphan County, Kansas, to restrain him from levying upon and selling the property of said company for taxes assessed and levied against the same. *Decree of Circuit Court of Appeals and of the Circuit Court reversed*, and cause remanded to said circuit court, with directions to dismiss the suit for want of jurisdiction.

See same case below, 27 U. S. App. 436.

Statement by Mr. Justice **Shiras:**

The St. Joseph & Grand Island Railroad Company, describing itself as a corporation created and subsisting under and by virtue of the laws of Kansas and Nebraska, and as a common carrier operating a railroad as a continuous line from the city of Grand Island, in the state of Nebraska, to the city of St. Joseph, in the State of Missouri, which railroad passes through Doniphan county, in the state of Kansas, filed in the circuit court in the United States, for the district of Kansas, a bill of complaint against R. M. Steele, sheriff of said Doniphan county and a citizen of the state of Kansas, seeking to restrain the said Steele as sheriff of Doniphan county from levying upon and selling the complainant's property situated in said county for taxes assessed and levied against the same for the year 1892 by the assessing authorities of Doniphan county.

*The defendant answered; an agreed [**660** statement of facts was filed; and, after argument, a decree was entered dismissing the bill at plaintiff's costs. Thereupon an appeal was taken by the complainant to the United States circuit court of appeals for the eighth circuit, where the decree of the circuit court was affirmed. 27 U. S. App. 436. The case was then brought to this court on appeal.

Messrs. **John M. Thurston** and *John F. Dillon* for appellant.

Messrs. **P. L. Soper** and **J. H. Gillpatrick** for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

The St. Joseph & Grand Island Railroad Company, in its petition filed in the circuit court of the United States for the district of Kansas against R. M. Steele, sheriff of Doniphan county, Kansas, alleged that the contro-

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NOTE.—*As to jurisdiction of Federal courts not given by consent*, see note to Governor of Georgia v. Madrazo, 7: 74.

As to jurisdiction of United States circuit court depending on parties and residence, see note to Emory v. Greenough, 1: 640.

versy in the case involved the construction of an act of Congress approved July 14, 1870, granting to the St. Joseph & Denver City Railroad Company the right to build a bridge and maintain the same across the Missouri river at or near St. Joseph, Missouri; and also of an act of Congress approved March 5, 1872, authorizing and empowering the St. Joseph Bridge Building Company to construct a bridge across the Missouri river at or near St. Joseph, Missouri; that said bridge was built under these acts, and that all of its revenue producing facilities were derived therefrom, and that the controversy was over the right to tax this bridge.

But the other allegations of the bill disclose the case of a dispute arising under the taxing laws of the state of Kansas. One half of said bridge is within Doniphan county. On May 16, 1892, the railroad company returned to the auditor of the state a list and schedule of its property and railroad, including that part of said bridge. Thereupon the state board of railroad assessors for the state of Kansas duly assessed, for the purposes of taxation for the year **661]** 1892, all the property of said *railroad company; the county commissioners of Doniphan county, in pursuance of law, duly fixed and determined the amount of the tax which the railroad company was to pay for the year 1892; and the company duly paid the same to the treasurer of Doniphan county. Subsequently one George Manville, as trustee and assessor of Washington township in Doniphan county, made an assessment of that part of said bridge lying within said township, claiming that the same was subject to taxation in said township as an independent structure and as a toll bridge. Thereupon the county commissioners of Doniphan county, at their regular meeting in the month of June, 1892, acted upon said assessment; and, against the protest of the railroad company, levied upon said portion of the bridge lying within Washington township a tax for the year 1892.

The railroad company alleges in its bill that neither the county nor township authorities of Doniphan county have or had any authority or jurisdiction to assess and levy any taxes whatever upon the bridge property of the company in Doniphan county, but that the said state board of railroad assessors of Kansas had exclusive jurisdiction for assessiug the said property of the company in said county, and asks for an injunction restrainiug the sheriff of said county from selling or offering for sale the said bridge property for the taxes so assessed against the same for the year 1892 by the local authorities of Doniphan county.

It thus appears that the railroad company does not claim that, by virtue of any provisions of the several acts of Congress under which the bridge was built, the company is exonerated from paying taxes on the same within the jurisdiction of the state of Kansas, but its contention is that the bridge is to be regarded as a component part of its railroad, and as such is only taxable by the state board of railroad assessors, and that the county and township authorities cannot legally tax the bridge as a toll bridge for local purposes. The question thus presented, as we understand it, is one to be decided by and under the laws of the state of Kansas. The power of that state to tax the bridge property is not denied, but the argument is made that the *theory and true **[662** meaning of the state taxing laws is to restrict the exercise of that power to the state board of railroad assessors. The contention on the other side is that under the taxing laws of the state of Kansas it was proper for the state board to assess the railroad as an entirety, and for the county authorities to assess the bridge as an independent structure or toll bridge. This position is based on the dual character of the bridge, used, as it is, for both carrying the trains of the railroad company and vehicles and passengers who pay tolls. To give a Federal aspect to this question it is urged that the franchise to exact tolls was conferred on the original builders of the bridge by act of Congress. But this would not raise a Federal question unless it were claimed that, by reason of such grant, the bridge was exempted from state taxation. But the bill and argument of the railroad company, as we have seen, concede the right of the state to tax the bridge, but find fault with the method by which the taxing authorities, state and county, assessed the taxes for 1892,—a question to be decided under the laws of Kansas.

We cannot accede to the proposition that, because the acts of Congress, which authorized the construction of the bridge in question, gave the right to build a railroad and toll bridge, the conceded power of the state to tax did not extend to the bridge in both aspects. Nor can we agree that the making of such a contention raised a Federal question of a character to confer original jurisdiction in the circuit court of the United States. Not every mere allegation of the existence of a Federal question in a controversy will suffice for that purpose. There must be a real substantive question, on which the case may be made to turn. Nor can jurisdiction be inferred argumentatively from the averments in the pleadings, but the averments should be positive. *Hanford* v. *Davies*, 163 U. S. 273, 279 [41: 157, 159].

Finding no Federal question actually presented in the bill on which the circuit court could base the exercise of jurisdiction, we are now to inquire whether such jurisdiction can be found in the character of the controversy as one existing between citizens of different states.

*The allegations of the bill in that **[663** respect were as follows:

"The St. Joseph & Grand Island Railroad Company is a corporation created and subsisting under and by virtue of the laws of Kansas and Nebraska. . . . The defendant is the duly elected, qualified, and acting sheriff of Doniphan county, Kansas, and a citizen thereof."

There is no allegation in the bill as to the nature of such corporation,—whether it originated in special laws or under general laws of those states. Nor does it appear in which state the company was first incorporated. Our examination of the state statutes has led us to suppose that this company was formed by proceedings under general laws providing for consolidating railroad companies in adjoining states.

However this may be, such an allegation as we have here does not show that the railroad company complainant was a citizen of a different state than that of which the defendant was a citizen. Indeed, the allegation is, in effect, that the railroad company and the defendants were citizens of the state of Kansas.

Such a state of the record brings the case directly within *Ohio & M. R. Co.* v. *Wheeler*, 66 U. S. 1 Black, 286 [17: 130], where it was held that a corporation endued with its capacities and facilities by the co-operating legislation of two states cannot have one and the same legal being in both states; that neither state can confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised; and that two corporations deriving their powers from distinct sovereignties, and exercising them within distinct limits, cannot unite as plaintiffs in a suit in a court of the United States against a citizen of either of the states which chartered them.

While a railroad company owning and operating a line running through several states may receive and exercise powers granted by each, and may for many purposes be regarded as a corporation of each, such legislation does not avail to make the same corporation a citizen of every state it passes through, within the meaning of the jurisdiction clause of the Con-[**664**] stitution of the United *States. *Memphis & C. R. Co.* v. *Alabama*, 107 U. S. 581 [27: 518]; *St. Louis & S. F. R. Co.* v. *James*, 161 U. S. 545 [40: 802].

The decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court for the District of Kansas is likewise reversed, and the cause is remanded to that court, with directions to dismiss bill of complaint for want of jurisdiction; the costs in this court to be paid by appellant.

UNITED STATES, *Appt.*,
v.
JAMES C. REED.

(See S. C. Reporter's ed. 664–673.)

Office rent and expenses of shipping commissioner.

Office rent and incidental expenses of a shipping commissioner which were properly allowed him under the act of Congress of June 26, 1884, and under the action of the Secretary of the Treasury fixing his compensation, must be allowed him under the act of June 19, 1886, providing for such commissioners such compensation "as each would have received prior to the passage of the act."

[Nos. 189, 190.]

Argued March 10, 11, 1897. Decided May 24, 1897.

APPEALS from decrees of the United States Circuit Court of Appeals for the Second Circuit affirming the judgment of the Circuit Court of the United States for the Southern District of New York in favor of James C. Reed, shipping commissioner, plaintiff, against the United States for the sum of $3,125 for disbursements and rents incurred by the plaintiff as such commissioner in No. 189, and in No. 190 for the sum of $4,033.71 for disbursements and expenditures made by plaintiff in discharge of his duties as such commissioner. *Affirmed.*

Statement by Mr. Justice **Shiras:**

These were suits brought by James C. Reed, shipping commissioner of the United States at the port of New York, to recover, respectively, the amount expended by him for rent of office and storage rooms for his official use from March 1, 1891, to April 1, 1893, and the amount of certain expenses which he incurred between July 1, 1886, and March 1, 1891, in maintaining his office and discharging his duties, including rent of the said rooms from April 1, 1890, to March 1, 1891.

The petition in No. 189, asking judgment for the sum of $3,125, was filed in the circuit court of the United States for the southern district of New York on April 7, 1893. The government filed a general answer on June 21 of the same year, and the case was referred, by consent, to a referee, who took the evidence presented by the parties and reported the same, together with his opinion, to the court. Upon the coming *in of this report, the court, on Au-[**665** gust 26, 1893, filed its findings of fact and conclusions of law. The facts stated in the findings were substantially as follows:

The petitioner assumed the duties of his office prior to July 1, 1884, and on or about August 26 of that year the Secretary of the Treasury, pursuant to the provisions of the act of Congress entitled "An Act To Remove Certain Burdens on the American Merchant Marine, and Encourage the American Foreign Carrying Trade, and for Other Purposes," approved June 26, 1884, fixed the compensation of the petitioner at the sum of $4,000 per annum, and in addition thereto one half of the net surplus of the receipts of his office from fees earned, less the amount of salaries and expenses paid; limiting the amount of such compensation, however, to the maximum sum of $5,000 in any one year. The petitioner continued to hold the office and discharge the duties thereof from July 1, 1884, to the date of the filing of the said findings of fact, and within the period between July 1, 1884, and April 1, 1893, no change was made in the amount of his compensation, and the same was allowed and paid him at the rate of $5,000 per year. For the time between the opening of the fiscal year commencing March 1, 1891, and April 1, 1893, the surplus earnings of the office, of service fees, exceeded the necessary expenses incident to the conduct of the business of the office, including the compensation of the petitioner, by the sum of $14,551.29.

From July 1, 1884, to May 20, 1886, the office of the petitioner was situated at 187 Cherry street, in the city of New York, and the rental of the premises, together with all other expenses incident to the office of shipping commissioner and to the discharge of the duties thereof, were paid by the United States. On or about May 20, 1886, the office was removed,

NOTE.—*As to extra pay or compensation to officers*, see note to United States v. Macdaniel, 8: 587.

by direction of the Secretary of the Treasury, from Cherry street to the United States barge office, in the said city, a building owned by the government, and the expenses incident to the removal and to the fitting up of the petitioner's office in that building were paid by the United States.

On or about April 10, 1890, the petitioner, by direction of the Secretary of the Treasury, re-
666] moved from the barge office, *and procured offices at 25 Pearl street, and storage room for deceased seamen's effects at 19 Pearl street, at an annual rental of $1,500. Between March 1, 1891, and April 1, 1893, the petitioner incurred expenses, and was obliged to make and did make disbursements on account of rent of the said premises in Pearl street, amounting in the aggregate to the sum of $3,125.

The court further found that the said expenditures were incident to the office of shipping commissioner; that the said sum was a reasonable charge for the said premises; that the United States duly authorized the occupation by the petitioner of the premises and the expenditures incurred and proposed to be incurred therefor; that the petitioner had duly demanded the said amount from the United States, and that no part thereof had been paid.

In No. 190, the petition, asking judgment for $4,035.17, was filed in the said court on March 27, 1891, and the general answer of the government on June 10, 1891. The court's findings of fact and conclusions of law were filed April 6, 1893, on which day, reference of the case having theretofore been made as in No. 189, the report of the referee was submitted.

The findings in this case were essentially similar to those in No. 189 concerning the fixing of the petitioner's compensation, his continuance in office and his receipt of the maximum compensation during the time covered by his claim, his occupation of rooms in Cherry street, and his removal therefrom to the barge office, and thence, on April 10, 1890, to rooms in Pearl street, and the payment by the United States of the expenses of the office in Cherry street and of the removal to the barge office. The court further found that for the period between the opening of the fiscal year commencing July 1, 1886, and March 1, 1891, the surplus earnings of the office of the petitioner of service fees exceeded the necessary expenses incident to the discharge of the duties of the office, including the compensation of the petitioner, by the sum of $24,795.01; that between July 1, 1886, and March 1, 1891, the petitioner incurred sundry expenses, and was obliged to make
667] and did make *sundry disbursements amounting in the aggregate to $4,033.71 for necessaries incident to the duties imposed upon him by statute as shipping commissioner, including rent of the said office and storage rooms in Pearl street from April 10, 1890, to March 1, 1891, furnishing cost of removal, stationery, telephone, maritime register, ice, freight on blanks, safe deposit vault, telegrams, repairs, etc.; that the said amount was a reasonable expenditure for the purposes for which it was disbursed; that reports were made monthly by the petitioner to the Secretary of the Treasury, which reports contained the items of the receipts of the office and of the expenditures incurred and proposed to be incurred; that the petitioner had demanded of the United States payment of the said sum, and that no part of the same had been paid.

The court's conclusions of law in each case were "that the Secretary of the Treasury was authorized to determine the compensation of the petitioner as shipping commissioner at the port of New York, and having exercised such authority, the compensation of the petitioner remained as so fixed (to wit, $5,000 per annum); that the Secretary of the Treasury is authorized to regulate the mode of conducting the business in the shipping offices; that all expenditures made by shipping commissioners in discharge of their duties imposed upon them by the statutes of the United States or the regulations of the Treasury Department are to be audited and adjusted in the Treasury Department." Further, as conclusions of law, the court found in No. 189 that the petitioner was entitled to have and receive from the United States the sum of $3,125, and in No. 190 that he was entitled to have and receive from the United States the sum of $4,033.71. Judgment in No. 189, for the sum of $3,125, was rendered in favor of the petitioner on August 26, 1893, and in No. 190, for the sum of $4,033.71, on April 6, 1893.

In each case an appeal was taken by the government to the United States circuit court of appeals for the second circuit, where on June 4, 1894, and May 2, 1894, respectively, the said judgments were affirmed. On October 5, 1894, the government appealed in each case to this court.

Messrs. **Joshua Eric Dodge,** Assistant Attorney General, and *Samuel A. Putnam* for appellant.

Messrs. **G. E. P. Howard** and *Elihu Root* for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

These are appeals from the United States circuit court of appeals for the second circuit.

James C. Reed, the appellee, who for several years was the shipping commissioner at the port of New York, obtained judgments in the circuit court for the southern district of New York, for moneys which he had expended and disbursed between the 1st day of July, 1886, and the 1st day of April, 1893, in payment of expenses incident to the discharge of the duties imposed upon him as such shipping commissioner by the statutes of the United States.

In No. 189 the only question involved is the right of the appellee to be reimbursed for the rent of the commissioner's offices.

No. 190 involves both the question of rent for another period of time, and the further question of the right to be reimbursed for certain other expenses incidental to the office.

Reed was originally appointed shipping commissioner by the circuit court for the southern district of New York on May 12, 1884. At that time the law relating to the duties and compensation of that office was contained in U. S. Rev. Stat. §§ 4501, 4505, 4507, 4592, 4593, and 4594.

By the principal provisions of these sections,

affecting the matter in hand, the commissioner was authorized to employ clerks to assist him in the transaction of the business at his own proper cost, and to lease, rent, or procure, at his own cost, suitable premises for the transaction of business, and for the preservation of the books and other documents connected therewith—which premises should be styled the shipping commissioner's office. Certain fees **669**]for the several acts of *service were made payable to the commissioner, for which a fee-bill was to be prepared and conspicuously placed in the office. Out of such fees, for the purpose of reimbursing himself, the commissioner was entitled to deduct and retain any sums not exceeding the sums specified in the schedule, but it was provided, in § 4594, that "in no case should the salary, fees, and emoluments of any officer appointed under this title be more than $5,000 per annum, and any additional fees should be paid into the treasury of the United States."

By the act of June 26, 1884, Congress amended the law, as follows:

"Sec. 27. That § 4501 of the Revised Statutes is hereby amended so as to read as follows:

"Sec. 4501. The Secretary of the Treasury shall appoint a commissioner for each port of entry which is also a port of ocean navigation, and which, in his judgment, may require the same; such commissioner to be termed a shipping commissioner, and may, from time to time, remove from office any such commissioner whom he may have reason to believe does not properly perform his duty, and shall then provide for the proper performance of his duties until another person is duly appointed in his place; provided, that shipping commissioners now in office shall continue to perform the duties thereof until others shall be appointed in their places. Shipping commissioners shall monthly render a full, exact, and itemized account of their receipts and expenditures to the Secretary of the Treasury, who shall determine their compensation, and shall from time to time determine the number and compensation of the clerks appointed by such commissioner, with the approval of the Secretary of the Treasury, subject to the limitations now fixed by law. The Secretary of the Treasury shall regulate the mode of conducting business in the shipping offices to be established by the shipping commissioners as hereinafter provided, and shall have full and complete control over the same, subject to the provisions herein contained; and all expenditures by shipping commissioners shall be audited and adjusted in the Treasury Depart-**670**]ment in the mode and manner *provided for expenditures in the collection of customs. All fees of shipping commissioners shall be paid into the Treasury of the United States, and shall constitute a fund which shall be used under the direction of the Secretary of the Treasury to pay the compensation of said commissioners and their clerks and such other expenses as he may find necessary to insure the proper administration of their duties." 23 Stat. at L. 59.

Reed was continued in office by the appointment of the Secretary of the Treasury under this act of 1884, and remained in the discharge of his duties until after the 1st of April, 1893.

In pursuance of that provision of the act of 1884, which directed that the Secretary of the Treasury should determine the compensation of the shipping commissioner, that officer, on September 12, 1884, wrote to Reed that the department, on August 26, had determined to allow him compensation as shipping commissioner at the rate of $4,000 per annum and one half of the net surplus of the fees collected by him after the payment of salaries and expenses authorized, "such compensation not to exceed the maximum limited by law, it being understood that from such compensation you shall pay all your official expenses except for employees and rent, and that the compensation and all expenses shall not exceed the aggregate of the fees collected and deposited during the year."

Under this arrangement Reed rendered monthly accounts, charging against the fees earned in his office both the rent of the office occupied by him and all the other expenses of the character included in the present judgments, and all of these charges were regularly allowed to him by the Secretary of the Treasury down to and including the month of June, 1886.

In June, 1886, offices were provided for the shipping commissioner of New York in the barge office, a government building at that port. He removed to the barge office, and the expenses of his removal were audited and allowed by the Secretary of the Treasury under date of June 18, 1886.

On June 19, 1886, the law was further amended by an act which abolished the payment of fees, and which provided that shipping commissioners who theretofore had been paid wholly *or partly by fees should [**671** make a detailed report of such services, and the fees provided by law, to the Secretary of the Treasury, under such regulation as that officer should prescribe; and that the Secretary of the Treasury should allow and pay, from any money in the treasury not otherwise appropriated, said officers such compensation for said services as each would have received prior to the passage of the act; also such compensation to clerks of shipping commissioners as would have been paid them had the act not been passed; provided that such services had, in the opinion of the Secretary of the Treasury, been necessarily rendered. 24 Stat. at L. 79.

After and since the passage of this last statute the Secretary of the Treasury failed to allow to Reed any of his expenses, for rent or otherwise, upon the ground that Congress had failed to make any appropriation for that purpose; and Reed continued to pay out of his own pocket said rent and expenses until the expiration of his term of office. During this period the Secretary of the Treasury sent several communications to Congress, reminding that body that since July, 1886, no appropriations had been made to cover the expenses of the office of shipping commissioners, and recommending that such appropriations should be made.

It is not claimed on behalf of the government that the rent and expenses included in the judgment were not proper and necessary and actually incurred and paid by him.

Reed's compensation was fixed by the Secre-

tary of the Treasury, under the act of 1884, at the rate of $4,000, and one half of the net surplus collected by him after the payment of salaries and expenses authorized, and it was also directed by the Secretary that Reed should pay all official expenses except for employees and rent. By the act of 1886 it was provided that his compensation would be such as he would have received had that act not been passed.

We agree with the court of appeals in thinking that the act of 1886 did not repeal the provisions of the act of 1884 as respects expenditures by shipping commissioners other than for clerks. There is no repealing clause, 672] there is no reference *to such expenditures, nor any implication of any intention to impose the burden of maintaining suitable premises for the transaction of the business upon the commissioner, and we think that the commissioner was not required, under the act of 1886, to pay out of his compensation expenses of the office which before that act were paid by the government. If before the act of 1886 Reed received $5,000 for services and the government paid the rent and other expenses, and after the passage of the act he would receive $5,000 and pay the rent and expenses himself, he could not, under the latter construction, receive the same compensation as before.

It is true that under the Revised Statutes prior to the act of 1884, the commissioner was to lease, rent, or procure at his own cost the premises in which to do business, and had also to pay all the other expenses of his office. But during that period he had all the fees of the office. The fees were taken from him by the act of 1884, and the treasury was directed by that act to assume payment of all expenses, as is seen in its language, as follows:

"All expenditures by shipping commissioners shall be audited and adjusted in the Treasury Department in the mode and manner provided for expenditures in the collection of customs. All fees of shipping commissioners shall be paid into the treasury of the United States, and shall constitute a fund which shall be used under the direction of the Secretary of the Treasury to pay the compensation of said commissioners and their clerks, and such other expenses as he may find necessary to insure the proper administration of their duties." 23 Stat. at L. 59.

The record discloses that the Secretary of the Treasury construed the act of 1884 as directing him to allow for rent and expenses similar to those included in these judgments; and that he did not contend that the act of 1886 changed the rights of the commissioner in these particulars, but that he excused the nonpayment of rent and expenses because Congress had failed to make the proper appropriation.

The government's brief cites the case of the *United States* v. *Gunnison*, 155 U. S. 389 [39: 195]. But that was a case where it was held that 673]*a shipping commissioner at Mobile was not entitled to moneys paid for clerk hire, for the reason that the Secretary of the Treasury had formally notified the shipping commissioner, previous to the time for which the clerk hire was claimed, that his compensation would be limited to $100 per month, and that no additional compensation would be allowed. When he presented his vouchers, including the items for clerk hire, the Secretary approved them only for $100 per month.

The government's claim that the commissioner was to meet rent and expenses out of his salary might result in the application of his entire salary to that purpose. We are not willing to construe the statute so as to require so unreasonable a result.

Without pursuing the subject into further detail, we are of opinion that the circuit court did not err in sustaining the commissioner's claims for reimbursement, and *the decree of the circuit court of appeals is accordingly affirmed.*

ROBERT G. HEDRICK, *Plff. in Err.*,
v.
ATCHISON, TOPEKA, & SANTA FÉ RAILROAD COMPANY, James G. Wilson, and John G. Sanders.

(See S. C. Reporter's ed. 673-681.)

Findings of fact conclusive—possession of land, notice of rights therein.

1. Findings of fact are conclusive upon the Supreme Court of the United States on writ of error to a state court.
2. One who obtains a patent from the United States for land, with full knowledge of the rights, equities, and estate therein of a person who is in possession of the land and has attempted to locate a military bounty land warrant thereon, although by mistake the land is registered in the application as being in range 17, instead of range 14, takes the patent as trustee for the equitable owner.

[No. 154.]

Argued January 14, 1897. Decided May 24, 1897.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment of that court affirming the decree of the Circuit Court of Adair County, Missouri, in favor of the defendant, the Atchison, Topeka, & Santa Fé Railroad Company, in an action of ejectment brought by Robert G. Hedrick, plaintiff, against said company to recover possession of part of the company's right of way, decreeing that the plaintiff be devested of all right, title, and interest in the premises, etc. *Affirmed.*

See same case below, 120 Mo. 516.

Statement by Mr. Justice **Shiras:**

*Robert G. Hedrick filed his petition in 674] the circuit court of Adair county, Missouri, on October 14, 1890, against the Atchison, Topeka, & Santa Fé Railroad Company, seeking to recover possession of the portion of the defendant company's right of way which ex-

NOTE.—*As to review by United States Supreme Court of territorial decisions; extent and manner of; distinction between an appeal and a writ of error,*—see note to Miners' Bank v. Iowa, 13: 867.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands, how construed, see note to Watts v. Lindsey, 5: 423.

tended through the west half of the southeast quarter of section 28, township 61, range 14, in said county. The defendant company answered, as did also James G. Wilson and John G. Sanders, who, upon their own application, were made parties defendant. The plaintiff subsequently filed replications, and on May 5, 1891, the said court entered the following decree:

"Now at this day this cause coming on to be heard, the parties appear by their respective attorneys, and answer ready for trial, and, a jury being waived, the cause is submitted to the court.

"And the court having seen and heard the allegations and proofs of the parties, and being fully informed in the premises, doth find that this is an action of ejectment for the premises described in plaintiff's petition brought by the plaintiff against the defendant, the Atchison, Topeka, & Santa Fé Railroad Company, and that the defendants, Wilson and Sanders, have on their own motion been made parties defendant; that the said defendant railroad company is the lessee of the Chicago, Santa Fé, & California Railway Company of Iowa, which company is the grantee of the defendants Wilson and Sanders by general warranty deeds for the land in controversy; that the defendant Sanders is the grantee of said Wilson for a part of the said premises; that said Wilson is the grantee by mesne conveyances of warranty of one William E. Parcells, who is the grantee of one William A. Lane by general warranty deed of date April 15, 1875; that said Lane is the grantee of one Cavil M. Freeman by general warranty deed of date the — day of January, 1860.

"That on July 25, 1860, said Freeman, at the district land office at Milan, Missouri, where said land was subject to entry, located military county land warrant No. 8470 (act of Congress of March 3, 1855), upon the west half of the southeast quarter of section 28, town-
675] ship 61 north, range 14 west, *of the fifth principal meridian (which includes the land in question), and thereupon received a certificate of entry for said west half from the register of said land office, which entry was duly and properly posted on the books and records of said land office by proper notations and entries in the tract books, the plat book, and the monthly abstract book, but by mistake and oversight said land was described in the application as being in range 17, instead of range 14.

"That said Freeman sold said land as aforesaid, and paid taxes thereon, and his grantees have ever since paid taxes thereon and exercised acts of ownership over said land, and since April, 1875, have been in the actual, constant, continuous, and uninterrupted occupancy of said premises, making lasting and valuable and permanent improvements thereon, such as fencing, dwellings, and barns, and building a railroad thereon; that the plat book in the office of the county clerk of Adair county, certified by the register of the land office in 1866, shows that said west half, in range 14, had been entered and located by said Freeman, and the books in said land office continued to show said entry of said Freeman until some time subsequent to 1874, when first alterations and additions began to be made; and the court finds that said Freeman intended to and did enter said west half, in range 14, and the land officers in the land office at Milan, Missouri, knew said intention of said Freeman, and that he intended to enter said tract, and they intended him to enter said tract; and that thereby he became and was vested and possessed of the equitable right and estate in and to said tract, and became and was entitled to a patent to said land from the government.

"That on September 1, 1885, while defendants Wilson and Sanders were in the actual occupancy and possession of said premises, plaintiff taking advantage of the mistake made in said application, by his agent, A. C. Widdicombe, who was also his son-in-law, and an expert lawyer, who had full knowledge of the original entries and notations in said books and records of the land office, as well as of the additions, alterations, erasures and defacements of said books and records then and now existing, made application to enter said tract of land, and did *thereafter, on the 20th [676
day of July, 1886, secure a patent for said land.

"And the court further finds that the plaintiff is not a purchaser of said land in good faith without notice of the defendants' estate therein, but he is chargeable with full knowledge of all the rights, equities, and estate of defendants in and to the said premises, and holds the legal title, evidenced by said patent, as trustee for the defendant railroad company's lessor, the Chicago, Santa Fé, & California Railway Company, and that plaintiff is not entitled to recover in this action.

"Wherefore it is by the court considered, ordered, adjudged, and decreed that plaintiff be, and he is hereby, devested of all right, title, interest, and estate in and to the premises described in the petition as follows, to wit: A strip of land 100 feet wide on the north and west of the Santa Fé survey, and 50 feet wide on the south and east of said survey through the northwest quarter of the southeast quarter of section 28, in township 61, of range 14; and also a tract of land 100 feet wide on each side of and along the center line of said railway company's survey from where it enters the southwest quarter of the southeast quarter of section 28, township 61, of range 14, at station No. 7078-39 for a distance of 111 feet to station No. 7079-50; thence a tract of land 50 feet in width on the north and west side of said survey for a distance of 450 feet to station No. 7084; thence 100 feet on north and west side of said survey and 50 feet on south and east side of said survey for a distance of 1,310 feet to station No. 7097-10, to where said survey leaves said last-described 40 acres and as the same is located over and across the said southwest quarter of the southeast quarter of section 28, township 61, range 14, all the said described premises being the same land claimed and occupied by said railway company, situate in the west half of the southeast quarter of section 28, township 61, range 14, in the county of Adair and state of Missouri; and that all the said right, title, interest, and estate accruing to plaintiff by reason of said patent be and the same is hereby vested in the said Chicago, Santa Fé, & California Railway Company as *fully and completely as plaintiff might [677
or could do so by regular warranty deed duly executed according to law."

The plaintiff appealed to the supreme court.

of the state of Missouri, and upon the affirmance by that court of the said decree, he sued out a writ of error from this court.

Messrs. **Marcus T. C. Williams** and *Albert C. Widdicombe* for plaintiff in error.

Messrs. **Samuel W. Moore,** *Ben Eli Guthrie, Gardiner Lathrop,* and *Joseph Park* for defendants in error.

Mr. Justice **Shiras** delivered the opinion of the court:

This was an action of ejectment brought and tried in the circuit court of Adair county, Missouri. At the trial a jury was waived, and the court made a finding of facts, and thereupon entered judgment in favor of the defendants. Upon a writ of error to the supreme court of Missouri the findings by the circuit court were received as conclusive upon all the facts in issue, although, indeed, as we learn from its opinion, that court reviewed all the evidence, reaching the same conclusions with those found by the circuit court. 120 Mo. 516.

The findings of fact by the trial court and by the supreme court of the state are, in this writ of error, conclusive upon us. *Republican River Bridge Co.* v. *Kansas P. R. Co.* 92 U. S. 315 [23: 515]; *Dower* v. *Richards*, 151 U. S. 658, 672 [38: 305, 310]; *Egan* v. *Hart*, 165 U. S. 193, [41: 682].

Our only inquiry, therefore, is whether, upon the facts so found, the defendants in the court below were entitled to the judgment therein rendered.

The decisive facts were that, on July 25, 1856, Cavil M. Freeman, at the district land office at Milan, Missouri, where the land in controversy was subject to entry, located military bounty land warrant number 8470 isued **678]** under act of Congress, *March 3, 1855, upon the west half of the southeast quarter of section 28, township 61 north, range 14 west, of the fifth principal meridian, which includes the land in question, and thereupon received a certificate of entry for the same from the register of said land office, which entry was duly and properly posted on the books and records of said land office by proper notations and entries in the tract books, the plat book, and the monthly abstract book, but by mistake and oversight said land was registered in the application as being in range 17, instead of range 14; that said Freeman, having entered upon said land and paid taxes thereon, sold the same, and that his grantees have ever since paid taxes thereon, have exercised acts of ownership, and since April, 1875, have been in the actual and uninterrupted possession of said premises, and have made lasting and valuable and permanent improvements thereon, such as fencing, dwellings, and barns, and a railroad thereon; that the plat book in the office of the county clerk of Adair county, certified by the register of the land office in 1866, shows said west half, in range 14, had been entered and located by said Freeman, and the books in said land office continued to show said entry of said Freeman until some time subsequent to 1874, when first alterations and additions began to be made; that said Freeman intended to and did enter said west half, in range 14, and that the land officers in the land office at Milan knew said intention of said Freeman, and that he intended to enter said tract, and that they intended him to enter said tract; that thereby he became and was vested and possessed of the equitable right and estate in and to said tract, and was entitled to a patent to said land from the government; that on September 1, 1885, whilst defendants were in the actual occupancy and possession of said premises, plaintiff, taking advantage of the mistake made in said application by his agent, A. C. Widdicombe, who was also his son-in-law, and an expert lawyer, who had full knowledge of the original entries and notations in said books and records of the land office, as well as of the additions, alterations, erasures, and defacements of said books and records then existing, made application to enter said tract of *land, and **[679** did, thereafter, on the 20th day of July, 1886, receive a patent for said land; that the plaintiff was not a purchaser of said land in good faith, without notice of the defendants' estate therein, but was chargeable with full knowledge of all the rights, equities, and estate of defendants in and to the said premises.

The legal conclusion reached by the state courts upon such a state of facts was that the plaintiff was not entitled to recover, and that he held the legal title evidenced by said patent as trustee for the defendants. The propriety of that conclusion can be manifested by the citation of a few decisions of this court.

Wirth v. *Branson*, 98 U. S. 118 [25: 86], was, like the present, the case of a contest between the locator of a military bounty land warrant and a party who had subsequently obtained a patent for the same tract; and it was held that, as the land in question was shown to have been located under a regular military land warrant, a subsequent location, though followed by a patent, would be void; that, as everything was done by the locator of the warrant to entitle him to a patent, the land became segregated from the public domain, and was subjected to private ownership and all the incidents and liabilities thereof; and it was said that "the rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location of entry be vacated and set aside."

Widdicombe v. *Childers*, 124 U. S. 400 [31: 427], came to this court on a writ of error to the supreme court of Missouri. In its facts it closely resembles the present one. The suit was brought by Widdicombe to recover the possession of the southeast quarter, section 36, township 64, range 6, Clarke county, Missouri. He claimed title under a patent of the United States, bearing date of *December **[680** 15, 1871, issued upon a location of agricultural scrip on May 10, 1871. As an equitable defense to the action, such a defense being per-

missible by the laws of Missouri, the defendants alleged in substance that they claimed title under Edward Jenner Smith, who, on July 6, 1836, went to the proper land office and made application for the purchase of the land in dispute; that his application was duly accepted and he completed the purchase by the payment of the purchase money as required by law; that the entries made at the time by the proper officers in the plat and tract books kept in the office showed that he had bought and paid for the southeast quarter, but that the register, in writing his application, described the southwest quarter by mistake; that he signed the application without discovering the error; that he immediately went into possession of the southeast quarter as and for the land he had purchased, and he and those claiming under him have asserted title thereto and paid taxes thereon ever since; that afterwards the entries on the plat and tract books were changed, without authority of law, so as to show that his purchase had been of the southwest quarter instead of the southeast quarter; that Widdicombe located his scrip on the southeast quarter with full knowledge of all the facts, and that he now held the legal title under his patent in trust for those claiming under Smith, whom the defendants represented in the suit. The trial court found the facts to be substantially as stated in the answer; and the supreme court of Missouri affirmed the finding and rendered judgment in favor of defendants, requiring Widdicombe to convey in accordance with the prayer of the answer. The case was brought to this court on a writ of error, and the judgment of the state court was affirmed. In the course of the opinion it was said by Mr. Chief Justice Waite:

"The mistake in this case does not appear to have been discovered by Smith, or those claiming under him, until after Widdicombe had got his patent, and after they had been in the undisputed enjoyment for thirty-five years and more of what they supposed was their own property under a completed purchase, with the price fully paid. Widdicombe, being a purchaser with full knowledge of their rights, was in law a purchaser in bad faith, and as **681**] their equities were superior to *his, they were enforceable against him, even though he had secured a patent vesting the legal title in himself. Under such circumstances a court of chancery can charge him as trustee and compel a conveyance which shall convert the superior equity into a paramount legal title. . . . The holder of a legal title in bad faith must always yield to a superior equity. As against the United States his title may be good, but not as against one who had acquired a prior right from the United States in force when his purchase was made under which his patent issued. The patent vested him with the legal title, but it did not determine the equitable relations between him and third persons. *Townsend* v. *Greeley*, 72 U. S. 5 Wall. 326 [18: 547]; *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 [20: 485]; *Wirth* v. *Branson*, 98 U. S. 118 [25: 86]; *Marquez* v. *Frisbie*, 101 U. S. 473 [25: 800]."

Further discussion is unnecessary. *The judgment of the Supreme Court of Missouri is affirmed.*

BROOKE MACKALL, *Appt.*,

v.

WESTEL WILLOUGHBY.

(See S. C. Reporter's ed. 681-688.)

Contract for attorney's compensation.

A contract to give an attorney as compensation for services in three suits 50 per cent of the mesne profits, damages, and costs which may be recovered in one of them, provided that if this amounts to less than $5,000 he shall "have such sum of $5,000," and "have a lien therefor upon said judgment and property as may be recovered," entitles him to a lien for that amount on property the title to which is successfully defended for the client in one of the other suits, although he failed of recovery in the action which he brought for mesne profits.

[Nos. 274, 281.]

Argued April 21, 22, 1897. Decided May 24, 1897.

APPEALS from decrees of the Court of Appeals of the District of Columbia; the decree in No. 274, reversing the decree of the Supreme Court of said District dismissing a suit in equity brought by Westel Willoughby against Brooke Mackall *et al.* to establish an indebtedness of the defendant Mackall to the plaintiff Willoughby and to charge such indebtedness on certain land in the city of Washington; and the decree of the Court of Appeals in No. 281 is one dismissing an appeal to that court from said Supreme Court in the same case. *Affirmed.*

See same case below, 5 App. D. C. 162, 6 App. D. C. 125.

Statement by Mr. Justice **Shiras:**

In May, 1892, Westel Willoughby filed a bill of complaint in the supreme court of the District of Columbia against Brooke Mackall, the Mutual Fire Insurance Company, Samuel C. Wilson, trustee, and Leonard Mackall, trustee, and Oliver Thompson, trustee. The principal object of the bill was to establish an alleged indebtedness of Brooke Mackall to the complainant and to charge such indebtedness on certain land situated in the city of Washington. To this bill a demurrer was filed on the part of Brooke Mackall, which was sustained, and a decree was entered that the bill be dismissed. On appeal to the court of appeals of the District of Columbia at November term, 1893, the decree of the supreme court of the district was reversed, and the cause was remanded to that court for further proceedings. The other defendants disclaimed, and proceedings against them were discontinued, but Brooke Mackall answered and filed a cross-bill. The cause was put at issue and evidence adduced. On May 29, 1894, the supreme court of the district, upon final hearing, dismissed the original bill and the cross-bill, but without prejudice to a certain action at law pending between the parties. On Jan-

NOTE.—*As to attorney's compensation contingent on success or from proceeds of suit; a fixed sum or a percentage; purchase of interest in the suit or subject of litigation by attorney,*—see note to McMicken v. Perin, 15: 504.

As to lien of an attorney for compensation, see note to Texas v. White, 19: 992.

uary 24, 1895. a mandate was issued by the court of appeals of the district, reciting that the decree of the supreme court of the District had been reversed, and remanding the cause to that court with directions to pass a final decree in conformity with the opinion of the court of appeals.

In the supreme court of the district on January 30, 1895, a final decree was entered, adjudging an indebtedness of Brooke Mackall to the complainant in the sum of $5,000, with interest from November 24, 1884, and decreeing that the same was a lien upon the land described in the bill and that said land be sold, etc. On February 7, 1895, an appeal was taken from this decree to the court of appeals, **683**] which *court, on motion, dismissed said appeal on May 17, 1895. 5 App. D. C. 162.

It appears by the record that on January 23, 1895, the defendant moved, in the court of appeals, at No. 361, January term of that court, for allowance of an appeal from the decree of the court of appeals, entered in January, 1895, to the Supreme Court of the United States, and this appeal appears to have been allowed on May 3, 1895, and constitutes No. 274, October 7, 1896, of the records of this court. An appeal from the decree of the court of appeals of April 23, 1895 (6 App. D. C. 125) dismissing, on motion, the appeal to that court was taken on April 23, 1895, and constitutes No. 281, October term, 1896, on the records of this court.

Mr. **Henry E. Davis** for appellant.
Mr. **Arthur A. Birney** for appellee.

Mr. Justice **Shiras** delivered the opinion of the Court:

The vital question depends for its answer on the interpretation to be given to the contract between the parties. It is in the following words and figures:

"This agreement made this 10th day of April, 1883, between Brooke Mackall, Jr., and Westel Willoughby, witnesseth:

"That whereas the said W. Willoughby has been for a considerable period acting as counsel in the case of *Alfred Richards and others* v. *Brooke Mackall and others*, No. 2373, in equity, in the supreme court of the district of Columbia, and which is now pending before the Supreme Court of the United States, for the defendants in said suit, and whereas he is counsel for the plaintiff in the case of *Brooke Mackall, Jr.*, v. *Alfred Richards and others*, in equity, No. 8118, in the supreme court of the District of Columbia, and he is also counsel for the defendant in the case of *Leonard Mackall and others* v. *Brooke Mackall, Jr.*, No. 8038, in equity, in said court:

684] *"Now, therefore, in consideration of the services of said W. Willoughby as such counsel, performed and to be performed, he hereby agreeing to conduct the said abovementioned suit of Richards and others, No. 2373, to a final termination and adjudication by the court of last resort to the best of his ability as such counsel, the said Brooke Mackall, Jr., hereby agrees to allow and to pay to him as compensation for such services, in addition to what has already been received by him, a sum equal to 50 per cent of such money as may be adjudged to the said B. Mackall, Jr., as aforesaid, and which may be recovered in said suit of *Brooke Mackall, Jr.*, v. *Richards and others*, in equity, No. 8118, by way of mesne profits, damages, and costs, provided, that if such 50 per cent be less than $5,000, the said W Willoughby shall have such sum of $5,000, and the said W. Willoughby shall have a lien therefor upon said judgment and property as may be recovered against the said Alfred Richards; and the above compensation shall be received by the said W. Willoughby in full satisfaction for his services in the aforesaid matters in controversy as counsel, he to have no other compensation for such services.

"It is provided further, that if said causes, Nos. 8038 and 8118, are not finally determined in the court sitting in special term, and an appeal is taken for such services as may be necessary in appellate courts an additional compensation shall be allowed, which shall hereafter be agreed upon by the parties, and he shall also be allowed an additional compensation for services in No. 2373, which may be necessary after the decision of the Supreme Court of the United States upon the points now pending therein."

The construction put upon this agreement by the complainant is that he was entitled, on performing the services which he thereby agreed to render, to have a fee of not less than $5,000, and to have the same declared a lien upon all the property that may have been recovered in the three cases named in said agreement as Nos. 2373, 8118, and 8184 on the docket of the supreme court of the District of Columbia, in which he had acted as counsel for the defendant, Brooke Mackall.

*The theory of the defendant is that the[**685** compensation, in addition to what he had already received, was exclusively contingent upon recovery in cause No. 8118; that it was to be a sum equal to 50 per cent of such recovery; and that the lien contemplated was to be upon the property recovered in that cause, and upon that property only. And he now contends that, as there was no recovery in No. 8118, the complainant was entitled to nothing, and his bill should have been dismissed.

The litigation mentioned and contemplated in the agreement was over lot 7, in square 223, in the city of Washington. On a portion of the lot was erected a building known as the Palace Market. One Richards, who had furnished material for its construction, filed a mechanic's lien thereon and on the lot on which it stood. In proceedings to enforce payment of this lien, a sale was had by the marshal, at which sale Richards became the purchaser. The marshal's deed to Richards described the property sold as follows: "Beginning at the northeast corner of said square, and running thence south 44 feet; thence westerly to the west end of the lot; thence in a northerly direction with the west line thereof to the north line of said lot; then with said northerly line to the place of beginning."

Cause No. 2373 was a bill filed by creditors of Mackall, including Richards, seeking to subject to sale for the satisfaction of their judgments all of the lot No. 7 not before sold by

ine marshal of the District to Richards, and asserting that Mackall had such an interest therein as rendered it liable to the satisfaction of such judgments. On May 1, 1873, the court adjudged and decreed as follows: "That the title to said real estate in the proceedings in the said cause mentioned—that is to say, to all of lot numbered 7, in square numbered 223, in the city of Washington, not heretofore sold by the marshal of the District of Columbia to the complainant Alfred Richards—is vested in the defendant Brooke Mackall, Jr.," and appointed trustees to sell the same. Upon exceptions to the sale and report thereof by the trustees, the court sustained the exceptions on the **686**] ground of the imperfect *description of the property to be sold, and subsequently directed another sale of "all that portion of lot 7 in square 223, in the city of Washington, lying south of a line drawn from a point on the line of Fourteenth street, northwest, westwardly and parallel with New York avenue, to the west line of the said lot 7. This order is made without passing upon the validity of the said marshal's sale."

These exceptions were filed on behalf of Mackall by Willoughby. From the decree of the general term affirming this decree of sale an appeal was taken to this court, where it was held that the part sold to Richards in the mechanic's lien proceedings was only the part of the lot upon which the Palace Market stood. 112 U. S. 369 [28: 737].

Upon this decision Mackall paid the judgment creditors, and there was no sale of any part of the lot to satisfy them. The result, therefore, of case No. 2373 was that Richards's title, derived from his purchase under the mechanic's lien proceedings, was restricted to the Palace Market and that portion of the lot on which it stood; and that Mackall's title was affirmed to the rest of the lot.

In the meantime, on April 11, 1882, cause No. 8118 had been instituted. It was a suit in equity, the object of which was to recover possession of that part of lot 7 which had been sold to Richards by the marshal in 1870, and also to recover the mesne profits while Richards had been in possession. The court below in special term dismissed the bill; but that decree was reversed in general term, the sale and conveyance by the marshal to Richards being set aside as void and of no effect. As between the parties to the suit, Mackall was declared to be the owner of the property, with a right to have a legal title conveyed to him, upon his paying Richards's claim as judgment creditor, as well as his disbursements in connection with said premises. The ground upon which the general term proceeded was that on account of the ambiguity and uncertainty in the description of the property, both in the advertisement and in the marshal's deed, the sale could not be sustained. *Mackall* v. *Richards*, 3 Mackey, 271.

From this decree an appeal was taken to this **687**]court, by *which on January 9, 1888, the decree below was reversed, and the cause remanded with directions to dismiss the bill, the court holding that the complainant was guilty of laches, and refusing relief on that ground alone. *Richards* v. *Mackall*, 124 U. S. 183 [31: 396].

It appears that after the decision of this court in 112 U. S. 369 [28: 737], restricting Richards's title to that portion of the lot on which the Palace Market stood, Richards regarded that decision as final and abandoned all claim except to that part of the lot actually occupied by that building, and that Mackall took and remained in possession ever since.

Upon this state of facts, the court of appeals interpreted the agreement as providing that Willoughby was to receive a fee of not less than $5,000, and to have the same declared a lien upon all of the property recovered in the cases named in the agreement, and in which he had acted as counsel for Mackall.

The conclusion of that court was thus expressed:

"Whilst Willoughby's right to the sum of $5,000 as a fee for his services in all of this litigation is not now denied, it is contended and was so held in the court below, that his lien therefor is limited to such property as was actually recovered, and cannot attach to this lot or any part of it, because it was not actually recovered in any one of said suits, the only suit for actual recovery being No. 8118 aforesaid, which was defeated, as we have seen. We think that the word 'recovered' should not be so restricted in its meaning. There is no reason why the agreement should not be liberally construed. Its object was to give Willoughby a lien on the property which might be recovered—that is to say, secured or realized—by and through the litigation conducted by him, offensive and defensive, Richards, recognizing, as he was bound to do, that the title to the lot, outside the walls of the building, had been settled adversely to his claim, abandoned any possession he might have had and submitted it to Mackall. Mackall entered without opposition, and has since held peaceable, undisturbed, and unquestioned possession. In the general sense of the word, he actually recovered his land through the services rendered *by Willoughby in cause No. [**688** 2373. He failed of recovery in 8118, through which he lost the title to the Palace Market lot, and Willoughby lost the contingent interest in the mesne profits expected to be recovered therein, in addition to the land. Willoughby's fee to the extent of the $5,000 claimed was not contingent, but certain and fixed. Having as a matter of fact, through success in No. 2373, settled the title to a very valuable part of the lot, and enabled Mackall to retake peaceable possession thereof without further litigation necessary to assure him therein, we think his lien attached thereto under the construction of the contract declared on the former appeal, and which is adhered to."

We have not overlooked the ingenious argument of the counsel for the appellant, based on the phraseology of a prior agreement, and on statements of the briefs filed on behalf of Mackall, in the case of *Richards* v. *Mackall*, 124 U. S. 183 [31: 396]; but, even if it were open for us to regard those papers, we do not perceive that they clearly point to a different construction of the present agreement than that imported by its own terms.

Upon the whole, we accept the interpretation put upon the contract by the court of appeals as a reasonable one; and *the decree of the Court of Appeals is affirmed.*

CARLOTTA M. MacGREAL and Wilburne P. MacGreal, *Appts.*,
v.
ROSE M. TAYLOR and Mamie E. Norment, Executrices of Sarah Utermehle, Deceased.

(See S. C. Reporter's ed. 688-703.)

Disaffirmance of deed of a minor—subrogation to prior liens—decree of sale—application of proceeds of sale.

1. It is not necessary, in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed *in statu quo*.
2. One who loans money to a minor whose infancy is not disclosed, on the supposed security of a deed of trust which is subsequently disaffirmed because of the infancy, is entitled to be subrogated to prior liens which were paid off with the money loaned.
3. A decree for the sale of property under a deed of trust given by an infant and afterwards disaffirmed, when the money obtained thereon has been used to pay off prior liens and make improvements, should be so framed as to place the borrower, so far as it can be done, in the position occupied at the time the deed of trust was given.
4. In a suit to foreclose a deed of trust given by

NOTE.—*As to subrogation; rights of assignee to and as to prior encumbrances; junior encumbrancer, right of,*—see note to Bank of United States v. Peter, 10: 89.

As to the doctrine of subrogation; who entitled to,—see note to German Bank v. United States, 37: 564.

As to infancy in avoidance of deeds, see note to Harding v. Handy, 6: 429.

As to acts of infant, when void, and when voidable, and by whom voidable, see note to Tucker v. Moreland, 9: 345.

Of the power and right of an infant to disaffirm a contract on attaining majority, without restoring the consideration—act of infant, when voidable by his privies in blood or heirs, or personal representatives.

The modern doctrine sustained by a preponderance of reason and authority seems to be that a return of the consideration received by the infant is not always necessary when he disaffirms the contract.

If a minor has possession of any of the property or other consideration of the contract, when he disaffirms it, or after he becomes of age, he must return it.

But if he has lost, expended, or squandered the consideration during his minority he cannot be required to purchase the right of reclaiming his own by still further abstractions from his estate.

Neither as to executed nor executory contracts is he required to return the consideration where it has passed from him during minority. Brantley v. Wolf, 60 Miss. 420; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Chandler v. Simmons, 97 Mass. 514, 93 Am. Dec. 117; Manning v. Johnson, 26 Ala. 452, 62 Am. Dec. 732; Jenkins v. Jenkins, 12 Iowa, 195; Carpenter v. Carpenter, 45 Ind. 142; Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233; Miles v. Llngerman, 24 Ind. 385; Dill v. Bowen, 54 Ind. 205; Fitts v. Hall, 9 N. H. 445; Miller v. Smith, 26 Minn. 248, 37 Am. Rep. 407; Carr v. Clough, 26 N. H. 280, 59 Am. Dec. 345; Kline v. Beebe, 6 Conn. 494; Voorhies v. Voorhies, 34 Barb. 150.

Where a minor son conveys real estate to his father, and receives and expends or wastes during infancy the money received therefor, and has no other property, he may, on arriving at full age disaffirm the deed without restoring the consideration, and mere passive acquiescence for three years after majority is not a ratification. Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233.

In an action by a grantee to set aside a previous deed executed by his grantor in infancy, as a cloud upon his title, it is not necessary to tender the purchase price paid by the defendant if the infant has consumed it during minority. Eureka Co. v. Edwards, 71 Ala. 248, 46 Am. Rep. 314.

Where the contract has been executed, and the former infant, or anyone asserting claim in his right, comes into a court of equity in quest of equity, he must do or offer to do equity, as a condition on which relief will be decreed to him. Asking for equity he must do equity. Roof v. Stafford, 7 Cow. 179; Hillyer v. Bennett, 3 Edw. Ch. 222; Bartholomew v. Finnemore, 17 Barb. 428; Smith v. Evans, 5 Humph. 70; Mustard v. Wohlford, 15 Gratt. 329, 76 Am. Dec. 209; Bedinger v. Wharton, 27 Gratt. 857.

If the suit be at law, the tender need not ordinarily be made, as a condition of recovering the property. But if the suit be in equity, and if the money or other valuable thing be *in esse*, and in possession of the party seeking the relief, or in him from whom the right to sue is derived, the bill, to be sufficient, must tender or offer to produce or pay, as the case may be. Not so if the infant has used or consumed it during his minority. Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117; Walsh v. Young, 110 Mass. 396; Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233; Dill v. Bowen, 54 Ind. 204; Phillips v. Green, 5 T. B. Mon. 344; Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13; Roberts v. Wiggin, 1 N. H. 73, 8 Am. Dec. 38.

In Henry v. Root, 33 N. Y. 526, an infant had purchased real estate, and taken and continued in possession of the same, and exercised acts of ownership over it, after becoming of full age. It was held that this was an affirmance of the contract, and that the grantee could not retain the benefits of his contract and thus affirm it after becoming of age and avoid payment of the purchase money on a plea of infancy. Boyden v. Boyden, 9 Met. 519; Robbins v. Eaton, 10 N. H. 561; Irvine v. Irvine, 76 U. S. 9 Wall. 618 (19: 800).

The decisions of the courts in this country on the question of restoring the consideration of a contract made by an infant before he can avoid it are not harmonious.

In New Hampshire it has been held that in an action to recover the price of personal property sold to an infant, to which the defense of infancy is interposed, the infant must account for what he received by restoring or paying the value of whatever remains in specie, and allowing for the benefit of whatever cannot be so restored. Hall v. Butterfield, 59 N. H. 354, 47 Am. Rep. 209; Heath v. Stevens, 48 N. H. 251.

This doctrine has been repeatedly recognized in actions brought to recover what has been paid, or compensation for what has been done, under contracts made by infants. Bingham v. Barley, 55 Tex. 281, 40 Am. Rep. 801; Kitchen v. Lee, 11 Paige, 107, 42 Am. Dec. 101; Deason v. Boyd, 1 Dana, 46; Cheshire v. Barrett, 4 McCord, L. 241, 17 Am. Dec. 735; Bartholemew v. Finnemore, 17 Barb. 430; Flynn v. Powers, 54 Barb. 554, 35 How. Pr. 282.

And in some jurisdictions it is held that where the consideration cannot be restored, the infant, before he can be allowed to rescind, must place the adult in as good a condition as though he had returned the consideration, or he must account for the value of it. Heath v. West, 28 N. H. 101; Locke v. Smith, 41 N. H. 346; Young v. Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Kimball v. Bruce, 58 N. H. 327; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Badger v. Phinney, 15 Mass. 359, 8

to infant who has disaffirmed it after the money has been used to pay off the prior liens and make permanent improvements on the property, relief may be given by sale of the property and application of the proceeds, first, to repay the mortgagee the amount used to discharge prior liens and taxes; then to pay the mortgagor an amount equal to the value of the lot at the institution of the suit (less such prior liens and taxes), without interest on that amount and without taking into consideration the value of the improvements placed on the lot; and, third, in paying to the mortgagee the balance of such proceeds, not exceeding what is due on the loan, with interest, which last sum represents, so far as may be, the value of the improvements put upon the lot with the money borrowed. Any balance remaining will belong to the mortgagor.

[No. 75.]

Argued October 28, 1896. Decided May 24, 1897.

Am. Dec. 105; Riley v. Mallory, 33 Conn. 201; 2 Kent, Com. 236; Benj. Sales, § 27, note.

This is especially the case in contracts for services, where the infant seeks to avoid his contract and recover what his services are reasonably worth; and this allows the adult to set off against the value of the plaintiff's services the reasonable value of what the infant has received on account of such services; or, in other words, the infant is entitled to recover for the benefit which the adult has derived from the services performed by him. Lufkin v. Mayall, 25 N. H. 82; Locke v. Smith, 41 N. H. 346; M'Crillis v. How, 3 N. H. 348; Vent v. Osgood, 19 Pick. 572; Stone v. Dennison, 13 Pick. 1, 23 Am. Dec. 654; Breed v. Judd, 1 Gray, 455; Gaffney v. Hayden, 110 Mass. 137, 14 Am. Rep. 580; Hoxie v. Lincoln, 25 Vt. 206; Harney v. Owen, 4 Blackf. 337, 30 Am. Dec. 662; Squier v. Hydliff, 9 Mich. 274; Spicer v. Earl, 41 Mich. 191, 32 Am. Rep. 152; Whitemarsh v. Hall, 3 Denio, 375; Makarell v. Bachelor, Cro. Eliz. 583. Ives v. Chester, Cro. Jac. 560; Ewell, Infancy, Coverture, Idiocy, etc., 109; Field, Infants, 23.

An infant need not, under Ind. Rev. Stat. 1894, §§ 3364, 3365 (Ind. Rev. Stat. 1881, §§ 2944, 2945), on disaffirming a sale of his real estate on attaining his majority, restore or tender the purchase price of the premises received by him, unless at the time of the sale he fully represented himself to have attained his majority. Gillenwaters v. Campbell, 142 Ind. 529.

A minor leasing rooms for a year while attending college is bound, on the ground that the lodging is a necessary, only to pay for the time he continues to occupy them, and may terminate the lease at any time. Gregory v. Lee, 64 Conn. 407, 25 L. R. A. 518.

The right of a minor to disaffirm a voidable deed passes to her children upon her death before disaffirmance. Walton v. Gains, 91 Tenn. 420.

An infant in whose name land paid for by her father is taken, under an agreement by the infant to give her father a life lease of the land, cannot, while retaining the property, avoid her agreement on the ground of infancy. Kincaid v. Kincaid, 85 Hun, 141.

As a general rule, no one but an infant, or his legal representatives, executors, and administrators, can avoid his voidable acts, deeds, and contracts. Simkins v. Searcy, 10 Tex. Civ. App. 406.

If land of an infant *feme covert* is held by herself and her husband and he receives and spends the purchase money she is not bound to return it before suing to recover back the property,—especially where she is not financially able to do so. Fox v. Drewry, 62 Ark. 316.

A wife who, upon attaining her majority, rescinds a purchase of real property made while she was an infant, is not entitled to payment out of the proceeds of a sale of the property, of the amount paid for her on the purchase price by her husband out of his own moneys before the payment of the mortgages given to secure the purchase price. Jennings v. Hare, 47 S. C. 279.

A house was built by contractors upon land owned by an infant, pursuant to a contract made with the infant, who furnished a portion of the materials, and did some of the work upon the building. The infant executed a bond and mortgage covering such land to the contractors to secure the cost of the erection of such house, and thereafter, when he became of age, disaffirmed the said bond and mortgage upon the ground of infancy. *Held*, that the bond and mortgage could be avoided on the plea of infancy. That upon disaffirming the bond and mortgage no restoration by the infant was necessary. Allen v. Lardner, 73 Hun, 603.

One who has executed a release during her minority may rescind the same on the ground that it was obtained by fraud, upon attaining her majority, without restoring the consideration, upon showing her inability to do so. Jackson v. Brown, 76 Hun, 41.

One who seeks to disaffirm a contract on the ground that he was an infant at the time of its execution is required to return so much of the consideration received by him as remains in his possession at the time of such election, but is not required to return any equivalent for such part thereof as may have been disposed of by him during his minority. Englebert v. Pritchett, 26 L. R. A. 177, and note, 40 Neb. 195.

An infant married woman disaffirming a note and mortgage made by her to secure a loan to her husband is not bound to restore the consideration paid by the mortgagee, since no portion of it has gone to her. Thormaehlen v. Kaeppel, 86 Wis. 378.

One who after attaining her majority ratifies a contract previously made, with full knowledge of all the matters involved, cannot retain the benefit of such contract, and at the same time rely upon infancy to avoid her liability thereunder. Youmans v. Forsythe, 86 Hun, 370.

A minor after he arrives at full age may repudiate his contract with his employer, that articles not necessaries purchased by him from the latter shall be charged on his account for wages, and recover his full wages, although he has advantageously disposed of the articles. Morse v. Ely, 154 Mass. 458.

A minor who has conveyed land to attorneys in consideration of legal services rendered by them, and beneficial to him, cannot disaffirm the deed at maturity without paying the reasonable value of such services. Searcy v. Hunter, 81 Tex. 644.

An infant who has deposited money as margin on stock purchased and sold, but has never received any stock or proceeds of the sales or anything except notices of the purchase and sale of such stock, is entitled to recover back his money. Mordecai v. Pearl, 63 Hun, 553.

Neither a minor nor his heir or legal representative, who elects to disaffirm a contract entered into, is obliged to refund the consideration received unless it is in his possession at the time of the election. Harvey v. Briggs, 68 Miss. 60, 10 L. R. A. 62.

Grantors in a deed, although not bound thereby on account of their minority at the time of its execution, cannot annul the deed and recover back the land without restoring the money paid by the grantee, or which went to discharge a judgment lien on the land which the grantee assumed and agreed to discharge in consideration of the conveyance. Potts v. Ferguson, 77 Tex. 561.

APPEAL from a decree of the Court of Appeals of the District of Columbia reversing the decree of the Supreme Court of that District and adjudging a certain sum due to the executrices of Sarah Utermehle and directing the sale of certain premises on default of the payment of said sum in a suit in equity brought by Sarah Utermehle, plaintiff, against Carlotta M. MaeGreal *et al.*, to foreclose a trust deed, in which action, Sarah Utermehle having died, Rose M. Taylor *et al.*, executrices, were substituted in her place. *Reversed, and cause remanded for further proceedings.*

See same case below, 1 App. D. C. 359.

The facts are stated in the opinion.

Messrs. **Henry E. Davis** and *W. P. Black*, for appellants:

The note and mortgage sought to be foreclosed in this case, having been executed by the maker during her minority and without any fraud upon her part, and there having been nothing in the nature of ratification at any time, were subject to disaffirmance upon her attaining majority.

Sims v. *Everhardt*, 102 U. S. 300 (26: 87); *Hitz* v. *Jenks*, 123 U. S. 297 (31: 156); *Tucker* v. *Moreland*, 35 U. S. 10 Pet. 58 (9: 245); *Pitcher* v. *Laycock*, 7 Ind. 398; *Myers* v. *Sanders*, 7 Dana, 507; *Brantley* v. *Wolf*, 60 Miss. 422; *Wells* v. *Seixas*, 24 Fed. Rep. 82.

Although if a minor, at the time of attempting disaffirmance of a contract made during minority, have in hand the fruits of the contract in specie, there must be a restitution of such fruits as a condition to the exercise of the right of disaffirmanee, yet if the infant has parted with the specific thing, or if its form has been so changed that its return in specie is impossible, then the right of disaffirmance is unrestricted.

Tucker v. *Moreland*, 35 U. S. 10 Pet. 58 (9: 345); *Chandler* v. *Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Miller* v. *Smith*, 26 Minn. 248, 37 Am. Rep. 407; *Price* v. *Furman*, 27 Vt. 270, 65 Am. Dec. 194; *Pitcher* v. *Laycock*, 7 Ind. 398; *Carpenter* v. *Carpenter*, 45 Ind. 142; *Mustard* v. *Wohlford*, 15 Gratt. 329, 76 Am. Dec. 209; *Miles* v. *Lingerman*, 24 Ind. 385; *Shaw* v. *Boyd*, 5 Serg. & R. 309, 9 Am. Dec. 368; *Robbins* v. *Eaton*, 10 N. H. 561; *Catlin* v. *Haddox*, 49 Conn. 492, 44 Am. Rep. 249; *Cresinger* v. *Welch*, 15 Ohio, 156, 45 Am. Dec. 565; *Conroe* v. *Birdsall*, 1 Johns. Cas. 127; Bishop, Cont. §§ 940, 921.

The exercise of the right of disaffirmance is not a fraud within the contemplation of the law, however it may work a hardship upon the other party to the contract; nor is the failure to disclose infancy at the time of entering into the contract such fraud.

Baker v. *Stone*, 136 Mass. 405; *McCarty* v. *Carter*, 49 Ill. 53, 95 Am. Dec. 572; *Wieland* v. *Kobick*, 110 Ill. 16, 51 Am. Rep. 676; *Brantley* v. *Wolf*, 60 Miss. 422; *Conrad* v. *Lane*, 26 Minn. 389, 37 Am. Rep. 412; *Whitcomb* v. *Joslyn*, 51 Vt. 79, 31 Am. Rep. 678; *Wilson* v. *Branch*, 77 Va. 65, 46 Am. Rep. 709; *Myers* v. *Sanders*, 7 Dana, 507; *Martin* v. *Gale*, L. R. 4 Ch. Div. 428; *Stikeman* v. *Dawson*, 1 De G. & S. 90.

But in the case at bar there was notice to complainant through her attorney of the infancy of the borrower—constructive notice, if not actual—and because of that notice there can be no denial of the right of disaffirmance.

Dibble v. *Jones*, 5 Jones, Eq. 389.

There is no room to invoke the doctrine of equitable subrogation in the present case, for the reason that the foundation for such subrogation was not laid in the pleadings.

Coe v. *New Jersey Midland R. Co.* 31 N. J. Eq. 105; *Tradesmen's Bldg. & L. Asso.* v. *Thompson*, 32 N. J. Eq. 133; *Bohn Sash & D. Co.* v. *Case*, 42 Neb. 281.

Messrs. **William F. Mattingly, Job Barnard,** and *James S. Edwards*, for appellees:

It would be a reproach upon the whole system of equity were we to permit the defendant, under all the facts and circumstances of this case, to hold and enjoy all the fruits of this fair and advantageous contract and then repudiate its obligations.

The privilege of pleading infancy is to be regarded as a shield to protect the infant, and not as a sword with which he may injure another.

Zouch v. *Parsons*, 3 Burr. 1794; *Carr* v. *Clough*, 26 N. H. 293, 59 Am. Dec. 345; *Badger* v. *Phinney*, 15 Mass. 363, 8 Am. Dec. 105.

A minor is sufficiently protected from imposition and danger if he may, on arriving at full age, rescind his contract, upon condition that he restore to the person with whom he has contracted all the rights previously held.

Hubbard v. *Cummings* 1 Me. 11; *Bailey* v. *Barnberger*, 11 B. Mon. 115; *Manning* v. *Johnson*, 26 Ala. 446, 62 Am. Dec. 732; *Slaughter* v. *Glenn*, 98 U. S. 242 (25: 122); *Oliver* v. *Piatt*, 44 U. S. 3 How. 333 (11: 622); *May* v. *LeClaire*, 78 U. S. 11 Wall. 217 (20: 50); *Womack* v. *Womack*, 8 Tex. 397, 58 Am. Dec. 119.

A contract with an infant being voidable, upon disaffirmance by the infant it becomes in law void *ab initio*, and each party is entitled to recover what has passed under it.

Vasse v. *Smith*, 10 U. S. 6 Cranch, 226 (3: 207); *Langdon* v. *Clayson*, 75 Mich. 204.

The following authorities all are in favor of our position:

Hastings v. *Dollarhide*, 24 Cal. 195; *Skinner* v. *Maxwell*, 66 N. C. 45; *Thomason* v. *Phillips*, 73 Ga. 140; *Stout* v. *Merrill*, 35 Iowa, 47; *Phillips* v. *Green*, 5 T. B. Mon. 345; *Dana* v. *Coombs*, 6 Me. 89, 19 Am. Dec. 194; *Boyden* v. *Boyden*, 9 Met. 521; *Young* v. *McKee*, 13 Mich. 552; *Cogley* v. *Cushman*, 16 Minn. 397; *Kerr* v. *Bell*, 44 Mo. 120; *Uecker* v. *Koehn*, 21 Neb. 571, 59 Am. Rep. 849; *Roberts* v. *Wiggin*, 1 N. H. 73, 8 Am. Dec. 38; *Roof* v. *Stafford*, 7 Cow. 179; *Henry* v. *Root*, 33 N. Y. 526; *Lynde* v. *Budd*, 2 Paige, 191, 21 Am. Dec. 84; *Curtiss* v. *McDougal*, 26 Ohio St. 66; *Wade* v. *Love*, 69 Tex. 522; *Smith* v. *Evans*, 5 Humph. 70; *Weed* v. *Beebe*, 21 Vt. 495; *Mustard* v. *Wohlford*, 15 Gratt. 340, 76 Am. Rep. 209; *Callis* v. *Day*, 88 Wis. 643; *Gillespie* v. *Bailey*, 12 W. Va. 70.

Mrs. Utermehle became in equity, as the holder of the notes secured by the prior trusts, subrogated to all the rights and benefits which Porter had of enforcing his lien for the purchase money.

Jones, Mortg. §§ 874, 877, 1080; 3 Pom. Eq. § 1300 and note; *Ottman* v. *Moak*, 3 Sandf. Ch. 431; *Callis* v. *Day*, 38 Wis. 647; *Langdon* v. *Clayson*, 75 Mich. 204.

Mr. Justice **Harlan** delivered the opinion of the court:

By deed dated March 8, 1886, and duly recorded, an unimproved lot or parcel of land in the city of Washington known as lot 49 in square 111, was conveyed by Henry C. Porter to Seymour Cunningham and John S. Blair to secure the balance of the unpaid purchase money therefor due to one William Brough, evidenced by Porter's two promissory notes, each for $1,250, bearing even date with the above trust deed, and payable to the order of Brough.

On the 3d day of September, 1887, Porter conveyed the same property to Robert E. Moore and his wife Carlotta M. Moore, to have and to hold the same to the grantees, their heirs and assigns, as tenants by the entirety. As part of the consideration for this last conveyance, the grantee, Carlotta M. Moore, agreed to assume and pay the debt to Brough.

By deed bearing the same date as the one from Porter to Moore and wife, and executed contemporaneously therewith, Robert E. Moore and Carlotta M. Moore conveyed the premises to Charles Early and Joseph T. Dyer in trust to secure the sum of $1,600, being the balance of the deferred purchase money due to Porter, and evidenced by the promissory note of Moore and wife, payable to the order of Porter.

On the 29th day of April, 1888, Robert E. Moore died, and the premises in question became the absolute and separate property of Carlotta M. Moore in fee simple, subject to the prior liens.

691] *In 1889 Mrs. Moore borrowed from Sarah Utermehle the sum of $8,000 for which she executed her note, dated October 22, 1889, payable three years after date, with interest at 6 per cent per annum, payable quarterly. In order to secure the payment of that note, she conveyed by deed on the same day the above premises and appurtenances to William R. Woodward and Leroy M. Taylor and their heirs as joint tenants, with the usual provisions for a release of the lien in case of the payment of the note; and also in trust to permit her, her heirs or assigns, to use and occupy the described land and premises, and the rents, issues, and profits thereof, to take, have, and apply to and for her and their sole use and benefit, until default should be made in the payment of the debt thereby secured or any instalment of principal or interest, as the same became due and payable, or any proper cost, charge, commission, or expense in and about the same. That deed contained the clause usually found in such instruments, authorizing the trustees, upon any default in the payment of the debt or of any instalment of principal or interest, as the same should become due and payable, or any proper cost, charge, commission, or expense in and about the same, to sell the land and premises at public auction upon such terms and conditions, at such time and place, and after such previous public advertisement as they or the survivor of them should deem advantageous and proper; and to convey the same in fee simple to and at the cost of the purchaser or purchasers thereof, who were not required to see to the application of the purchase money.

The last-named transaction was consummated pursuant to an agreement between Mrs. Moore and Mrs. Utermehle, and under the following circumstances: Mrs. Moore was in default in respect of the payment of the sums secured by the above trust deeds of 1886 and 1887, and being threatened with a foreclosure and sale under those deeds, and having no property except the premises in question, and desiring also to improve the same by the erection of a substantial building for the purposes of a home, applied to Mrs. Utermehle for a loan of $8,000 for the period above named, to be *secured by a deed of trust, in the [**692** usual form, on the land and premises. She represented the title to the premises to be good and unencumbered otherwise than by the above trust deeds. Her application, the bill states, was accompanied by an assurance upon her part that she would immediately commence the construction of a substantial brick building upon the lot and premises, with suitable provisions to secure the payment or application of all the proceeds of the loan "not required to take up the said overdue notes, representing said unpaid purchase money, taxes then due, expense of examination of title to said land and premises, conveyancing and other incidental expenses incurred on account of the negotiation of said loan, all of which were also to be taken up or paid therefrom towards such construction." Relying upon said premises and the proposed security offered by her, $8,000 was loaned by Mrs. Utermehle to Mrs. Moore. Out of that sum, pursuant to the agreement or understanding between Mrs. Moore and Mrs. Utermehle, the latter took up the notes representing the unpaid purchase money secured by the above trust deeds, and paid the taxes then due on the property, together with the expense of examining the title and other expenses, all amounting to $3,291.99, which sum was paid directly by Mrs. Utermehle to the holders of the notes and the parties to whom the expenses and taxes were payable. Thereupon Mrs. Moore procured the services of J. W. Myers, a builder, and entered upon the construction of a substantial brick dwelling upon the lot and premises, as agreed upon, and as the condition of the loan to her, and the balance of the $8,000 was expended in the purchase of materials furnished for and used in its construction, and to pay laborers, mechanics, and others for work done thereon. The house was completed, and is known as No. 1612 Nineteenth street northwest. Mrs. Moore moved into it about two months after its completion.

Subsequent to the loan, Mrs. Moore married the appellant Wilburne P. MacGreal, and the house and lot is occupied by them as a home.

Before the present suit was instituted, Mrs. MacGreal, *under date of June 13, 1890, [**693** addressed to Mrs. Taylor a communication, as follows: "In response to your recent communication, calling attention to my nonpayment of interest upon the note held by you as the representative of Mrs. Utermehle, I would say that I consider that I have not been well treated in the entire transaction, and inasmuch

as the property now owned by me is threatened with a suit to enforce mechanics' liens now already filed, I have taken legal advice upon the subject. As I was a minor at the time of these transactions—the execution of the deed of trust, etc.—I am advised that the affirmance or disaffirmance of the contract rests in my *direction* [discretion] when I become of age. I therefore will not pay the interest demanded, and at the proper time will take such action as I may be advised to protect my rights."

Subsequently, on the 23d of June, 1890, she executed and placed of record an instrument in which she gave notice that she disaffirmed the deed of trust of October 22, 1889, and the note described in it. On the same day she executed the following paper: "I hereby disaffirm a certain contract alleged to have been entered into between one Joseph W. Myers and myself October 28, 1889, and I disclaim any and all liability thereunder, for the reason that at the time of the making of said alleged contract I was a minor under the age of twenty-one years, and became of age June 20, 1890; of all which take due notice." And on June 27, 1890, she executed, and recorded July 14, 1890, a deed disaffirming the deed of trust executed to Taylor and Woodward, upon the ground that said deed had been executed and delivered when she was a minor.

The quarter-yearly instalment of interest due the 22d day of April, 1890, on the debt secured by the deed of October 22, 1889, not having been paid, and after notice to Mrs. MacGreal of its nonpayment, this action was instituted by Mrs. Utermehle on the 23d of June, 1890, for the recovery of the amount due on the note given to her, and for a decree for the foreclosure of the deed of trust of October 22, 1889, and a sale of the property in satisfaction of the amount due to her.

694] *She asked for such other and further relief in the premises as the nature of the case required.

Admitting the execution of the deed to Woodward and Taylor, and the note therein described, Mrs. MacGreal resisted the relief asked upon the ground that at the date of the execution of the deed and note she was under the age of twenty-one years, and within a reasonable time after reaching full age she made and placed upon record an absolute disclaimer of the alleged contract; of which disclaimer and the reasons assigned therefor, it is claimed, Mrs. Utermehle, the original plaintiff and testatrix of the appellees, had due notice. Her husband disclaimed in his answer any personal knowledge of the matter in dispute, and insisted that the bill did not state facts entitling the plaintiff to the relief asked. Woodward and Taylor, trustees, answered, admitting the allegations of the bill and expressing their submission to any decree that might be just and proper. Indeed, the arrangement between Mrs. Utermehle and Mrs. MacGreal was made in good faith on each side.

It is not disputed that Mrs. MacGreal arrived at full age on the 20th day of June, 1890. And it may be stated, as the result of the testimony, that when the deed of October 22, 1889, was executed, no inquiry was made as to her age, nor did she make any representation on that subject.

In the supreme court of the District of Columbia a decree was rendered dismissing the bill. But in the court of appeals of the district that decree was reversed, and a decree passed which adjudged that there was due from Mrs. MacGreal to the executrices of Mrs. Utermehle the sum of $8,000 with interest at the rate of 6 per cent per annum until paid, and the costs of suit; and directing that, on default in the payment of principal, interest, and costs aforesaid by a day named, the lot in question with the improvements thereon be sold and the proceeds applied in payment of such sum. 1 App. D. C. 359.

The principal propositions made on behalf of the appellants are:

That the mortgage sought to be foreclosed and the note *described therein having [**695** been executed by the maker during her minority, and without any fraud on her part, and nothing in the way of ratification having occurred, it was competent for the mortgagor, upon arriving at full age, to disaffirm the contract altogether, and thus defeat the lien created by that mortgage upon her property;

That while a minor may not, upon reaching his majority, disaffirm his contract and retain such of the fruits of the contract as are in his hands "in specie" at the time of disaffirmance, if he has parted with the specific thing received by him under the contract, or if its form has been so changed that its return in specie is impossible, his right to disaffirm cannot be questioned; and,

That the exercise of the right of disaffirmance is not, in law, a fraud, although it may work hardship upon the other party to the contract, nor is a failure to disclose the fact of infancy at the time of entering into the contract a fraud that will affect such right.

These propositions, it is said, are sustained by *Tucker* v. *Moreland*, 35 U. S. 10 Pet. 58, 70, 71, 73–74, 77 [9: 345, 350-353], and *Sims* v. *Everhardt*, 102 U. S. 300, 301, 312 [26: 87, 89].

Tucker v. *Moreland* was an action of ejectment, in which plaintiff's right of recovery depended upon his having the benefit of a deed of trust executed by an infant, but which he disaffirmed after reaching full age. This court, speaking by Mr. Justice Story, said: "It is apparent, then, upon the English authorities, that however true it may be that an infant may so far bind himself by deed in certain cases as that in consequence of the solemnity of the instrument it is voidable only, and not void, yet that the instrument, however solemn, is held to be void if upon its face it is apparent that it is to the prejudice of the infant. This distinction, if admitted, would go far to reconcile all the cases, for it would decide that a deed by virtue of its solemnity should be voidable only, unless it appeared on its face to be to his prejudice, in which case it would be void." "To give effect to such disaffirmance it was not necessary that the infant should first place the other party *in statu quo*." "The result of the American *decisions," the [**696** court continued, "has been correctly stated by Mr. Chancellor Kent, in his learned Commentaries (2 Com. Lect. 31), to be, that they are in

favor of construing the acts and contracts of infants generally to be voidable only, and not void, and subject to their election when they become of age, either to affirm or disallow them; and that the doctrine of *Zouch* v. *Parsons*, 3 Burr. 1794, has been recognized and adopted as law. It may be added that they seem generally to hold that the deed of an infant conveying lands is voidable only, and not void; unless, perhaps, the deed should manifestly appear on the face of it to be to the prejudice of the infant; and this upon the nature and solemnity, as well as the operation of the instrument." Again: "In many cases the disaffirmance of a deed made during infancy, is a fraud upon the other party. But this has never been held sufficient to avoid the disaffirmance, for it would otherwise take away the very protection which the law intends to throw around him to guard him from the effects of his folly, rashness, and misconduct. In *Saunderson* v. *Marr*, 1 H. Bl. 75, it was held that a warrant of attorney given by an infant, although there appeared circumstances of fraud on his part, was utterly void, even though the application was made to the equity side of the court to set aside a judgment founded on it. So, in *Conroe* v. *Birdsall*, 1 Johns. Cas. 127 [1 Am. Dec. 105], a bond made by an infant, who declared at the time that he was of age, was held void, notwithstanding his fraudulent declaration; for the court said that a different decision would endanger all the rights of infants. A similar doctrine was held by the court in *Curtin* v. *Patton*, 11 Serg. & R. 309, 310. Indeed, the same doctrine is to be found affirmed more than a century and a half ago, in *Johnson* v. *Pie*, 1 Lev. 169, 1 Sid. 258, 1 Kebb. 905, 913."

In *Sims* v. *Everhardt*, 102 U. S. 300, 301, 312 [26: 87, 89], it appeared that Mrs. Sims, a minor—her husband uniting with her—sold and conveyed her land to Mrs. Everhardt, who paid the purchase money. Some doubt being expressed as to the age of the grantor, she stated in writing on the deed that she was then over twenty-one years of age. The purchaser went into possession, paid off a mortgage and **697**]*taxes on the property, continued in possession, and made improvements up to her death. Subsequently Mrs. Sims was divorced from her husband, for his fault, and shortly afterwards she gave notice to the devisees of Mrs. Everhardt that she disaffirmed the deed in question, and demanded possession of the land. That demand not having been complied with, she brought suit against the devisees of her grantee to set aside the deed and for an account of the rents and profits of the land, "as well as of the amount she was in duty bound to pay to the defendants on account of the purchase money by the grantee, and the mortgage aforesaid." The court below upon final hearing dismissed the bill. This court reversed the decree, holding that under the peculiar circumstances of the case, including the fact that Mrs. Sims labored under the disability of coverture when she made the deed, her disaffirmance of it was within a reasonable time, and she was entitled to the decree asked. Mr. Justice Strong, delivering the opinion of the court, said: "The remaining question is whether she is estopped by anything which she has done from asserting her rights to the land in controversy. In regard to this very little need be said. It is not insisted that she has done anything since she attained her majority which can work an estoppel. All that is claimed is that when she made her deed she asserted she was of age and competent to convey. We are not, therefore, required to consider how far a married woman can be estopped by her acts when she has the single disability of coverture. The question is whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way. An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. *Brown* v. *McCune*, 5 Sandf. 224; *Keen* v. *Coleman*, 39 Pa. 299 [80 Am. Dec. 524]. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is *implied in his deed. An assertion[**698** of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed." It may be observed that the court did not decide in that case that Mrs. Sims was entitled to the land without accounting to the estate of Mrs. Everhardt for the purchase money and for the amount paid in order to discharge the mortgage debt upon it.

These cases do not determine the vital questions arising in the one before us. They undoubtedly do hold that an infant's deed is voidable only, unless it appears upon its face to be to his prejudice, in which case it may be deemed void; also, that he is not estopped by his acts or declarations, however fraudulent, or by his silence, during infancy, from asserting, upon arriving at full age or within a reasonable time thereafter, the invalidity of such deed.

In the present case, it is beyond question that Mrs. MacGreal's deed, made while she was a widow and an infant, was voidable, and that she disaffirmed it within a reasonable time after reaching her majority.

But does it follow that the plaintiffs are not entitled to relief on account of the money advanced by their testatrix, and which was lent to be applied and was applied in making valuable improvements upon the lot owned by the infant? If the money obtained from Mrs. Utermehle, the repayment of which was attempted to be secured by the deed of trust of October 22, 1889, had been paid directly to the infant, and, prior to the institution of this suit, had been all expended otherwise than in the improvement of her lot, the case would not be so difficult of solution; for it is well settled that it is not a condition of the disaffirmance by an infant of a contract made during infancy that he shall return the consideration received by him, if, prior to such disaffirmance and during infancy, the specific thing received has been disposed of, wasted, or consumed and cannot be returned. In *Boyden* v. *Boyden*, 9 Met. 519,

521, Chief Justice Shaw, after observing that a contract with an infant is binding upon the other party until it is disaffirmed by the infant, said that if the infant "elects to disaffirm 699]*it, he annuls it on both sides, and the parties revert to the same situation as if the contract had not been made. If the minor refuses to pay the price, as he may, the contract of sale is annulled, and the goods revest in the vendor." In *Green* v. *Green*, 69 N. Y. 553 [25 Am. Rep. 233], Chief Justice Church, delivering the opinion of the court, said: "The right to repudiate is based upon the incapacity of the infant to contract, and that incapacity applies as well to the avails as to the property itself, and when the avails of the property are improvidently spent or lost by speculation or otherwise during minority, the infant should not be held responsible for an inability to restore them. To do so would operate as a serious restriction upon the right of an infant to avoid his contract, and in many cases would destroy the right altogether." In *Monumental Bldg. Asso. No. 2* v. *Herman*, 33 Md. 128, 133, it was said: "If the infant disaffirm an executed contract, and the specific consideration can be restored in whole or in part, the infant is treated as a trustee of the other party, and must give it up; but where the articles received by him are consumed or the money spent, the party advancing them is without a remedy." So in *Chandler* v. *Simmons*, 97 Mass. 508, 514 [93 Am. Dec. 117], the court said: "Another ground relied on by the defendant is that the deed (by the infant) cannot be avoided without a return of the consideration. We do not understand that such a condition is ever attached to the right of a minor to avoid his deed. If it were so, the privilege would fail to protect him when most needed. It is to guard him against the improvidence which is incident to his immaturity, that this right is maintained. *Gibson* v. *Soper*, 6 Gray, 279-282 [66 Am. Dec. 414]; *Boody* v. *McKenney*, 23 Me. 517. If the minor, when avoiding his contract, have in his hands any of its fruits specifically, the act of avoiding the contract by which he acquired such property will devest him of all right to retain the same, and the other party may reclaim it. He cannot avoid in part only, but must make the contract wholly void if at all, so that it will no longer protect him in the retention of the consideration. *Badger* v. *Phinney*, 15 Mass. 359 [8 Am. Dec. 105]; *Bigelow* v. *Kinney*, 3 Vt. 353 [21 700]Am. Dec. 589]. Or, if he retains *the use or disposes of such property after becoming of age, it may be held as an affirmance of the contract by which he acquired it, and thus deprive him of the right to avoid. *Boyden* v. *Boyden*, 9 Met. 519; *Robbins* v. *Eaton*, 10 N. H. 561. But if the consideration has passed from his hands, either wasted or expended during his minority, he is not thereby to be deprived of his right or capacity to avoid his deed, any more than he is to avoid his executory contracts. And the adult who deals with him must seek the return of the consideration paid or delivered to the minor in the same modes and with the same chances of loss in the one case as in the other. *Dana* v. *Stearns*, 3 Cush. 372-376. It is not necessary in order to give effect to the disaffirmance of the deed or contract of a minor, that the other party should be placed *in statu quo*. *Tucker* v. *Moreland*, 35 U. S. 10 Pet. 65-74 [9: 348-352]; *Shaw* v. *Boyd*, 5 Serg. & R. 309 [9 Am. Dec. 368]. See also 1 Am. Lead. Cases, 5th ed. *224, *232, *249, *259; *Mustard* v. *Wohlford*, 15 Gratt. 329, 340 [76 Am. Dec. 209]; *Cresinger* v. *Welch*, 15 Ohio, 156 [45 Am. Dec. 565]; *Eureka Co.* v. *Edwards*, 71 Ala. 248, 256 [46 Am. Rep. 314]; *Corey* v. *Burton*, 32 Mich. 30; *Price* v. *Furman*, 27 Vt. 268, 271 [65 Am. Dec. 194]; *Robinson* v *Weeks*, 56 Me. 102, 107; *Carpenter* v. *Carpenter*, 45 Ind. 142, 146; *Harvey* v. *Briggs*, 68 Miss. 60, 66 [10 L. R. A. 62]; *St. Louis, I. M. & S. R. Co.* v. *Higgins*, 44 Ark. 293, 297; *Reynolds* v. *McCurry*, 100 Ill. 356, 359; Tyler's Infancy & Coverture, § 37, and authorities cited.

Does the present case come within the rule upon which Mrs. MacGreal relies? Under the terms of the loan, the money obtained from Mrs. Utermehle was used in lifting existing valid mortgages from her lot and in placing substantial improvements upon it; and she is in actual possession of the lot so improved and freed from the liens created by the deeds of March 8, 1886, and September 3, 1887, and subject to which she acquired the property. A court of equity will look at the real transaction, and will do justice to the adult if it can be done without disregarding or impairing the principle that allows an infant, upon arriving at majority, to disaffirm his contracts made during infancy. Mrs. MacGreal having disaffirmed her deed of October 22, 1889, she is not entitled, as between *herself and the estate[701 of Mrs. Utermehle, to be protected except in the enjoyment of such rights in the property in question as she had at the time it was encumbered by her disaffirmed deed of trust. She is not entitled to make profit out of those whose money has been used, at her request, in protecting and improving her estate. Her lot was subject to prior liens on account of the debts due to Brough and Porter as well as for taxes. Those debts have been discharged, and her property is no longer in any danger from them. The liability of her property for those debts when the deed of 1889 was executed cannot be questioned. These debts having been paid by Mrs. Utermehle, the appellees are entitled, in equity, to be subrogated to the rights of the persons who held them, and who were about to foreclose the liens therefor when the application was made to Mrs. Utermehle for the loan of $8,000 to be used in meeting those debts and in improving the lot in question. 1 Jones, Mortg. §§ 874, 877, and authorities cited. And within the meaning of the rule that, upon the infant's disaffirmance of his contract, the other party is entitled to recover the consideration paid by him which remains in the infant's hands or under his control, it may well be held—and gross injustice will be done in this case if it be not so held—that the money borrowed from Mrs. Utermehle is, in every just sense, in the hands of Mrs. MacGreal. To say that the consideration paid to Mrs. MacGreal for the deed of trust of 1889 is not in her hands, when the money has been put into her property in conformity with the disaffirmed contract, and notwithstanding such property is still held and

enjoyed by her, is to sacrifice substance to form, and to make the privilege of infancy a sword to be used to the injury of others, although the law intends it simply as a shield to protect the infant from injustice and wrong.

But we are of opinion that the court below erred in adjudging, as, in effect, it did adjudge, that the appellees are entitled to have their *entire* debt first paid, even if all the proceeds of sale be required for that purpose. The decree should have been so framed as to place Mrs. MacGreal, so far as it could be done, in the position occupied by her at the time **702**] the deed *of trust was given; for only by such a decree can the privilege of infancy, resulting from incapacity to contract, be effectively protected. A decree giving the appellees a preference in the distribution of the proceeds of sale for their entire claim necessarily must rest upon the ground that one who obtains from an infant a deed of trust conveying his real estate to secure the repayment of money loaned to him, and to be applied, and which is applied, in improving such estate, may thereby make the disaffirmance of the infant ineffectual in every case where the property, upon being sold, does not bring more than the debt attempted to be secured. But no such result can properly happen if the court enforces the established rule that, upon the disaffirmance of a deed made during infancy, the infant is entitled to recover the property conveyed by him, and the adult to recover such of the consideration paid by him as may remain in the hands of the infant at the time of disaffirmance. As Mrs. MacGreal ought not to hold the property in its improved state without accounting, as far as possible, for the money used in protecting it from sale for existing liens, and in improving it, there must be a sale in order that justice may be done. But as the disaffirmance of her deed restores her rights in the property, a sale ought not to have the effect of depriving her of the interest she had at the time the deed of trust was executed. The decree for a sale was proper, but, upon the showing made by this record, it should direct the proceeds to be applied, first, in repaying to the appellees, with interest, the sums paid by Mrs. Utermehle in discharge of the prior liens created by the deeds of 1886 and 1887 and by the taxes then upon the property; second, in paying Mrs. MacGreal an amount equal to the value of the lot at the institution of this suit (less such prior liens and taxes) without interest on that amount, and without taking into consideration the value of the improvements placed on the lot; and third, in paying to the appellees such of the proceeds of sale as may remain, not exceeding the balance due on the loan, with interest. This last sum would represent, so far as may be, the value of the improvements put upon the lot with Mrs. Utermehle's money. **703**] *Lynde* v. *McGregor*, 13 Allen, 182, 185 [90 Am. Dec. 188]. Any other decree will make the disaffirmance by the infant ineffectual, if the property, upon being sold, does not bring more than the debt attempted to be secured. If the property in its improved condition does not bring enough to pay the whole debt due the appellees, they will be without remedy for the deficiency. If any balance should remain after satisfying the above claims in the order mentioned, it will belong to Mrs. MacGreal.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion. *Reversed.*

The CHIEF JUSTICE and Mr. Justice **Brown** are of opinion that the judgment should be affirmed.

PETER MENOTTI, *Plff. in Err.*,
v.
KATE MAY DILLON and Mary Ives Crocker.

(See S. C. Reporter's ed. 703-722.)

Lands granted to state—decision of land department—land grant to railroad.

1. Land located as lieu land by a bona fide settler, and purchased from the state of California prior to the act of Congress of July 23, 1866, quieting land titles in that state, is within the provision that "in all cases" where the state has selected any portion of the public domain in part satisfaction of any grant to the state, and has disposed of the same to purchasers in good faith, such lands shall be and are confirmed.
2. The decision of the land department is not conclusive as to a question of law whether or not an act of Congress confirmed to a state lands withdrawn by executive order from pre-emption, private entry, and sale for the benefit of a railroad company.
3. The filing of a map of general route, and the issuing of a withdrawal order, do not prevent the United States by legislation at any time prior to the definite location of a railroad from selling, reserving, or otherwise disposing of any of the lands which but for such legislation would have become, in virtue of such location, the property of the railroad company,—especially when the railroad grant was made subject to the reserved power of Congress to add to, alter, or amend the act containing it.

[No. 309.]

Submitted April 28, 1897. Decided May 24, 1897.

IN ERROR to the Supreme Court of the State of California to review a judgment of that court reversing a judgment and remanding the cause with directions to enter judgment in favor of plaintiffs in an action of ejectment brought in the District Court of the Third Judicial District of California by Kate May Dillon *et al.*, plaintiffs, against Peter Menotti, to recover the possession of land. *Reversed*, and case remanded for further proceedings.

See same case below, 89 Cal. 354, 105 Cal. 572.

The facts are stated in the opinion.

Mr. **S. F. Leib** for plaintiff in error.

Mr. **A. L. Rhodes** for defendants in error.

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands, how construed, see note to Watts v. Lindsey, 5: 423.

As to land grants to railroads, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was commenced in the district court of the third judicial district of California.

The complaint alleged that on the 23d day of April, 1873, the original plaintiff, Charles McLaughlin, became the owner in fee simple and entitled to the possession of the south half of section 21 in township 7 south, of range 3 west, of the Mount Diablo base and meridian, according to the United States survey; that thereafter he continued to be the owner and was entitled to the possession of said land; but that on the above date the defendant Menotti entered into possession, ousted him and continued to hold possession, to his damage in the sum of $1,000.

The answer of the defendant denied each allegation of the complaint. McLaughlin died, and his estate was distributed to the present appellees who were substituted as plaintiffs.

706] *There have been two trials of the case, each time by the court without the intervention of a jury. The first judgment, which was for the defendant, was reversed by the supreme court of California because of the insufficiency of the finding of facts bearing upon the question of title. 89 Cal. 354. The last judgment was also for the defendant; but it was reversed, and the cause remanded with directions to enter judgment in favor of the plaintiffs for the lands in controversy, and for rents and profits. *McLaughlin* v. *Menotti*, 105 Cal. 572. From that decree a writ of error was sued out to this court.

The case made by the agreed statement of facts, and by the evidence introduced at the trial, was substantially as follows:

The Central Pacific Railroad Company of California executed, October 31, 1864, an assignment to the Western Pacific Railroad Company of the right to construct its road between San José and Sacramento, and of its right accruing to it by virtue of the acts of Congress of July 1, 1862 (12 Stat. at L. 489, chap. 120), and July 2, 1864 (13 Stat. at L. 356, chap. 216), to the land in controversy in this action. This assignment was ratified by Congress March 3, 1865. 13 Stat. at L. 504, chap. 88.

On the 8th day of December, 1864, the Western Pacific Railroad Company filed in the office of the Secretary of the Interior a map designating the general route of its road. A copy of that map was received at the United States land office at San Francisco on the 30th day of January, 1865, accompanied by an order from the secretary reserving from pre-emption, private entry, and sale for the benefit of the railroad company the odd-numbered sections of land within 25 miles on either side of the line of such general route. This reservation was in force from the day last mentioned.

On February 20, 1870, the Central Pacific Railroad Company filed in the department of the interior the map of the definite location of its railroad between San José and Sacramento; but the road opposite the land in controversy, between San José and Niles, was completed about the 1st day of September, 1866.

707] *On June 22, 1870, the Central Pacific Railroad Company of California and the Western Pacific Railroad Company consolidated under the name of the Central Pacific Railroad Company.

The official map of township 7 south, range 3 west, Mount Diablo base and meridian, was filed by the United States Surveyor General for California in the United States land office at San Francisco on February 27, 1865. Prior to that date, and on or about the 10th day of June, 1864, a survey was made by a deputy United States surveyor for California of the part of that township embracing the land in controversy; but that survey was not made by authority of the government of the United States. No actual survey of any portion of that township had ever been made before June, 1864, and up to that time no attempt had been made by any person, or by the government, to have its boundaries ascertained, or to establish the lines of sections in that township.

The land in controversy in this action is within 20 miles of the line of definite location of the Central Pacific Railroad Company, and within 25 miles, but not within 10 miles, from the line of the general route of the railroad.

On the 3d day of April, 1872, the United States duly executed and delivered to the Central Pacific Railroad Company a patent for the land in controversy, with other lands. It was in the usual form of patents issued under the Pacific railroad acts. And on the 3d day of April, 1873, that company executed to McLaughlin a deed conveying to him all its right, title, and interest in this land.

At the commencement of this action the defendant was in the possession of the south half of the southeast quarter, and the southwest quarter of section 21, of township 7 south, range 3 west, Mount Diablo meridian, being 240 acres of the land described in the complaint, and of no more. No part of these lands are or were mineral lands, or were returned or denominated as mineral lands.

It was found that one Philip Hirleman settled upon and *improved this land as early as [**708** 1858; that it was "then used for pasturage, had a house upon it, and was inclosed partly by a post and rail fence, and for the balance by gulches forming a natural inclosure;" that in June, 1864, and until December 6, 1866, it was occupied by him, and had on the land during that time a house, barn, corrals, a small field of wheat and potatoes, and cows and horses. The finding states that he "was there all the time; had possession of about 1,000 acres of land, including the land in controversy, which was inclosed by two fences and two gulches; each fence at each end thereof connecting with the gulches; the gulches and fences constituting an inclosure of the tract of about 1,000 acres, including the land in controversy. The fences ran east and west; the northerly fence was between ½ mile to 1 mile in length and ran partly across section 21, and the south fence was upon a section lying south of section 21.

It was also found that "on January 30, 1865, the said Hirleman was, and had been prior thereto, and during the year 1864, and was, subsequent to the said 30th day of January, 1864, up to the time of the execution by him of the deed to Jean Peter, a settler in good faith

on the land involved in this action, to wit, said 240 acres; and that the improvements hereinabove designated were made on the said land by him in good faith, and that such settlement by him, and the said improvements, were made with the intention in good faith of taking, at the proper time, the necessary steps to acquire the title to said land from the government of the United States, by proeuring its location in part satisfaction of the grant made by the government of the United States to the state of California of 500,000 acres of land, by act of Congress of date ——; and then of purchasing the land involved in this action from the state of California."

During the years 1864 and 1865 Hirleman was a naturalized citizen of the United States: was then and had been since 1858 a resident in good faith of California and of the county of Santa Cruz, in which county the land involved in this action was then located; and was the head of a family, possessing all the qualifications necessary to enable him to acquire **709**]the title *from the government of the United States to the land in controversy.

It also appears from the finding of the court that under and by virtue of the act of the legislature of the state of California of April 27, 1863, entitled "An Act To Provide for the Sale of Certain Lands Belonging to the State of California," Hirleman, on June 13, 1864, in due and proper form, made application to Leander Ransom, who was then and there the duly appointed, qualified, and acting locating agent of the state of California, under said act, to locate as a lieu school-land location, and to purchase from said state, the said 240 acres of land involved in this action; which said application was accompanied with the affidavit of said applicant, in due and proper form, required by the act of April 27, 1863, and also with the affidavit of loyalty, in due and proper form, required by the act of April 27, 1863, and also the affidavits of three disinterested witnesses as to the character of said land, and the fact that no valid claim existed thereto adverse to said applicant's claim, as required by said act of April 27, 1863; and that said locating agent on June 16, 1864, duly accepted said application and affidavits and offer to purchase, upon the condition that if said location should be made and approved by the United States, it should be for the use and benefit of said applicant upon his complying with all the conditions and provisions of said act of April 27, 1863; and that said locating agent on February 28, 1865, in conformity with the provisions of said act, located in lieu of a portion of the lands of said state, which had been lost to said state, the said 240 acres of land involved in this action, at the request, and for the use of said Hirleman, by filing an application for the same in the name and for the state of California, in the United States land office at San Francisco, said land being within the San Francisco land district, with the consent of John F. Swift, who was then the duly appointed, qualified, and acting register of said district; which said location made upon said Hirleman's application was filed in the state land office of the state of California on April 4, 1865, and was, by the surveyor general of said state, approved May 13, 1865; and that the treasurer *of Santa[**710** Cruz county, within which county said land was then included, was, in the said order of approval, directed to receive in payment of said location, within fifty days from the recording of said approval, 20 per cent of the purchase money and one year's interest on the balance in advance, at the rate of 10 per cent per annum from the date of the location in the locating agent's office."

On the 4th day of June, 1865, and within fifty days after the recording of the approval of Hirleman's location of June, 1864, payment was made by him to the treasurer of Santa Cruz county, in all respects as directed; and on the 31st day of August, 1865, a certificate of purchase, in due form, covering the land, was issued to him by the state of California upon his application.

On December 6, 1866, Hirleman conveyed by deed all his right, title, and interest in and to these 240 acres of land to Jean Peter, who thereupon took and held possession of the same until March 9, 1867, when he conveyed, by deed, all his right, title, and interest to the defendant Menotti, who thereupon entered into possession, and ever since has been and still is in possession.

The finding further states that after the 23d day of July, 1866,—the date of the passage of the act of Congress quieting land titles in California,—to wit, about the 13th day of March, 1872, "the defendant made application to the proper officers of the United States land department for a confirmation of the right of said state to said land so selected by said state for his benefit, under the provisions of the act of Congress entitled 'An Act To Quiet Land Titles in California,' approved July 23, 1866 (14 Stat. at L. 218, chap. 219); and thereupon, and upon due notice to said Western Pacific Railroad Company and the parties claiming under it, such proceedings were regularly had in said department and such proofs submitted, and such a hearing in said department had that on the 15th day of May, 1874, the commissioner of the General Land Office, under the direction and with the approval of the Secretary of the Interior, listed over and certified to said state the 240 acres of land as confirmed to said state of California."

*On December 31, 1874, full payment [**711** upon this location was made to the state, through the proper county treasurer, by Menotti as assignee of Hirleman. And on February 25, 1875, the state issued to him, as such assignee, its letters patent, granting the 240 acres of land in question upon the application above mentioned.

It appears from the above statement that Menotti and those under whom he claims title have been in actual possession of the lands in controversy since 1858. Of Hirleman's good faith in settling upon, improving, and purchasing them, no question can be made under the findings of fact. Nor is any question made as to the good faith of those claiming under him. It may also be stated that fifteen years had expired after Hirleman settled upon the land and commenced improving it before McLaughlin, the original plaintiff, obtained a deed from the Central Pacific Railroad Company.

The case is, therefore, one that appeals strongly to the court for the protection of the defendant who claims under an actual settler who in good faith purchased these lands from the state, and whose right thereto, as a claimant under the state, has been confirmed by the action of the Land Department.

It is necessary to a clear understanding of the precise question to be determined that reference be made to certain legislation by the United States and California.

By the act of Congress of March 3, 1853, entitled "An Act To Provide for the Survey of the Public Lands in California, the Granting of Pre-emption Rights Therein, and for Other Purposes" (10 Stat. at L. 244, 246, chap. 145), it was provided "that all the public lands in the state of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the state for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title and the mineral lands, shall be subject to the pre-emption laws of the 4th of September, 1841, with [712] all the *exceptions, conditions, and limitations therein, except as is herein otherwise provided." § 6. By the same act it was provided "that where any settlement, by the erection of a dwelling house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the state in lieu thereof, agreeably to the provisions of the act of Congress, approved on the 20th of May, 1826, entitled 'An Act to Appropriate Lands for the Support of Schools in Certain Townships and Fractional Townships, not Before Provided for,' and which shall be subject to approval by the secretary of the interior." § 7.

The act of Congress of July 1, 1862 (12 Stat. at L. 489, chap. 120), relating to the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, contained a grant of the odd-numbered sections of public lands (excluding mineral lands) on each side of the road within certain limits "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed." § 3. It provided that "Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act." § 18. And by the act of July 25, 1864 (13 Stat. at L. 356, chap. 216), the above grant was enlarged, and it was provided (§ 4)—using the words of the act as published by the authority of Congress—that any lands granted by it, or by the above act of July 1, 1862, of which it was amendatory, "shall not defeat or impair any pre-emption, homestead, s mp land, *or other lawful claim*, nor include any government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturist, to be ascertained under such rules as have been or may be established by the commissioner of the General Land Office, in conformity with the provisions of the pre-emption *laws." That act pro-[713] vided that "Congress may, at any time, alter, amend, or repeal this act." § 22.

The legislature of California by the act of April 27, 1863, entitled "An Act to Provide for the Sale of Certain Lands Belonging to the State," Cal. Stat. 1863, chap. 397, p. 591, made provision, among other things, for the sale of "the unsold portion of the 500,000 acres granted to the state for school purposes,"† and "the 16th and 36th sections granted for the use of the public schools, or lands in lieu thereof." § 2.

The same act of California (April 27, 1863), § 4, provided: "Whenever any resident of this state desires to purchase any portion of a sixteenth or thirty-sixth section of any township in this state, or lands in lieu thereof, if the lands sought to be purchased have not been surveyed by authority of the United States, he shall file in the office of the county surveyor of the county in which said lands are situate an application for a survey and plat and field notes of the lands sought to be purchased, which, when obtained, he shall file with the locating agent of the district, together with an affidavit that he is a citizen of the United States, or has filed his intentions to become a citizen, that he is of lawful age, and is a resident of the state, that the lands sought to be purchased are unoccupied except by the applicant, and that there are no improvements on said lands other than his own, and that to the best of his knowledge and belief there is no valid claim existing to said land adverse to his own, and if the applicant be a *female, [714] that she is entitled to purchase and hold real estate in her own name under the laws of this state; all of which shall be verified by the affidavit of three disinterested witnesses."

By another section (§ 5) it is provided: "Whenever a settlement is or has been made by occupation or improvement upon any portion of a sixteenth or thirty-sixth section of any of the public lands in this state, the locating agent of the district in which such land is situated shall, if such occupant has not acquired a pre-emption right to such land, notify such occupant or claimant of the fact that he is upon lands belonging to the state, and that he must make application to purchase the same of the state within sixty days, or forfeit all rights to the land. If such occupant or

†This reference was, no doubt, to the act of September 4, 1841 (5 Stat. at L. 453, chap. 16), by which Congress granted to each of certain states named, and to each new state, as it was admitted into the Union, 500,000 acres of land for purposes of internal improvement, "the selections in all of said states to be made within their limits respectively in such manner as the Legislatures thereof shall direct" (§ 8); and to the act of the California Legislature of May 3, 1852, which authorized the issue of land warrants to be sold and the proceeds invested in bonds to be kept as a special deposit to the credit of the "school fund," and which act also provided that "the parties purchasing such warrants, and their assigns, are hereby authorized in behalf of this state to locate the same upon any vacant and unappropriated land belonging to the United States within the state of California subject to such location," etc. Cal. Laws 1852, chap. 4, p. 41.

claimant shall neglect or refuse to make such application to purchase within the sixty days above named, such land shall be subject to location and sale in the manner provided for the sale of other sixteenth and thirty sixth sections, with the exception that the affidavits in regard to occupancy and improvement may be omitted, in all of which cases the application to purchase shall be accompanied by the affidavit of the locating agent of the district, that he has duly notified the occupant or claimant of the land as provided by this section, and that for a period of sixty days after such notice the occupant or claimant has refused or neglected to apply for said lands."

We have seen that before the passage of this act of Congress, namely, on the 13th day of June, 1864, Hirleman made application in proper form to the state, under the act of April 27, 1863, "to locate as a lieu school-land location and to purchase from said state, the said 240 acres of land involved in this action." That application and offer to purchase were accepted by the state's agent on the 16th of June, 1864, upon the condition that if the location was made and was approved by the United States it should be for the use of the applicant upon his complying with the conditions of the act of April 27, 1863. The location was made by the state's locating agent on the 28th day of February, 1865, by filing an application in its name in the land office at San Fran-
715] cisco. The application *was approved by the surveyor general of California on May 13, 1865. And on August 1, 1865, Hirleman having made payment as required, a certificate of purchase covering the lands was given to him by the state. These things all took place before the railroad company filed its map of definite location, and before the passage of the act to be presently referred to quieting land titles in California.

As Congress expressly declared that neither the act of 1864 nor that of 1862 should defeat or impair "any pre-emption, homestead, swamp land, or other lawful claim," the controlling question in the case is whether, within the meaning of that act, Hirleman's claim ever became a "lawful claim" upon these lands. In determining this question, the words in the act of 1862, "not sold, reserved, or otherwise disposed of by the United States . . at the time the line of said road is definitely fixed," must be taken in connection with the words in the amendatory act of July 25, 1864, "shall not defeat or impair any . . . other lawful claim." Construing those acts together it is clear that no lands were embraced by the grant to which any "lawful claim" had attached *at the time the line of railroad was definitely fixed* on the 20th day of February, 1870. By the express terms of the granting act, as we have seen, only odd-numbered sections were granted which, at the date of the definite location of the road, were *not* sold, reserved, *or otherwise disposed of* by the United States, and to which no pre-emption, homestead, or other lawful claim had attached. *Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 629, 639–644 [28: 1122, 1125, 1127].

What, then, was the situation at the time of the definite location of the road?

By the act of Congress of July 23, 1866 (14 Stat. at L. 218, chap. 219), entitled "An Act to Quiet Land Titles in California," it was provided (§ 1) "that in all cases where the state of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said state by any act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be, and hereby are, confirmed to said state: *Provided*, *That no selection made by said state [716 contrary to existing laws shall be confirmed by this act for lands to which any adverse pre-emption, homestead, or other right has, at the date of the passage of this act, been acquired by any settler under the laws of the United States, or to any lands which have been reserved for naval, military, or Indian purposes by the United States, or to any mineral land, or to any land held or claimed under any valid Mexican or Spanish grant, or to any land which, at the time of the passage of this act, was included within the limits of any city, town, or village, or within the county of San Francisco: *And provided further*, That the state of California shall not receive under this act a greater quantity of land for school or improvement purposes than she is entitled to by law." The 2d section related to selected lands that had been surveyed by authority of the United States; the 3d section to selected lands that had not been surveyed by authority of the United States, but which had been surveyed by authority of and under the laws of the state, and sold to purchasers in good faith under the laws of the state.

This act was passed several years before the railroad company filed its map of definite location. Its object is manifest upon its face. It was a statute of repose in respect of land titles in California. Referring to the provisions of the act of March 3, 1853 (10 Stat. at L. 244, 246, chap. 145), requiring surveys of the public lands as a means of extending to California the system of surveys, sales, and pre-emptions provided for other states and territories, this court speaking by Mr. Justice Miller, in *Huff* v. *Doyle*, 93 U. S. 558, 559 [23: 975, 976], said: "The state of California, impatient of the delay of the United States' authorities in making these surveys, undertook to perform that duty herself; and assuming from data furnished by her own surveys, that a great many acres of the 16th and 36th sections were within one or the other of the exceptions of the granting clause, for which the state was to select other lands, the legislature authorized selections and locations to be made in lieu thereof, according to state surveys. The land in controversy was so selected by the state and sold to the *plaintiff, [717 who settled on it in 1865, and received from the state a certificate of sale. The officers of the land department, when the matter was brought to their attention, refused to recognize the surveys made by the state, or to acknowledge the validity of selections and locations made under the state laws; and as many such selections and actual settlements under them had been made, the hardships and embarrassments growing out of the action of the state government caused the passage of the act of July 23, 1866." In *Rowe's Case*, the Land De-

partment said: "The act of July 23, 1866, is remedial in its character and should be liberally construed. It is entitled 'An Act To Quiet Land Titles in California,' and was evidently intended by Congress to be curative of irregularities in selections made by the state under various grants, and to confirm titles in innocent purchasers from the state notwithstanding irregularities in selections." 7 U. S. Land Dec. 397, 399.

While guarding the rights of settlers "under the laws of the United States," and taking care to exclude from its provisions all lands previously reserved for naval, military, or Indian purposes by the government; mineral lands; lands held or claimed under valid Mexican or Spanish grants; and lands which at the time were within any city, town, or village, or within the county of San Francisco; Congress intended that justice should be done to those who in good faith had purchased from the state, under its laws, lands which the state had selected from the public domain in part satisfaction of grants by Congress. In accomplishing that result, it used in the act of 1866 language that clearly covered all cases of that character. No case of that kind was excepted from the operation of the act. The present case belongs to that class. The lands in controversy were selected by the state in part satisfaction of a grant to it of public lands. And they were disposed of by the state to a purchaser in good faith under its laws. All this occurred, as we have seen, before the passage of the act of 1866; for Hirleman, under whom Menotti claims, received from the state, on the 1st day of August, 1865, a certificate of purchase. And Menotti made application to the Land Department, under the [718] act of *July 23, 1866, for the confirmation of the right of the state to the land so selected by it for his benefit; *and upon due notice to the Western Pacific Railroad Company and the parties claiming under it,* such proceedings were had in that department, such proofs submitted, and such hearing had, that on the 15th day of May, 1874, the Commissioner of the General Land Office, under the direction and with the approval of the Secretary of the Interior, listed over and certified to the state the 240 acres of land "as confirmed to said state of California." Thereupon Menotti, as assignee of Hirleman, on the 31st day of December, 1874, made full payment upon such location to the state, and on the 25th day of February, 1875, the state issued to him its letters patent, based upon the original application in 1864 for the lands in question.

In *Wilkinson* v. *Merrill*, 52 Cal. 424, 426, the supreme court of California said: "Under the act of Congress of July 23, 1866, it was a question for the Land Department, first, whether the state had selected the land in controversy in part satisfaction of any grant made to the state by any act of Congress; second, whether the state had disposed of the land to a purchaser in good faith under her laws; third, whether the land was within any of the exceptions by which lands are reserved from the validating effect of the act; fourth, whether the defendant had proved up his claim before the register and receiver in the manner and within the time required by the validating act. These were questions in which no one but the United States and the defendant were interested; and the act of Congress confers upon the Land Department the jurisdiction to determine them. On deciding these questions in favor of the applicant claiming as a purchaser from the state, it is made the duty of the commissioner of the General Land Office to certify the lands over to the state for the benefit of the purchaser. The case shows that the selection by the state for the use of the defendant was approved by the Commissioner of the General Land Office and by the Secretary of the Interior after proper investigation, and thereupon the land was duly listed to the *state. Up to [719] this point the rights of no third person had intervened, and the Land Department, to whom the decision of all the questions of law and fact pertaining to the proceeding were specially confided, having decided in favor of their regularity and validity, the decision was conclusive as against the United States, and is conclusive as against the plaintiff, who subsequently attempted to acquire the title from the state." In *Huff* v. *Doyle*, 93 U. S. 558, 559 [23: 975, 976], this court said that it admitted of grave doubt whether in a suit at law the validity of the action of the land department confirming lands to the state under the act of 1866 could be impeached, and that it certainly could not be impeached on any other ground disclosed by the record of that case than that it confirmed lands to the state which were expressly excepted from confirmation. We are of the opinion that while the decision of the Land Department was conclusive as to all facts upon which it necessarily rested, it was not conclusive as to the question of law involved in it, namely, whether the act of 1866 confirmed to the state any lands which, at the time, were withdrawn by executive order from "pre emption, private entry, and sale" for the benefit of the railroad company.

It is said that the railroad company filed its map of general route on the 8th day of December, 1864, and that these lands having been withdrawn from pre-emption, private entry, and sale by the executive order of January 30, 1865, they were not embraced by the act of 1866. In our opinion this is not a proper interpretation of that act. The proviso of the 1st section distinctly indicates certain cases to which the act should not apply; and, distinctly excluding those cases, but no others, from its operation, the act, in express words, confirmed to the state, "in all cases," lands which the state had theretofore selected in satisfaction of any grant by Congress and sold to purchasers in good faith under its laws. No exception is made of lands which, at the date of the passage of the act, were withdrawn from pre-emption, private entry, and sale pursuant to the filing by the railroad company of its map of general route. And the court should not construe the act as excluding lands in that condition, unless it is prepared to hold that *Congress had no power to confirm to the [720] state lands which, at the time, were simply withdrawn from pre-emption, private entry, or sale for railroad purposes. We cannot so adjudge. The withdrawal order of January 30, 1865, did not, in our judgment, stand in the way of the passage of such an act as that of 1866,

first, because the acts of 1862 and 1864 by necessary implication recognized the right of Congress to dispose of the odd-numbered sections, or any of them, within certain limits on each side of the road, at any time prior to the definite location of the line of the railroad; second, Congress reserved the power to alter, amend, or repeal each act; third, the filing of the map of general route gave the railroad company no claim to any specific lands within the exterior limits of such route on either side of the road, the rule being that a grant of public lands, in aid of the construction of a railroad, is, until its route is established, in the nature of "a float," and title does not attach to specific sections until they are identified by an accepted map of definite location of the line of road to be constructed. The railroad company accepted the grant subject to the possibility that Congress might, in its discretion, and prior to the definite location of its line, sell, reserve, or dispose of enumerated sections for other purposes than those originally contemplated. *Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 629, 639-644 [28: 1122, 1125-1127]; *United States* v. *Southern P. R. Co.* 146 U. S. 570, 593 [36: 1091, 1097]. In *Northern P. R. Co.* v. *Sanders*, 166 U. S. 620, 634 [41: 1139, 1144], we said: "The company acquired, by fixing its general route, only an inchoate right to the odd-numbered sections granted by Congress, and no right attached to any specific section until the road was definitely located, and the map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper."

It is true, as said in many cases, that the object of an executive order withdrawing from pre-emption, private entry, and sale lands within the general route of a railroad is to preserve the lands, unencumbered, until the completion and acceptance of the road. But where the grant was, as here, of odd-numbered 721]*sections, within certain exterior lines, "*not* sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed," the filing of a map of general route and the issuing of a withdrawal order did not prevent the United States, by legislation, at any time prior to the definite location of the road, from selling, reserving, or otherwise disposing of any of the lands which, but for such legislation, would have become, in virtue of such definite location, the property of the railroad company. Especially must this be true where the grant is made subject to the reserved power of Congress to add to, alter, amend, or repeal the act containing such grant. The act of 1866 did not take from the railroad company any lands to which it had then acquired an absolute right. The right it acquired, in virtue of the act making the grant and of the accepted map of its general route, was to earn such of the lands, within the exterior lines of that route, as were *not* sold, reserved, or disposed of, or to which no pre-emption or homestead claim had attached, at the time of the definite location of its road. That act did not violate any contract between the United States and the railroad company, for the reason that the contract itself recognized the right of Congress at any time before the line of road was definitely located, to dispose of odd-numbered sections granted. It was one that disposed of the lands in question before the definite location of the road. It dedicated these and like lands, part of the public domain, to the specific purposes stated in its provisions, and to that extent removed the restrictions created by the withdrawal order of 1865, leaving that order in full force as to other lands embraced by it. *Bullard* v *Des Moines & F. D. R. Co.* 122 U. S. 167, 174 [30: 1123, 1126]. That order took these lands out of the public domain as between the railroad company and individuals, but they remained public lands under the full control of Congress, to be disposed of by it in its discretion at any time before they became the property of the company under an accepted definite location of its road.

We cannot doubt that the act of 1866 was a legal exertion *of the power of Congress[722 over the public domain; and as its provisions embraced the present case, it must be adjudged that, at the date of the definite location of the line of the railroad referred to, there was a "lawful claim" upon the lands in controversy, based on the act of 1866; in other words, that act confirmed to the state, for the benefit of those who had purchased from it in good faith, all lands embraced by its provisions, and not expressly excepted therefrom. The subsequent definite location of the line of the railroad did not withdraw from its operation any lands confirmed to the state. This doubtless was the view taken by the land department, which, after due notice to all parties interested, confirmed these lands to the state. The circumstance that the railroad company had, before that action of the land department, obtained a patent covering these with other lands, is not material, for the reason that they had been segregated from the public domain by the act of 1866, and were thereby excluded from the grant of 1862, notwithstanding they were within the exterior lines of the general route of the railroad. Besides, Menotti's proceedings under the act of 1866 were instituted in that department before the railroad company obtained its patent.

Without considering other aspects of the case, we are of opinion that the defendant was entitled, upon the findings of fact, to a judgment in his favor. A judgment in favor of the plaintiffs was a denial of rights secured to the defendant by the laws of the United States.

As the views we have expressed determine the case for the plaintiff in error, it is unnecessary to consider whether, as held by the supreme court of the state, the words in the 4th section of the printed act of July 2, 1864 (13 Stat. at L. 356, chap. 216), "the improvements of any bona fide settler, *or* any lands returned and denominated as mineral lands," should read "the improvements of any bona fide settler *on* any lands returned and denominated as mineral lands."

The judgment is reversed and the case remanded to the supreme court of California for further proceedings not inconsistent with this opinion.

Reversed.

723] ANA J. DOMINGUEZ DE GUYER, Maria D. Dominguez de Watson, *et al.*, *Plffs. in Err.*,

v.

WILLIAM BANNING.

(See S. C. Reporter's ed. 723-744.)

An island when not included in a survey—extent of patent for lands—decree of confirmation.

1. An island within the exterior limits of a bay and almost covered at high tide is not included in a patent for a private land claim, although the exterior lines of the survey made under the decree of confirmation as shown by a map which is made a part of the patent, included the whole of the bay, where the map also contained words stating that the bay was excluded from the survey, and the survey itself said that it was exclusive of the land covered "by the navigable waters" of the bay, and further described the land as certain numbered lots of the public survey, none of which include the island.
2. Claimants of land under a patent issued under the act of Congress of March 3, 1851, for a private land claim in California, cannot recover lands expressly excluded from the survey, to which no objection was urged, as well as from the patent issued and accepted under a decree confirming the claim, so long as the patent remains uncanceled.
3. Where a patent for lands issued in execution of a decree of confirmation made under the act of 1851 has been accepted by the patentee and is uncanceled, persons claiming under the patentee cannot recover lands not embraced by it, even if such lands are embraced by the lines established by the decree; the conclusive presumption being that the patent correctly locates the lands covered by the confirmed grant.

[No. 24.]

Argued March 20, 23, 1896. Ordered for Reargument May 4, 1896. Reargued January 8, 1897. Decided May 24, 1897.

IN ERROR to the Supreme Court of the State of California to review a judgment of that court affirming the judgment of the Superior Court of the County of Los Angeles, California, in favor of defendant, William Banning, in an action brought in ejectment by Ana J. Dominguez de Guyer *et al.*, for the recovery of possession of an island known as Mormon island in the bay of San Pedro, California. *Affirmed.*

See same case below, 91 Cal. 400.

The facts are stated in the opinion.

Mr. **Jefferson Chandler** for plaintiffs in error.

Mr. **Stephen M. White** for defendant in error.

Mr. Holmes Conrad, Solicitor General, filed a brief in behalf of the United States.

Mr. Justice **Harlan** delivered the opinion of the court:

This action is in form ejectment. It was brought May 17, 1886, in the superior court of the county of Los Angeles, California, by Ana J. Dominguez de Guyer and others to recover the possession of a certain island known as Mormon island, in the inner bay of San Pedro, California. At mean high tide the island has an area of less than 1 acre; at mean low tide, about 18.88 acres. The area of the bay, including the island, is 1,100.59 acres.

The defendant Banning filed an answer, in which he denied the allegations of the complaint; also a cross complaint asserting title in himself, and asking a judgment declaring him to be the owner and of right in possession of the premises in controversy.

A jury having been waived, and the cause having been tried by the court, judgment was rendered that the plaintiffs take nothing by their action, and that the defendant was the owner, seised in fee and entitled to the possession of the lands described in the pleadings. That judgment was reversed by the supreme court of California. Three of the members of that court as then constituted—Justices Fox, Sharpstein, and *Paterson—were of opin-[725 ion that the island, as well as the whole of the inner bay within the exterior lines of a grant alleged to have been made by the Mexican government to Christobal Dominguez, belonged to the claimants under that grant, and that the title was vested in the plaintiffs. Mr. Justice Thornton was of opinion that the plaintiffs were entitled to recover the island and such other portion of the land sued for as contained 18.88 acres and was not covered by the navigable waters of the inner bay. Chief Justice Beatty and Justice McFarland dissented.

Upon a rehearing the court, then constituted of Chief Justice Beatty and Justices De Haven, McFarland, Harrison, Garoutte, and Sharpstein, unanimously affirmed the judgment of the inferior court. 91 Cal. 400.

The present appeal was prosecuted by the Los Angeles Terminal Land Company and George Carson, trustee, they having, after the final decision in the state court, become vested with all the right, title, and interest of the original plaintiffs.

The case has been twice orally argued in this court, and we have, in addition, the benefit of a brief filed by leave of court, on behalf of the United States in support of the judgment below, the solicitor general having stated that the government has a deep interest in the result of the litigation by reason of the fact that it has heretofore expended vast sums of money in improving the navigation of the inner bay of San Pedro, and the entrance thereto; and that this bay is regarded as one of the most important points on the Pacific coast as a harbor of refuge.

The history of the title to the lands in controversy, as shown by acts of Congress, public documents, and records is substantially as follows:

By the act of Congress of March 3, 1851 (9 Stat. at L. 631, chap. 41), provision was made for the appointment of a board of com-

NOTE.—*As to Missouri private land claims*, see note to Les Bois v. Bramell, 11: 1051.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 381.

As to errors in survey and descriptions in patents for lands, how construed, see note to Watts v. Lindsey, 5: 423.

missioners to ascertain and settle private land claims in California.

That act declared that every person claiming lands in that state by virtue of any right or title 726] derived from the Spanish *or Mexican government should present the same to that board, together with such documentary evidence and testimony of witnesses as the claimant relied upon in support of his claim—the decision when rendered to be certified, with the reasons on which it was founded, to the district attorney of the United States for the district in which it was rendered. § 8. In case of the rejection or confirmation of a claim, provision was made for a review of the decision by the district court of the district in which the land was situated; and an appeal was allowed from the judgment of that court to the Supreme Court of the United States. §§ 9, 10. When deciding on the validity of any claim the board, as well as the courts, were to be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim was derived, the principles of equity, and the decisions of the Supreme Court of the United States as far as they were applicable. § 11.

By the 13th section of the act it was provided "that all lands, the claims to which have been finally rejected by the commissioners in manner herein provided, or which shall be finally decided to be invalid by the district or supreme court, and all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held, and considered as part of the public domain of the United States; and for all claims finally confirmed by the said commissioners, or by the said district or supreme court, a patent shall issue to the claimant upon his presenting to the General Land Office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same; and in the location of the said claims, the said surveyor general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by § 6 of the act 727] 'to create the office of surveyor *of the public lands for the state of Louisiana,' approved 3d March, 1831."

It was further provided "that the final decrees rendered by the said commissioners, or by the district or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons." § 15.

On the 19th day of October, 1852, Manuel Dominguez, Conception Roche, and others presented to the board of commissioners appointed under the above act a petition claiming a certain tract of land in the county of Los Angeles, known by the name of San Pedro, containing 10 square leagues, more or less. The petition stated that some of the plaintiffs claimed by inheritance and a portion by purchase from the heirs of Christobal Dominguez, who, it was alleged, died seised in fee thereof, having inherited from his uncle, Juan José Dominguez, who also died seised thereof in fee about the year 1809 or 1810; that the latter previous to his death obtained "a perfect grant or concession of the said tract, but at what particular date or from what precise governor cannot now be discovered, owing to the fact that during his lifetime the papers issued and granted, it is believed by José Dario Arguello, governor of the peninsula, in pursuance of the power duly vested in him, were burnt or lost; which said papers, it is averred, contained a complete or perfect grant to the said Juan José;" that such title had been frequently and repeatedly acknowledged by both the Spanish and Mexican governments, and particularly by Don Pablo Vincente de Sola, governor of the province of California, by decree bearing date December 31, 1822; that the said Christobal Dominguez, the father and grandfather of the majority of the petitioners, possessed the tract peaceably and quietly up to his death, and died in the full and legal seisure thereof about 1823; that since that time his heirs and representatives have held and still hold the full, recognized, and peaceable possession thereof, except as thereafter stated in the petition, which possession was known to the Mexican government and *approved, ratified, and[728 confirmed by it in numberless instances; that the lines and boundaries of the tract were and had always been well known, defined, and respected; and that about the year 1817 the judicial possession thereof was given by competent authority, and its lines and boundaries marked out and clearly defined.

The petitioners, after stating their relationship to Christobal Dominguez, averred that they claimed "in fee the said Rancho of San Pedro as tenants in common in the shares and proportions as aforesaid in virtue of the aforesaid grants, of their long pacific possession, and of the ratification, approval, and acknowledgment of their title by the Mexican government."

The prayer of the claimants was that their title to the Rancho San Pedro be confirmed.

The board of commissioners sustained the claim of the petitioners, and an appeal was prosecuted by the government to the district court of the United States for the southern district of California. In that court, on the 10th day of February, 1857, the following judgment was rendered:

"It is ordered, adjudged, and decreed that the decision of the said board of land commissioners be, and the same is hereby, affirmed. And it is further adjudged and decreed that the claim of the appellees to the lands claimed in this case is good and valid and the same are hereby confirmed to them as follows: The lands of which confirmation is hereby made are those known as the 'Rancho of San Pedro,' situate in Los Angeles county, and bounded as follows:

"Commencing at the large sycamore tree (aliso) standing on the side of the high road leading from San Pedro to Los Angeles, thence running in a westerly direction to a stone placed near the high road above men-

tioned and near a small arroyo or creek; thence crossing the plain and following the line of said stones, which are placed as landmarks along said boundary line, to a large stone placed as a monument in said line on the top of a sand hill; thence to the sea, passing by and including the salt ponds known by the name of Las Salinas; thence along the sea until it reaches a point opposite the northern line of 729] the Rancho Palos Verdes, *occupied by and confirmed by said commissioner to the Sepulvedas; thence following said line in an easterly direction to some sand hills for about 12,000 varas; thence southerly to a point called La Goleta on the sea coast; thence following the sea coast easterly to the river San Gabriel; thence up said river to a point where a line drawn from the stone first mentioned through said sycamore tree would strike said river; thence along such line to the place of beginning, containing eight and a half (8½) square leagues, a little more or less."

The United States asked and was allowed an appeal from this decision. But the Attorney General of the United States having given notice that the government would not prosecute the appeal, the parties stipulated in writing that the order granting the appeal be vacated, and that the claimants might proceed under the decree as under a final decree. That stipulation was filed in the cause on the 4th day of June, 1857, and on the same day an order was made, vacating the allowanee of the appeal, and giving the claimants leave to proceed as under a final decree.

On the 18th day of December, 1858, a patent was issued by the United States to the persons in whose behalf the decree of confirmation was made. The patent did not set out the decree, nor give the boundaries of the confirmed tract as described in it, but, after referring to the petition presented to the board of land commissioners, and stating generally that the petitioners claimed therein the confirmation of the tract known by the name of San Pedro, proceeded:

"And whereas the board of land commissioners aforesaid, on the 17th day of October, 1854, rendered a decision that 'the claim of the said petitioners is valid, and it is therefore decreed that the same be confirmed to them, to hold and possess the same as tenants in common in the respective shares and proportion which they hold in and to the premises thereby confirmed by title deduced from Christobal Dominguez, deceased, by heirship or mesne conveyances, it being the intention to confirm to each of said petitioners the respective title held by him at the time of his becoming a party to this proceeding, derived from the source above mentioned;' which decree 730]* or decision was confirmed by the district court of the United States for the southern district of California on the 10th day of February, 1857; and whereas it further appears from a certified transcript on file in the general land office that the Attorney General of the United States having given notice that the appeal of the Supreme Court of the United States in this cause would not be prosecuted, the aforesaid district court, on the 4th day of June, 1857, 'ordered that the order of this court made on the 24th day of February, A. D. 1857, granting an appeal to the supreme court from the decree of confirmation of this court, filed on the 10th day of February, 1857, be, and is hereby, vacated, and that the said claimants have leave to proceed under said decree as under a final decree.'

"And whereas, under the 13th section of the act of Congress of the 3d of March, 1851, there have been presented to the commissioner of the general land office a plat and certificate of the survey of the land confirmed as aforesaid, authenticated on the 19th day of February, 1858, by the signature of the surveyor general of public lands in California; which plat and certificate are in the words and figures following, to wit:

"'U. S. Surveyor General's Office,

"'San Francisco, California.

"'Under and by virtue of the provisions of § 13 of the act of Congress of the 3d of March, 1851, entitled "An Act to Ascertain and Settle the Private Land Claims in the State of California," and of the 12th section of the act of Congress approved on the 31st of August, 1852, entitled "An Act Making Appropriations for the Civil and Diplomatic Expenses of the Government for the Year Ending the 30th of June, 1853, and for Other Purposes," and in consequence of a certificate of the United States district court for the southern district of California, of which a copy is annexed, having been filed in this office, whereby it appears that the Attorney General of the United States having given notice that it was not the intention of the United States to prosecute the appeal from the decision *of the said district court by which it [731 affirmed the decision of the board of commissioners appointed under the provisions of the said act of the 3d of March, 1851, to ascertain and settle the private land claims in the state of California, by which they recognized and confirmed the title and claims of Manuel Dominguez *et al.* to the tract of land designated as the Rancho "San Pedro," containing 8½ square leagues, a little more or less, the said appeal has been vacated by the said district court, and thereby the said decisions in favor of the said Manuel Dominguez *et al.* have become final, I have caused the said tract to be surveyed in conformity to the boundaries specified in the said confirmatory decree, and do hereby certify the annexed map to be a true and accurate plat of the said tract of land as appears by the field notes of the survey thereof made by Henry Hancock, deputy surveyor, in the month of December, 1857, under the directions of this office, which, having been examined and approved, are now on file therein.

"'And I do further certify that, under and by virtue of the said confirmation and survey, the said Manuel Dominguez *et al.* are entitled to a patent from the United States upon the presentation hereof to the general Land Office for the said tract of land, the same being described as follows, to wit:

[Here follows a description, by metes and bounds, of the exterior lines of the rancho San Pedro, within which is Mormon island in the inner bay of San Pedro.]

"'Excepting, reserving, and excluding from the tracts as thus surveyed that portion thereof

covered by the navigable waters of the inner bay of San Pedro, and which are included within the following-described lines, to wit: Beginning at the stake on the high-water line of the inner bay of San Pedro on the line between stations 23 and 24 of the survey of the rancho, and which stake is 212 chains south 7° 32′ east from said station number 23.

[Here in the body of the certificate is a table showing the metes and bounds of the entire sur-
732] vey, and also a table headed *"Traverse of inner bay of San Pedro to be excluded from survey of the claim," and showing the metes and bounds of the part so excluded; and immediately below the last table are these words: "Area within the exterior lines of the confirmed tract, 44,219.72 acres; area within lines '7' to '16,' being the lands covered by the navigable waters of the inner bay of San Pedro, connected with the ocean, and therefore to be excluded, 1,100.50 acres; area included in the boundaries specified by the confirmatory decree, exclusive of bay, 43,119.13 acres."]

" 'Thence according to the true meridian (the variation of the magnetic needle being 15° 30′ east), along the high-water line of the inner bay of San Pedro south 80° 45′ east 10 chains and 84 links to station. . . . Thence north 31° 30′ west, crossing the channel or entrance to the bay, 19 chains and 44 links to 'La Goleta,' exterior boundary station number 24, and thence north 7° 32′ west, crossing the said 'inner bay,' 125 chains and 20 links to the stake on the high-water line of the bay and commencement of this survey thereof.

" 'Containing, exclusive of the lands above described as covered by the navigable waters of the inner bay of San Pedro 43,119.13 acres, and being designated upon the plats of the public survey as lots numbered 37, 38, 39, in township 3 south, of range 12 west; lot number 37, in township 3 south, of range 13 west; lot number 37, in township 3 south, of range 14 west; lot number 37, in township 4 south, of range 13 west; lot number 37, in township 4 south, of range 14 west; lot number 37, in township 4 south, of range 15 west; and lot number 37, of township 5 south, of range 13 west of the San Bernardino meridian line.

" 'In testimony whereof I have hereunto
733] signed my name *and affixed the seal of said office this 19th day of February, A. D. 1858.

" '[L. S.] J. W. Mandeville,
" 'U. S. Sur.-Gen'l, Cal.' "

"Now know ye that the United States of America, in consideration of the premises and pursuant to the provisions of the act of Congress aforesaid of 3d March, 1851, have given and granted, and by these presents do give and grant, unto the said Manuel Dominguez, Conception Roche, Bernardino Roche, José Antonio Aguirre, Maria Jesus Cotta de Dominguez, Madalena Dominguez, Andres Dominguez, Feliciana Dominguez, Estaban Dominguez, Maria Dominguez, Pedro Dominguez, José Dominguez, Maria, widow of Manuel Roche, and Antonio Jacinto Roche, and to their heirs, the tract of land embraced and described in the foregoing survey in the respective shares and proportions which they hold in the premises 'by them deduced from Christobal Dominguez, deceased, by heirship or by mense conveyances, but with the stipulation that in virtue of the 15th section of the said act the confirmation of the said claim and this patent shall not affect the interest of third persons,' to have and to hold," etc.

This patent appears to have been recorded December 28, 1869, at the request of Manuel Dominguez.

At the trial the plaintiffs read in evidence the petition of claimants before the board of land commissioners for the confirmation of the rancho San Pedro; the decree of the board confirming the same; the decree of the district court confirming the decision of the commissioners, and the orders therein made as above stated; and a copy of the above patent from the United States.

At this stage of the trial it was stipulated between counsel that "whatever title vested by said confirmation and patent in said petitioners and confirmees had passed to and become vested in the plaintiffs in this action, who are now owners of whatever title passed under said confirmation and patent to the said petitioners and confirmees."

*A witness for the plaintiff, who was a [734 surveyor, testified that "the lines of the decree of confirmation and the exterior lines of the patent and the patent map were identical; that the survey was made in conformity to the decree of confirmation, and from that survey the description contained in the patent was made;" and that the inner bay of San Pedro, within which was Mormon island, was within the exterior lines called for in that decree and defined on the patent map.

Banning, in support of his claim to the premises, introduced in evidence a patent from the United States, of date December 30, 1881, for lot 1 of section 8, in township 5 south, of range 13 west, of San Bernardino meridian in California, "containing 18.88 acres, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general;" and a quitclaim deed to him from A. A. Polhamus, navigator, for "a certain tract of land situate in the bay of Wilmington, county of Los Angeles, state of California, known as Mormon island, and all the land adjoining thereto, to which I [the grantor] have any title or claim."

Banning testified in his own behalf that he entered into possession of Mormon island in 1880, his possession beginning by his buying out the person then on the island. But he does not state who that person was or by what right he was in possession. He also testified that when he took possession he claimed that the title was in the United States, and he continued to so claim until he obtained a patent from the United States, when he claimed the property for himself; and that he has been in possession since 1890, no one else claiming the right of possession until the present plaintiffs set up their claim by this suit. He said: "This tract of land known as Mormon island is an island; at about half tide it is an island, and is now an island at low water; at low water it is only partly surrounded by water; at low water it would not be surrounded with water; at mean tide there would be about 2 feet of water around it; at high tide it is almost all covered with water. . . . A very

small portion of the island is above ordinary high water. At mean tide, I don't think there
735] is an acre above water. The *descriptive clause in the patent to me extends to mean low water. I think to include 18 acres would carry it to mean low water. We occupied a portion of it that was covered with water. I have shipways there and houses on piles. About an acre is covered in that way. Another portion of the island we run lighters on and pile lumber on when the high tide falls. We use in that way sometimes a couple of acres on the west side, the channel side of the island, and that kind of occupation would cover about 8 acres."

There was some evidence as to how certain lands, including Mormon island, were assessed from 1880 to 1887 inclusive. But in the view the court takes of the case it is not necessary to advert to it.

The map which accompanied and was made part of the patent of 1858 shows the exterior lines of the survey made under the decree of confirmation. Those lines include the whole of the inner bay of San Pedro. The map also shows the exterior lines of the bay itself. But across that part of the map which designates the bay are the words "inner bay of San Pedro (Exception)." And, as already stated, the map has on its face not only a table showing the exterior lines of the entire boundary run by the surveyor general, but a table of courses and distances, under the heading "Traverse of inner bay of San Pedro to be excluded from survey of the claim." It is not disputed that Mormon island is within the exterior lines of this inner bay, and is almost covered with water at high tide. That the part excluded or excepted from the survey embraced the navigable waters of the inner bay cannot be doubted. Was it not also intended to exclude Mormon island, which, according to the opinion of the court below on the original hearing, consisted, at high water, "of a pile of rocks, covering not much more than an acre?" This question was answered in the negative by the supreme court of California, which on the rehearing of the case, said: "The remaining question is, whether the land in controversy is included within the exception; and, as to this, we entertain no doubt that the exception properly construed embraces all the lands within the exterior boundaries of the inner bay of
736] *San Pedro, as shown on the map accompanying the patent, and is not confined simply to such land as is covered by the navigable waters of that bay. That this is the true meaning of the exception is made to appear, not only from the fact that the inner bay of San Pedro is marked 'excepted' upon the map referred to, but is also conclusively shown by the concluding portion of the survey itself, as returned and certified, in which, after giving the boundaries of the land surveyed by courses and distances, it designates the land surveyed, 'exclusive of the lands above described as covered by the navigable waters of the inner bay of San Pedro,' as being certain numbered lots on the plats of the public survey, neither of which lots includes any portion of the land within the exterior boundaries of the inner bay of San Pedro, as marked on said map." We entirely concur in that view. The purpose of the surveyor general was to set apart to the claimants under the decree of confirmation 43,119.13 acres, and not to include in, but distinctly to exclude from, the surveyed claim the 1,100.50 acres within the exterior lines of the inner bay. And that there might be no doubt where and how the confirmed tract was located, the survey describes the 43,119.13 acres as being designated upon the plats of the public survey as certain numbered "lots." Mormon island is not within any of those lots. The island, therefore, was not included within, but was excluded from, the surveyed claim, nor patented to the claimants who obtained the decree of confirmation.

The plaintiffs therefore contend that we have a case in which the survey made in execution of the decree of confirmation under the act of 1851, and the patent based on that survey, except and exclude lands which, although within the exterior lines of the bay, are within the exterior lines of the confirmed tract as described in such decree.

But does it follow that in this action to recover possession the plaintiffs can recover lands that were excluded from the survey, and are not embraced by the patent based upon that survey? The plaintiffs offered in evidence in support of their title a patent which manifestly did not grant lands that were excluded from the surveyed claim; and yet it is contended *that they may go behind [
737 both the survey and patent, and recover the possession of the lands so excluded, precisely as they could do if the lands had been included in both the survey and patent.

In our opinion, if those who obtained the decree of confirmation objected to the survey as not being in conformity with that decree, their objection should have been made known to the district court before the survey was transmitted to the General Land Office, or at least before it was acted upon and made the basis of a patent. The patent was not issued until nearly a year after the survey was made and certified. Under the act of 1851, it was within the power of the district court to have required a survey in exact conformity with its decree. Its jurisdiction over the subject did not end with the decree. The Surveyor General was required by the statute (§ 13) to cause an accurate survey to be made of all private claims finally confirmed under the act of 1851, and to furnish plats of the same. If he misinterpreted the decree, if he made an inaccurate survey, and excluded from it lands that were confirmed to the original claimants, the court had authority to compel the proper execution of its decree.

In *United States* v. *Fossatt*, 62 U. S. 21 How. 445, 450 [16: 186, 187], decided in 1858, which case arose under the act of 1851 for the settlement of private land claims in California, this court, speaking by Mr. Justice Campbell, said: "It is asserted on the part of the appellants that the district court has no means to ascertain the specific boundaries of a confirmed claim, and no power to enforce the execution of its decree, and consequently cannot proceed further in the cause than it has done. The 13th section of the act of March 3, 1851, makes it the duty of the Surveyor General to cause all private claims which shall be finally

confirmed to be accurately surveyed, and to furnish plats of the same. It was the practice under the acts of 1824 and 1828 (4 Stat. at L. 52, 284), for the court to direct their mandates specifically to the surveyor designated in those acts. And in the case of *Sibbald* v. *United States*, 37 U. S. 12 Pet. 488 [9: 1167], the duty of the **738**]surveyor to fulfil the *decree of the court, and the power of the court to enforce the discharge of that duty, are declared and maintained. The duties of the surveyor begin under the same conditions, and are declared in similar language, in the acts of 1824, 1828, and of 1851. The opinion of the court is, that the power of the district court over the cause, under the acts of Congress, does not terminate until the issue of a patent conformably to that decree." To the same effect was *United States* v. *Berreyesa*, 64 U. S. 23 How. 499 [16: 474].

The power of the district court over proceedings taken in execution of its decree was distinctly recognized by, although existing before, the act of June 14, 1860 (12 Stat. at L. 33, chap. 128), which provided that "the district courts of the United States for the northern and southern districts of California are hereby authorized, upon the application of any party interested, to make an order requiring any survey of a private land claim within their respective districts to be returned into the district court for examination and adjudication, and on the receipt of said order, duly certified by the clerk of either of said courts, it shall he the duty of the Surveyor General to transmit said survey and plat forthwith to said court."

Referring to the act of 1860, in *United States* v. *Halleck*, 68 U. S. 1 Wall. 439, 454 [17: 664, 668] (1863),—in which case a second survey had been ordered prior to the act of 1860, and was pending when that act was passed,—Mr. Justice Field, speaking for the court, said that whatever question might be raised as to the jurisdiction of the district court to supervise the survey previous to that act, there could be none after its passage. And in *Fossatt* v. *United States*, 69 U. S. 2 Wall. 649, 712 [17: 739, 750] (the same one above reported in 21 How. 445, 450 [16: 186, 187]), Mr. Justice Nelson, delivering the opinion of the court, said: "The fundamental error in the argument is in assuming that the survey and location of the land confirmed are not proceedings under the control of the court rendering the decree, and hence not a part of the judicial action of the court. These proceedings are simply in execution of the decree, which execution is as much the duty of the court, and as much within its competency, as the hearing of the cause and the rendition of its judgment; as much **739**] so as the *execution of any other judgment or decree rendered by the court. This power has been exercised by the court ever since the Spanish and French land claims were placed under its jurisdiction, as may be seen by the cases referred to in the opinion of the court in this case, . . . and in many others to be found in the reports. The powers of the surveyor general under these act were as extensive and as well defined as under the act of 1851. The act of 1860 did not enlarge or in any way affect his powers. They remained the same as before."

So far from the claimants under the decree of confirmation rendered in 1857 bringing the survey before the district court in order that any error therein might be corrected, they accepted it as filed. We say this because the statute requires a patent to issue to the claimant "upon *his* presenting to the General Land Office an authentic certificate of the confirmation, *and a plat or survey of said land, duly certified and approved by the surveyor general of California.*" If the claimants under the decree of confirmation did not themselves present the survey to the General Land Office, and ask a patent in accordance therewith, they accepted a patent based upon that survey and plainly showing that it conformed to a survey that did not embrace, for the purposes of a patent, anything within the exterior lines of the inner bay of San Pedro. If the Secretary of the Interior upon inspecting the survey and the decree of confirmation had authority to order a new survey or to disregard the part of it excluding lands within the exterior lines of the inner bay, the record does not show that any effort was made in the Land Office to bring about such a result. On the other hand, if the Land Office had only a ministerial duty to issue a patent in exact accordance with the decree of confirmation, no steps were taken to compel the performance of that duty. We have, therefore, a case brought in 1886 in which the plaintiffs seek to recover the possession of lands alleged to have been confirmed in 1857 to those under whom they claim, but which lands in 1858, nearly thirty years before the commencement of this action, were expressly excluded as well from the survey to which no *objection was urged, as from the patent[**740** issued to and accepted by the claimants under that decree.

We are of opinion that while it may be true, in some cases, that an action to recover possession of lands confirmed to a claimant under the act of 1851 can be maintained before a patent is issued, yet a patent issued avowedly in execution of such decree was conclusive between the United States and the claimants, and, until canceled, it alone determines, in an action to recover possession, the location of the lands that passed under the decree. Such is the effect of former decisions of this court.

An instructive case upon the subject is *Beard* v. *Federy*, 70 U. S. 3 Wall. 478, 491 [18: 88, 91], in which this court considered the character and effect of a patent issued upon a confirmation of a claim to land under the laws of Spain or Mexico. The court said: "In the first place, the patent is a deed of the United States. As a deed, its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the board of land commissioners. *Landes* v. *Brant*, 51 U. S. 10 How. 373 [13: 460]. In the second place, the patent is a record of the action of the government upon the title of the claimant as it existed upon the acquisition of the country. Such acquisition did not affect the rights of the inhabitants to their property. They retained all such rights, and were entitled by the law of nations to protection in them to

the same extent as under the former government. The treaty of cession also stipulated for such protection. The obligation to which the United States thus succeeded was, of course, political in its character, and to be discharged in such manner and on such terms as they might judge expedient. By the act of March 3, 1851, they have declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to lands are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals 741]from the *decisions of the tribunal, first to the district and then to the supreme court; and designated officers to survey and measure off the land when the validity of the claim is finally determined. When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is therefore record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now so as to embrace the premises as they are surveyed and described. As against the government this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie. If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognized in one suit and rejected in another, and if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest. Every fact upon which the decree and patent rest would be open to contestation. The intruder, resting solely upon his possession, might insist that the original claim was invalid or was not properly located, and, therefore, he could not be disturbed by the patentee. No construction which will lead to such results can be given to the 15th section The term 'third persons,' as there used, does not embrace all persons other than the United 742]States and the claimants, but *only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property."

These principles were recognized in *More* v. *Steinbach*, 127 U. S. 70, 83 [32: 51, 56], and again in *Knight* v. *United Land Asso.* 142 U. S. 161, 187 [35: 971, 983]. See also *Meader* v. *Norton*, 78 U. S. 11 Wall. 442, 457 [20: 184, 187]; *Adam* v. *Norris*, 103 U. S. 591, 593 [26: 583, 584]; *Stoneroad* v. *Stoneroad*, 158 U. S. 240 [39: 966]; *Russell* v. *Maxwell Land Grant Co.* 158 U. S. 253 [39: 971].

The decisions of the supreme court of California have been to the same effect.

In *Teschemacher* v. *Thompson*, 18 Cal. 11, 25, 26 [79 Am. Dec. 151], the court, after referring to the statute of 1851, said: "As the last act in the series of proceedings, a patent is to issue to the claimant. This instrument is not only the deed of the United States, but it is a solemn record of the government of its action and judgment with respect to the title of the claimant existing at the date of the cession. By it the sovereign power, which alone could determine the matter, declares that the previous grant was genuine; that the claim under it was valid and entitled to recognition and confirmation by the law of nations and the stipulations of the treaty; and that the grant was located, or might have been located, by the former government, and is correctly located by the new government, so as to embrace the premises as they are surveyed and described. Whilst this declaration remains of record, the government itself cannot question its verity, nor can parties claiming through the government by title subsequent."

In *Chipley* v. *Farris*, 45 Cal. 527, 538, which involved the title to lands alleged to have been covered by a Mexican grant, and in respect of which there were proceedings under the act of Congress of March 3, 1851, it was contended on one side that the patent was conclusive upon all points in the case, and put an end to all questions of lines and boundaries. On the other side, it was insisted that the confirmation of the claim gave the claimant a perfect title, and that he could not be devested of title to any lands embraced in the decree of confirmation by a patent that excluded a portion of them. The *supreme court of Cali- [743 fornia said: "A patent issued under the act of 1851 is, as has often been held by this court, the final act in proceedings instituted for the confirmation of the claim of the patentee to land which had been granted by the former government, and for the segregation of such lands from the public lands of the United States; and it is a record which binds both the government and the claimant, and cannot be attacked by either party, except by direct proceedings instituted for that purpose. *Leese* v. *Clark*, 18 Cal. 535. While it stands the claimant, or those deriving title through him, will not be permitted to aver that the claim comprised other or different lands from those mentioned in the patent. . . . It is contended by the plaintiffs that the survey, which is incorporated into the patent, does not accord with the decree of confirmation, and that they are entitled to rely upon the decree—which is also incorporated into the patent—for title to lands within the decree, but not within the survey. This position cannot be maintained consistently with the views already expressed as to the nature and effect of the patent. The patent purports to convey the lands described in the survey, and its scope cannot be extended, nor, on the other hand, can it be lim-

lted, by showing that the decree comprised a greater or less area than the survey. Nor can the claimant, after admitting—as he must—the conclusive effect of the patent, make out title to lands not conveyed by the patent, by the production of the proceedings which culminated in the patent. The patent, while it remains in force, conclusively determines what lands the claimant was entitled to under his claim and the decree of confirmation. The claimant can neither reform the patent nor show that it is in any respect incorrect, in an action of ejectment." See also *Moore* v. *Wilkinson*, 13 Cal. 478; *Cassidy* v. *Carr*, 48 Cal. 339; *Gallagher* v. *Riley*, 49 Cal. 473, 477; *Carey* v. *Brown*, 58 Cal. 180, 185; *People* v. *San Francisco*, 75 Cal. 389; *Wright* v. *Seymour*, 69 Cal. 122. And as said by Mr. Justice Field in *Moore* v. *Wilkinson*, 13 Cal. 488, "the 15th section of the act of Congress of 1851 provides 744]that the final decree of confirmation *and patent shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons. If conclusive between the United States and the claimants, it must be equally so between persons holding under either of those parties."

In our opinion the adjudged cases and the evidence in the cause leave no room to doubt the soundness of the conclusions announced by the supreme court of the state, namely: (1) That the lands in controversy are not embraced by the patent issued to the petitioners under the proceedings before the board of land commissioners appointed under the act of 1851; (2) the patent having been accepted by the patentees, and being uncanceled, the plaintiffs in this action, claiming under the patentees, cannot recover lands not embraced by it, even if such lands are embraced by the lines established by the decree of confirmation —the conclusive presumption being that the patent correctly locates the lands covered by the confirmed grant.

It is proper to say that the court decides nothing more in this case than that the plaintiffs are not entitled to recover possession of the specific lands here in controversy. In this view it is unnecessary to decide whether the defendant Banning was entitled to a judgment on his cross-complaint, nor whether the lands under the navigable waters of the inner bay of San Pedro, and those here in controversy or any part thereof, passed to the state of California upon its admission into the Union, or after the issuing of the patent of 1858.

Judgment affirmed.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1897.

Vol. 168.
22A

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1897,

AND REPORTED HEREIN,

VOL. 168,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 168 U. S.	Title.	Here in.
1	Southern P. R. Co. v. United States	355
24–25	" " "	368
25–28	" " "	369
28–31	" " "	370
31–34	" " "	371
34–37	" " "	372
37–40	" " "	373
40–42	" " "	374
42–45	" " "	375
45–48	" " "	376
48–51	" " "	377
51–54	" " "	378
54–57	" " "	379
57–60	" " "	380
60–63	" " "	381
63–66	" " "	382
66	" " "	383
66–68	Bergere v. United States United States v. Bergere	383
68–71	" "	384
71–74	" "	385
74–77	" "	386
77–80	" "	387
80–85	" "	388
85	" "	389
85–86	" "	390
86–88	Alaska Min. Co. v. Whelan ("Alaska Treadwell Gold Min. Co. v. Whelan")	390
88–89	" " "	391
89	" " "	392
90–91	Turner v. New York	392
91–94	" "	393
94–95	" "	394
95–97	United States v. Goldenberg	394
97	" "	395
102–103	" "	398
104	Compania de Navigacion La Flecha v. Brauer	398
104–106	" " "	399
106–109	" " "	400
109–111	" " "	401
117	" " "	404
117–120	" " "	405
120–123	" " "	406
123–124	" " "	407
124–125	Craemer v. Washington	407
125–128	" "	408
128–131	" "	409
131	Miller v. Cornwall R. Co.	409
132–134	" "	410
134–135	" "	411
135–137	Fletcher v. Baltimore & P. R. Co.	411
137–139	" " "	412
139–142	" " "	413
142–144	" " "	414
144	Interstate Commerce Commission v. Alabama M. R. Co.	414
146–148	" " "	415
148–149	" " "	416
161–163	" " "	421
163–165	" " "	422
166–169	" " "	423
169–171	" " "	424
171–174	" " "	425
174–177	" " "	426
177	Chaves v. United States	426
178–180	" "	427
180–183	" "	428
183–186	" "	429
186–188	" "	430
188–189	" "	431
189–192	" "	432
192–195	" "	433
195–197	" "	434
198	Zia v. United States	434
198–201	" "	435
201–204	" "	436
204–207	" "	437
207	" "	438
208–209	Crespin v. United States	438
209–212	" "	439
212–215	" "	440
215–218	" "	441
218	" "	442
218–220	Roff v. Burney	442
220–223	" "	443
223–224	" "	444
224–225	Ogden City v. Armstrong	444
225	" "	445
225–226	" "	446
226–227	" "	447

Off. Rep. 168 U. S.	Title.	Here in.
227–228	Ogden City v. Armstrong	448
228–231	" " "	449
231–234	" " "	450
234–237	" " "	451
237–240	" " "	452
240–241	" " "	453
241–242	Dennison v. United States	453
242–245	" " "	454
245–248	" " "	455
248–250	" " "	456
250	Underhill v. Hernandez	456
250–253	" " "	457
253–254	" " "	458
255–256	Pratt v. Paris Gaslight & C. Co.	458
256–258	" " "	459
258–261	" " "	460
261–262	" " "	461
262–264	Hodgson v. Vermont	461
264–268	" " "	462
268–271	" " "	463
271–273	" " "	464
273	United States v. Wilson	464
274–276	" " "	465
276–278	" " "	466
278	Holtzman v. Douglas	466
279–282	" " "	467
282–285	" " "	468
285–286	" " "	469
287	O'Brien v. Miller	469
288–292	" " "	470
292–293	" " "	471
293–296	" " "	472
296–299	" " "	473
299–302	" " "	474
302–304	" " "	475
304–307	" " "	476
307–310	" " "	477
310	" " "	478
311–312	Harrison v. Perea	
	Perea v. Harrison	478
312–314	" " "	479
314–317	" " "	480
317–320	" " "	481
320–323	" " "	482
323–326	" " "	483
326–328	" " "	484
328	Karrick v. Hannaman	484
328	" " "	485
328–329	" " "	486
329–331	" " "	487
331–333	" " "	488
333–335	" " "	489
335–338	" " "	490
338–339	" " "	491
339	Warner v. Baltimore & O. R. Co.	491
340–341	" " "	494
341–344	" " "	495
344–347	" " "	496
347–349	" " "	497
349	St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. Minneapolis Mill Co. v. St. Paul Water Comrs.	497
349–352	" " "	498
352–354	" " "	499
354–357	" " "	500
357–360	" " "	501
360–363	" " "	502
363–366	" " "	503
366–369	" " "	504
369–372	St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. Minneapolis Mill Co. v. St. Paul Water Comrs.	505
372–374	" " "	506
375–377	United States v. Crosthwaite	507
376–380	" "	508
380–381	" "	509
382	Williams v. United States	509
383–385	" "	510
385–388	" "	511
388–391	" "	512
391–394	" "	513
394–397	" "	514
397–398	" "	515
398	Nobles v. Georgia	515
398–402	" "	516
402–404	" "	517
404–407	" "	518
407–409	" "	519
410	The Victory & The Plymothian	519
410–411	" "	520
411–415	" "	521
413	" "	522
415	" "	523
416–418	" "	526
418–421	" "	527
421–424	" "	528
424–426	" "	529
426–429	" "	530
429–430	" "	531
430–432	Muse v. Arlington Hotel Co.	531
432–435	" " "	532
435–437	" " "	533
438	The Resolute	533
438–439	"	534
439–440	"	535
440–443	"	536
443–444	The William M. Hoag ("The William H. Hoag") The Three Sisters	537
445	Stewart v. Baltimore & O. R. Co.	537
445–448	" " "	538
448–450	" " "	539
451	Thompson v. Maxwell Land Grant & R. Co.	539
451–453	" " "	540
453–456	" " "	541
456–459	" " "	542
459–462	" " "	543
462–465	" " "	544
465–468	" " "	545
468–471	" " "	546
471	" " "	547
471	Bent v. Miranda	547
471–473	Hyer v. Richmond Traction Co.	547
473–476	" " " "	548
476–479	" " " "	549
479–482	" " " "	550
482–485	" " " "	551
485–488	" " " "	552
488–490	Douglas v. Kentucky	553
490–493	" "	554
493–496	" "	555
496–499	" "	556
499–502	" "	557
502–505	" "	558
505	" "	559
505–507	United States v. Union P. R. Co.	559
507–510	" "	560

Off. Rep. 168 U. S.	Title.	Here in.
510–513	United States v. Union P. R. Co.	561
513	" " "	562
513–515	Springer Land Asso. v. Ford	562
515–518	" " "	563
518–521	" " "	564
521–524	" " "	565
524–527	" " "	566
527–530	" " "	567
530–532	" " "	568
532	Bram v. United States	568
534–535	" "	570
535–537	" "	571
537–540	" "	572
540–543	" "	573
543–546	" "	574
546–549	" "	575
549–552	" "	576
552–555	" "	577
555–558	" "	578
558–561	" "	579
561–564	" "	580
564–567	" "	581
567–569	" "	582
569–572	" "	583
572–573	" "	584
573	Adams v. Henderson	584
574	" " "	585
574–577	" "	586
577–580	" "	587
580–583	" "	588
583–585	*Re* Tampa Suburban R. Co.	589
585–588	" "	590
588	" "	591
589–590	Michigan Land & L. Co. v. Rust	591
591–593	" " "	592
593–596	" " "	593
596–599	" " "	594
599–602	" " "	595
602–604	" " "	596
604	Northern P. R. Co. v. Musser-Sauntry Land, L. & M. Co.	596
605–607	" " "	597
607–610	" " "	598
610–611	" " "	599
611–612	Wilson v. Lambert	599
612–615	" "	600
615–618	" "	601
618	" "	602
618–620	Shepard v. Adams	602
620–623	" "	603
623–626	" "	604
626–627	" "	605
627–628	Highland Ave. & B. R. Co. v. Columbian Equipment Co.	605
628–631	" " "	606
631–632	" " "	607
632–634	Hall v. United States	607
634–637	" "	608
637–640	" "	609
640–642	Crossley v. California	610
642	"	611
642–645	Conde v. York	611
645–647	" "	612
647–650	" "	613
650–651	" "	614
651	McHenry v. Alford	614
652–655	" "	615
655–657	" "	616
657–660	" "	617
660–663	" "	618
663–666	" "	619
666–669	" "	620
669–672	" "	621
672–673	" "	622
674	Castillo v. McConnico	622
674–677	" "	623
677–680	" "	624
680–683	" "	625
683–685	" "	626
685	Penn Mut. L. Ins. Co. v. Austin	626
685–687	" " " " "	627
687–690	" " " " "	628
690–693	" " " " "	629
693–696	" " " " "	630
696–699	" " " " "	631
699–701	" " " " "	632
703	Memorandum Cases	1207
712	" "	1218

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1897.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

1] SOUTHERN PACIFIC RAILROAD COMPANY *et al., Appts.,*
v.
UNITED STATES.

Decision as to definite location of lands in railroad grant—former decision, when conclusive—act granting lands to railroad—former adjudication—amendment of bill—special replication—former judgment, when admissible in evidence—party not appealing.

(See S. C. Reporter's ed. 1–66.)

1. A decision as to the sufficiency of maps to make a definite location or designation of the route of a railroad, on which the title to lands included in a railroad grant depends, is conclusive in another action then pending between the same parties, respecting other lands within the same grant.
2. A right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, even if that suit is for a different cause of action.
3. The word "designated" in the act of Congress of 1866 granting lands to a railroad the line of which "is designated by a plat" means no more nor less than the words "definitely located."
4. An adjudication of a fact on which depends the title to lands in controversy is conclusive as between the parties, in respect to the title of

NOTE.—*As to pre-emption rights,* see note to United States v. Fitzgerald, 10: 785.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands, how construed, see note to Watts v. Lindsey, 5: 423.

As to land grants to railroads, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

As to statutes legalizing invalid grants, see note to Erskine v. Nelson County (N. D.) 27 L. R. A. 696.

As to surveys; meander lines,—see note to Stoner v. Rice (Ind.) 6 L. R. A. 387.

As to homestead right, see note to Sweezey v. Sparling (Iowa) 9 L. R. A. 777.

That a right, question, or fact which was put in issue and determined in a suit cannot be disputed in a subsequent suit between the same parties or their privies, although the second suit is for a different cause of action; when judgment binding; parol evidence.

A judgment dismissing a suit against a seller of stock to compel delivery is conclusive of his right in a subsequent suit to compel payment of the purchase price. Schulte v. Guthlein, 4 Ohio N. P. 169.

A judgment in a prior action between the same parties is conclusive as to all matters adjudicated thereby, or which the parties might have litigated as incident to the subject-matter of the litigation. Everitt v. New York Engraving & Print. Co. 20 Misc. 548, Affirming 19 Misc. 360.

A defense which has been urged and decided adversely in a former suit cannot be set up in a second suit between the same parties on the same cause of action, even though new evidence has been subsequently discovered, or the judgment was erroneous. Lafourche Police Jury v. Terrebonne Police Jury, 49 La. Ann. 1331; Nesbitt v. Independent Dist. of Riverside, 144 U. S. 610 (36: 562); Dowell v. Applegate, 152 U. S. 327 (38: 463); Cromwell v. Sac County, 94 U. S. 351 (24: 195); Bryan v. Kennett, 113 U. S. 179 (28: 908); Aurora v. West, 74 U. S. 7 Wall. 103 (19: 49); Gould v. Evansville & C. R. Co. 91 U. S. 533 (23: 419).

A decree of a court of equity is a bar at law to any other proceeding between the same parties in respect to the same cause of action, although such decree is entered by default. Jamieson v. Holm, 69 Ill. App. 119.

A judgment in ejectment against one claiming possession as officer of a state, if not *res judicata* as to another state officer, is of the highest authority upon the position that the title of the plaintiff is good as against anyone who assumes the right to the possession of the property solely because he is a state officer. Wesley v. Tindal, 81 Fed. Rep. 612.

A judgment foreclosing a mortgage will bar the lien of a city for an assessment for a street improvement, in a subsequent action, where the city was made a party to the foreclosure, filed its answer and cross petition, but failed to set up such lien. Cincinnati v. Lingo, 13 Ohio C. C. 334.

A judgment for defendant in replevin who justified under a chattel mortgage is *res judicata* in a subsequent action between the same parties for the same purpose, in which the mortgagor attempts to avoid the effect of the mortgage on the ground, not raised in the former case, but which might have been raised therein, that it is usurious. Lawton v. Hudson, 19 App. Div. 522.

other lands depending upon the existence or non-existence of that fact.

5. The amendment of a bill to set up a judgment rendered, pending the suit, in another case between the same parties and involving the same issue, although for a different cause of action, is not necessary, as the judgment cannot be pleaded as an absolute bar arising upon the face of the record, but can be used as evidence, without being specially pleaded.

6. An amended bill or special replication is not necessary in order to avoid the effect of an amended answer which is, at most, only a more extended statement of the grounds of defense previously set forth.

7. A former judgment, if admissible in evidence, is conclusive of the matters in issue and actually determined by it, although it is not pleaded.

8. A decree cannot be reversed for error against a party who has not appealed.

[No. 71.]

Argued December 2, 3, 1896. Decided October 18, 1897.

APPEAL from a decree of the United States Circuit Court of Appeals for the Ninth Circuit affirming the decree of the Circuit Court of the United States for the Southern District of California in favor of the United States in an action brought by the United States, plaintiff, against the Southern Pacific Railroad Company *et al.*, defendants, to obtain a decree quieting the title of the United States to lands in California acquired under the treaty of Guadalupe Hidalgo. *Affirmed*, as to the Southern Pacific Railroad Company, and as to the trustees in the mortgage executed by that Company and as to the other defendants, subject, however, to the right of the government to proceed in the Circuit Court to a final decree as to those defendants.

See same case below, 62 Fed. Rep. 581, 535, 69 Fed Rep. 47.

The facts are stated in the opinion.

Messrs. **Joseph H. Choate**, *J. Hubley Ashton*, and *Charles H. Tweed*, for appellants:

The lands involved in this suit are all within

A decree of distribution of a probate court is conclusive upon a Federal court of equity in another jurisdiction, and prevents its compelling an account for what was received under such distribution. Hiller v. Ladd, 80 Fed. Rep. 794.

A judgment setting aside a will and declaring it to be "*un acte faux*" is not evidence of admission of the title of the heir at law by the devisee. Durocher v. Durocher, 27 Can. S. C. 363.

An adjudication that certain judgments are frauduient and void as against plaintiffs, in an action to set them aside, is not an adjudication that such judgments are void or ineffectual as against other judgments rendered after the former, but before the commencement of the action to set such former judgments aside. Lopez v. Merchauts' & F. Nat. Bank, 18 App. Div. 427.

A judgment in mandamus that a school district report to the county officers anuually for five years the amount of tax necessary to be levied to pay one fifth of the amount due on a judgment against the district is conclusive upon the county officers and upon every taxpayer in the school district of the question whether such amount is in excess of the limitation prescribed by the state statutes for the annual levy of taxes by the district, in a subsequent action of mandamus against the county to compel its collection of the tax levied. Holt County v. National L. Ins. Co. 49 U. S. App. 376, 80 Fed. Rep. 686, 25 C. C. A. 469.

A decree construing patents and holding a certain device an infringement, though conclusive in subsequent litigation upon the particular question decided, is not conclusive upon similar questions that may subsequently arise between the parties as to a different machine. Norton v. Jensen, 81 Fed. Rep. 494.

The conclusive effect of a judgment upon subsequent litigation involving the same matters is not avoided by the fact that the interests of the parties are shown with greater fullness and accuracy, both in the pleadings and evidence, than in the former suit. McAleer v. Lewis, 75 Fed. Rep. 734.

A stipulation of the parties for a judgment does not preclude them from questioning the judgment rendered in accordance therewith, where it was not within the province of the court to render it. Grand Isle v. Milton, 68 Vt. 234.

A judgment from which no appeal was taken, finding void a foreign judgment, is conclusive on the parties on whatever ground it was based McCadden v. Slauson, 96 Tenn. 586.

A judgment in a suit to remove a cloud from title, based upon the ground that in the then existing state of the law and practice the controversy could not be determined, is not a bar to a suit subsequently commenced after the passage of an act providing a remedy in such a state of facts. Miles v. Strong, 68 Conn. 273.

A judgment dismissing a petition by a landlord in summary proceedings based on an oral agreement for a lease entered into by defendant's agent, on the ground that plaintiff failed to establish his petition by proof, is not conclusive against his right to maintain a subsequent proceeding to recover possession of the premises on the ground that there was no agreement for a lease, and that the tenancy was terminated by statute in such case on May 1 following the entrance into possession. Lazarus v. Ludwig, 18 Misc. 474.

A question which is involved within the issues of a former controversy is conclusively settled as between the parties by the decision in that controversy, whether the court in its judgment passed specifically on that particular question or not. Union P. R. Co. v. Chicago, R. I. & P. R. Co. 164 Ill. 88.

A decree need not pass distinctively and pointedly upon a matter raised in a subsequent cause to render it *res judicata*, where the matter is alleged and the recovery proceeds upon it. O'Hara v. Mobile & O. R. Co. 75 Fed. Rep. 130, Affirmed in 40 U. S. App. 471, 76 Fed. Rep. 718, 22 C. C. A. 512.

A judgment rendered upon a finding of issues in an action is conclusive as between the parties upon all the material facts involved, and prevents a contest of them in any subsequeut proceedings in the same action so long as the judgment remains in force. Baltimore & O. R. Co. v. Smith, 54 Ohio St. 562.

A decree adjudging that the purchaser at a trustee's sale did not take title for his cotenants under a tax title does not bar the interests of such cotenants under the latter title, if superior to that under the trustee's sale. Kuykendall v. Devecmon, 82 Md. 643.

A decree for rents and profits of premises, rendered on personal service, is binding on the parties in a subsequent suit for partition of the same premises, and the amount due thereunder should be allowed in entering the partition decree where it is properly pleaded. Angelo v. Aldridge, 164 Ill. 388.

A decree ordering the sale of the property free from an alleged lease is binding upon a lessee when before the court, and prevents his setting up such

the prescribed limits opposite this constructed railroad, and were earned by and belong to the Southern Pacific Railroad Company, unless affirmatively excepted from its grant.

The decrees in the former cases decided by this court in 1892 (146 U. S. 570, 615 (36: 1091, 1104) are not conclusive in this suit in favor of the United States, either as *res judicata* or as an estoppel or as evidence.

The cause of action is certainly not the same. The present action is for nearly 700,000 acres of land, no part of which was claimed in either of the former actions, which were for the recovery of wholly distinct and different parcels of land.

The causes of action being different, the judgment in the former action can operate as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated or determined, according to the principle emphatically decided by this court.

Cromwell v. *Sac County*, 94 U. S. 351 (24: 195); *Davis* v. *Brown*, 94 U. S. 423 (24: 204); *Nesbitt* v. *Independent Dist of Riverside*, 144 U. S. 610 (36: 562); *Wilmington & W. R. Co.* v. *Alsbrook*, 146 U. S. 279, 302 (36: 972, 981); *Keokuk & W. R. Co.* v. *Missouri*, 152 U. S 301, 314, 315 (38: 450, 456); *Last Chance Min. Co.* v. *Tyler Min. Co.* 157 U. S. 683, 687 (39: 859, 862); *Roberts* v. *Northern P. R. Co.* 158 U. S. 1, 27, 28, 29 (39: 873, 882, 883).

The main question or point presented for determination in the present case was neither litigated nor determined in the former cases.

We ask the judgment of the court in this case upon new questions of law arising upon new and different facts.

Stated generally, the decision of the court in the former case against the contention of the defendants was, that, notwithstanding the fact that the line shown upon the four maps of the Atlantic & Pacific Company was a line from The Needles to San Francisco, this was a valid designation of line between The Needles and San Buenaventura, and was not invalid and

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lease as defense to an action of ejectment by the purchaser. Union Brewing Co. v. Meier, 163 Ill. 424.

A judgment holding that outstanding contracts for the sale of timber standing on land constitute no defect of title does not remove the defects created by such contracts, where the parties holding them are not parties to the action. Gates v. Parmly, 93 Wis. 294.

A decree under the Colorado irrigating statutes, adjudicating the quantity of water to which the parties thereto were entitled, is conclusive in a subsequent suit to establish rights to such water between the parties. Boulder & W. County Ditch Co. v. Lower Boulder Ditch Co. 22 Colo. 115.

A judgment by default for plaintiff in summary proceedings is conclusive that the relation of landlord and tenant existed between the parties, and that there was a valid lease of the premises, so as to bar a subsequent action to have the lease declared a mortgage and usurious. Reich v. Cochran, 151 N. Y. 122, 37 L. R. A. 805.

A judgment for rent in an action by the landlord against the tenant is conclusive against one found in possession of the property grown on the leased premises when the sheriff goes upon the premises to levy an attachment to enforce payment of the rent. Bain v. Wells, 107 Ala. 562.

A judgment for defendants in ejectment is evidence in a subsequent action that the wife of the plaintiff in ejectment had neither possession nor right of possession after such judgment was rendered, as the husband is the proper party to institute an action in ejectment for the wife's land. Harris v. Sconce, 66 Mo. App. 345.

A judgment in an action of trespass in obstructing a way, in which the defendant was not permitted to show the facts constituting his easement, is not conclusive upon his right to the easement in a subsequent action in which it is not pleaded in bar. Fritz v. Tompkins, 18 Misc. 514.

A judgment in a suit in which one side contended that a trackage agreement between railroad companies existed and was binding as an entirety, and the other side denied the validity of the contract or any of the terms or conditions thereof, is conclusive, in a subsequent suit, of the power of one of the companies to make such agreement, whether as lessor or lessee. Union P. R. Co. v. Chicago, R. I. & P. R. Co. 164 Ill. 88.

A judgment for plaintiff in an action for the contract price of goods is *res judicata* as to payments claimed to have been made before it was rendered. Evans v. Cumberland Mills, 118 N. C. 583.

A judgment in an action for the contract price of goods is a bar to a claim for damages because of short weights and measures of the goods delivered before the judgment was rendered, where counterclaims based on such shortage were set up in the action. Evans v. Cumberland Mills, 118 N. C. 583.

A judgment against the maker of a note given for a precedent debt upon the original debt is not a merger of a cause of action on the note so as to bar a subsequent action against the indorser. Carter, R. & Co. v. Howard, 17 Misc. 381, Affirming 15 Misc. 697.

A judgment in favor of the makers of a note sued on, on the ground that plaintiffs did not have possession of the note and that their right to it as against the one in possession, who was not a party, could not be tried, is not a bar to a subsequent action to compel the one in possession to deliver up the note, and against the makers for the amount due thereon. Cobb v. Fogg, 166 Mass. 466.

A judgment in an action under N. Y. Code Civ. Proc. § 2653*a*, determining finally the validity of a will, is conclusive as between the parties thereto, notwithstanding the fact that a necessary party was not made a party to the action. *Re* Ruppauer, 9 App. Div. 422.

A judgment is not binding upon one who was not a party to the action in which it was rendered. Price v. Gwin, 144 Ind. 105.

The doctrine of *res judicata* applies only to the parties to the action and those in privity with them. Monroe v. Hanson, 47 Neb. 30.

A stranger to a proceeding to establish a copy of a lost deed is not estopped to attack the correctness of the copy established, where he does not claim under the grantee therein and is not in privity with him. Clayton v. West, 97 Ga. 328.

A judgment in an action brought by an individual is not conclusive in a subsequent action to which he is not a party or even a relator, although both cases turn on the constitutionality of a statute. Denney v. State, Bassler, 144 Ind. 503, 31 L. R. A. 726.

One interested under a will who has accepted, with reference to a particular fund, the benefit of the construction put upon the will in an action to which he is not formally made a party, but of which he has full knowledge, is, in the absence of special circumstances, bound by the decision, and will not be permitted to dispute it by commencing a fresh action in respect to another fund arising under a different interest under the will, but in identical circumstances. *Re* Lart, 65 L. J. Ch. N. S. 846, 75 L. T. N. S. 175, [1896] 2 Ch. 788.

ineffectual because the line claimed extended from The Needles to San Francisco: that the grant to the Atlantic & Pacific Railroad Company took effect upon the lands in dispute in that suit by relation as of the date of the grant, when (as was assumed in that case) that company filed maps of definite location; that therefore the subsequent grant to the Southern Pacific did not embrace those lands, but they were excluded or excepted from it, so that, when the lands in California claimed in that case adjacent to the unconstructed portion of the Atlantic & Pacific were declared forfeited and restored to the public domain by the act of Congress of 1886, the Southern Pacific, whose grant but for the prior grant to the Atlantic & Pacific would have embraced the same lands, took nothing under its grant by reason of the forfeiture. In passing upon the above questions this court treated the Atlantic & Pacific maps of 1872 as bona fide maps of definite location, the question then litigated was, whether the Atlantic & Pacific had the right to locate a line to San Francisco, or, if not, whether the location was valid between The Needles and San Buenaventura.

Stated generally, the claim of the defendants here is that the Atlantic & Pacific never did file any maps of definite location of a railroad in California; that the maps which they did file, indicating in a rude and wholly inaccurate way a line opposite the lands in question here, were in no sense maps of definite location, were at the best a mere general designation of route, and that therefore the grant to the Atlantic & Pacific never did attach to the lands within the withdrawal limits opposite this line, or to any specific lands in the state of California, and that they were therefore not excluded or excepted from the grant of 1871 to the Southern Pacific, which, by virtue of its designation of general route, and building the road, and filing maps of definite location, became the absolute owner of the lands within the prescribed limits opposite thereto, under that grant.

A judgment in ejectment against a town which claimed title in fee by dedication to a strip of land as a street will preclude a city to which such town is subsequently annexed from claiming to be the owner in fee of such land, as against the other parties thereto. Mason v. Chicago, 163 Ill. 351.

As against grantees, creditors, and others claiming under the judgment debtor, a judgment, in the absence of fraud or collusion, is evidence in favor of the judgment creditor of the fact and amount of his claim against the debtor. Pickett v. Pipkin, 64 Ala. 520; Sidensparker v. Sidensparker, 52 Me. 481; Raymond v. Richmond, 78 N. Y. 351; Hersey v. Benedict, 15 Hun, 285; Candee v. Lord, 2 N. Y. 269, 51 Am. Dec. 294; Ludington's Petition, 5 Abb. N. C. 323; Vogt v. Tieknor, 48 N. H. 242; Chamberlain v. Carlisle, 26 N. H. 540; Swihart v. Shaum, 24 Ohio St. 432; Goodnow v. Smith, 97 Mass. 69; Inman v. Mead, 97 Mass. 310.

A judgment obtained upon the ground that the alleged demand is not yet due is no bar to an action subsequently brought on the same judgment after it has fallen due. Embden v. Lisherness, 89 Me. 578.

A former judgment is not binding on the parties in a subsequent action by way of estoppel to any question of fact, unless it appears from the judgment, or by extrinsic evidence, that such question was within the issues of the former action, and was actually litigated and determined therein. Augir v. Ryan, 63 Minn. 373; Snyder v. McComb, 39 Fed. Rep. 292; Donahue v. McCosh, 81 Iowa, 296; James v. Sterrett, 137 Pa. 234; Davis v. Sexton, 35 Ill App. 407; Philadelphia v. Ridge Ave. R. Co. 142 Pa. 484; Goodhart v. Bishop, 142 Pa. 416; Rogers v. Rogers, 37 W. Va. 407; Paterson v. Baker, 51 N. J. Eq. 49; Macomb Sewer-Pipe Co. v. Hanley, 61 Minn. 350.

A prior judgment is conclusive as to every question which might have been presented and determined in the suit in a second suit upon the same cause of action between the same parties, but where the second suit is upon a different cause of action, though between the same parties, it operates as an estoppel only upon the point or questions actually litigated and determined, and not as to other matters which might have been but were not litigated and determined. Lawrence v. Stearns, 79 Fed. Rep. 878; Dooley v. Potter, 140 Mass. 49; Ryder v. Loomis, 161 Mass. 161; Schwan v. Kelly, 173 Pa. 65.

The estoppel of a judgment does not depend upon the question whether or not there is the same demand in both cases, but it exists even although there be different demands, when the question upon which the recovery of the second depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies. New Orleans v. Citizens' Bank, 167 U. S. 371 [42: 202].

Plaintiff in an action cannot claim in a subsequent action that the issues properly tendered by the complaint in the former action were not heard and determined therein. Franke v. Franke, 15 Ind. App. 529.

A judgment or decree is conclusive between the parties and those in privity with them, not only as to what was ostensibly determined thereby, but also as to those matters properly involved which might have been raised and determined. Roby v. Calumet & C. Canal & D. Co. 165 Ill. 277.

A judgment against plaintiff in an action for a monthly instalment of rent, necessarily involving a determination that the defendant was justified in removing from the premises on account of their untenantable condition, is a bar to an action for a subsequent instalment under the same lease. Burdick v. Cameron, 10 App. Div. 589.

A judgment upon a policy against an insurance company is conclusive of the right of the insured to recover as against the surety upon a bond of such company given to the state for the prompt payment of all claims under policies. Union Guaranty & T. Co. v. Robinson, 49 U. S. App. 148, 24 C. C. A. 650, 79 Fed. Rep. 420.

A judgment in an action for specific performance of an agreement to make a will in plaintiff's favor for services performed by him for the testator, without any claim for damages for breach of such agreement, is not a bar to an action for the value of services so performed. Gall v. Gall, 17 App. Div. 312.

A judgment in an action to recover an instalment due on a contract is conclusive as to the questions decided therein, in a second action to recover subsequent instalments. Everett v. New York Engraving & Print. Co. 19 Misc. 360, 20 Misc. 548.

Parol evidence is admissible to show what issues have been adjudicated, and the grounds upon which the judgments rendered were rested. Chase v. Walker, 26 Me. 559; Sturtevant v. Randall, 53 Me. 150; Howard v. Mitchell, 14 Mass. 241; Adams v. Barnes, 17 Mass. 368; Campbell v. Butts, 3 N. Y. 174; Doty v. Brown, 4 N. Y. 71, 53 Am. Dec. 350; Wood v. Jackson, Genet, 8 Wend. 37, 22 Am. Dec. 603; Gardner v. Buckbee, 3 Cow. 127, 15 Am. Dec. 256; Burt v. Sternburgh, 4 Cow. 562, 15 Am. Dec. 402; Kilheffer v. Herr, 17 Serg. & R. 319, 17 Am. Dec. 658; Marsh v. Pier, 4 Rawle, 273, 26 Am. Dec. 131; Young v. Black, 11 U. S. 7 Cranch, 567 [3: 441]

It is thus manifest at the first blush that the question of the bona fides of the maps of the Atlantic & Pacific, as maps of definite location, and the bona fides of any claim that these should be so regarded, was never litigated or determined in the former actions, and a critical analysis of the proceedings, and the decision in the former actions will make this absolutely certain.

We invite the careful attention of the learned court to the exact matters decided here in the former action, under the opinion of the court, so far as they bear upon the question now arising.

The three objections raised by the defendants to the validity of the alleged designation of the Atlantic & Pacific line were overruled by the court. These objections were:

First. That the maps were filed at different times, in sections, of segments of its proposed route.

Second. That these maps were filed in the office of the Secretary of the Interior instead of the General Land Office; and

Third (which was the objection mainly relied upon). That the route, as originally designated, ran to San Francisco as the ultimate objective point, instead of by the most eligible and practical route from The Needles to the Pacific ocean, as prescribed in the act.

These questions as to the validity and effectiveness of the designation of route were raised, discussed, and determined adversely to the defendants.

There was, however, no issue in that case as to whether the maps of 1872 were or were not valid maps of definite location, as distinguished from maps of preliminary location or designation of route.

The court held that, in view of its former decisions, it was no longer open for dispute that the grant to the Atlantic & Pacific took effect upon the lands as soon as the definite location of the road was fixed, so that it could no longer be changed.

But, before leaving the subject, the court in its opinion showed that, if the facts which now appear had then appeared, the title of the Southern Pacific to the lands in dispute would have been upheld.

We submit, therefore, that, from the opinion of the court in the former actions, it is beyond dispute that the point now raised by the defendants appears distinctly not to have been litigated or determined, and, the cause of action being different in the present action, the defendants are not by the former judgment precluded from maintaining the ground on which they now stand; namely, that the Atlantic & Pacific Company never did locate, that is, definitely locate, its line west of the Colorado river, and that the grant to that company never did take effect upon the lands in suit, or any other specific lands in the state of California, and that there is therefore nothing to interfere with the passage of the title to the Southern Pacific Company.

But if we look behind the final decision in the court of last resort to the pleadings as set forth in the former cases, we shall find that the point now relied on was not then put in issue or raised, which is fatal to any claim of *res judicata* or estoppel.

Cromwell v. *Sac County*, 94 U. S. 353 (24: 195); *Davis* v. *Brown*, 94 U. S. 428 (24: 207); *Johnson Co.* v. *Wharton*, 152 U. S. 261 (38: 434).

A judgment against a plaintiff who would have had to establish several facts to maintain his case is not an estoppel as to any specific fact, unless it was actually litigated.

Long v. *Baugas*, 2 Ired L. 290, 38 Am. Dec. 694; *Angel* v. *Hollister*, 38 N. Y. 378.

It appears from the pleadings in that suit that there was no claim on the part of the complainant that the maps referred to were maps of definite location, but that they were merely maps designating a general route; that the defendant claimed that these maps did not have the effect of properly locating the road under the act, and giving title to the Atlantic & Pacific not because they were not in fact maps of definite location; were not filed or approved as such; were not bona fide maps at all; or because the contents of the certificates appended to the maps were false; but for the reasons that they were filed in sections, and when all the sections were filed showed a proposed route to San Francisco (which was claimed to be a wholly unauthorized line) instead of a line from The Needles, by the most practicable and eligible route to the Pacific, which the act contemplated and expressly prescribed. These were the points in respect to the maps, and the only points which were litigated and judicially determined in the case.

Again, by reference to the pleadings on which the other case, No. 177, in the circuit court was tried, also put in evidence by the government in this action, it distinctly appears that no such point as is now presented was put in issue in that action.

Thus it distinctly appears that, under the issues framed in the former actions, only questions of law were litigated and determined, and no issue of fact, as to whether the Atlantic & Pacific Company ever filed maps of definite location was tried or actually litigated at all.

Yet the real question of fact now presented was not in any way before the court, and, although all the questions of law involved in the former cases are here involved, there is also here in this action a new issue of fact as to the character and bona fides of the maps filed, and a new question of law as to the effect of their character or of their falsity.

The plaintiff might have embraced the present lands in the former suit, but it chose not to do so; and, in separating and dividing its claim for the several tracts into several suits, it set up and presented as many causes of action as it brought suits to determine the title of the lands involved in the several suits.

Nesbitt v. *Independent Dist of Riverside*, 144 U. S. 610 (36: 562).

It is quite true, as pointed out by this court in its opinion in the prior cases, that the purpose of the litigation by the government was to procure an adjustment and determination of the extent of its grant to the Southern Pacific Railroad Company, and, if it had included all the land covered by the grant in the same suit, the adjudication would necessarily have been final. If all the eggs had been put into one basket, the company through undue confidence in the safety of its position, or its slip in re-

spect to ascertaining where the real strain existed, might have lost all; but, as only a portion were put at risk in the former cases, it is entitled to save the rest. While, of course, the court did decide, upon the pleadings and evidence before it in these cases, that the lands were lost to the Southern Pacific on account of the vesting of title in the Atlantic & Pacific, it made such decision only as to the lands that were involved in that controversy. While assuming (as it was entitled to do in that case) that a good and sufficient map of definite location was filed by the Atlantic & Pacific Company, it is certainly demonstrable from the record and the opinion that it did not hold it to be good and sufficient against objections not then presented, and which are now raised for the first time upon wholly new evidence

The proposition that this court in the former actions in deciding that the title vested in the Atlantic & Pacific, and under them in the complainant, necessarily decided every fact and every question of law involved in the title, is true only in respect to the title of the lands there in controversy; and, if we are right in claiming that a suit for these lands is another cause of action, the proposition has no relevancy here.

Eastman v. *Cooper*, 15 Pick. 279, 26 Am. Dec. 600; *Sawyer* v. *Woodbury*, 7 Gray, 502, 66 Am. Dec. 518; *King* v. *Chase*, 15 N. H. 9, 61 Am. Dec 675.

No estoppel by former judgment can arise until the former judgment is pleaded, provided there is an opportunity to plead it. The government has not seen fit to plead any former adjudication as an estoppel, although it had ample opportunity so to do in this cause.

The rule that an estoppel by a former judgment must be pleaded, if there is an opportunity to plead it, and that failure to plead it, if there is an opportunity to plead it, waives the estoppel, is declared by the following authorities:

Herman, Estoppel & Res Judicata, §§ 1269, 1273, 1291; *Fanning* v. *Insurance Co.* 37 Ohio St. 344; *Gray* v. *Pingry*, 17 Vt. 419, 44 Am. Dec. 345; *Blood* v. *Marcus*, 38 Cal. 590, 99 Am. Dec. 435; *Isaacs* v. *Clark*, 12 Vt. 692, 36 Am. Dec. 373; *Hanson* v. *Buckner*, 4 Dana, 451, 29 Am. Dec. 401; *Glean* v. *Priest*, 43 Fed. Rep. 19.

And in the following cases the same rule is applied to estoppel by written contract.

Mabury v. *Louisville & J. Ferry Co.* 18 U. S. App. 542, 60 Fed. Rep. 645, 9 C. C. A. 174; Bigelow, Estoppel, 5th ed. 455; *Wood* v. *Ostram*, 29 Ind. 179; *Robbins* v. *Magee*, 76 Ind. 390; *Cole* v. *Lafontaine*, 84 Ind. 448; *Stewart* v. *Beck*, 90 Ind. 458.

Rule 45 of the rules of equity provides:

"No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct."

The appellees here, plaintiffs below, availed themselves of the provisions of rule 45; obtained leave of the court to, and did, amend their bill September 25, 1891. The defendant's answer to this amended bill filed June 12, 1893, set up title in them for these lands in virtue of its land grants from Congress; specially pleaded that the Atlantic & Pacific Company did not definitely locate its railroad in California, and that the maps filed by it were fraudulent pretenses, but the plaintiffs did not, by amended bill, plead the former judgment, as they might have done. There can be no doubt, therefore, that, although the plaintiffs did not plead the former judgment, they had full opportunity to plead it.

The provisions of § 101 of the Ohio Code closely resemble rule 45 of the rules of equity. It provides, however, that the plaintiff may reply by answer to the new matter set up by the defendant, while rule 45 provides that the plaintiff may reply to such new matter by amendment of the bill. In the case of *Fanning* v. *Insurance Co.* 37 Ohio St. 344, the single question was submitted and determined whether the plaintiff might introduce in evidence a former judgment between the same parties, upon the same demand and cause of demand, the plaintiff having answered without pleading the former judgment. The court, in deciding the case, said:

"The former adjudication is new matter, which the Code Practice requires should be pleaded. It is matter *ex post facto*, and should be specially pleaded, so that the court may, as matter of law, determine as to its effect. This was the settled rule at common law whenever there was an opportunity to plead such former adjudication. The Code having furnished that opportunity to plead it, we think the record was inadmissible as evidence."

In the case of *Wilson* v. *Stolley*, 4 McLean, 275, the court distinctly held that under rule 45 the matter which at common law should be set up by replication must be set up by amendment to the bill.

The sense of all which is that wheresoever the plaintiff was formerly required to present matters by replication, he is now required by rule 45 to present such matters by amendment to the bill; and, failing to so present such matters, he cannot be heard in evidence as to them.

Another rule, well settled in respect to estoppel by former judgment is, that, if such estoppel exists it may be waived by the plaintiff's introduction of evidence as to the truth of the matters claimed to have been decided in the former case.

The necessary legal effect of the estoppel is to preclude all inquiry as to the truth of the matter determined, and when a party who is entitled to set up the estoppel does open inquiry into the truth of the matter he cannot complain that the other party pursues it without regard to the estoppel.

If the plaintiff lets down the bar of the estoppel, he must permit the defendant to follow his lead into the field of evidence.

Megerle v. *Astle*, 33 Cal. 84; *Philadelphia, W. & B. R. Co.* v. *Howard*, 54 U. S. 13 How. 335 (14: 169); *Mack* v. *Lery*, 60 Fed. Rep. 751.

From all of which it appears that, even had an estoppel existed here, the plaintiffs waived it, first, by not pleading the former judgment; second, by joining issue about the truth of the matters; and, third, by introducing evidence as to the truth of the matters.

A plea of estoppel admits the cause of action, and, if the estoppel fails, judgment follows, of course, for the other party.

One must rely either upon the estoppel, as such, or upon the truth of the matters themselves, and will not be heard about the truth of the matters, if he elects to rely on the estoppel.

Herman, Estoppel & Res Judicata, § 1266; *Kilheffer* v. *Herr*, 17 Serg. & R. 319, 17 Am. Dec. 661.

The circuit court, in determining this case, ignored the former decision, and upon the main issue found substantially that the Atlantic & Pacific Company never did definitely locate its railroad in California, and found the same maps which were before the supreme court in the former case to be fraudulent pretenses, which amounted at most to but a general designation of its contemplated route. Upon these findings of facts, as will be shown later, the decree should have been for appellants. And it follows that had the appellees relied on an estoppel the decree would have been against them, because the court could not have reached the facts without first finding against the estoppel. So, in either event, whether the plaintiffs relied on the estoppel or on the truth of the matters, the decree should have been against them.

This, it seems to us, fully disposes of the influence of the former case upon this—considered as to each and every relationship which a former suit can sustain to a subsequent suit.

The evidence contained in the record now before the court conclusively shows that the basis of fact on which this court rested its judgment in the former actions never existed, and that, in truth, the Atlantic & Pacific Railroad Company never did definitely fix or definitely locate the line of its road west of the Colorado river, and never filed a map of definite location in California; that the maps which it did file in 1872, showing the route of a proposed line opposite the lands in controversy in this suit, were not maps of definite location, but were at best only maps designating a general route.

As a consequence, we insist with confidence that the grant to the Atlantic & Pacific Company never did take effect; never did attach to the lands in suit or to any other lands in California; and that, therefore, in accordance with the principles laid down in the former decision, the lands passed to the Southern Pacific Railroad Company under its grant upon the construction of its road, and the filing of maps showing its constructed line.

There can be no question as to what the law requires to constitute a definite location under a railroad land grant, which shall have the effect of specifically locating the line of the road from which the measurement of the alternate sections granted shall be made.

The object of the government in making a land grant in every case is to secure the building of the railroad as a public object: the lands granted are in each case to be in alternate sections immediately adjacent to the railroad as it shall finally be constructed: and, until the precise line on which the railroad is to be built is definitely determined by the company and communicated to the government, the grant is a mere float.

The route of the railroad is considered to be definitely fixed when "the necessary determinative lines have been fixed on the face of the earth," that is to say, when the company has made its preliminary and final surveys, staked its line upon the ground, and communicated to the government, by filing a map of the same, its final determination as to the precise line upon which the road is to be built. It is only when this has been done that the line of the road is definitely fixed.

Kansas P. R. Co. v. *Dunmeyer*, 113 U. S. 629 (28: 1122); *Sioux City & I. F. Town Lot & Land Co.* v. *Griffey*, 143 U. S. 32 (36: 64).

A definite location, then, is necessarily the result of an actual examination and survey of the route, and the fixing of determinative lines on the face of the earth: locating it over the very ground on which it is intended to build the railroad. The term cannot be satisfied by a line drawn at random over the face of the country, without regard to mountains or valleys, or the other features of topography by which the practicability of a route can be determined.

It must have been adopted by the company in good faith and with the aid of engineering skill, as the route on which it is deemed practicable and actually intended to construct the road.

When the map or plan of such a line, showing accurately the precise line as fixed upon the surface of the earth for the construction of the railroad, has been filed by the company in the General Land Office as the definite location of the road, thus terminating its election as to the location of its line, its route is definitely fixed.

The rule that land grants do not attach to any specific lands at any time prior to the definite location of the line, applies, in all its force, to the grant made to the Atlantic & Pacific Railroad Company by the act of July 27, 1866.

Burlington & M. River R. Co. v. *Fremont County*, 76 U. S. 9 Wall. 89 (19: 563); *Van Wyck* v *Knevals*, 106 U. S. 360 (27: 201).

If, therefore, as we claim is clearly shown by the evidence in this case, the Atlantic & Pacific road was never definitely located, the grant to that company never vested or became attached to any specific lands, but remained a float until the passage of the forfeiture act, which terminated its existence even as a float.

Considering it then as settled for all purposes of the case that a bona fide map of definite location adopted by the company as its finally and definitely fixed line of road, from which there would be no change without legislative consent, was the essential and indispensable thing by which only the grant to the Atlantic & Pacific Company could attach to the lands, if it could attach at all before actual construction, we submit that it is conclusively established by the evidence in this case that no such map ever existed or was filed, no definite location was adopted by the company, and no such definite location was approved by the Secretary of the Interior, and that therefore no title to the land in dispute ever vested in that

company; but, coming within the terms of the grant to the Southern Pacific, they became its property upon the construction of its road and the filing of its maps of definite location as the construction proceeded.

By the act of 1866 the Atlantic & Pacific was authorized to construct a continuous railroad from Springfield, Missouri, by the route laid down in the act, to the Colorado river, at such point as might be selected by that company for crossing, and thence by the most practicable and eligible route to the Pacific ocean; and by the same act the Southern Pacific was authorized to connect with the Atlantic & Pacific road at or near the boundary line of the state of California, and to build a railroad thence to San Francisco. Construing together the language of the two authorizations given to the different companies by the same act, the obvious intent and purpose were that the Southern Pacific should build from the point of junction to San Francisco. The Atlantic & Pacific should do no such thing, but should build across westerly by the most eligible route to the Pacific.

By the act of 1871 the Southern Pacific was expressly authorized to construct a line over the lands now in controversy.

Assuming that the Atlantic & Pacific was, by the act of 1866, authorized to build from the Colorado river to the Pacific ocean over the lands in controversy (instead of by the more natural route through Cajon pass since adopted in the interest of the Atchison Company, or the more southerly route to San Diego), it had done nothing towards building there, and indicated no purpose to build there till a year after the time when the Southern Pacific, on the 3d of April, 1871, filed its map of general route, designating its line under the Texas Pacific act from Tehachapi pass, by way of Los Angeles, to Yuma, on the Colorado river, the point at which it was intended that the Texas Pacific would cross that river. In fact, up to that time the Atlantic & Pacific had only built from 50 to 75 miles in the far-distant state of Missouri, and even that was sold out under foreclosure to another company in 1876.

The line so designated by the Southern Pacific Company passed through the lands now in controversy, and that company afterwards proceeded in good faith to construct its railroad substantially on the general route so designated; and, as the work proceeded, successive sections were duly examined by Commissioners appointed by the President and their reports accepted by him.

The company entered into possession of the lands (so far as there was any actual possession of the lands), mortgaged and sold them, and, as rapidly as the circumlocution of the Interior Department would admit, received patents therefor.

Under the act of 1866, the Southern Pacific had also designated the general route of its road from the junction point with the Atlantic & Pacific on the Colorado river to San Francisco, all with the due approval of the government, and, although controversy arose in the Interior Department as to whether the line designated by the Southern Pacific was authorized by the state law, that matter was definitely settled by the action of Congress by the joint resolution of June 28, 1870, authorizing it expressly to construct its railroad on the route indicated by its map of general route.

The Atlantic & Pacific gave no sign of any purpose of building in California at all for three years and two months after the passage of the act of 1866, by which the two companies had been authorized to build on their respective routes from the Colorado river westward. Then, finding that the Southern Pacific had not only filed its map of general route from the boundary line to San Francisco, but was engaged in the actual and rapid construction of its road upon the line so designated, it began its dog-in-the manger policy, which, from that time, it uniformly pursued in respect to the Southern Pacific by filing a map designating its general route from the point of crossing on the Colorado river, not by the most practicable and eligible route of the Pacific ocean, but straight upon the track of the Southern Pacific to San Francisco. The plat so filed showed the same line as that shown upon the map of general route of the Southern Pacific, on which the latter company had for two years been building. That is to say, a line through the Tehachapi pass running east of Tulare lake, and then across to the northward of the lake, and running through the coast range of mountains to San Francisco.

This map was duly certified by the president of the company as designating the line of the Atlantic & Pacific, and upon it the company claimed the land grant along the line accordingly.

Secretary Cox, with whom the map was filed, rejected it, declaring that he could not recognize the claim of the Atlantic & Pacific Railroad Company to the reservation of lands upon the route in question, because the act already cited, upon which the company relied, did not, as he construed it, give them a route, or make them a grant of lands, from the Colorado river to San Francisco at all.

So matters stood for two years and a half more, the Southern Pacific vigorously prosecuting the work of building; the Atlantic & Pacific neither doing anything in the way of building, nor manifesting any intention of building, westward from the Colorado river in either direction, either to San Francisco or by the most practicable route to the Pacific.

Even sixteen years after—*viz.*, on January 5, 1885 — the Atlantic & Pacific Railroad Company still adhered to its line to San Francisco designated in 1869, and insisted that its map of that year showed, not only the general route, but the definite location, of its railroad, and that the secretary's refusal to approve this map did not and could not impair its rights to build upon the line shown thereon.

Of couse, the court will understand that this line of 1869 was far remote from the lands in controversy.

And now we come to the facts in respect to the maps of 1872, which do not involve the lands in controversy, and the court will perceive that it was but another step in the same dog-in-the manger policy of the Atlantic & Pacific.

By this time it was pretty clear that the At-

lantic & Pacific would never build in California, but it hoped to defeat the Southern Pacific, which was building on the line designated for it by the act of 1871. It now for the first time designated a route, which was far remote and wholly distinct from its route of 1869.

Starting from The Needles, the point of junction, at the crossing of the Colorado river, it ran westerly to San Buenaventura on the coast, and thence by a route west of the coast range of mountains to San Francisco.

We claim in this suit that this route of 1872 was an unauthorized route, and that it was never adopted as a definite location of the Atlantic & Pacific so as to vest in the company title to any specific lands.

Assuming that the point that it was an unauthorized route *in toto* and in all its parts, because it proceeded from the junction point to San Francisco (the route which had been expressly reserved for the Southern Pacific), has been settled adversely to our claim by the previous decision of the court in 146 U. S 570 (36:1091), we come to the proofs which demonstrate that the line shown upon the 1872 maps was never adopted as the definite location of the Atlantic & Pacific.

The maps running from the western boundary of Missouri to the eastern boundary of California are all maps which, so far as the maps themselves are concerned, are of the character of maps of definite location, but the first or most easterly of these maps is the only one which was tendered by the company as a map of definite location. The map from the Missouri state line to the mouth of Kingfisher creek (No. 25) was tendered and received as a map of definite location but, after this map was so tendered and filed, the subject whether the maps should be tendered as maps merely designating the line of the road or as maps of definite location obviously received careful consideration from the company and its counsel, and it was determined that they should thereafter be tendered merely as maps of designation of line, and this was done. The obvious purpose of this method of characterizing the maps was to secure withdrawal without committing itself to definite location, and thus leave open the opportunity for a subsequent change of route as between the company and the government.

Coming to the map on which the present controversy mainly turns, it appears that it was not presented by the company to the Interior Department at all as a map of definite location by which the company intended to be forever bound and from which it could not change without legislative consent, but merely as a map of designation of route.

As to the characterization of the map by the company in presenting it to the secretary, it was presented, not as a map of definite location, but purposely and in pursuance of a settled policy as a map of general route and nothing else.

This mode of designation obviously left it open to the company afterwards to claim the right to diverge from the route designated, and carry a divergence of the land grant with it.

Again, the character of the map itself must be looked to as an important element in determining whether, by its filing, it could secure the attachment of the grant to the lands, and vest the title in the company by relation as of the date of the act, and, therefore, the actual facts as proved in respect to this particular map are of the utmost importance for the consideration of the court.

This map is characterized by the company itself in transmitting it to the department as a map designating the line or route of the railroad over the lands in question.

It partakes upon its face in no sense or manner of the character of a map of definite location It neither shows the topography of the country nor the relation of the proposed railroad to any of the features of topography, nor to the natural objects along the line of route.

It is upon its face merely a map of general route, showing a general route somewhere nearly on the course of which a road might be thereafter definitely located and constructed, and it served none of the purposes of a map of definite location, for no man could follow it with map in hand and discover where the road would be built: and the line itself indicated by the route applied to the earth's surface shows a line running recklessly over hills and mountain tops, regardless of topography, and one not possible for any engineers or responsible officers of railroad companies to have attempted to adopt as a line of definite location.

Compared with the maps of definite location previously presented by the company, it appears at once to be a wholly different thing.

No resolution of the company, no certificate of its engineer, could convert such a map from what it is into a map of definite location, and, as Mr. Hillyer's letter shows, it was actually tendered by the company to the government, not as a map of definite location, but as a map of general route. By a clerical error, misled, perhaps, by the certificate of the engineer appended to this map, as this court was misled on the former hearing, the secretary, in acknowledging the receipt of it (or the secretary's clerk in drafting the letter for the secretary to sign acknowledging the receipt of it), by such clerical error referred to it as a map of definite location. This clerical error, as has already been shown, was corrected in the secretary's office, probably upon the suggestion of the attorney of the company, made after his receipt of the erroneous letter; but, as a similar letter referring to it as a map of definite location was sent by him to the Commissioner of the Land Office, that officer, perhaps, proceeded, before the clerical error was corrected in the letter to him upon the subject, to communicate it to his subordinate officials as a map of definite location.

It was impossible that the company or its engineers, or its attorneys, could have intended to commit the company irretrievably to the particular location of its line or road indicated on the map.

As between the Secretary of the Interior and the company they were unquestionably regarded and treated as maps of general route, and not of definite location, and the subsequent correspondence between the company and the Secretary of the Interior proceeded upon the same view.

The character or quality of the maps as ten-

dered by the company and received by the secretary as maps of general routes are unequivocally shown by the letter of Hillyer of March 8, 1872, tendering them, and the letter of the secretary of the 9th of March acknowledging its receipt in the form in which that letter was finally framed in the department, agreeing with the letter of Hillyer tendering them. In the former case in this court the map was assumed to be a map of definite location from the false certificate thereon, and from the uncorrected copy of the secretary's letter of March 9th, which was in evidence, and the references in the subordinate branches of the land office to the map as being a map of definite location, which was due to the failure to completely correct the error in all the copies of the letter referred to.

But since the decision in the former case a great mass of additional evidence in respect to map No. 31 has been taken, which demonstrates it to have been in fact as it was presented and received, and as it appears upon its face to be not a map of definite location at all, but at best only a map of general route, and even in that character can hardly be treated as filed in good faith; for if, as this court in *Buttz* v. *Northern P R. Co.* 119 U. S. 55 (30 330) insisted they ought to do, the officers of the Land Department had exercised "supervision over the matter so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line, irrespective of the character of the country through which the road is to be constructed," this map No. 31 would necessarily have been rejected, for, if not fraudulent, it is certainly nothing more than an arbitrary and capricious selection of a line, irrespective of the character of the country over which the road was to be constructed.

The War Department itself has issued an authentic topographical map which includes a considerable portion of California, covered by the lines shown on map 31, and, as the record shows, the line shown upon this Atlantic & Pacific map 31 has been laid down in red upon the government topographical map, especially in the vicinity of the Soledad cañon, with the result of demonstrating beyond all doubt, or possibility of doubt, that the route shown on map 31 does not follow the valley at all, but zigzags across it into hills and mountains where no railroad could possibly be built.

It affords a mathematical demonstration that this route never could have been laid down or designed, or tendered or received, as anything but a map of general route.

But further than this, before the existence of this government topographical map was known by the defendants, the chief engineer of the Southern Pacific Railroad Company took map No. 31, and followed it on the ground in the vicinity of the Soledad cañon, and ran his levels to show the vertical position of the points on the line in reference to the sea level. The result of this scientific examination showed that to build a railroad on the line would be impossible for any practical purpose, and that no railroad engineer could have made such a survey for it.

It further appears by the same evidence that the few towns, villages, or places purporting to be named on this Atlantic & Pacific map are out of their proper positions—both in latitude and longitude—and not slightly out, but miles and miles out, and all attempts to adapt or shift the map so as to bring one place into proper position threw all other places all the more out of position.

It neither followed elevations or depressions, nor rivers, nor plains, but jumped at random from hill top to mountain top and across valleys.

It necessitated grades wholly impossible in engineering, and in some instances from one quarter to fully one half a mile to the mile, or ten times as steep a grade as is known in use for the ordinary steam locomotive.

The court upon an examination of these proofs cannot but conclude that no competent engineer or honest company could have laid out or adopted this line as a line of definite location.

The point upon which the circuit court of appeals based its judgment in favor of the government is wholly untenable and inapplicable. It is as follows: "Assuming, however, that a survey of a line on the ground is required, and that a fraudulent deception was practised upon the government by the representation that a survey had been made, this is ground upon which the department might properly reconsider its acceptance and approval of the maps filed; but, until such reconsideration, the status of the lands is fixed by what was done. The approved maps operated to identify these lands as within the grant to the Atlantic & Pacific Company, without reference to the good faith of the company in preparing them. The fact of definite location is settled by the maps, and it is the fact, not the means by which it was procured, that decides the question."

On the contrary, we submit with confidence that we have already demonstrated that the fact of definite location was not settled by the maps, and that inasmuch as the subsequent grant to the Southern Pacific embraced the same lands, and the lands in question could, as this court has held, only be excepted or cut out from that grant by a definite location on the part of the Atlantic & Pacific which alone could attach its grant to the lands, nevertheless, until such definite location was actually and honestly made in good faith, there was no such exception from the grant to the Southern Pacific and, as no such definite location ever was made by the Atlantic & Pacific, there never was any such exception from the grant to the Southern Pacific.

This view of the circuit court of appeals all proceeds upon the assumptions (which are absolutely incorrect) that the Atlantic & Pacific maps were on their face, and that they were accepted by the Interior Department as, maps of definite location, and utterly fails to appreciate the point of our contention.

The court below likens the position of the Southern Pacific in this case to that of an infringer seeking collaterally to avoid a patent by proving that it was procured by fraud from the government, and relies upon the well-known authorities which prohibit all such attempts upon the ground that fraud, if it ex-

isted in such a case, could only be taken advantage of by the government.

But the very gist of our case, under the former decision of this court in 146 U. S. 570 (36: 1091), is that, if the Atlantic & Pacific did not in fact secure these lands by a definite location embracing them, they came to us under our grant, so that, for the very reasons stated in the patent cases referred to, we are here entitled to take advantage of the failure of the Atlantic & Pacific to establish its definite location, and would even have been so entitled if we had made out a case of fraud in procuring a map which on its face was not a map of definite location to be accepted as such.

Lee v. *Johnson*, 116 U. S. 48 (29: 570).

Now, our very position here is that the failure of the Atlantic & Pacific to file a map of definite location, which would have prevented the title from vesting in us, did necessarily affect the result so far as we were concerned, and that as no such map was filed we are entitled to the lands.

We do not in this point claim to have the lands because they were forfeited, or could be forfeited, to the government by reason of any fraud in the map, but we claim because no map of definite location had ever been filed, and therefore no exception had been worked or cut out of our grant by such definite location.

The point so strenuously contended for below by the learned counsel for the government, but which was not accepted by either of the courts below, that even though no map of definite location was filed and no route adopted or definitely fixed by the Atlantic & Pacific Railroad Company, any proceedings in the department which assumed that there had been such a map filed are final and conclusive to defeat our rights, has no foundation in law or justice or sense, and there is no authority to support such a proposition as applied to the present case.

It has repeatedly been held by the court that the legal rights of the parties cannot be affected or impaired by an erroneous decision of the Secretary of the Interior in awarding lands to one party which rightfully belonged to another.

St. Paul & S. R. Co. v. *Winona & St. P. R. Co.* 112 U. S. 720 (28: 872); *Sioux City & St. P. R. Co.* v. *Chicago, M. & St. P. R. Co.* 117 U. S. 406 (29: 928).

No decision of the Secretary of the Interior upon this question could be conclusive as between the United States and the Southern Pacific Railroad Company in this controversy.

The ground upon which the cause was decided in the circuit court, and which is relied upon by the appellee, that even if the map of 1872 is to be deemed to constitute a designation of general route only, the lands involved in the suit are nevertheless, by force and operation of such a designation, excluded from the grant to the Southern Pacific Railroad Company, is not well founded.

The filing of a map of general route confers upon the company no interest, legal or equitable, in any of the land opposite the line shown on the map. Its effect and operation are merely of a negative and prohibitive character. It merely inhibits subsequent disposition of the lands by the prescribed methods of sale, entry, or pre-emption, but does not give to or confer upon the company any rights in the lands. Those can only be acquired by definite location or construction according to the varying provisions of the different acts.

The sole and only effect of the filing of the maps of general route was to set in motion a prohibition against "sale, entry, or pre-emption."

Kansas P. R. Co. v. *Dunmeyer*, 113 U. S. 630, 638 (28: 1123, 1125).

The court in that case construed the directed withdrawal strictly according to its terms, and held that the withdrawal was strictly limited to withdrawal from sale, and did not include withdrawal from other modes of disposition of public lands, such as pre-emption and homestead entry.

So far as adjudication is concerned, the court has, we think, gone no farther than to hold that in the case of conflicts or overlaps of this character, priority of grant, and not priority in filing maps of general route or maps of definite location, was to control and determine to which of two claimants the prior right to the land accrued, and that no right accrued to either company in respect of or affecting specific lands until definite location or construction of line.

If, however, there were anything in the point suggested by counsel for the United States in this regard, and if the exception in the 3d section of the act involved, or any general principle applicable or applied to the subject is to be held and construed as excluding or excepting lands which had theretofore ceased to be liable to sale, entry, or pre-emption, then the necessary application of this doctrine to the case under consideration would be precisely the reverse of what is claimed by counsel for the United States.

The suggestion made in the argument before the circuit courts of appeals that a deduction was to be made from the amount of our grant by reason of the first proviso in the 3d section of the act of 1866 is now well founded.

Upon the passage of the act of July 6, 1886, the United States became seised of its original estate in the lands as of July 27, 1866, with the same effect as if it had never made any grant to the Atlantic & Pacific Railroad Company. It could only enter upon the lands for forfeiture as of its former estate in the lands.

Where a person enters for a condition broken the estate becomes void *ab initio*.

1 Greenl. Cruise, Real Prop. ed. 1856, p. 509, § 52, citing Co. Litt. § 325; 1 Co. Inst. 202*a*; 1 Shep. Touch. by Preston, p. 155; 3 Comyn, Digest, 133, *Conditions* (O, 6); 2 Preston, Abstracts, 195 *et seq.*

The American authorities state and apply the doctrine with the same effect.

Barker v. *Cobb*, 36 N. H. 344; *Michigan State Bank* v. *Hastings*, 1 Dougl. (Mich.) 225, 41 Am. Dec. 549; *De Peyster* v. *Michael*, 6 N. Y. 467, 506, 57 Am. Dec. 470; Gray, Restraints on Alienation, § 309; *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44 (22: 551); *St. Louis, I. M. & S. R. Co.* v. *McGee*, 115 U. S. 469, 474 (29: 446, 448); *United States* v. *De Repentigny*, 72 U. S. 5 Wall. 211 (18: 627); *St. Paul & S. C. R. Co.* v. *Winona & St. P. R. Co.* 112 U. S. 720,

726 (38: 872, 874); *Sioux City & St. P. R. Co.* v. *Chicago, M. & St. P. R. Co.* 117 U. S. 406, 408 **(29: 928, 929).**

The amalgamation and consolidation of the Southern Pacific Railroad Company with other California corporations does not in any wise affect or impair the grant to that corporation by the Texas Pacific act of 1871.

The claim of the Southern Pacific Railroad Company, under its main-line grant of 1866, to about 6,000 acres of land which are included in this suit and embraced within the limits of the Southern Pacific branch-line grant under the Texas Pacific act of 1871, is not involved in this suit, and any determination of this cause should be, and should be expressed to be, without prejudice to such claim as the Southern Pacific Railroad Company may have to this comparatively small amount of lands.

The Central Trust Company of New York, the trustee in the mortgage deed of trust referred to in the answer, and dated August 25, 1888, which was prior to the filing of the bills in this case, is a necessary and indispensable party to the present litigation in respect to the title of the lands in controversy, and should have been joined as a defendant to the bills.

Keokuk & W. R. Co. v. *Missouri*, 152 U. S. 301, 303, 314, 315 (38: 450, 451, 456); *Campbell* v. *Hall*, 16 N. Y. 575; *Mathes* v. *Cover*, 43 Iowa, 512; *Bryan* v. *Malloy*, 90 N. C. 508; *Scates* v. *King*, 110 Ill. 456; *Coles* v. *Allen*, 64 Ala. 98; *Todd* v. *Flournoy*, 56 Ala. 99, 28 Am. Rep. 758; *Shay* v. *McNamara*, 54 Cal. 169.

The purchasers of the patented lands involved in this suit, who constitute a large part of the individual defendants thereto, are protected in their titles to these lands under the general equitable principles, without reference to the acts of March 3, 1887, and March 2, 1896, hereinafter referred to.

United States v. *Burlington & M. River R. Co.* 98 U. S. 342 (25: 199); *United States* v. *California & O. Land Co.* 148 U. S. 31, 40, 41, 42, 45 (37: 354, 359–361); *United States* v. *Des Moines Nav. & R. Co.* 142 U. S. 510, 530 (35: 1099, 1103); *United States* v. *Minor*, 114 U. S. 233–243 (29: 110–114); *United States, McBride*, v. *Schurz*, 102 U. S. 378 (26: 167); *Colorado Coal & I. Co.* v. *United States*, 123 U. S. 307, 313, 314 (31: 182, 185, 186); *Noble* v. *Union River Logging R. Co.* 147 U. S. 165 (37: 123); *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 (20: 485) *et seq.*; *Knight* v. *United Land Asso.* 142 U. S. 161 (35: 974); *St. Louis Smelting & Ref. Co.* v. *Kemp*, 104 U. S. 636 (26: 875); *Steele* v. *St. Louis Smelting & Ref. Co.* 106 U. S. 447 (27: 226); *Chandler* v. *Calumet & H. Min. Co.* 149 U. S. 79 (37: 657).

This court will act upon the new circumstances created by the act of 1896, and upon the new provisions of law in that act, in respect to the rights of the defendants who are bona fide purchasers of the lands, or any of them, involved in this suit, agreeably to the well-settled principles in regard to such competent legislation affecting the rights of the parties, pending the final determination of such a cause.

Pennsylvania v. *Wheeling & B. Bridge Co.* 59 U. S. 18 How. 421 [15: 435]; *Gray* v. *Chicago, I. & N. R. Co.* (*The Clinton Bridge*), 77 U. S. 10 Wall. 454 [19: 969]; *Ex parte McCardle*, 7 Wall. 514 [19: 256]; *Baltimore & P. R. Co.* v. *Grant*, 98 U. S. 399 [25: 231]; *United States* v. *The Peggy*, 5 U. S. 1 Cranch, 103 [2: 49]; *Yeaton* v. *United States*, 9 U. S. 5 Cranch, 281 [3: 101]; *The Rachel* v. *United States*, 10 U. S. 6 Cranch, 329 [3: 239]; *State, Baltimore*, v. *Norwood*, 12 Md. 195.

Messrs. **J. H. Dickinson,** Assistant Attorney General, and **Joseph H. Call,** Special United States Attorney, for appellee:

The cases of *United States* v. *Southern Pacific R. Co., D. O. Mills*, and *Gerrit L. Lansing*, and others, decided by this court and reported in 146 U. S. 570, 615 [36: 1091, 1104], involved, as we contend, all the questions now presented in this case, and these questions were all decided in favor of the United States.

The court will examine duly authenticated copies of opinions in order to determine if necessary the precise questions decided, and will read the pleadings and final decree in the light of the opinion of the court.

Last Chance Min. Co. v. *Tyler Min. Co.* 157 U.S 690, 691 [39: 863]; *Kreiger* v. *Shelby R. Co.* 125 U.S. 39 [31: 675]; *Fire Asso. of Philadelphia* v. *New York*, 119 U. S. 110 [30: 342]; *Bissell* v. *Spring Valley Twp.* 124 U. S. 225 [31: 411].

It was not necessary to plead the former adjudication.

Mutual L. Ins. Co. v. *Harris*, 97 U. S. 331, 336 [24: 959, 962]; *Young* v. *Black*, 11 U. S. 7 Cranch, 565 [3: 440]; 1 Greenl. Ev. 14th ed. § 531; Herman, Estoppel & Res Judicata, § 1275; *Washington, A. & G. Steam Packet Co* v. *Sickles*, 65 U. S. 24 How. 342 [16: 653].

A plaintiff can, without pleading it, rely in evidence upon a former judgment as an estoppel upon a defense made by defendant.

Mason Lumber Co. v. *Buchtel*, 101 U.S. 638 [25: 1072]; *Washington, A. & G. Steam Packet Co.* v. *Sickles*, 72 U. S. 5 Wall. 580 [18: 550]; *Franklin County* v. *German Sav. Bank*, 142 U. S. 94 [35: 948]; *Campbell* v. *Rankin*, 99 U. S. 261 [25: 435].

In a suit to quiet title to land the plaintiff is never required to plead a prior adjudication.

Riverside Land & Irrig. Co. v. *Jensen*, 108 Cal. 146; *Clink* v. *Thurston*, 47 Cal. 21; *Wixson* v. *Devine*, 67 Cal. 341.

There was no opportunity to plead *res judicata*. Where there is no such opportunity, it may always be shown in evidence.

Black, Judgm. § 784; Wells, Res Adjudicata, § 401; 1 Greenl. Ev. § 531.

There was no waiver of the former judgment.

Kilheffer v. *Herr*, 17 Serg. & R. 319, 325, 17 Am Dec 658; *Johnson Co.* v. *Wharton*, 152 U. S. 257 [38: 432]; *Young* v. *Black*, 11 U. S. 7 Cranch, 567 [3: 441]; *Marsh* v. *Pier*, 4 Rawle, 288, 26 Am. Dec. 131; *Miles* v. *Caldwell*, 69 U. S. 2 Wall. 39 [17: 756].

The pleadings show that the same issue was adjudicated.

United States v. *Southern P. R. Co.* 146 U. S. 570 [36: 1091]; *Wiggins Ferry Co.* v. *Ohio & M. R. Co.* 142 U. S. 410 [35: 1060]; *King* v. *Chase*, 15 N. H. 9, 41 Am. Dec. 675; *Cromwell* v. *Sac County*, 94 U. S. 353 [24: 198].

If in a suit for land an issue in respect of a transaction or instrument upon which the title

to the land depends be determined, it cannot be reopened by the parties in a suit for other lands in respect of which the same title is asserted.

Last Chance Min. Co. v. *Tyler Min. Co.* 157 U. S. 683 [39:859]; *Mason Lumber Co.* v. *Buchtel*, 101 U. S. 638, 639 [25:1074]; Black, Judgm. p. 739, §§ 614, 615; *Bissell* v. *Spring Valley Twp.* 124 U. S. 225 [31: 411]; *Washington A. & G. Steam Packet Co.* v. *Sickles*, 65 U. S. 24 How. 333 [16: 650]; *Morgan* v. *Beloit*, 74 U. S. 7 Wall. 619 [19:205]; *Tioga R. Co.* v. *Blossburg & C. R. Co.* 87 U. S. 20 Wall. 143 [22: 335]; *Bouchaud* v. *Dias*, 3 Denio, 238; *Aurora* v. *West*, 74 U. S. 7 Wall. 102 [19:49]; *Outram* v. *Morewood*, 3 East, 346.

When this controversy was formerly before this court and decided in *United States* v. *Southern P. R. Co.* 146 U.S. 570, 615 [36:1091, 1104], the court held that certain propositions relating to land grants, applicable to the case, had been firmly established by an unbroken line of decisions running through a period of many years.

Applying these well-settled rules to the case, the court decided that neither the lands within the granted or indemnity limits of the Atlantic & Pacific grant could be taken by the Southern Pacific Railroad under its junior grant, and said that Congress had the right to and did forfeit the former grant for the exclusive benefit of the United States, and that the Southern Pacific could obtain no benefit from that forfeiture.

Since the decision in *United States* v. *Southern P. R. Co.* 146 U. S. 570, 615 [36: 1091, 1105], the principles there so clearly and fully restated have been approved and affirmed by the court in the following cases, among others:

United States v. *Northern P. R. Co.* 152 U. S. 284 [38: 443]; *Lake Superior Ship Canal, R. & I. Co.* v. *Cunningham*, 155 U.S. 354 [39: 183]; *Sioux City & St. P. R. Co.* v. *United States*, 159 U. S. 349-372 [40: 177-185]; *Cameron* v. *United States*, 148 U. S. 301 [37: 459]; *Whitney* v. *Taylor*, 158 U. S. 85 [39: 906]; *Weeks* v. *Bridgman*, 159 U. S. 541 [40: 253]; *Ard* v. *Brandon*, 156 U. S. 537 [39: 524]; *Wisconsin C. R. Co.* v. *Forsythe*, 159 U. S. 46 [40: 71]; *Monroe Cattle Co.* v. *Becker*, 147 U. S. 57 [37: 77]; *Noble* v. *Union River Logging Co.* 147 U. S. 175 [37: 123].

When the maps of definite location of the Atlantic & Pacific Company were filed and approved, the legal title to the granted lands vested, with a right to indemnity.

Lee v. *Johnson*, 116 U. S. 48 [29: 570]; *Cragin* v. *Powell*, 128 U. S. 691 [32: 566]; *Simms* v. *Slacum*, 7 U. S. 3 Cranch, 300 [2: 446]; *United States, McBride*, v. *Schurz*, 102 U. S. 378 [26:167]; *St. Louis Smelting & Ref. Co.* v. *Kemp*, 104 U. S. 636 [26:875]; *French* v. *Fyan*, 93 U. S. 169 [23:812]; *Bicknell* v. *Comstock*, 113 U. S. 149 [28: 962]; *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 [20:485]; *Moore* v. *Robbins*, 96 U. S. 530 [24:848]; *Quinby* v. *Conlan*, 104 U. S. 420 [26:800]; *Steel* v. *St Louis Smelting & Ref. Co.* 106 U. S. 447 [27:226]; *Vance* v. *Burbank*, 101 U. S. 514 [25:929]; *Hoofnagle* v. *Anderson*, 20 U. S. 7 Wheat. 212 [5: 437]; *Chandler* v. *Calumet, & H. Min. Co.* 149 U. S. 79 [37:657]; *United States* v. *Marshall Silver Min. Co.* 129 U. S. 579 [32: 734]; *Barden* v. *Northern P. R. Co.* 154 U. S. 288 [38: 992]; *Heath* v. *Wallace*, 138 U. S. 573 [34: 1063]; *Russell* v. *Maxwell Land Grant Co.* 158 U. S. 253 [39: 971]; *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U.S. 155 [39: 931].

The courses and distances measured to the projected township lines must yield to plainly indicated monuments and natural objects.

St. Clair County v. *Lovingston*, 90 U. S. 23 Wall. 62 (23: 59); *Higuera* v. *United States*, 72 U. S. 5 Wall. 827, 835 (18: 469); *Preston* v. *Bowmar*, 19 U. S. 6 Wheat. 580 (5: 336); *Newsom* v. *Pryor*, 20 U. S. 7 Wheat. 7 (5: 382).

Even the absence of a survey upon the ground by the Atlantic & Pacific Company would not defeat the grant when the map indicates the line by natural objects or monuments.

Blake v. *Doherty*, 18 U. S. 5 Wheat. 359 (5: 109); *United States* v. *Arredondo*, 38 U. S. 13 Pet. 133, 134 (10: 93, 94); *United States* v. *Moreno*, 68 U. S. 1 Wall. 400, 404 (17: 633, 635); *United States* v. *Vaca*, 59 U. S. 18 How. 556 (15: 485); *Newsom* v. *Pryor*, 20 U. S. 7 Wheat. 7 (5: 382); *Johnson* v. *Pannel*, 15 U. S. 2 Wheat. 206 (4: 221).

That the Atlantic & Pacific Company claimed a grant north of Ventura did not impair the grant between Ventura and Missouri.

Winn v. *Patterson*, 34 U. S. 9 Pet. 663 (9: 266); *Richmond Min. Co.* v. *Rose*, 114 U. S. 576, 580 (29: 273, 274); *Glacier Mountain Silver Min. Co.* v. *Willis*, 127 U. S. 481 (32: 174); *Mitchel* v. *United States*, 34 U. S. 9 Pet. 733 (9: 291).

Third parties cannot question good faith or sufficiency of the Atlantic & Pacific map.

Grinnell v. *Chicago, R. I. & P. R. Co.* 103 U. S. 739 (26: 456); *Van Wyck* v. *Knevals*, 106 U. S 360 (27: 201); *Walden* v. *Knevals*, 114 U. S. 373 (29: 167); *Sioux City & I. F. Town Lot & Land Co.* v. *Griffey*, 143 U. S. 32 (36: 64).

The forfeiture of the Atlantic & Pacific grant was not for the benefit of the Southern Pacific Railroad Company.

United States v. *Southern P. R. Co.* 146 U. S. 570 (36: 1091); *United States* v. *Northern P. R. Co.* 152 U. S. 284 (38: 443); *Lake Superior Ship Canal, R. & I. Co.* v. *Cunningham*, 155 U. S. 354 (39: 183); *Sioux City & St. P. R. Co.* v. *United States*, 159 U. S. 349 (40: 177).

When the Southern Pacific grant took effect on filing its map of definite location, 1874-1878, these lands were *sub judice* and reserved.

Whitney v. *Taylor*, 158 U. S. 85 (39: 906); *Wilcox* v. *Jackson, M'Connel*, 38 U. S. 13 Pet. 498 (10: 264); *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 740 (23: 634); *Doolan* v. *Carr*, 125 U. S. 618 (31: 844); *Newhall* v. *Sanger*, 92 U. S. 761 (23: 769); *Cameron* v. *United States*, 148 U. S. 301 (37: 459).

This doctrine of "*sub judice*" or "reservation" applies to lands covered by invalid railroad locations.

Bullard v. *Des Moines & Ft. D. R. Co.* 122 U. S. 167 (30: 1123); *United States* v. *Des Moines Nav. & R. Co.* 142 U. S. 510 (35: 1099); *Hamblin* v. *Western Land Co.* 147 U. S. 531 (37: 267).

If the Atlantic & Pacific map was one of general route only its filing reserved all lands within primary and indemnity limits.

St. Paul & P. R. Co. v. *Northern P. R. Co.*

139 U. S. 1 (35: 77); *Wisconsin C. R. Co.* v. *Forsythe*, 159 U. S. 46 (40: 71).

It has always been the rule in the interpretation of congressional grants that effect must be given to the intention of Congress whenever such intention can be ascertained.

Missouri, K. & T. R. Co. v. *Kansas P. R. Co.* 97 U. S. 491 (24: 1095); *St. Paul & S. C. R. Co.* v. *Winona & St. P. R. Co.* 112 U. S. 720 (28: 872); *Sioux City & St. P. R. Co.* v. *Chicago, M. & St. P. R. Co.* 117 U. S. 406 (29: 928); *United States* v. *Southern P. R. Co.* 146 U. S. 570, 615, 619 (36: 1091, 1104 1106); *United States* v. *Northern P. R. Co.* 152 U. S. 284 (38: 443); *Lake Superior Ship Canal, R. & I. Co.* v. *Cunningham*, 155 U. S. 354 (39: 183); *Sioux City & St. P. R. Co.* v. *United States*, 159 U. S. 349, 372 (40: 177, 185); *Wisconsin C. R. Co.* v. *Forsythe*, 159 U. S. 46 (40: 71).

Lands set apart and reserved were not operated upon by Southern Pacific grant.

Wilcox v. *Jackson, McConnel*, 38 U. S. 13 Pet. 513 (10: 271); *United States* v. *Missouri, K. & T. R. Co.* 141 U. S. 374 (35: 766); *Bardon* v. *Northern P. R. Co.* 145 U. S. 535 (36: 806).

The law set apart and identified these lands when the Atlantic & Pacific map of definite location was filed, as declared by this court again and again.

Buttz v. *Northern P. R. Co.* 119 U. S. 55 (30: 330); *St. Paul & P. R. Co.* v. *Northern P. R. Co.* 139 U. S. 1 (35: 77); *Hamblin* v. *Western Land Co.* 147 U. S. 531 (37: 267); *United States* v. *Des Moines Nav. & R. Co.* 142 U. S. 510 (35: 1099).

Southern Pacific grants forbade the selection of these lands as indemnity.

United States v. *Missouri, K. & T. R. Co.* 141 U. S. 374 (35: 771); *United States* v. *Southern P. R. Co.* 146 U. S. 615 (36: 1104).

The map offered by the Atlantic & Pacific Company in 1869 from The Needles to San Francisco was properly rejected as being wholly unauthorized.

St. Paul & P. R. Co. v. *Northern P. R. Co.* 139 U. S. 1 (35: 77); *United States* v. *Northern P. R. Co.* 152 U. S. 284, 292 (38: 443, 447); *United States* v. *Southern P. R. Co.* 146 U. S. 570, 596 (36: 1091, 1098).

These purchasers are not bona fide purchasers.

A purchaser with notice is not a bona fide purchaser.

Simmons Creek Coal Co. v. *Doran*, 142 U. S. 417, 435 (35: 1063, 1071); *Nesbitt* v. *Independent Dist. of Riverside*, 144 U. S. 610, 618 (36: 562, 565); *Lytle* v. *Lansing*, 147 U. S. 59 (38: 78); *Sutliff* v. *Lake County Comrs.* 147 U. S. 230 (37: 145); *Hedges* v. *Dixon County*, 150 U. S. 182 (37: 1044).

These lands having been granted to and set apart for the Atlantic & Pacific Railroad by legislative as well as by executive authority, it was entirely beyond the jurisdiction of the Interior Department to patent them to the Southern Pacific Company, and under such circumstances a patent is utterly null and void and does not convey any legal or equitable title.

Morton v. *Nebraska*, 88 U. S. 21 Wall. 660 (22: 639); *Noble* v. *Union River Logging R. Co.* 147 U. S. 165, 174 (37: 123, 127); *Doolan* v. *Carr*, 125 U. S. 618, 625 (31: 844); *Wright* v. *Roseberry*, 121 U. S. 488, 520 (30: 1039, 1049); *Dubuque & P. R. Co.* v. *Litchfield*, 64 U. S. 23 How. 66 (16: 500); *Newhall* v. *Sanger*, 92 U. S. 761 (23: 769); *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 740 (23: 637); *Lake Superior Ship Canal, R. & I. Co.* v. *Cunningham*, 155 U. S. 354, 373-375 (39: 183, 190); *Burfenning* v. *Chicago, St. P. M. & O. R. Co.* 163 U. S. 321 (41: 175).

The position of the government is that those lands were reserved from the grant to the Southern Pacific Railroad Company, and were in no wise operated upon by that grant. It has always been the settled doctrine in this country that patents to lands issued without authority of law, or issued for lands which are reserved, are absolutely null and void, and do not pass any legal or equitable title to the land.

Mr. Justice **Harlan** delivered the opinion of the court:

This suit was brought to obtain a decree quieting the title of the United States to a large body of lands in California, acquired under the treaty of Guadalupe Hidalgo.

These lands, it is stated by counsel, aggregate about 700,000 acres, 61,939 acres of which have heretofore been patented to the Southern Pacific Railroad Company, and for 72,000 acres of which that company has made application for patents. They are thus described in the bill filed by the United States: All the sections of land designated by odd numbers in townships 3 and 4 north, ranges 5, 6, and 7 west; township 1 north, ranges 16, 17, and 18 west; township 6 and the south three fourths of township 7 north, ranges 11, 12, 13, 14, 15, 16, 17, 18, and 19 west; all sections designated by odd numbers as shown by the public surveys, embraced within the townships from number 2 north to number 5 north, both numbers included, and ranges from number 8 west to number 18 west, both numbers included, except sections 23 and 35, in township 4 north, range 15 west, and except sections 1, 11, and 13, in township 3 north, range 15 west; also the unsurveyed lands within said area which will be designated as odd-numbered *sections [25 when the public surveys according to the laws of the United States shall have been extended over such townships—all of the aforesaid lands being surveyed by San Bernardino base and meridian.

The government suggests that the greater portion of these lands have been set apart under authority of the act of Congress of March 3, 1891 (26 Stat. at L. 1095, 1103, chap. 561, § 24), and by the Proclamation of the President of the United States of December 20, 1892 (27 Stat. at L. 1049), as a public reservation.

The principal contention of the United States is that the lands in dispute are in the same category in every respect with those in controversy in *United States* v. *Southern Pacific Railroad Company*, 146 U. S. 570 [36:1091], and *United States* v. *Colton Marble & Lime Company* and *United States* v. *Southern Pacific Railroad Company*, 146 U. S. 615 [36: 1101]; and that, so far as the question of title is concerned, the judgments in those cases have conclusively determined, as between the United States and the Southern Pacific Railroad Com-

pany and its privies, the essential facts upon which the government rests its present claim.

Stated in another form, the United States insists that in the former cases the controlling matter in issue was, whether certain maps filed by the Atlantic & Pacific Railroad Company in 1872, and which were accepted by the Land Department as sufficiently designating that company's line of road under the act of Congress of July 27, 1866 (14 Stat. at L. 292, chap. 278), were valid maps of *definite location;* the United States contending in those cases that they were, and the Southern Pacific Railroad Company contending that they were not, maps of that character; that that issue was determined in favor of the United States; and that as the lands now in dispute are within the limits of the line of road so designated, it is not open to the Southern Pacific Railroad Company, in this proceeding, to question the former determination that such maps sufficiently identified the lands granted to the Atlantic & Pacific Railroad Company by the act of 1866, and were therefore valid maps of definite location.

This position of the government makes it necessary to ascertain what was in issue and **26**] what was determined in the *former cases. Did the former adjudication have the scope attributed to it by the United States? If it did, the decision of the present case will not be difficult.

It is necessary to a clear understanding of the question just stated that we should first look at the provisions of the several acts of Congress relating to the Atlantic & Pacific and Southern Pacific Railroad Companies, and which were referred to and construed in the former cases.

The Atlantic & Pacific Railroad Company was incorporated by the act of Congress approved July 27, 1866 (14 Stat. at L. 292, chap. 278), with authority to construct and maintain a line of railroad and telegraph from a point at or near Springfield, Missouri, to the western boundary line of that state, thence by the most eligible railroad route, to be determined by the company, to the Canadian river, thence to Albuquerque on the river Del Norte, thence by way of Agua Frio or other suitable pass to the head waters of the Colorado Chiquito, thence along the 35th parallel of latitude, as near as might be found most suitable for a railroad route, to the Colorado river at such point as might be selected by the company for crossing and "thence by the most practicable and eligible route to the Pacific." § 1. In the aid of the construction of that line Congress granted every odd-numbered section of public land (not mineral) to the amount of twenty alternate sections per mile on each side of such line as the company might adopt through any territory of the United States, and ten alternate sections per mile on each side of the line through any state, to which the United States had full title, and not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, "*at the time* the line of said road *is designated by a plot thereof* filed in the office of the Commissioner of the General Land Office." § 3.

Section 4 made provision for patents to be issued to the company for lands opposite to and conterminous with each section of 25 miles of road, completed in a good, substantial, and workmanlike manner.

It was also provided that the President of the United States should cause the lands to be surveyed for 40 miles in width *on both sides [**27** of the entire line after the general route was fixed, and as fast as the construction of the railroad required; that the grants, rights, and privileges specified in the act of Congress were given and accepted subject to the conditions that the company would commence work within two years from the approval of the act, complete not less than 50 miles per year after the second year; construct, equip, furnish, and complete its main line by July 4, 1878; and if the company made any breach of the conditions imposed, and allowed the same to continue for upwards of one year, then, at any time thereafter, the United States could do any and all acts and things needful and necessary to insure a speedy completion of the road. §§ 6, 8, 9.

By the 18th section of the act the Southern Pacific Railroad Company, a California corporation, was authorized to connect with the Atlantic & Pacific Railroad at such point, near the boundary line of the state, as it deemed most suitable for a railroad line to San Francisco; and to have a uniform gauge and rate of freight or fare with that road; and in consideration thereof, to aid in its construction, "shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic & Pacific Railroad herein provided for."

The 20th section provided that, the better to accomplish the object of the act, "namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said Atlantic & Pacific Railroad Company, add to, alter, amend, or repeal this act."

The legislature of California by an act approved April 4, 1870, authorized the Southern Pacific Railroad Company to change the line of its road so as to reach the eastern boundary of the state by such route as the company should determine to be the most practicable. And by joint resolution passed *June 28, [**28** 1870, Congress declared that that company might construct its road and telegraph line, as near as might be, on the route indicated by the map filed by that company in the Department of the Interior on the 3d day of January, 1867, and "upon the construction of each section of said road in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each of such sections by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July 27, 1866, and upon the report of the commissioners to the Secretary of the Interior that such section of

said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land conterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July 27, 1866, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the 3d section of said act." 16 Stat. at L. 382.

By an act approved March 3, 1871, Congress incorporated the Texas Pacific Railroad Company and made to it a grant of public lands. And by the 23d section of that act it was provided: "That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapi Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California, by the act of July 27, 1866: *Provided, however*, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company." 16 Stat. at L. 573, 579, chap. 122.

29] *The Southern Pacific Railroad Company constructed the road thus contemplated, and claims that the lands here in dispute passed to it under the above act of 1871.

The Atlantic & Pacific Railroad Company built part of its road east of Colorado river, but did not construct any line west of that river or in California.

In consequence of such failure, Congress, by the act of July 6, 1886 (24 Stat. at L. 123, chap. 637), provided "that all the lands, excepting the right of way and the right, power, and authority given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations, heretofore granted to the Atlantic & Pacific Railroad Company by an act entitled 'An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast,' approved July 27, 1866, and subsequent acts and joint resolutions of Congress, which are adjacent to and conterminous with the uncompleted portions of the main line of said road, embraced within both the granted and indemnity limits, as contemplated to be constructed under and by the provisions of the said act of July 27, 1866, and acts and joint resolutions subsequent thereto and relating to the construction of said road and telegraph, be, and the same are hereby, declared *forfeited* and *restored to the public domain.*"

In execution of that act the United States, in 1889, commenced suits in the circuit court of the United States for the southern district of California for the purpose of quieting its title to various tracts of land, aggregating about 5,342 acres, and claimed by the Southern Pacific Railroad Company and by other corporations and individuals asserting title under that company. In one of those suits, the Southern Pacific Railroad Company, and D.O. Mills and Garrett L. Lansing, trustees under a mortgage executed by that Company on the 1st day of April, 1875, and Joseph Youngblood were made *defendants; in the other, the same [30 company and trustees, together with the City Brick Company, Thomas Goss, Edward Simmons, and A. A. Hubbard, were defendants.

These are the cases reported in 146 U. S. 570, 615 [36: 1091, 1104].

The issues presented by the government in the former suits are fully shown by an amended bill filed therein November 22, 1889. After referring to the organization of the Southern Pacific Railroad Company, and to the act of Congress of July 27, 1866, it proceeds: "Your orator alleges that by and pursuant to said act of Congress, the Atlantic & Pacific Railroad Company was created and duly organized, and on November 23, 1866, within the time and in the manner provided in said act, accepted said grant, and did *designate the line of its route* from Springfield, Missouri, to the Pacific by maps and plats thereof, which it filed in the office of the Commissioner of the General Land Office in manner following, to wit: On or about March 9, 1872, said company filed in the office of the Commissioner of the General Land Office maps *designating the line of its route*, and showing the general features of the country and vicinity, as follows: First—From San Francisco to San Miguel Mission in California. Second—Map of its route from San Miguel Mission *via* Santa Barbara and San Buenaventura, to a point in township 2 south, range 17 west, San Bernardino base and meridian, in California. Third—Map of its route from said point last mentioned to a point in township 7 north, range 7 east, San Bernardino base and meridian, in California. Fourth—Map of its route from said point last named to the Colorado river. And thereafter, on or about March, 1872, said company filed in said office as aforesaid its several other maps, designating its route from said point last named to Springfield in the state of Missouri, making altogether a continuous line designating its entire route, and showing the general features of the country from said town of Springfield, Missouri, by way of the points named in said act of Congress of July 27, 1866, to the Pacific at San Buenaventura, and from there to San Francisco, and in the manner provided in said act, and such designation was accepted by the United States. *Your orator alleges that [31 *said several parts of its map, filed as aforesaid, made and constituted the entire route or line of said Atlantic & Pacific Railroad Company, fully designating the whole thereof.*"

It was further averred that "on March 9, 1872, and on April 22, 1872, the Secretary of the Interior and the Commissioner of the General Land Office, respectively, ordered all the odd sections of land within 30 miles on each side of said designated route of said Atlantic & Pacific Railroad Company reserved from sale and withdrawn;" that said Atlantic &

Pacific Railroad Company did construct and complete a portion of its road west of Springfield, Missouri, in the time and manner required by said act, but did not at any time construct or complete any railroad west of the Colorado river; and that by the act of Congress approved July 6, 1886, "all the lands and rights to lands theretofore granted and conferred upon said Atlantic & Pacific Railroad Company were forfeited, resumed, and restored to entry for noncompletion of that portion of said railroad to have been constructed in California."

After alleging that the Southern Pacific Railroad Company was not the company of that name organized under certain articles of amalgamation and consolidation, dated October 11, 1870, and amended April 11, 1871, but was the now existing company of that name, and after setting out the 23d section of the act of Congress of March 3, 1871, incorporating the Texas & Pacific Railroad Company (16 Stat. at L. 573, chap. 122), and granting lands to the Southern Pacific Railroad Company for the line therein described, the amended bill in the former suits proceeded: "Said Southern Pacific Railroad Company, the corporation which existed on April 3, 1871, as heretofore shown, pretended to accept said grant on April 3, 1871, and did on that day designate the line of its road by a plat thereof, which it filed in the office of the Commissioner of the General Land Office, and thereupon the Secretary of the Interior ordered all the public lands in odd sections within 30 miles of such route, to which no right or claim had attached, to be withdrawn from market and reserved. And your [32] orator *alleges that the Southern Pacific Railroad Company, which was organized and created on August 12, 1873, by the pretended articles of amalgamation and consolidation of said several railroad companies as heretofore set forth, did construct and complete a railroad from Tehachapi Pass, by way of Los Angeles to the Colorado river, in the manner and within the time prescribed in said act of Congress, *in* which the Southern Pacific Railroad Company therein named was authorized and empowered to do. And thereafter the commissioners appointed under said act for that purpose did unlawfully make and file their alleged acceptance of the whole of said railroad by sections. And there was not, and is not now, any railroad or part thereof constructed or completed under said act or between said points otherwise than as aforesaid."

It was also alleged that "on the south side of said route of the Atlantic & Pacific Railroad Company within 30 miles of said route, but also within 20 miles of the pretended designated route of the Southern Pacific Railroad Company, there was not on July 27, 1866, nor on March 12, 1872, nor on April 3, 1871, and is not now, enough public land in the odd sections to equal in amount ten alternate sections per mile of the line of road of said Atlantic & Pacific Railroad Company, within such limits, for that prior to said date of July 27, 1866, the Mexican government and the United States had sold, granted, reserved, and otherwise disposed of so great a quantity of land in those limits;" also, that "all of the said lands before described are situated on the south side of the said designated route of the Atlantic & Pacific Railroad Company more than 20 miles but less than 30 miles therefrom, but are less than 20 miles from the said pretended designated route of said Southern Pacific Railroad Company."

The amended bill concludes by alleging that the defendants and either of them have no title or interest in or to the lands described, "for that said pretended patents under which defendants solely claim title were issued inadvertently, without authority, and were at their inception, and still are, each void and inoperative to pass title, and that said lands were never granted to said Southern Pacific Railroad Company, *defendant herein, but are still [33 owned by the plaintiff;" and that the Secretary of the Interior, on the 16th day of August, 1887, on behalf of the government, and in accordance with law, demanded of said company the relinquishment of its claim to all of the lands described in such patents, and a return of the patents, all of which that company refused to do.

The relief asked was a decree cancelling the patents issued to the Southern Pacific Railroad Company, quieting the title of the government to the lands described therein, and enjoining that company from asserting or claiming any right or title thereto adversely to the United States.

The answer of the Southern Pacific Railroad Company, filed in the former suits December 30, 1889, shows its understanding as to what were the issues tendered by the government. From that answer these extracts are made:

"The defendant admits that by and under said last-mentioned act of Congress [July 27, 1866], the Atlantic & Pacific Railroad Company was created and organized, and did duly accept the provisions of the said law within the time and in the manner provided in said act, but it *denies* that said Atlantic & Pacific Railroad Company *did designate the line of its route from Springfield, in the state of Missouri, to the Pacific coast, as required by said act.*

"This defendant denies that on the 9th of March, 1872, or at or about any such time, the Atlantic & Pacific Railroad Company filed in the office of the Commissioner of the General Land Office maps designating the line of its route, or otherwise in accordance with the law, and denies that on or about the 9th March, 1872, said Atlantic & Pacific Railroad Company filed four maps in the office of the Commissioner of the General Land Office, as stated in said bill. Said company filed two maps and claimed that they were filed for the purpose of locating parts or fragments of a line for its road in the state of California, but the defendant *denies that said maps constituted a valid location of said road in California.* Certified copies of said maps are annexed to the answer heretofore filed in this suit by this defendant and marked 'Exhibit A,' Nos. 1 and 2, which, with the indorsements *thereon, [34 are now herein referred to and made part of this answer; and this defendant says that said railroad was not located or attempted to be located on or about March 9, 1872, or at any such time, in California, either in whole or in part, otherwise than as aforesaid by said maps. This defendant denies that the Atlantic &

Pacific Railroad Company *by or through the filing of said maps, acquired the right to any lands of the United States lying opposite to the lines or route marked on said maps*, and denies that said company acquired the right to select any public lands along said routes or lines as 'other lands' in lieu of sections within 20 miles that had been granted, sold, 'reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of' by the United States. These maps were sent to the General Land Office by the Secretary of the Interior with a letter dated March 9, 1872, of which a certified copy is annexed to said answer heretofore filed, marked 'Exhibit B.'

"This defendant says that the lands mentioned in the amended bill herein lie opposite to the line of route marked on the said map, designated in said letter as No. 2 of a portion of the proposed road of the Atlantic & Pacific Railroad Company, that is, a piece of road within the state of California, 'from a point on the western boundary line of Los Angeles county, California, to a point in township 7 north, range 7 east, of San Bernardino meridian in said state.' Neither when filed in March, 1872, nor at any such time, did it appear that said map represented any part of a line that was, or was intended to be, enjoined to any other part located before that time for the Atlantic & Pacific Railroad.

"Further answering, this defendant says that the Atlantic & Pacific Railroad Company afterwards, *viz.*, on the 13th day of August, 1872, filed in the Department of the Interior two other maps which it claimed were intended to designate the line of other fragments or portions of its railroad in California. Certified copies of said maps and of the letter of the Secretary of the Interior of April 16, 1874, in respect thereto, are annexed to the answer filed **35**] heretofore in this suit by this *defendant, marked 'Exhibit C.' Nos. 1 and 2, and *are now herein referred to and made part of this answer.* And this defendant *denies that said maps constituted a valid location of the parts or fractions of road therein described*, and *denies that the four maps hereinbefore mentioned of four several parts of the road constituted a valid location of the said Atlantic & Pacific Railroad in California.* And it denies that the said Atlantic & Pacific Railroad was ever in any other wise lawfully located in the state of California. . . . And the defendant says that *there is nothing in or upon said maps to identify the same as the line of road mentioned in the said act of Congress.*"

After referring to the 18th section of the act of July 27, 1866, and alleging that the construction of a railroad from the Colorado river to San Francisco was "expressly relegated and appropriated to this defendant," and that the Atlantic & Pacific Railroad Company was never authorized to construct any such line of railroad, or to acquire any lands by reason of or in respect of the construction or proposed construction of any such line, the answer of the Southern Pacific Railroad Company denied that, "on or about March, 1872, the Atlantic & Pacific Company filed in the office of the Commissioner of the General Land Office maps designating its route from the Colorado river to Springfield, in the state of Missouri," or that "said maps made altogether the line of railroad from Springfield, in the state of Missouri, to the Pacific coast, which was provided for and required by said act of Congress of July 27, 1866, to be constructed and completed by the said Atlantic & Pacific Railroad Company," or "that the several parts of its map filed made and constituted the whole of its line as provided for in said act of Congress;" that the parts of its map, "when taken together, showed a line terminating at San Francisco, which was not the terminus provided for by said act of Congress." The answer also denied that on March 9, 1872, and April 22, 1872, or at any such times, the Secretary of the Interior and the Commissioner of the General Land Office ordered all the odd sections of land within 30 miles on each side of the designated route *of the said Atlantic & Pacific Railroad [**36** Company reserved from sale and withdrawn; that about April 22, 1872, the Commissioner of the General Land Office ordered lands withdrawn for 30 miles on each side of the parts of lines of route attempted to be located March 9, 1872, by the two maps hereinbefore mentioned as filed March 9, 1872, his orders being addressed to the register and receiver of the United States land office at San Bernardino, Los Angeles, and Visalia, and were substantially as shown by the certified copy of the Commissioner's letter of said date to the officers at Los Angeles; but the defendant denied that the orders of April 22, 1872, had any effect whatever upon its rights and grants, and were intended only to take effect upon public lands not reserved, sold, granted, or otherwise appropriated at the time of filing said maps, March 9, 1872.

The defendant averred that "the lands involved in this suit had previously, on the 3d April, 1871, by the filing of the map of definite location of the defendant's railroad, been duly reserved from sale by and under the said 23d section of the act of Congress of March 3, 1871, and the 6th section of the act of Congress of July 27, 1866, which said sections are quoted in the bill of complaint herein, and avers also that said lands had been duly withdrawn from market and appropriated for the use of this defendant by the order of the Commissioner of the General Land Office to the register and receiver of the United States land office at Los Angeles, issued April 21, 1871, a copy of which is hereto annexed, marked 'R,' and made a part of this answer."

Admitting that the Atlantic & Pacific Railroad Company did construct and complete a portion of its road west of Springfield, Missouri, in the time and manner required by said act, but averring that that company did not at any time construct or complete any railroad west of the Colorado river, the defendant averred that "on the 3d April, 1871, it designated the line of its said railroad, as described in said § 23, by a map thereof, filed in the office of the Commissioner of the General Land Office, and thereupon the said Commissioner ordered all the public lands in odd sections within *30 miles of such route to be withdrawn[**37** from market. Certified copy of the map filed by this defendant in the office of the Commissioner of the General Land Office is annexed to the answer heretofore filed by this defendant,

marked 'Exhibit D,' and the same is now referred to and made part of this answer;" that "it is the same railroad company that constructed the railroad provided for in the 23d section of said act of Congress of March 3, 1871, and that it fully constructed and completed its road according to said act, and the construction thereof bas been accepted and approved by the President of the United States, construction of the last mile of said road having been accepted by President Hayes on the 23d of January, 1878."

The Southern Pacific Railroad Company admitted in its answer that the line which the Atlantic & Pacific Railroad claimed to have located in California "*crosses the line of the Southern Pacific Railroad located under the act of March* 3, 1871," but alleged "that under and by virtue of said act of March 3, 1871, and the map of location filed on the 3d day of April, 1871, the lands described in said patent were reserved for and appropriated to tbis defendant, whose title thereto has become perfect and complete by the construction of its road as prescribed in said act," and that "the said Atlantic & Pacific Railroad Company's pretended line was not located until subsequent to the year 1871; that when sougbt or pretended to be located, it was found to be on a wholly unauthorized route, not prescribed or permitted under any act of Congress in relation to or affecting said Atlantic & Pacific Railroad Company."

The answer of the Southern Pacific Railroad Company, in the former cases, also contained these paragraphs:

"This defendant admits that on the south side of the pretended location of the Atlantic & Pacific road, and within 30 miles thereof, but also within 20 miles of the locatlon of the Southern Pacific Railroad, tbere was not on April 3, 1871, and is not now, enough public land in the odd sections to equal ten alternate sections per mile on each side of the pretended location of the line of the said Atlantic & Pacific
38] *Railroad Company within such limits, and this defendant admits that tbe above-described tracts of land are situated more than 20 miles and less than 30 miles from tbe line of the pretended location of tbe Atlantic & Pacific Railroad, and less than 20 miles from the said located line of tbe Southern Pacific Railroad.

"This defendant avers that said tracts of land have been granted, by the 23d section of the act of March 3, 1871, to it, the Southern Pacific Railroad Company. . . .

"This defendant admits that, under date of March 29, 1876, April 4, 1879, and December 27, 1883, the patents were issued to this defendant for the lands hereinabove descrlbed, but denied that such patents were issued inadvertently or without authority. On the contrary, this defendant avers that said patents were issued wlth due deliberation and in strict conformity with the law, and that the signatures of the President of the United States and the recorder of the General Land Office thereto were affixed fairly and properly and under the autbority of law. This defendant here refers to the Exhibit 1, Nos. 1 and 2, annexed to its answer heretofore filed, and makes the same part of this answer,

"When the grant of lands was made to this defendant, March 3, 1871, and its grant was located, April 3, 1871, all the lands involved in this case were public lands of the United States."

To this answer a general replication was filed.

The pleadings in the former suits show that the government based its claim to relief upon certain grounds that were distinctly controverted by tbe Southern Pacific Railroad Company. Those grounds were:

That the grant by Congress of public lands to the Atlantic & Pacific Railroad Company was before the grant to the Soutbern Pacific Railroad Company;

That when the Atlantic & Pacific Railroad Company designated its line by a plat thereof filed in the office of the Commissioner of the General Land Office, as required by Congress, it acquired an inchoate title to the lands granted, *that is, a right to earn them [**39** and to obtain a complete title by construction of its road;

That the Atlantic & Pacific Railroad Company, by certain maps and plats filed in the office of the Commissioner of the General Land Office in 1872 and fully identified both in the bill and answer—which maps were accepted by the Interior Department as adequate and valid—sufficiently designated, as required by the act of 1866, an entire line from San Francisco *via* San Miguel Mission, Santa Barbara, San Buenaventura, and the Colorado river to Springfield, Missouri, so as to become entitled, as of the date of tbe grant of July 27, 1866, to earn the lands appertaining to the line so designated;

That the lands then in controversy appertained to the line of road, and were within the exterior lines of the route, so designated, were among the lands granted to the Atlantic & Pacific Railroad Company, and in consequence of such designation were withdrawn by the Secretary of the Interior from sale or preemption for the benefit of that company; and,

Tbat the Atlantic & Pacific Railroad Company having failed to meet the conditions of the grant by constructing its road in California, the lands to which it had acquired an inchoate title by means of the accepted map designating its line were "restored to the public domain," under the above act of July 6, 1886 (24 Stat. at L. 123, chap. 637), and were not left, upon such statutory forfeiture, to be earned by the Southern Pacific Railroad Company under the junior grant.

Tbe Southern Pacific Railroad Company controverted the material allegations of the government's bill and amended bill, and made defense upon tbese among other grounds:

That the only designation of a line or route ever made by tbe Atlantic & Pacific Railroad Company was one of an entire line from Springfield to San Francisco, and tbat it had no authority to establish, designate, or locate any such extended line;

That the maps of 1872 filed by the Atlantic & Pacific Railroad Company, which were referred to in the bill, and also made *parts of the company's answer, were not sufficient* *to identify [**40** *any specific lands west of the Colorado river; were not therefore maps of definite location;* and that that company never made any sufficient

location or designation of a line in California, so that it could claim the lands in dispute under the grant made by the act of 1866;

That the lands in question were covered by the location made by the Southern Pacific Railroad Company under the act of Congress granting lands to it, and were part of those withdrawn from sale and in its favor by the Secretary of the Interior; and,

That, in any view, the right of the Southern Pacific Railroad Company to those lands attached and became complete upon the forfeiture of the lands and rights granted to the Atlantic & Pacific Railroad Company, such forfeiture—it was claimed—not affecting the rights previously acquired by the Southern Pacific Railroad under the accepted maps of the definite location of its line, and under the withdrawal from sale of the lands appertaining to that line.

In the former suits it was conceded that *if* the maps filed by the Atlantic & Pacific Railroad Company in 1872 were valid maps of *definite location*, sufficiently identifying the lands granted to it, then the lands involved in those suits were within the overlapping limits of the two grants.

The learned counsel for the railroad company in those cases contended that, in order to show a conflict between the claims of the two companies to the particular lands then in controversy, the United States must show that the Atlantic & Pacific Railroad Company designated its route under the act of 1866, and that there was no proof of that fact "except that the Atlantic & Pacific Company from time to time filed certain fragmentary maps pretending to designate routes, and which, if connected, would not constitute a route such as the act of 1866 authorized it to select." This general point, counsel argued, resolved itself into three subsidiary questions, namely: "1. Whether the Atlantic & Pacific Railroad Company *ever designated its route*. Whether such a designation, if made, *operated*, from the mere circumstance that the grant to that company **41**] was prior in time to that made to *the Southern Pacific Company, *to exclude the lands in the overlapping limits at the place of crossing from the latter grant.* 3. Whether, if such designation was made, the proviso in the 23d section of the above act of March 3, 1871, protecting the rights, 'present and prospective,' of the Atlantic & Pacific Company, was designed for any other purpose than to save to it any lands which it might eventually earn by a full performance of its undertaking."

Manifestly the fundamental question in the former cases was whether the Atlantic & Pacific Railroad Company ever filed any such maps as the act of 1866 contemplated when declaring that the odd-numbered sections granted should be those on the line of the road to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, "at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office."

In those cases the circuit court denied the relief asked and dismissed the bills filed by the United States. 39 Fed. Rep. 132, 40 Fed. Rep. 611, 45 Fed. Rep. 596, 46 Fed. Rep. 683. But this court reversed the judgment so rendered, holding—

That the grants to the Atlantic & Pacific and the Southern Pacific Railroad Companies were *in præsenti*, that is to say, the route not being at the time determined, the grant was in the nature of a float, no title attaching to any specific sections until they were capable of identification;

That when the granted lands were once identified by approved maps of definite location, the grants severally took effect by relation as of the dates of the respective acts of Congress—the grant to the Atlantic & Pacific Railroad Company being prior in time to that made to the Southern Pacific Railroad Company;

That the Atlantic & Pacific Railroad Company did file maps of definite location in 1872, which were "received and approved by the Land Department *as maps of definite location;*" that *then* "the specific tracts were designated, and *to them* the title of the Atlantic & Pa- [42 cific attached *as of July* 27, 1866;" that "in fact the line of definite location of the Atlantic & Pacific was established, and maps thereof filed and approved, before any action in that respect was taken by the Southern Pacific Company;" and that "there was never a time, therefore, at which the grant of the Southern Pacific could be said to have attached to these lands, and the plausible argument based thereon, made by counsel for the Southern Pacific Company, falls to the ground;"

That the map filed by the Southern Pacific Railroad Company, April 3, 1871, could not have been a map of definite location, but was "only of the general route, and there was *then* no designation of lands *to which the Southern Pacific Company's title could attach;*"

That it was immaterial whether the map of definite location of the Southern Pacific road was filed and approved before or after April 11, 1872, "for when filed the grant could take effect by relation only as of March 3, 1871 [the date of the grant to it], and *at that time, and for nearly five years theretofore*, the title to these lands had been in the Atlantic & Pacific;" nor was it material that the act of 1871 "in terms purports to bestow the same rights, grants, and privileges as were granted to the Southern Pacific Railroad Company by the act of 1866," for that merely defined "the extent of the grant and the character of the rights and privileges" given, and did "not operate to make the latter grant take effect by relation as of the date of the prior grant, and thus subject the grants to the two companies to the rule controlling contemporaneous grants as established by *St. Paul & Sioux City Railroad* v. *Winona & St. Peter Railroad*, 112 U. S. 730 [28: 876], and *Sioux City & St. Paul Railroad* v. *Chicago, Milwaukee & St. P. Railway*, 117 U. S. 406 [29: 928]," that "even if Congress had in terms expressed an intent to that effect in a subsequent act, it was not competent by such legislation to devest the rights already vested in the Atlantic & Pacific Company;" that the case, stating it in the best way for the railroad company, was one "of two companies with conflicting grants, each of whose line of definite location has been ap-

43] proved *by the Land Department;" and that "unquestionably, the grant older in date takes the land;"

That whatever right or title was acquired by the Southern Pacific Railroad Company, by its map filed April 3, 1871, was *absolutely displaced when the Atlantic & Pacific Company's map was filed;*" that Congress intended "no scramble between companies for the grasping of titles by priority of location, but that it is to be regarded as though title passes as of the date of the act, and to the company having priority of grant, and, therefore, that in the eye of the law it is now as though there never was a period of time during which any title to these lands was in the Southern Pacific;" so that, "whatever may have been the dates of the filing by the respective companies, the case stands as though the lands granted to the Atlantic & Pacific had been identified in 1866 and title had *then* passed, and *there never was a title of any kind vested in the Southern Pacific Company;*" and,

That upon the forfeiture by Congress of the rights granted to the Atlantic & Pacific Railroad Company, the lands to which its grant had attached upon the filing and acceptance of its map of definite location in 1872 *did not inure to the benefit of the Southern Pacific Railroad Company;* that "if the act of forfeiture had not been passed by Congress, the Atlantic & Pacific could yet construct the road, and that, constructing it, its title to these lands would become perfect;" that "no power but Congress could interfere with this right of the Atlantic & Pacific;" that "Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited;" that "it enacted that they be restored to the public domain;" that "the forfeiture was not for the benefit of the Southern Pacific, it was not to enlarge its grant as it stood prior to the act of forfeiture," but was for the benefit of the United States, as shown by the act of Congress declaring that the lands be restored to the public domain; consequently, that by the act of forfeiture, "the title of the Atlantic & Pacific was retaken by the general government, and retaken for its own benefit and not that of the Southern Pacific Company;" and 44] that the lands belonged to the *United States, and the Southern Pacific Railroad Company had "no title of any kind" to them. *United States* v. *Southern Pacific Railroad Company*, 146 U. S. 570, 607 [36: 1091, 1102].

Touching the point made in the former cases, that the maps filed by the Atlantic & Pacific Railroad Company designating a line from the Colorado river to San Francisco were inoperative by reason of the want of authority to construct a road to the latter city, the court said: "But it is urged by counsel for defendant that no map of definite location of line between the Colorado river and the Pacific ocean was ever filed by the Atlantic & Pacific or approved by the Secretary of the Interior. This contention is based upon these facts: The Atlantic & Pacific Company claimed that, under its charter, it was authorized to build a road from the Colorado river to the Pacific ocean, and thence along the coast up to San Francisco; and it filed maps thereof in four sections. San Buenaventura was the point where the westward line first touched the Pacific ocean. One of these maps was of that portion of the line extending from the western boundary of Los Angeles county, a point east of San Buenaventura, and through that place to San Miguel Mission, in the direction of San Francisco. In other words, San Buenaventura was not the terminus of any line of definite location from the Colorado river westward, whether shown by one or more maps, but only an intermediate point on one sectional map. When the four maps were filed, and in 1872, the Land Department, holding that the Atlantic & Pacific Company were authorized to build not only from the Colorado river directly to the Pacific ocean, but also thence north to San Francisco, approved them *as establishing the line of definite location.* Subsequently, and when Mr. Justice Lamar was Secretary of the Interior, the matter was re-examined and it was properly held that under the act of 1866 the grant to the Atlantic & Pacific was exhausted when its line reached the Pacific ocean. San Buenaventura was, therefore, held to be the western terminus, and the location of the line approved to that point. The fact that its line was located, and maps filed thereof in sections, is *immaterial. [45 *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1 [35: 77]. Indeed, all the transcontinental roads, it is believed, filed their maps of route in sections. So the question is, whether the filing a map of definite location from the Colorado river through San Buenaventura to San Francisco, under a claim of right to construct a road the entire distance, is good as a map of definite location from the Colorado river to San Buenaventura, the latter point being the limit of the grant. *We think, unquestionably, it is.* Though a party claims more than he is legally entitled to, his claim ought not to be rejected for that to which he has a right. The purpose of filing a map of definite location is to enable the Land Department to designate the lands passing under the grant; and when a map of such a line is filed, full information is given, and, so far as that line may legally extend, the law perfects the title. It surely cannot be that a company must determine at its peril the extent to which its grant may go, or that a mistake in such determination works a forfeiture of all its rights to lands." 146 U. S. 570, 596 [36: 1091, 1098].

The closing paragraph in the opinion in the former cases is in these words: "Our conclusions, therefore, are, that a valid and sufficient map of definite location of its route from the Colorado river to the Pacific ocean was filed by the Atlantic & Pacific Company, and approved by the Secretary of the Interior; that by such act the title to these lands passed, under the grant of 1866, to the Atlantic & Pacific Company, and remained held by it subject to a condition subsequent until the act of forfeiture of 1886; that by that act of forfeiture the title of the Atlantic & Pacific was retaken by the general government, and retaken for its benefit, and not that of the Southern Pacific Company, and *that the latter company has no title of any kind to these lands.*" 146 U. S. 607 [36: 1102].

In the cases of *United States* v. *Colton Marble*

& Lime Company and *United States* v. *Southern Pacific Railroad Company*, 146 U. S. 615 [36: 1104], it was adjudged that the proviso in the act of March 3, 1871 (16 Stat. at L. 573, chap. 122) giving lands in aid of the construction of the Southern Pacific Railroad), that the grant should "in no way affect or impair the rights, 46] present or *prospective, of the Atlantic & Pacific Railroad Company," operated to except the indemnity lands of the Atlantic & Pacific Company from the grant to the Southern Pacific Company.

The former cases were decided in this court on the 12th day of December, 1892.

A petition for rehearing was presented to several members of the court, but a rehearing was not granted. In that petition the Southern Pacific Railroad Company insisted that this court had erred in various particulars, among them the following:

In not giving due legal effect to the forfeiture act of July 6, 1886, its contention—as on the original hearing—being that the legal operation and effect of that act were to avoid the grant to the Atlantic & Pacific Railroad Company as of the date of the act of 1866, and to restore to the United States, *as of that date*, the title to all the lands embraced in the forfeiture, leaving nothing in the way of the full enjoyment by the Southern Pacific Railroad Company of the grant made to it; consequently, that all proceedings taken by the Atlantic & Pacific Railroad Company, under the act of 1866, were avoided and defeated as absolutely and effectually as if the grant had never been made and no proceedings taken in execution of it; and,

In respect to the "designation of line under the Atlantic & Pacific Railroad maps and the effect and operation thereof."

The present suit was brought by the United States against the Southern Pacific Railroad Company and D. O. Mills and G. L. Lansing as trustees in a mortgage executed by that company on the 1st day of April, 1875 (the same trustees and mortgage referred to in the former cases), as well as against certain individuals and corporations, to quiet the title of the United States to the lands involved in this suit. It was pending at the time the former cases were decided in this court. The lands now in controversy are situated opposite to and are conterminous with the first, second, and fourth sections of the Southern Pacific Railroad as con-47] structed *between 1873 and 1877, inclusive, and within the primary and indemnity limits of the grant to the Southern Pacific Railroad Company made by the 23d section of the Texas & Pacific act of March 3, 1871; the 61,939.62 acres patented to that company being opposite to the first and fourth sections of its road. It may be said that the lands here in dispute belong to one or the other of the following classes: Land within the common granted limits of both the Atlantic & Pacific grant of 1866 and the Southern Pacific grant of 1871; lands within the granted limits of the Southern Pacific grant and the indemnity limits of the Atlantic & Pacific grant; lands within the Southern Pacific indemnity limits and the Atlantic & Pacific granted limits; lands within the common indemnity limits of both grants. Of those in dispute, 219,012.93 acres have not been surveyed by the United States.

But all the lands now in dispute are within the limits of the grant to the Atlantic & Pacific Railroad Company, *if* the maps filed by that company in 1872, and which were approved by the Land Department, are to be regarded as maps of definite location. This is substantially admitted to be a correct statement of the controlling question before the court; for the defendants, in their very able argument, state that the lands involved in the suit "are within the limits which would have appertained to the grant to the Atlantic & Pacific upon the 1872 route, *if* that had been an authorized route, and *if* a *definite location* had been duly made thereon so as to attach the grant to specific lands."

The contingencies here suggested have been fully met by this court; for it was distinctly adjudged, in the former cases, as between the government and the Southern Pacific Railroad Company (146 U. S. 570, 596 [36:1091, 1098]), that the maps filed in 1872 sufficiently identified the lands granted to the Atlantic & Pacific Railroad Company on the contemplated line between the Colorado river and San Buenaventura on the Pacific coast, although, for want of authority in that company to construct a railroad to San Francisco, they did not secure to the company any lands north of San Buenaventura; that is, those maps were directly adjudged to be maps adequately *fixing [48 or locating the line of the road under the act of 1866. The records of those cases having been introduced in the present suit, there is no room for doubt—if those records are competent evidence—as to what was in issue and what was adjudged in the former cases. The maps which in this case are relied upon by the United States as maps of definite location, and which the Southern Pacific Railroad Company denies to be of that character, *are the identical maps which the government relied on in the former cases*, and the same which that company referred to *and made part of its answer in the former litigation*, and which were adjudged by this court, in conformity with the contention of the government, to be valid maps of definite location, the acceptance of which made it impossible for the Southern Pacific Railroad Company to acquire any interest in any lands granted to the Atlantic & Pacific Railroad Company that were forfeited to the United States by the act of 1886.

It is said, however, that, under the pleadings and evidence in this collateral proceeding it is open to the Southern Pacific Railroad Company to renew the contest as to the sufficiency of the maps of 1872 filed by the Atlantic & Pacific Railroad Company and to show that they were not maps of definite location.

Is this position consistent with the settled rule of law as to the conclusiveness, between parties and their privies, of the final determination by a court of competent jurisdiction of matters put in issue by the pleadings?

The importance of this question, independently of the magnitude of the interests to be affected by our decision, and of the earnest contention of learned counsel, justifies a refer-

ence to some of the adjudged cases, showing the grounds upon which this salutary rule rests.

The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or
49] fact *once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order: for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

Among the cases in this court that illustrate the general rule are *Hopkins* v. *Lee*, 19 U. S. 6 Wheat. 109, 113 [5:218, 219]; *Smith* v. *Kernochen*, 48 U. S. 7 How. 198, 216 [12:666, 673]; *Thompson* v. *Roberts*, 65 U. S. 24 How. 233, 240 [16:648, 650]; *Washington, Alexandria, & Georgetown S. P. Co.* v. *Sickles*, 65 U. S. 24 How. 333, 340, 341, 343 (16:650, 652, 653]; *Russell* v. *Place*, 94 U. S. 606, 608 [24:214, 215]; *Cromwell* v. *Sac County*, 94 U. S. 351 [24:195]; *Campbell* v. *Rankin*, 99 U. S. 261 [25:435]; *Mason Lumber Co.* v. *Buchtel*, 101 U. S. 638 [25:1072]; *Bissell* v. *Spring Valley Township*, 124 U. S. 225, 230 [31:411, 413]; and *Johnson Co.* v. *Wharton*, 152 U. S. 253 [38:430].

In *Hopkins* v. *Lee*—which was a suit in equity by the purchaser of land to compel the vendor to remove certain encumbrances upon it—it was held that a fact established therein and made the basis of a decree could not be disputed in a subsequent action of covenant brought by the latter against the former for not conveying certain lands, part of the consideration, the court saying that the rule on that subject had found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it an end could not be put to litigation; in *Smith* v. *Kernochen*—which was ejectment by an assignee of a mortgage to recover possession of the mortgaged premises—that a final decree, in a previous suit, brought by the mortgagee against the mortgagor to foreclose the mortgage, adjudging the mortgage to be invalid for want of authority in the mortgagor to execute it, concluded the question of title, the court
50] observing *that the case came within the general rule that the judgment of a court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence conclusive between the same parties or their privies upon the same matters when brought directly in question in another court; in *Thompson* v. *Roberts*, that the judgment of a court of law, or a decree of a court of equity, directly upon the same point, and between the same parties, is good as a plea in bar, and conclusive when given in evidence in a subsequent suit; in *Washington, Alexandria, & Georgetown S. P. Co.* v. *Sickles*, that to the end that rights might be secured and the repose of society preserved, and that limits might be imposed upon the faculties of litigation, the presumption had been adopted that the thing adjudged by a court of competent jurisdiction, under definite conditions, shall be received in evidence "as irrefragable truth," such a presumption being a guaranty of the future efficiency and binding operation of the judgment; in *Cromwell* v. *Sac County*, that a judgment upon the merits constitutes an absolute bar to a subsequent suit upon the same cause of action in respect to every matter offered and received in evidence, or which might have been offered to sustain or defeat the claim in controversy, while if the second action is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered, the inquiry in such case being "as to the point or question actually litigated and determined in the original action, not what might have been litigated and determined;" in *Russell* v. *Place*, that "a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties;" in *Campbell* v. *Rankin*, that in an action to recover damages for trespass upon a mining claim, the record of a former suit between the same parties, involving the same question of interfering mining claims, was admissible as evidence, the court observing that "whenever the same question has been in issue and tried and judgment rendered, it is conclusive of the issue so decided in any subsequent *suit between the same parties;" in [51
Mason Lumber Co. v. *Buchtel*, that in a suit for the amount of the first instalment due on a contract for the purchase of timber lands—the defense being that the defendant had been induced to make the contract by false and fraudulent representations—a judgment based upon a finding that no such representations were made, was conclusive in respect of that matter in a subsequent action brought on the contract to recover a different instalment; in *Bissell* v. *Spring Valley Twp.*, that an adjudication, in an action on coupons of municipal bonds, sustaining the defense that the municipality never executed the bonds, and that the bonds were not its legal obligations, was conclusive in a subsequent action brought by the same party on different coupons of the same bonds; and in *Johnson Co.* v. *Wharton*, that in an action to recover stipulated royalties, for a named period, for guard rails constructed according to the specifications of a certain patent, in which judgment was given for the plaintiff, the defendant in a second suit brought to recover like royalties for a later period could not make the same defense, although, by reason of the small amount in dispute, he was precluded from having the judgment in the first suit reviewed upon writ of error, this court stating that it was a general rule, having its foundation in a wise public

policy, that the final judgment of a court, at least one of superior jurisdiction, competent under the law of its creation to deal with the parties and the subject-matter, and having acquired jurisdiction of the parties, concludes those parties and their privies in respect of every matter put in issue by the pleadings and determined by such court. See also *Lessee of Parrish* v. *Ferris*, 67 U. S. 2 Black, 606, 608 [17: 317, 318]; *Washington, A. & G. Steam Packet Co.* v. *Sickles*, 72 U. S. 5 Wall. 580, 592 [18: 550, 554]; *Dowell* v. *Applegate*, 152 U. S. 327, 342 [38: 463, 469].

The latest expressions of opinion by this court on this question are in *Last Chance Mining Co* v. *Tyler Mining Co.* 157 U. S. 683, 691 [39: 859, 863], and *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396 [42. ——]. In the first of these cases it was held that a judgment by default in favor of the Last Chance Mining Company against the Tyler Mining Company for a parcel of land embraced within the bound-
52] aries of certain mining claims, *alleged to have been legally located and to belong to the former company, precluded the latter company from contending in a subsequent action for part of a mineral vein not embraced within the former suit, but within the mining claims involved in the first suit, that the mining claims in question had not been legally located—the court observing that a judgment by default was just as conclusive an adjudication between the parties of what is essential to support the judgment as one rendered after answer and contest, the essence of estoppel by judgment being that "there has been a judicial determination of a fact, and the question always is, Has there been such determination? and not, Upon what evidence or by what means was it reached?"

In *New Orleans* v. *Citizens' Bank*, it was held that the final and unreversed judgment of a court in Louisiana of superior jurisdiction upon the issue duly raised by the pleadings whether the bank was exempt by contract with the state from taxes assessed against it for particular years, concluded that question, as between the same parties and their representatives, in respect of taxes assessed against it for subsequent years. In that case the court said: "The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies."

In view of these adjudications, it would seem that the controlling inquiry is whether, under the pleadings in the former cases, the sufficiency of the Atlantic & Pacific maps of 1872 as maps of definite location was a matter in issue and determined, as between the United States and the Southern Pacific Railroad Company. That that matter was in issue and was actually decided in the former cases, is too clear to admit of doubt. That it was material is equally clear; for, upon its determination depended the question whether the grant of public lands to the Atlantic & Pacific Railroad Company attached to any specific lands along its line to which the forfeiture act of 1886 could apply. *If those [53 maps were valid maps of definite location, then, according to the settled adjudications of this court, to which reference has often been made, the right of that company to earn the lands appertaining to its line, thus definitely located, attached, by relation, as of the date of the grant to it in 1866; and in this view the Southern Pacific Railroad Company, holding the junior grant, took none of the lands appertaining to that line by reason of the definite location and construction of its line. Thus, also, those lands were in such condition, at the date of the forfeiture act of 1886, that they could be forfeited as lands in which the Atlantic & Pacific Railroad Company then had an interest, and, in accordance with the act of Congress, be fully restored to the public domain for the exclusive benefit of the United States, unaffected by the later grant made to the Southern Pacific Railroad Company.

The only way in which, in the former cases, the court could have avoided a decision as to the character of those maps, was to have held that whether they were maps of definite location or not, the rights of the Southern Pacific Railroad Company attached, upon the declaration of forfeiture, to the lands then in dispute, and that Congress was without power to restore them to the public domain. So far from sustaining that view, the court expressly adjudged that, upon the acceptance of the Atlantic & Pacific maps of 1872, the rights of *that* company, in the lands granted, attached *as of the date of the grant of* 1866, and that it was not possible for the Southern Pacific Railroad Company, by the location of its road, *whether located before or after its acceptance of the maps of* 1872, to acquire any interest whatever in the lands there in dispute that would prevent Congress, upon forfeiting the rights of the Atlantic & Pacific Railroad Company, from restoring such lands to the public domain to be disposed of by the United States as it saw proper.

It is in effect said that the failure of the government in the former cases to aver, in words, that the maps of 1872 were maps of "definite location," leaves the question of the sufficiency of those maps open in this case relating to different lands. *It seems to be [54 forgotten that the amended bill was in exact conformity with the act of 1866, which in the 3d section—the one making the grant—used the words "at the time the line of said road is *designated* by a plat thereof filed in the office of the Commissioner of the General Land Office." The word "designated" in that act meant no more nor less than the words "definitely located" mean. When the Southern Pacific Railroad Company denied that the Atlantic & Pacific line had been sufficiently designated, or that there had been a valid location of it, both litigants, as well as the court, understood, and properly, that the case presented the question whether there had been such a definite location of the Atlantic & Pacific line as the act of Congress required. That that company so understood the word "designated," as used in the 3d section of the act of 1866, is beyond question; for its answer filed in the former cases on the 30th of Decem-

ber, 1889, in which it claimed the lands then in controversy, refers to the map filed by it on the 3d April, 1871, as one by which "it *designated* the line of its said railroad." And when it was adjudged that the maps of 1872 indicated a definite location of the line of the Atlantic & Pacific Railroad, the settled rules of law forbid that the defeated party should reopen that question in another suit, relating to other lands appertaining to the line so designated. The matter alleged by the government, and upon which the recovery proceeded, was, we repeat, the sufficiency of the maps of 1872 to entitle the Atlantic & Pacific Railroad Company to earn the lands there in dispute.

It is also said that the decision in the former cases concluded, at most, only the question of title in respect of the lands there in controversy. This cannot be correct when the lands in both suits have a common source of title, and the title depends upon the existence or nonexistence of the same fact or facts. If the accepted maps filed by the Atlantic & Pacific Railroad Company in 1872 sufficiently located the line of that company, it could not possibly be that they were valid maps of definite location as to part of the lands appertaining to that line, and not maps of that character in [55 respect of other *lands embraced by it. Consequently, the former judgment, while unmodified, determined the character of the maps, as between the United States and the Southern Pacific Railroad Company. If the court had adjudged in the former cases that those maps were neither filed nor accepted as maps of definite location, but were only maps of general route, could it be doubted that the government would have been estopped from asserting to the contrary in a subsequent suit involving other lands claimed by the Southern Pacific Railroad Company which were covered by the same maps, and appertained to the same line? Must a different principle be applied because the decision was favorable to the government upon the question whether the maps of 1872 were maps of definite location? Certainly not.

But it is earnestly insisted that a prior judgment cannot operate as an estoppel in a subsequent suit between the same parties, unless it be pleaded when there is an opportunity to do so; that such an opportunity existed in this suit; and that the United States having failed to avail itself of that opportunity, it was open to the court to determine the truth of the matter upon all the evidence now before it.

This contention is based upon the 45th rule in equity, providing: "No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct." Under this rule, it is said, the United States had an opportunity to amend its bill, and in that mode have met the allegations of the amended answer of 1893; but, having failed to ask leave to amend, it lost the benefit of the former judgment.

The part of the amended answer of 1893 to which counsel refer as making an issue or issues not made in the former cases, and which, it is contended, must have been met by an amended bill if the government expected to rely upon the prior judgment, is as follows:

"And the said respondents deny that said Atlantic & Pacific Railroad Company did locate on the ground or designate *upon a [56 plat or map the whole of said line of railroad, under or in accordance with said act, from Springfield, Missouri, by way of the points or places named in said act, or otherwise, to the Pacific ocean, and deny that it ever lawfully located or adopted or designated any part of said line in the state of California; and deny that on or about the — day of ——, 1866, or at any other time, said company did file any such plat in the office of the Commissioner of the General Land Office, and deny that at that or at any such time, any such designation or location of said line of railroad was approved by the Secretary of the Interior; and deny that the odd sections of public lands on each side of said road for 30 miles were withdrawn from market or reserved; and deny that the lands in suit herein, or any of them, fell within the 20 mile limits of any such line, or were ever lawfully withdrawn from market, or reserved for, or for the benefit of, the said Atlantic & Pacific Railroad Company; and deny that the Atlantic & Pacific Railroad Company ever designated a line of railroad between the Colorado river and the Pacific ocean by a map thereof filed in the office of the Commissioner of the General Land Office, or made or filed a map of definite location of a route from the Colorado river to the Pacific ocean, whether by the most practical and eligible route or otherwise howsoever. The said respondents aver that the said Atlantic & Pacific Railroad Company never made any actual or definite location of its railroad in California, nor constructed any part of a railroad in said state, under or according to the act of Congress approved July 27, 1866, or any amendments, modifications, or supplements thereto or otherwise howsoever. The pretended location of a route by said Atlantic & Pacific Railroad Company in California never was or became an actual or definite location, or anything else than an attempted or pretended designation of a general route for a railroad from San Francisco to The Needles, and such pretended location or designation of route was a colorable and fraudulent location or designation of an unauthorized and impracticable line. The Secretary of the Interior never undertook to accept such pretended location *or desig- [57 nation as anything else than a designation of a general route, and no right to or interest in any public lands was, or could be, acquired by said railroad company by reason of any such attempted location or designation, or any act of acceptance thereof."

Undoubtedly, there are cases in which a party may lose the benefit of a prior judgment, in respect of matters determined by it, when, having an opportunity to plead such judgment, he fails to do so. But that principle has no application in the present case. Under equity rule 45, a general replication to the amended answer of the defendant company

sufficed, unless that amended answer contained such matter as made it "necessary" that the government should amend the bill. But when a former recovery is to be relied on by the plaintiff it can only be necessary to amend the bill when the rules of pleading imperatively require that to be done in order to obtain the benefit of such recovery. No amendment of the bill was necessary in this case for the reason that the judgment in the prior suit —the present suit being on a different cause of action—could not be pleaded as an absolute bar arising upon the face of the record, but could be used *as evidence* to support the contention that the maps of 1872 sufficiently identified the lands granted by the act of 1866. The contrary is again asserted by the Southern Pacific Railroad Company in this suit. But that precise issue we have seen was made in the former suit, and was determined for the United States. And to establish that fact, the United States introduced the former record as evidence in its behalf. To say that the government lost the benefit of its former judgment covering this issue or question, because it did not amend its bill and plead the judgment as an estoppel, is to say that it was required to set out in its pleading what was merely evidence to support its title to the lands in controversy. The 45th equity rule is not to be so interpreted. It means, at most, that a general replication is always sufficient to put in issue every material allegation of an answer or amended answer, unless the rules of pleading imperatively require an amendment of the bill. Besides, rule 45 must be construed in con-
[58 nection with the *equity rule 19, declaring that the plaintiff, at his direction, may omit from the bill "what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill." If it was competent for the government, in this case, to have referred, in its bill, to the former suit, and, in advance, by appropriate allegations, to have met the objections which it supposed the defendant would urge to the former judgment as fixing the character of the maps of 1872, it was not bound to pursue that course nor to amend its bill and set out what was only evidence of its title to the particular lands in controversy.

But there is another reason why the United States was not required to amend its bill. Before the amended answer of 1893 was filed, the government, by its pleadings, had distinctly alleged that the maps of 1872 sufficiently designated the line of the Atlantic & Pacific Railroad, and identified the lands granted to it, while the defendant's pleadings with equal distinctness averred that they were not valid maps of definite location. Such was the condition of the record when this court decided the former case on the 12th day of December, 1892. That decision, as we are informed by the railroad company, instructed it "as to where the real strain of the controversy came," and having failed "to appreciate the inferences which the court might draw from facts or evidence," leave was obtained in the circuit court to file, and it did file in this case, the amended answer of 1893, bringing, it is claimed, into view such new issues and such additional facts as deprived the government of the right, unless it amended the bill and formally pleaded such judgment as an estoppel, to rely upon the judgment in the prior cases as conclusive of the matters determined by it. That which is claimed to be new in the amended answer was not such matter as even prior to equity rule 45 would have required a special replication or an amended bill in order to avoid its effect. The amended answer was, at most, only a more extended statement of the grounds of defense previously set forth. The manifest purpose of it was to relieve the strain of the prior *decision, and, under the [59 guise of presenting new issues of a substantial character, to enable the railroad company, by introducing additional evidence on its behalf, to retry, in this collateral proceeding, the question as to the sufficiency of the maps of 1872. The pleadings in the prior cases distinctly averred an adequate designation of the line of the Atlantic & Pacific Railroad and the identification of the lands appertaining to that line. The averment in the amended answer of 1893, that the location by the Atlantic & Pacific Railroad Company of its route in California "never was or became an actual or definite location," but was only "an attempted or pretended designation of a general route for a railroad from San Francisco to The Needles," and that such designation of its route was "a colorable and fraudulent location or designation of an unauthorized and impracticable line," and was not at all necessary, because the defendant company, under its original answer, if not estopped by the former judgment, could have introduced any evidence tending to show that there had been no valid definite location of the line of the Atlantic & Pacific Railroad, and that the maps of 1872 were filed and accepted only for the purpose of indicating a general route. So that if the government was entitled, under the pleadings as they were when the defendant company filed its amended answer of 1893, to introduce in evidence the record and judgment in the former cases, its right in that respect was not lost by its failure to amend its bill and especially set up that record.

That the record and judgment in the former cases were admissible in evidence without being specially pleaded, we entertain no doubt. And when before the court as admissible evidence, the only inquiry was whether the sufficiency of the maps of 1872 was a matter in issue and determined between the parties to those cases. There are some cases holding that a judgment, without being specially pleaded, is not conclusive upon the issues to which it relates, but is only persuasive evidence, and that the court is at liberty to find according to the truth as shown by all the evidence before it. But according to the weight of authority and upon principle, *the former [60 judgment, if admissible in evidence at all, is conclusive of the matters put in issue and actually determined by it. Mr. Greenleaf correctly says that "the weight of authority, at least in the United States, is believed to be in favor of the position, that where a former recovery is given in evidence, it is equally conclusive, in its effect, as if it were specially pleaded by the way of estoppel." 1 Greenl. Ev. § 531. This view is in accord with the deci-

sions of this court above cited. See also, *Marsh* v. *Pier*, 4 Rawle, 273, 288 [26 Am. Dec. 131]; *Lawrence* v. *Hunt*, 10 Wend. 80, 83 [25 Am. Dec. 539]; *Betts* v. *Stair*, 5 Conn. 550 [13 Am. Dec. 94]; *Sawyer* v. *Woodbury*, 7 Gray, 499, 502 [66 Am. Dec. 518]; *Jennison* v. *Inhabitants of West Springfield*, 13 Gray, 544; *Cannon* v. *Brame*, 45 Ala. 262; *Trayhern* v. *Colburn*, 66 Md. 277, 278; *Garton* v. *Botts*, 73 Mo. 274, 278; *Walker* v. *Chase*, 53 Me. 258, 260; *Lynch* v. *Scanton*, 53 Me. 100, 102; *Prather* v. *Owens* Cheves, L. 236; *Jones* v. *Weathersbee*, 4 Strobh. L. 50, 54, 55 [51 Am. Dec. 653]; *Warwick* v. *Underwood*, 8 Head, 238, 240 [75 Am. Dec. 767]; *Isaacs* v. *Clark*, 12 Vt. 692, 694 [36 Am. Dec. 372].

In the present case the railroad company has made an elaborate argument in support of the proposition that the necessary legal effect of the forfeiture act of July 6, 1886, was to restore the title of all lands affected by that act to the United States, *as of the date* of the grant of July 27, 1866, and to "avoid" and "defeat" as of that date the grant to the Atlantic & Pacific Railroad Company with like effect as if it had never existed; that upon such forfeiture the United States became seised of its original estate in the lands as of July 27, 1866, with the same effect as if it had never made any grant to the Atlantic & Pacific Railroad Company; and that it could only enter upon the lands for forfeiture as of its former estate in them. In this view, it is contended that the rights of the Southern Pacific Railroad Company attached immediately upon the forfeiture, and before the lands so forfeited were restored to the public domain. It is sufficient to say, in reference to this contention, that the question as to the effect of the act of forfeiture upon the rights of the Southern Pacific Railroad Company was fully considered and determined in the former cases. **61**] It was held that it was *not the intention of Congress that these lands should pass conditionally to the Southern Pacific Railroad Company, or to give to it any lands previously granted to the other company, and that the first proviso of § 3 of the act of 1866 imports that "Congress was not only not intending to give to one company that which it had already given to another, but intended that lands previously granted should be definitely excepted from the latter grant." The court said: "Again, there can be no question, under the authorities heretofore cited, that, if the act of forfeiture had not been passed by Congress, the Atlantic & Pacific could yet construct its road, and that, constructing it, its title to these lands would become perfect. No power but that of Congress could interfere with this right of the Atlantic & Pacific. No one but the grantor can raise the question of a breach of a condition subsequent. Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It enacted that they be restored to the public domain. The forfeiture was not for the benefit of the Southern Pacific; it was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant; and now, finding that the Atlantic & Pacific was guilty of a breach of a condition subsequent, it elected to enforce a forfeiture for that breach and a forfeiture for its own benefit."

For the reasons stated, we are of opinion that it must be taken in this case to have been conclusively adjudicated in the former cases, as between the United States and the Southern Pacific Railroad Company—

1. That the maps filed by the Atlantic & Pacific Railroad Company in 1872 were sufficient, as maps of definite location, to identify the lands granted to that company by the act of 1866.

2. That upon the acceptance of those maps by the Land Department, the rights of that company in the lands so granted, attached, by relation, as of the date of the act of 1866; and,

3. That in view of the conditions attached to the grant, *and of the reservations of [**62** power in Congress contained in the act of 1866, such lands became, upon the passage of the forfeiture act of 1886, the property of the United States, and by force of that act were restored to the public domain, without the Southern Pacific Railroad Company having acquired any interest therein that affected the power of the United States to forfeit and restore them to the public domain.

These grounds being accepted as the basis of our decision, the law in the present case is clearly for the United States; for, as all the lands here in controversy are embraced by the maps of 1872, and therefore appertain to the line located by such maps, it must be, for the reasons stated in the former decision, that the United States is entitled, as between it and the Southern Pacific Railroad Company, to the relief given by the decree below.

Even if we were prepared upon a re-examination of the former cases, or upon the showing made by the present record, to hold that the maps of 1872 were not valid maps of definite location, we could not for that reason, in this proceeding, go behind the former adjudication, and deny to the United States the benefit of the rule making that adjudication so long as it was unmodified, conclusive, as between the parties to it, of all matters actually determined under the issues in the prior suits.

One other matter deserves attention. The learned counsel for the railroad company in their extended comments upon the evidence in the present record, insist that, under the proof now before the court, it is indisputable that the Atlantic & Pacific Railroad Company did nothing more than file in the Interior Department "a map of general or *preliminary* route for the purpose of securing a *preliminary* withdrawal of lands;" that the maps of 1872 were neither filed nor accepted as maps of definite location; and that the proof is of such a peculiar character as to demand an examination of it by the court.

In support of this contention reference was made to duly certified copies of certain letters, appearing in the records of the Interior Department: 1. A letter to Mr. Delano, Secretary *of the Interior, from Mr. Hill- [**63** yer, attorney of the Atlantic & Pacific Railroad Company under date of March 8, 1872, inclosing "the accompanying maps to be filed in the office of the Commissioner of the General Land Office"—the above maps of 1872,

four in number—which letter concludes: "The Atlantic & Pacific Railroad Company respectfully request that the lands embraced in the grant to the company under the provisions of the act of July 27, 1866, and coterminous with the portions of the line or route designated by the plats herewith filed or heretofore filed by said company, may be withdrawn from sale, entry, or pre-emption, and reserved for said railroad company according to the provisions of said act." 2. A letter from Secretary Delano to Mr. Hillyer, under date of March 9, 1872, acknowledging the receipt of the latter's letter, "transmitting four maps of the preliminary location of portions of the Atlantic & Pacific Railroad," and saying that said "maps have to-day been transmitted to the Commissioner of the General Land Office for appropriate action." 3. A letter from the Secretary of the Interior to the Commissioner of the General Land Office, under date of March 9, 1872, saying: "I transmit herewith, for appropriate action, four maps of the preliminary location of portions of the Atlantic & Pacific Railroad," and that said "maps were received yesterday from C. J. Hillyer, Esq., atty. of the Co.—in this city."

From these documents it appears that the attorney of the railroad company described two of the maps as "designating," and the remaining two as "showing," the line or route of the railroad, while the two letters of the Secretary describes them as maps of the "*preliminary* location of portions" of the road. It is conceded that in the letters of the Secretary, *as originally written*, the maps were referred to as maps of *definite location* of portions of the Atlantic & Pacific Railroad. And it was shown that the word "preliminary," inserted in place of "definite," in the two letters of the Secretary, was in the handwriting of a former (now deceased) clerk in the Land and Railroad Division of the Interior Department, who, it is claimed, made the change with the knowledge [64] *or in conformity with the directions of the Secretary; also, that corresponding memoranda, in pencil and in the handwriting of that clerk, appear upon those letters and upon the jackets containing them.

Upon the part of the United States it is contended that there is no evidence whatever tending to show that the secretary had any knowledge of or directed the word "definite" to be stricken out and "preliminary" inserted; on the contrary, that the Department, at all times, subsequently to March 9, 1872, treated the maps in question as maps of definite location. In support of its position the government refers to the fact that in the letter-press copy, as well as in what is called by counsel the permanent record of letters, in the department, the letter of the Secretary to the Commissioner of the General Land Office contains the words "definite location," not "preliminary location," and the letter of the Secretary to Mr. Hillyer of March 9, 1872, reads "four maps of the definite location," not "four maps of the preliminary location." The government also refers to the fact that when the Commissioner of the Land Office received the letter from the Secretary of the Interior the indorsement placed on the back of the map was in these words: "Map of definite location of the Atlantic & Pacific Railroad through the county of Los Angeles and part of San Bernardino, California. Received at the C. L. O. with Secretary's letter of March 9, 1872;" also to the letter of the Commissioner, dated April 22, 1872, and addressed to the local land officers in California, in which the former said: "Gentlemen: I transmit herewith a diagram showing the definite location of the Atlantic & Pacific Railroad under the act of July 27, 1866 (14 Stat. at L. 292), from a point on the western boundary of Los Angeles Co. to a point in T. 7 N., R. 7 E. of the San Bernardino, in your district, showing also the twenty and thirty mile limits of the land grant under said act," etc. It also appears that Assistant Attorney General Smith, in an official communication addressed to the Secretary of the Interior, under date of March 16, 1874,—in which he considered the question of the right of the Atlantic & Pacific Railroad Company to locate its line *from the Colorado river, by way [65 of Tehachapi pass to San Francisco,—referred to and treated the maps of 1872 as maps of definite location. And they were so referred to and treated by Secretary Lamar in his opinion of March 23, 1886, holding that that company was not entitled to construct a road from San Buenaventura to San Francisco. 4 D. L. O. 458.

We cannot concur in the view that the evidence upon this branch of this case is of such nature as to compel the court, in the interest of truth and justice, not only to consider it but to pass again upon the issue made in the former suits as to the character of the maps of 1872. Whatever is new in the evidence now before us, touching that matter, is simply cumulative on the one side or the other. The application to consider that evidence is practically an application for a rehearing as to things directly determined in the former suits between the same parties, and which adjudication has never been modified. Such a course of procedure is wholly inadmissible under the settled rule of *res judicata*. Without, therefore, expressing any opinion as to the effect of this new evidence relating to matters once finally adjudged, we hold that the Southern Pacific Railroad Company cannot, in this proceeding, question the validity of those maps as maps of definite location.

One of the objects of this suit was to obtain a decree quieting the title of the United States, not only to the lands claimed by the Southern Pacific Railroad Company, but to those claimed by numerous individual defendants by purchase from or contract with that company. The decree which was passed declares that it is not to "affect any right which the defendants, or any of them, other than the Southern Pacific Railroad Company, now have or may hereafter acquire in, to, or respecting any of the lands hereinbefore described, in virtue of the act of Congress entitled 'An Act to Provide for the Adjustment of Land Grants Made by Congress to Aid in the Construction of Railroads and for the Forfeiture of Unearned Lands, and for Other Purposes; approved March 3, 1887.'" Instead of leaving undetermined the matters in dispute between the United States and the defendants other than the *Southern Pacific Railroad Company, [66 the circuit court should have determined, by

its final decree, what rights those defendants have by virtue of the above act of March 3, 1887 (24 Stat. at L. 556, chap. 376), in the lands or any of them now in dispute and claimed by the United States. The effect of the decree is to leave undetermined the question whether the defendants who claim under the Southern Pacific Railroad Company are protected by that or any other act of Congress. The government was entitled to a decree quieting its title to all the lands described in its pleadings, except those, if any, that are protected, in the hands of claimants, by acts of Congress. *United States* v. *Winona & St. Peter R. R. Co.* 165 U. S. 463 [41: 789]; *Winona & St. Peter R. R. Co.* v. *United States*, 165 U. S. 483 [41: 798]. But as the government has not appealed, the decree cannot be reversed for the error of the circuit court in not finally disposing of the issues between the United States and the individual defendants who claim under the Southern Pacific Railroad Company.

The result is that *the decree must be affirmed in all respects as to the Southern Pacific Railroad Company*, as well as to the trustees in the mortgage executed by that company, and affirmed also as to the other defendants, subject, however, to the right of the government to proceed in the circuit court to a final decree as to those defendants.

It is so ordered.

ELOISA L. BERGERE, for Herself, etc., *Appt.*,
v.
UNITED STATES.

UNITED STATES, *Appt.*,
v.
ELOISA L. BERGERE, etc.

(See S. C. Reporter's ed. 33 86.)

Mexican land grant—adverse possession—evidence—imperfect grant.

1. A presumption of the approval by the Mexican governor of a grant of land does not arise where an alcalde who had been directed to put the grantee in possession of land asked for, and to transmit the expediente to his superior for approval, gave possession of more land than the petition asked for, and there is no approval to be found upon the papers themselves, although the expediente, which belonged to the public archives, was found in possession of the grantee, without anything to show that it was delivered to him in place of a testimonio.
2. Mere proof of pasturing stock on a vast tract of land, without any evidence of an exclusive possession under a claim of right, is not sufficient to show adverse possession.
3. The omission of any mention of a grant of at least half a million acres of land, in a will which clearly shows the testator's intent to marshal his assets and mention and dispose of all his property by specific dispositions, is irresistible evidence that he did not suppose he owned that land.
4. An imperfect grant which can be confirmed by the court of private land claims must be one which the complainant could by right, and not by grace, have demanded should be made perfect by the former government had the territory not been acquired by the United States.

[Nos 43, 46.]

Argued April 19, 1897. Decided October 18, 1897.

APPEALS from a judgment of the Court of Private Land Claims confirming in the petitioner Bergere, for herself and the other heirs of Manuel Antonio Otero *et al.*, the title to 11 square leagues of land in the territory of New Mexico. *Reversed*, and case remanded with directions to enter judgment in conformity with the opinion.

The facts are stated in the opinion.

Messrs. **J. D. O'Bryan, James W. Vroom,** and **T. B. Catron** for Bergere *et al.*, claimants.

Messrs. **Matthew G. Reynolds,** Special Assistant to the Attorney General, and Holmes Conrad, Solicitor General, for the United States.

Mr. Justice **Peckham** delivered the opinion of the court:

These are cross-appeals from a judgment of the court of private land claims, confirming in the petitioner Bergere, for herself and the other heirs of Manuel Antonio Otero, and Miguel Antonio Otero, the title to 11 square leagues of land in the territory of New Mexico. The petition was filed in the court below, asking that the validity of the title to a very much larger tract of land in the above territory, alleged to have been granted in 1819 to one Bartolomé Baca by acting Governor Melgares, might be confirmed to the heirs and legal representatives of Baca, of whom, she alleged, she was one.

The number of acres contained in the alleged grant was not stated, but it has been variously estimated at from half a million to a million and a half.

The judgment of confirmation was granted upon the ground, as stated by the court, that the grant to Baca was imperfect at the time of the cession of the department of New Mexico to *the United States by the treaty of Guada-[68 lupe Hidalgo, and hence it could only be confirmed by the court for the amount of 11 square leagues, under the 7th subdivision of § 13 of the act of Congress of March 3, 1891, chap. 539, creating the court of private land claims. (26 Stat. at L. 854.) That subdivision reads as follows:

"No confirmation in respect of any claims or lands mentioned in § 6 of this act, or in respect of any claim or title that was not complete and perfect at the time of the transfer of sovereignty to the United States as referred to in this act, shall in any case be made or patent issued for a greater quantity than 11 square leagues of land to or in the right of any one original grantee or claimant, or in the right of any one original grant to two or more persons jointly, nor for a greater

NOTE.—*As to Missouri private land claims*, see note to Les Bois v. Bramell, 11: 1051.

As to what necessary to constitute adverse possession; requisites of,—see note to Ricard v. Williams, 5: 398.

As to occupancy necessary to constitute adverse possession, see note to Ewing v. Burnet, 9: 624.

quantity than was authorized by the respective laws of Spain or Mexico applicable to the claim."

The petitioner thought the court below should have confirmed her title to the whole of the land described in the alleged grant, while the counsel for the government was of the opinion that the judgment ought not to have confirmed her title to any portion thereof. Both parties have therefore appealed from the judgment to this court.

In the course of the trial certain papers were put in evidence on the part of the petitioner, for the purpose of proving the alleged grant. They were written in the Spanish language, and a sworn translation thereof, also appearing in the record, reads as follows:

"To the Acting Governor:

"Don Bartolomé Baca, captain of the volunteer militia company of cavalry of the villa of Albuquerque, residing in the jurisdiction of Tome, before you with the greatest respect and subordination, as by law required, represents: That he has a number of sheep, horned cattle, and horses, without legitimate property on which to keep them together under shepherds, cattle herders, and horse herders, to take care of them and secure their safety, they now roving over different places, exposed to all the contingencies arising from their being 69 |*scattered. There being vacant on the other side of the Abó Mountain a tract called the Torreon, and which extends, on the north, to the Monte del Cibolo; on the south to the Ojo del Cuervo; on the east to the springs called the Estancia Springs; on the west to the said Abó Mountain; he prays you to be pleased to grant the same in real possession, in the exercise of the powers upon you conferred by His Majesty, in order to establish thereon a permanent ranch or hacienda, which he engages to occupy with his stock, sustaining the same with armed servants, who may defend it against the incursions of the enemy without abandoning it; and he will also, if possible, open lands for cultivation, whether irrigable or dependent upon the seasons, for the advancement of agriculture, and, although the water sources it contains are small and uncertain, he proposes to improve them with reservoirs and other appliances which will secure every advantage possible; and he affirms that it has at present no owner, and that it never has had any known owner.

"Wherefore he prays you to be pleased to grant this his petition in conformity with law, and to direct the royal judge of his district to give him legal possession, with the proper documents and other formalities which are required, whereby he will receive favor, grace, and justice. I swear that I do not act in bad faith, and in that which is necessary, etc.

"San Fernando, February 4, 1819.

"Bartolomé Baca. [rubric.]

"Santa Fé, July 2, 1819.

"As he asks it according to law, and I understand that no injury results to any third party, but, on the contrary, increase of stock raising and agriculture under the conditions asked:

"Don José Garcia de la Mora will proceed to give the possession, designating limits and doing what is proper, which, being concluded, he will transmit the expediente to this office, so that if it be approved the proper testimonio may be ordered to be given to the petitioner.

Melgares. [rubric.]

*"In execution of the decree of July 2, [70
1819, I, José Garcia de la Mora, the judge commissioned by Lieutenant Colonel Facundo Melgares, governor of the province of New Mexico, proceeded in company with captain of volunteer militia Bartolomé Baca, who, by his merits and conduct in the service of both majesties, as has been proved by the offices which have been conferred upon him of alcalde mayor, and in other services in the field, the governors always appointing him commander of campaigns and scouting parties, which he always led with honor and valor, and in addition to all this he has always surpassed others in voluntary contributions, setting a good example to his inferiors. Wherefore, in reward of all these merits and services I have proceeded in his company to examine the tract he applies for, and knowing that it is wild land, and that no injury results to any third party, I have placed him in possession in the name of the King (whom may God preserve), and I took him by the hand and led him over the whole tract, he shouting and plucking up grass and throwing stones in the name of the King, saying, 'Long live our beloved monarch, Don Fernando VII., whom God may preserve,' with hurrahs and shouts, and I shed tears of delight at his acclamations; and I designated to him for his boundaries: On the south, the Ojo del Cuervo, following its line to the Ojo del Chico; on the east, the Cerro del Pedernal; on the north, the Ojo del Cibolo; on the west, the Altura de la Sierra (summit of the mountain range); the said gentleman being satisfied and grateful to the said governor for the benefit conferred upon him, binding himself to increase by his intelligence the limited waters which have been donated to him in order that his herds may be maintained, to which he is bound, transmitting the whole for your approval, he will satisfy the fees which may be charged to him.

"Wherefore, I transmit this to the superior authority in order that, it being examined by you, you may decide as you may deem just.

"San Fernando, September 12, 1819. To which I certify with my two assisting witnesses.

"José Garcia de la Mora. [rubric.]

*"Assisting witness: [71

"José Andres Caller. [rubric.]

"Assisting witness:

"Franco. Galiz. [rubric.]

"[Torn] the boundaries by [torn].

[rubric.]

"[Torn] elgares."

The original of the last portion of the above paper, from the words "San Fernando," etc., reads in Spanish as follows:

"San Fernando, doce de sepre. de mil ochocientos diez y nueve años. De qe. doy fee, con los dos de mi asistencia.

"José Garcia de la Mora. [rubrica.]

"De assa.:

"José Andres Caller. [rubrica.]

"De assa.:

"Franco. Galiz. [rubrica.]

"[Roto] de los limites por [Roto].

"[Roto] elgares." [rubrica.]

The petitioner claims that the evidence shows an approval by the governor of the action of the alcalde in delivering juridical possession of the land described in the petition of Baca, and that thereby the grant became effective and absolute. Also that there is sufficient evidence of an adverse possession of such land by Baca from 1819 to the time of his death in 1834 and after that time by his heirs and representatives.

The court below found the following facts:

"First. That on February 4, 1819, Bartolomé Baca presented a petition to the then governor of the province of New Mexico, Facundo Melgares, setting forth that he had registered a piece of vacant land which was called the Torreon; that the said governor made the said grant as petitioned for on July 2, 1819, and directed José Garcia de la Mora to give possession, designating the limits and officiating duly; that afterwards, to wit, on September 12, 72] 1819, the *said official gave to the said Bartolomé Baca the actual possession of the said tract of land, called the Torreon, petitioned for.

"Second. That the said tract of land, called the Torreon, had been in the actual possession of Bartolomé Baca for more than four years from the date of the grant on said September 12, 1819.

"Third. That the said petitioner who filed her petition for herself and other heirs of Manuel Antonio Otero and Miguel Antonio Otero are the legal successors in interest to the rights of the said heirs of the said Bartolomé Baca.

"The court finds as a matter of law that the grant to said Bartolomé Baca was imperfect at the time of the cession of the department of New Mexico to the United States of America by the treaty of Guadalupe Hidalgo, and that the petitioner for herself and other heirs of Manuel Antonio Otero and Miguel Antonio Otero, as the legal representatives of the said Bartolomé Baca, is entitled to a confirmation of 11 square leagues of land within the outboundaries of the tract of land, called the Torreon, granted to said Baca, and of which he was put in actual possession.

"It is therefore ordered, adjudged, and decreed by this court that the claim of the petitioner for the land hereinbefore described and set out be, and the same is hereby, confirmed to the extent of 11 square leagues to the heirs and legal representatives of Bartolomé Baca, provided that this confirmation shall not confer any right or title to any gold, silver, or quicksilver, mines, or minerals of the same."

In regard to the character of the grant involved in this proceeding, it is conceded on the part of counsel for petitioner that the approval of the governor was necessary in order to make the grant effective. In their brief they say: "Now this grant was not finally made until return was made by the alcalde and approval had. Before that time it had no existence. The confirmation of the government was the one act that fixed the right of the grantee, and that final act was based upon the return and, necessarily in this case, in confirmation of the return."

73] *We have no doubt of the correctness of this view. The governor, in his reference of the case to the alcalde, bids him transmit the expediente to his office, *so that if approved* the proper testimonio may be ordered to be given the petitioner. Until approved, the action of the alcalde was of no effect.

The burden of showing this approval rested with the petitioner, and unless she has sustained it she has failed in this branch of her case.

In speaking of the burden cast upon a petitioner who asks confirmation of an alleged grant of land under the act of 1891, above referred to, this court in *Whitney* v. *United States*, 167 U. S. 529, at 547 [42: 263, at 270], said: "Upon the whole, we have come to the conclusion that the claimants have not made out their case by a fair preponderance of evidence, or such weight of testimony as is necessary to establish their title to this large tract of land."

Counsel for the petitioner claim that, assuming the burden as above stated, there is a presumption, arising from an inspection of these papers and from a consideration of the other evidence in the case, that there was an approval of the action of the alcalde by the governor, and that the grant was thus made effective. We do not concur in this view, and we are of opinion that the papers themselves show no approval by the governor, and that there is no evidence of other facts or circumstances from which such approval could properly be presumed.

There is no approval to be found upon the papers themselves. This is too plain for argument. The torn portion of the paper following the report of the alcalde has no word of approval thereon. There is part of a sentence which, as translated, means "the boundaries by," and under it is the signature of Melgares, with the exception that the first letter of his name is lacking. This does not and cannot in and of itself constitute an approval in fact, and there must be something more than this torn paper upon which to found a presumption of such approval.

It is, however, urged that the presumption arises from an inspection of all the papers above referred to, aided by a consideration of the other evidence in the case.

*We think no such presumption can be[74 indulged in from an inspection of all of the papers in question, even when aided by the other evidence.

Such an inspection shows that the alcalde proceeded on his own account to deliver juridical possession of a much larger tract of land than Baca had petitioned for in his petition to the governor. This larger tract the alcalde described in his report to the governor, and submitted his action to the governor for his final approval.

The action of the alcalde is sufficient to prevent a presumption of approval founded solely on an inspection of the papers. The difference between the amount of the land asked for and that delivered by the alcalde is too great to permit of any presumption of approval. There must be some proof of it. We are not aided in making this presumption by a consideration of the other evidence.

Counsel for the petitioner refer to the fact of the possession of these papers by Baca as an important piece of evidence in aid of this presumption. The possession alluded to was

proved by one of the grandsons of Baca, who was a witness for the petitioner. He testified that his mother was a daughter of Baca, and that his father was Baca's administrator. The papers of Baca were in the possession of his father as such administrator. His father died somewhere about 1880, and after his death the witness took the box of papers that had belonged, as he said, to his grandfather and kept it. He did not know its contents until he was looking for some papers belonging to his father, when he found what he describes as a part of the grant of a tract to Bartolomé Baca. Witness took the paper to Manuel Antonio Otero, who said: "Let us search for the other part, and I will buy it from you and the other heirs;" and then after a further search the other part was found, and these papers thus found are the ones above set forth.

Upon these facts it is said that it appears that the papers were in possession of Baca, and that they were delivered to him by or on behalf of the governor, and it therefore follows that the grant was approved by him, or [75 otherwise the papers *would not have been delivered. The bare fact of possession of the papers as above stated is all that the evidence shows. There is not one word of proof of any delivery of the papers to Baca, and we cannot see, from the mere fact of possession of the papers under these circumstances, sufficient ground upon which to base a presumption of delivery and therefore of approval.

We are asked to presume the fact of delivery because the papers were found in the box of papers once belonging to Baca, and we are then further asked to presume an approval because of the presumed delivery. This requires an entirely too free use of presumptions unsupported by evidence tending in the direction of proof of the facts to be presumed. If the papers had contained an approval by the governor, it might perhaps have been admissible to presume a delivery from the fact of possession. It is too much to ask us to presume both facts from the sole fact of the possession of the papers. The other evidence in the case, viewed in connection with these facts, is wholly insufficient to permit of the presumption. It is directed only to the fact of possession of the land by Baca, the character and weight of which evidence will be spoken of hereafter. It is enough to say here that it is insufficient to be used as lending any strength to the presumption of approval which we are at present discussing.

In the condition in which the papers were found, some evidence further than mere possession of them should have been given. The papers were not found together or at the same time; they were torn, and part of the name of the governor had disappeared; they were not of a character to be probably found in the hands of Baca. The proof as to the manner in which Spanish grants were evidenced, as ascertained from an examination of the records in the surveyor general's office in the territory, is unimportant. The witness was simply unable to give an opinion as to the general custom. Here, however, the papers themselves showed that something other than those papers were to be given the grantee. The papers formed the expediente and belonged in the archives of the government when approved, and they show on their face that *if the gov- [76 ernment approved, there was to be given in that case a proper testimonio to the petitioner, which it was evidently contemplated should be something other than this expediente. There is no proof of the existence of any such paper or that it was ever given.

Under all these circumstances some explanation as to the possession of these papers by Baca should have been given, showing they were intended as in place of the testimonio, so that the presumption of a delivery and an approval by reason thereof would not necessarily rest solely upon the fact that the papers without any approval indorsed on the return were found as stated.

Evidence of the delivery of juridical possession of the land to Baca is also referred to as aiding the presumption of the subsequent approval by the governor and the delivery of the papers to Baca, and the further alleged fact of the retention of such possession by Baca up to his death in 1834 is also mentioned for the purpose of strengthening this presumption. The alcalde in fact delivered to Baca juridical possession of much more land than was asked for by Baca in his petition. This fact is attempted to be explained upon the theory that the petition of Baca did not describe in detail the land he asked for, and that the governor in referring the petition to the alcalde directed him to designate the limits, and do what was proper, etc. There is, however, a sufficient description of the land contained in the petition of Baca. It was in regard to that particular land thus described that the acting governor said that "as he asks it according to law," etc., "Don Mora will proceed to give possession, *designating the limits.*" Was this an authority to Don Mora to designate such limits as might seem good to him, or was it simply an authority to designate those limits which were described in the petition of Baca? We have no doubt it was the latter, and hence when the alcalde made return that he had delivered juridical possession of a much larger tract of land than had been asked for, it would naturally be supposed there might be hesitation and refusal to approve on the part of the governor. Certainly, no presumption of approval would arise from these *facts. Therefore the delivery of [77 juridical possession, as shown in this case, has not the usual importance that is attached thereto when such delivery takes place as the concluding act in a grant of an absolute character. This delivery was concededly conditional, and could have no final effect until the approval by the governor, and this approval must be shown by the petitioner to have been given, and cannot be presumed to follow the delivery of juridical possession.

Actual possession of the land described in the alleged grant for four years by Baca, as found by the court below, is also claimed as an important fact upon which, in addition to the evidence already alluded to, the presumption of approval may properly be sustained. The evidence upon which the finding is based is not substantially contradicted, and it shows that after the delivery of juridical possession

by the alcalde Baca built some small buildings on a portion of the land, for the use of his herders and servants, who occupied them, and who were attending to the business of looking after his horned cattle, sheep, and horses, for which Baca wanted pasture. He never himself resided on the land, but subsequently to his taking possession from the alcalde and at different times prior to his death in 1834, other persons, embracing in all a number of families, had come upon Baca's portion of the land, and had dwelt there, without any molestation from him, and probably with his consent, on account of the protection their presence would afford to his interests against the Indians. During the years subsequent to the grant in question there were granted within the boundaries thereof small grants to settlements or towns, which the petitioner says were granted with the assent of Baca and his legal representatives. There is also evidence of some small attempts at cultivation within a narrow range of land contained in the grant, hardly enough to speak of. Some of the witnesses for the petitioner said the place was called Torreon because Baca built a torreon there, and the people gave it that name for that reason. The accuracy of this evidence becomes doubtful, to say the least, when, by referring to the original application of Baca to the acting gover-

78] nor *for the grant, he describes it therein as "a vacant ——— ——— tract called the Torreon, and which extends," etc., as described. Two of the sons of Baca occupied at one time a log house that was built by Baca upon the land, and they occupied it while superintending the herders who were caring for the cattle being pastured in the vicinity. Petitioner's witnesses also said that since 1819 and up to the death of Baca, he was recognized as the owner of the property, and after his death the property was recognized and respected as that of Baca.

Who were the persons thus recognizing ownership is not stated, whether servants and agents of Baca, or independent third persons. Some of the witnesses making these statements were wholly ignorant, as they said, of the fact that grants of portions of this land had been made by the Mexican government as vacant and unoccupied lands. Subsequently to the date of 1819 such conveyances were in fact made; and whether the title conveyed by them was good or bad, it appears conclusively that the Mexican government, during the time when this possession of Baca is claimed to have been in existence, regarded the tract as vacant and unoccupied so far as to permit of its conveyance to others of various portions of the land now claimed. Another witness thought that Baca occupied about 300 varas in width from east to west and from north to south, but he was ignorant as to the boundaries of the grant, although so far as he knew Baca claimed no more than 300 varas, and this was under some cultivation for a distance of about 100 varas from north to south, and this was as late as 1829 or 1830. Other persons during this time came in and made application to the judge of first instance, as witness remembered, for other portions of land embraced in this alleged grant, on the theory that such portions were vacant and unoccupied.

This in substance is the evidence of possession, and it cannot, as we think, at all strengthen the presumption of an approval of the grant and a possession in accordance with it.

Nor do we think there is any evidence upon which to base a claim of adverse possession of this land as of right or under some *claim[**79** of title. There is no evidence showing a possession exclusive in its nature and founded upon a claim of right to the land so possessed. If there had been evidence of an approval of the grant, the delivery of juridical possession, as stated in the return of the alcalde, might be sufficient evidence of title at one time to the whole land, yet, in the absence of such evidence of approval, we are of opinion that the actual possession, as proved, was totally insufficient to support a claim of title to this immense tract of land; nor is it sufficient to support a presumption that the acting governor did approve the grant and that what appears upon the torn expediente is in reality part of his written approval thereof. The recognition of the property as belonging to Baca was very probably a recognition of the occupancy by him of the 300 varas above alluded to, and is surely not definite enough to base a claim that the possession of this large amount of land by Baca was either notorious or in any degree exclusive, or that any portion of it was ever used by him for any purpose other than the pasturing of his cattle, sheep, and horses, and purposes connected therewith, but in no way exclusive of other persons.

In regard to proof of the fact of pasturing cattle as evidence of an adverse possession upon which to base a claim of title, we have held that such fact is of very slight weight when applied to cases arising under alleged grants of land of the nature of the one under consideration. In the case of *Whitney* v. *United States*, already above cited, 167 U. S. 529, 546 [42: 263, 269], this court said, speaking through Mr. Justice Brown, as follows:

"The claimant also relies upon a long-continued adverse possession of this land, maintained for nearly 170 years from the date of the grant, and nearly eighty years from the date of the testimonio issued by the alcalde mayor de Baca. Had it been shown that this possession was complete, adverse, and undisputed during the whole life of this grant, such possession would probably be regarded as complete evidence of title. Nor are we disposed to deny that the fact that the Luceros and their descendants pastured stock upon these lands is evidence of such possession, but in order to make it of any *particular weight it should be [**80** shown to have been exclusive, and that no other person pastured or had the same right to pasture upon these lands. The proceedings in the case first above mentioned, of the intrusion of the Romeros, indicate the lands to have been held in common and to have been subject to pasturage by the Indians and other residents of that neighborhood. Under such circumstances, it should be made to appear that the rights of Lucero and his descendants were exclusive in this particular. In addition to this, however, it is a fact so notorious that we may take judicial notice of it, that mere pasturage upon these western lands is very slight evi-

dence of possession. The court below was of opinion that from a practical standpoint the grazing of stock in this country has no value as evidence of practical location. In view of the fact that all, or nearly all, of this testimony respecting possession is given by witnesses who are descended from Lucero, or connected with his family, or are interested in the litigation, and the possession relied upon is not shown to have been exclusive, or inconsistent with the use of this vast tract as a pasturage common to all the dwellers in that neighborhood, we think the court did not err in refusing to give it weight as evidence of title."

These remarks apply with great force to this case, so far as the evidence herein goes to show actual possession by reason of the pasturing of stock, which is really all the evidence of possession the case affords It is entirely lacking in evidence of an *exclusive* possession under a claim of right, and the testimony is consistent with a mere occupancy of but a small portion of the land by Baca and his servants for purposes of pasturage, and without claim of further or exclusive right or title.

There is another fact that we think bears a good deal of force upon the question whether there ever was an approval by the governor, and, as connected therewith, whether Baca himself ever thought that he had or claimed to have any title to or property in the land described in his petition or in the report of the alcalde, and that fact is that he makes no mention whatever of this property [81] in his will, and does not in *that instrument claim to have any title to or interest in the same. The will was put in evidence only for the purpose of showing the written declarations of Baca as to his ownership of property and his omission to name the property in question, and we think it sufficiently proved for that purpose.

The failure to enumerate in his will a particular piece of property owned by a testator would, in ordinary cases, be of not the slightest significance. But a perusal of the will under examination shows, as we think, quite plainly, that the testator was in effect marshaling his assets and mentioning in the instrument all his property and making specific dispositions thereof. He speaks in great detail of his different pieces of property, both real and personal. The paper cannot be read without giving the impression that the testator was naming therein every piece of real property which he claimed to own. A reading of the will is the most satisfactory and the best proof of the correctness of this statement, and the instrument, with the exception of the formal parts, is therefore given in full in the margin.†

*After reading the will the inference is, [82] as we think, irresistible, that Baca did not suppose he owned, and made no claim to own, the property in question here. If he had owned it or *claimed to own it, there can be no doubt [83] it would have been mentioned in the will. A grant containing at the lowest estimate half a million acres of land would be much too large *for the testator to have overlooked or ig- [84] nored in a declaration of ownership of property such as is contained in this will.

We should infer from this omission that Baca knew he did not own the land and was aware of the fact that the action of the alcalde had never been approved by the governor.

From the fact of Baca's omission to name this land as his property we must infer that such actual possession as he had taken of a small portion of this land never led him to suppose that he was the owner of it or that he had any title to it.

It was in fact an occupation of a comparatively small piece of the land in question, for the purpose of pasturage, but in no way exclusive in its nature and under no claim of right or title. Hence the omission of Baca to mention the land as his property or to refer to it in any way.

The action of the Mexican government in making grants to third parties of certain portions of these lands, as vacant and unoccupied lands, is also of some importance. The grants were made at times which were long subsequent to the petition of Baca and the making of the return of the alcalde, and were made after an official examination of the lands then granted and a certificate that they were vacant.

We express no opinion as to the validity of these grants, and we allude to the subject only for the purpose of pointing out how the facts appeared to the Mexican officials, who, at that time, *were engaged in an investigation of [85] the question of occupancy, and who reported the lands mentioned in the respective grants as vacant and unoccupied, which we may assume they would scarcely have done had Baca or his heirs then been in the actual possession and occupancy of those very lands.

We have now referred to the substance of all the evidence contained in this record, and we are compelled to conclude that the petitioner has failed to make out a title of any kind to the land in question. While the court below failed to give judgment to the petitioner for the full amount of her claim, yet it did give her judgment for the amount already stated of 11 square leagues of land. The court found that the grant was an imperfect grant at the time of the cession of the territory to the United States.

In our view of the case no grant, perfect or

†Will of Bartolomé Baca.

First, I commend my soul to God, our Lord, who from nothing created it, and my body to the earth from which it was made, which when a corpse, I direct be shrouded in the habit of our seraphic father, San Francisco, and to be buried in the church of the Pure and Spotless Concepcion de Tome.

It is my will that my burial be humble and with mass with the body present. I also declare that I am lawfully married, *in facie ecclesiæ*, to Dona Maria de la Luz Chaves, from which marriage we have had and have, as our legitimate children, Maria Rita, Manuela Antonia, Maria Manuela, Juan, Manuel, and Maria Lugarda. I also declare as my property the house where I live, containing seventeen serviceable and three unserviceable rooms, with a chapel where the holy sacrifice of private mass is celebrated, adorned with thirty-five images in sculpture and pictures, a pulpit, twenty-four mirrors, a censer with its boot of silver, five chasubles with their corresponding accessories, two capes, two albs, two sashes, six altar draperies, two missals, one chalice with its accessories, two cruets with their salvers, eight metal candlesticks, and its vestry with a chest in which the ornaments are kept. I also declare as my property the utensils of

imperfect, was in existence at that time, and hence the finding of the court that the petitioner was entitled to a confirmation of 11 square leagues within the limits of the outboundaries of the tract, cannot be sustained.

The act creating the court of private land claims (above cited) provides in the 1st subdivision of § 13 for the confirmation of imperfect grants.

This court has construed the language there used to mean, "not only that the title was lawfully and regularly derived, but that, if the grant were not complete and perfect, the claimant could, by right and not by grace, have demanded that it should be made perfect by the former government, had the territory not been acquired by the United States." *Ainsa* v. *United States*, 161 U. S. 208, 223 [40: 673, 678].

The same construction was upheld in *United States* v. *Santa Fé*, 165 U. S. 675, 714 [41: 875, 888], and it is again approved in *United States* v. *Sandoval*, 167 U. S. 278, 293 [42: 168, 173]. After a full consideration of the case we must hold there is not sufficient evidence to show that at the time of the cession of the territory

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my house, consisting of eight mirrors, eleven silver plates, twelve spoons and eight forks also of silver, three copper kettles, two large chests, four carts with trappings, five trunks, three hampers, one silver vase and a tankard of the same, one wardrobe, one carriage, four serviceable and three unserviceable wagons, one flask case with twelve flasks, eight hoes, three axes, two adzes, three bars of iron, two American saws, one thousand six hundred dollars in money, one copper boiler. I also declare as my property nine small houses in this place of San Fernando, four small houses at El Cerro, the farming land I have at this place and at El Cerro, with the purchase I have in this said sitio, which is coterminous with the sitio of Valencia. I also declare as my property a house I have in the sitio of the Peraltas, a broken field, and an interest in the

[Good for seal third for the years 1833 and '34. Rubric.]

said sitio. I also declare as my property a house and lands in the sitio of the Aragons, an interest in said sitio which I bought of the late José Aragon.

I also declare as my property a ranch which I bought of Don Luciano Garcia on the other side, in front of Bernalillo, which consists of a house and lands, the value of which is one thousand dollars, which I gave for it. I also declare as my property two ranches in the sitio of Tome, with its houses, which I purchased of José Manuel Apodaca and Andres Mirabal, and two large fields purchased of Felipe Montoya. I also declare as my property two fields and an interest in the sitio of Las Enlames, which I purchased of the late Antonio José Baca. I also declare as my property that which I have in a room in my house set apart as a store, and in which there are forty-five pieces of calico, domestic, and muslin. I also declare as my property two houses I have in La Joya de Sevilleta, together with their share of lands in the sitio. I also declare as my property a house I have in the village of El Paso del Rio del Norte, with its vineyard and corresponding land, as appears from the document executed for me and which is in my possession. I also declare as my property the land I have in the sitio of Sansal, which Juan Antonio Baca paid me and which was received by Tomas Sanchez. I also declare as my property the broken lands I have in the sitio of Mansano and my interest therein, together with the will under the management of José Antonio Torres. I also declare as my property a mill I have in this place of San Fernando. I also declare as my property four hundred and fifty head of cattle from the brand up, seven thousand head of small stock, eight hundred ewes of mine which Don Francisco Ortiz has on shares, one thousand ewes which Gonzalez, who resides at Seboyeta, has on shares. I also declare as my property forty broken mules, a little more or less, twenty-four aparejos, with accessories, one hundred horses between unbroken and broken, twenty-four young mules one and two years old, two asses. I also declare that Don Mateo Sandoval owes me

[Good for seal third for the years 1833 and '34. Rubric.]

four hundred and thirty dollars in money, which I order collected. I also declare that, according to the cash book in my use and the obligations that have been made to me, collections be made of all the individuals who owe me and are not credited on their accounts and obligations. I also declare that I owe the house of the late Francisco Chaves four thousand and odd dollars in money and five thousand ewes I had from said house on shares. I order that it be paid. I also declare that I owe as tithes at El Paso del Norte four thousand dollars. This is being paid, and what is found not to have been paid, I order that it be paid. I also declare that I owe to Don Santiago Archavala for one thousand, two hundred sheep. I order that they be paid for. I also declare that I owe Don Rafael Ortiz for six hundred sheep for the year eighteen hundred and thirty-four. I order that they be paid for. I also declare that I owe my stepson, José Luna, for five hundred sheep. I also declare that Don Ricardo Ester owes me four thousand, five hundred dollars. I order that it be collected. I also declare that Don Ignacio de la Campa, who lives in Sonora, owes me one thousand, five hundred and fifty-six dollars, two reals. I order that it be collected. I also declare that Don Alexandro Legren owes me four hundred dollars, two hundred of which appear in an obligation he executed for me, and for the other two hundred he made no obligation. I order that it be collected. I also declare as my property a tract of land in the sitio of Lunas, which Antonio José Padilla paid me. I also declare that Ruybali de Savinal owes me for three hundred ewes. I order that it be collected. I also declare that Vicente Provencio, who resides at Oposura, in the state of Sonora, owes me five hundred dollars in money. I order that it be collected. I also declare that all the servants of my house, according to their accounts, are obligated to earn them in the house, even to the last real, and he who does not wish to serve shall pay in full. I also declare as my property forty she goats, which are in the possession of Gertrudis Montoya, who resides in Belen. I also declare as my property one iron cot and two bells.

[Good for seal third for the years 1833 and '34. Rubric.]

I also declare as my property a cross with its iron weather vane, which is used on the belfry. I also declare that I leave to my wife, Dona Maria de la Luz Chaves, my dwelling and all the household furniture within the doors thereof, it being observed that I have given houses to all my children; to Manuelita the house I have in Santa Fé, with its corresponding land, and to all the others I have also given houses in this place of San Fernando, with their respective lands. I also declare that I leave to my wife, Maria de la Luz Chaves, the land inclosed by a wall I have in this place and orchard.

In order to carry out all the wishes this will contains and which the codicil will contain, in case I leave one, I appoint as my executor, in the first place, my wife, Maria de la Luz Chaves; in the second, Don Jacinto Sanchez, and in the third, Don Enrique Luna, and each one *in solidum*, and I give them ample power to take possession of my property as soon as I die and to pay all I owe, and that their collection be lawful and real, and that they make it with the legality their good conscience may indicate to them, which charge shall continue for the legal year and as much more time as they may need, since I extend it. And after it is completed and everything is paid, in the sale of my property, furniture, real property, rights, and shares, present and future, I constitute as my sole and universal heirs my wife, Dona Maria de la Luz Chaves, and my said children, Maria Rita, Manuela Antonia, Maria Manuela, Juan Clemente, Manuel, and Maria Lugarda, who, after paying all I owe (except what I have given them), shall make a lump of what is left, the half for my said wife and the other half to be shared in equal parts by my children that they may enjoy it with the blessing of God and my own. And by these presents I revoke and cancel the wills and other testamentary provisions I may have made heretofore.

of New Mexico to the United States the predecessors or grantors of the petitioner had any title of any kind whatever, perfect or imperfect, to the land described in the petition here-
86] in, and, *consequently, there could be no confirmation of any alleged imperfect title or grant.

The judgment of the Court of Private Land Claims must therefore be reversed on the appeal of the United States, and the record remanded to that court, with directions to enter judgment in conformity with this opinion.

ALASKA TREADWELL GOLD MINING COMPANY, *Pff. in Err.*,
v.
PATRICK WHELAN.

(See S. C. Reporter's ed. 86-89.)

Foreman; when fellow servant with his men.

A mere foreman or boss of a gang of men working in a mine, employed in the same department of business, and under a common head, is a fellow servant with them, whether he has or has not authority to engage and discharge the men under him.

[No. 33.]

Submitted March 17, 1897. Decided October 18, 1897.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment of that court affirming the judgment of the District Court of the United States for the District of Alaska in favor of the plaintiff, Patrick Whelan, against the Alaska Treadwell Gold Mining Company, for damages for personal injuries received by him while a laborer in the service of said company at its mines in Alaska. *Judgments of the Circuit Court of Appeals and of the District Court reversed*, and case remanded to the district court with directions for a new trial.

See same case below, 29 U. S. App. 1.

Statement by Mr Justice **Gray:**

This was an action brought in the district court of the United States for the district of Alaska against a mining corporation by a workman in its employ. The complaint alleged that "on November 23, 1891, and for nearly six months prior thereto, this plaintiff was in the employ of said defendant, as a workman in the mine of said defendant, in breaking and preparing rock for the chutes, and doing other work as ordered by the foreman of said defendant, one Samuel Finley, under whom this plaintiff worked, and from whom he received his orders; that on November 23, 1891, while this plaintiff was yet in the employ of said defendant, he was ordered by the foreman of said defendant company to break rock immediately above and over one of the chutes of the defendant company; that in compliance with the orders of the foreman of said *defendant, and as became his duty so to [87 do, the plaintiff proceeded to his place immediately above and over said chute, and commenced to break said rock as he had been ordered so to do; and that while so engaged, and carefully and skilfully and without negligence performing his duties as aforesaid, and without the knowledge of this plaintiff, and carelessly and negligently, the foreman of said defendant drew or caused to be drawn the gate at the mouth of said chute over which this plaintiff was working, thereby causing the rock at the head of said chute to be suddenly drawn in, carrying this plaintiff with it, through said chute, a distance about 30 feet, and completely covering him with great quantities of rock and *débris*," thereby greatly injuring him.

At the trial the plaintiff, being called as a witness in his own behalf, gave evidence tending to support the allegations in the complaint; and testified that on the night of November 23, 1891, he was sent by Samuel Finley, the boss in the pit, to the top of a chute, there to break rock and pound it fine enough to go through the chute, which connected with the tunnel through which the rock was shot into cars to be taken to the mill; that at the bottom of the chute was a gate, always closed until the chute was filled and orders given to draw it; that Finley's custom was to come upon the top of the chute to see if the rock was broken fine enough, and, if it was all right, to tell the men to come down as he was going to draw; and that at the time in question, after putting the plaintiff and others to work at the chute, he never gave them any notice that he was going to draw.

Finley, being called as a witness for the defendant, testified that he did give notice to the men before drawing the chute. The defendant introduced evidence, which was uncontradicted, that its business was under the control of a general manager, and was divided into three departments, the mine, the mill and the chlorination works, each of which departments had a foreman or superintendent under the general manager; that the mine department had three shifts or gangs of workmen, two by day and one at night; and that Finley was the boss of the one at night.

*There was conflicting evidence upon the [88 question whether Finley had authority to engage and discharge the workmen under him.

No other material testimony was introduced as to the relation of the plaintiff and Finley to each other or to the defendant.

At the close of the whole evidence, the defendant requested the court to direct the jury to return a verdict for the defendant, upon the ground that the plaintiff's injuries were the result of the negligence of a coemployee or

NOTE.—*As to fellow servants and their negligence; who are fellow servants; vice principal; superior servant; liability of master,*—see note to Baltimore & O. R. Co. v. Baugh, 37: 773.

As to who are coemployees or coservants within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a coservant,—see note to Hough v. Texas & P. R. Co. 25: 612.

As to negligence; responsibility of master to servant for carefulness and competency of coservants,—see note to Wabash R. Co. v. McDaniels, 27: 605.

As to servant and agent distinguished,—see note to Muhlman v. Union P. R. Co. (C. C. D. Colo.) 2 L. R. A. 192.

fellow workman, Samuel Finley, for which the defendant was not liable. The court overruled the motion, and the defendant excepted to the ruling.

The court afterwards instructed the jury as follows: "The true test is whether the person in question is employed to do any of the duties of the master; if so, he cannot be regarded as the fellow servant, but is the representative of the master, and any negligence on his part in the performance of the duty thus delegated to him must be regarded as the negligence of the master. You have heard the testimony as to Finley's authority and duties, and whether or not he had any power to employ men or discharge them, or whether he simply acted under another man who had the same power over him that was exercised over other laborers."

The jury returned a verdict for the plaintiff, and judgment was rendered thereon, and affirmed by the circuit court of appeals. 29 U. S. App. 1. The defendant sued out this writ of error.

Mr. **T. Z. Blakeman,** for plaintiff in error:

One injured by the negligence of a fellow servant must allege and prove his ignorance of the latter's negligent habits. He must allege want of care in engaging the servant, or that he was retained after notice of his shortcomings.

Lake Shore & M. S. R. Co. v. *Stupak*, 108 Ind. 1; *Indiana, B. & W. R. Co.* v. *Daily*, 110 Ind. 75; *Laning* v. *New York C. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417; *Michigan C. R. Co.* v. *Dolan*, 32 Mich. 510.

A single act of negligence does not necessarily charge the master with notice of the servant's incompetency.

Baltimore Elevator Co. v. *Neal*, 65 Md. 438.

The mere fact that one of a number of servants who are in the same line of employment for a common master has the power to control and direct the actions of the others with respect to such employment will not of itself render the master liable for the negligence of the governing servant.

Chicago & A. R. Co. v. *May*, 108 Ill. 302; *Holden* v. *Fitchburg R. Co.* 129 Mass. 268, 37 Am. Rep. 343; *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 484 (27: 1005).

Final judgments, generally, of the district court of Alaska, are reviewable in the circuit court of appeals for the ninth circuit.

The Coquitlam v. *United States*, 163 U. S. 347 (41: 184).

Mr. **Oscar Foote,** for defendant in error:

The master is bound to inform his servant of facts within his knowledge affecting the safety of the servant in the work to be done.

McGowan v. *La Plata Min. & Smelting Co.* 3 McCrary, 393.

Where a method of contrivance is used which is dangerous to the public or the workman, and the control of which is exclusively in the owner of such contrivance or one acting for him, the value of human life and the dangerous character of the contrivance make it public policy and create a rule of law that the owner, either directly or through the one in control, shall be held to the greatest care which human reason, foresight, and skill can produce, and which is necessary to protect human life from the dangerous contrivance he has set in operation.

Smith, Neg. 142, 143; Broom, Legal Maxims, 390; Shearm. & Redf. Neg. §§ 683-691; *Union P. R. Co.* v. *McDonald*, 152 U. S. 262 (38: 434); Beach, Contrib. Neg. § 302.

The master, when taking a hand and engaging in common labor with the servant, does not thereby lose his position as master, or become a fellow servant in such legal sense that the servant impliedly undertakes to assume the risk of injury from his negligence when so jointly injured.

Ryan v. *Fowler*, 24 N. Y. 410, 82 Am. Dec. 315; *Anderson* v. *New Jersey S. B. Co.* 7 Robt. 611; *Northern P. R. Co.* v. *Peterson*, 162 U. S. 346 (40: 994).

If the master, instead of personally performing the obligations due his servant, engages another to do them for him, he is liable for the neglect of that other, which is not the neglect of a fellow servant, but of the master.

Baltimore & O. R. Co. v. *Baugh*, 149 U. S. 369 (37: 773); *Union P. R. Co.* v. *Snyder*, 152 U. S. 684 (38: 597); *Gilmore* v. *Northern P. R. Co.* 18 Fed. Rep. 866; *Lake Shore & M. S. R. Co.* v. *Laralley*, 36 Ohio St. 221; *Ryan* v. *Bagaley*, 50 Mich. 179; *Berea Stone Co.* v. *Kraft*, 31 Ohio St. 287, 27 Am. Rep. 510.

A mine foreman in charge of hands is not a fellow, but a superior, servant.

Brown v. *Sennett*, 68 Cal. 225, 58 Am. Rep. 8; *Mulcairns* v. *Janesville*, 67 Wis. 24.

There was no error in the circuit court of appeals in finding that the trial court did not err in submitting to the jury the question of negligence on the part of the defendant in error.

Northern P. R. Co. v. *Amato*, 144 U. S. 467 (36: 508); *Kane* v. *Northern C. R. Co.* 128 U. S. 91 (32: 339); *Jones* v. *East Tennessee, V. & G. R. Co* 128 U. S. 443 (32: 478).

The plaintiff's negligence to constitute a defense must have been so far an efficient cause of the injury that without his negligence the injury would not have happened.

Beach, Contrib. Neg. §§ 19 *et seq.*; *Kane* v. *Northern C. R. Co.* 128 U. S. 91 (32: 339); *Daley* v. *Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413; *Grippen* v. *New York C. R. Co.* 40 N. Y. 34; *New Haven S. B. & Transp. Co.* v. *Vanderbilt*, 16 Conn. 420.

Mr. Justice **Gray** delivered the opinion of the court:

The evidence introduced at the trial, giving it the utmost possible effect in favor of the plaintiff, was insufficient to support *a verdict [89 for him; and the defendant's request, made at the close of the whole evidence, to instruct the jury to return a verdict for the defendant, because Finley, whose negligence was the ground of the action, was a fellow servant of the plaintiff, should have been granted.

Finley was not a vice principal nor a representative of the corporation. He was not the general manager of its business, or the superintendent of any department of that business. But he was merely the foreman or boss of the particular gang of men to which the plaintiff belonged. Whether he had or had not authority to engage and discharge the men un-

der him is immaterial. Even if he had such authority, he was none the less a fellow servant with them, employed in the same department of business, and under a common head. There was no evidence that he was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence in using the machinery or in giving orders to the men.

The case is governed by a series of recent decisions of this court, undistinguishable in their facts from this one. *Central Railroad* v. *Keegan*, 160 U. S. 259 [40: 418]; *Northern Pacific Railroad* v. *Charless*, 162 U. S. 359 [40: 999]; *Same* v. *Peterson*, 162 U. S. 346 [40: 994]; *Martin* v. *Atchison, T. & S. F. Railroad*, 166 U. S. 399 [41: 1051]. See also *Wilson* v. *Merry*, L. R. 1 H. L. Sc. App. Cas. 326.

This ground being decisive of the case, no opinion need be expressed upon other questions argued at the bar.

Judgments of the Circuit Court of Appeals and of the District Court reversed, and case remanded to the district court with directions to set aside the verdict and to order a new trial.

The CHIEF JUSTICE and Mr. Justice **Harlan** dissented.

BENTON TURNER, *Plff. in Err.*,
v.
PEOPLE OF THE STATE OF NEW YORK.

(See S. C. Reporter's ed. 90-95.)

Statute shortening a limitation is constitutional —lands sold for taxes—limitation of six months—Federal question.

1. A statute shortening the period of limitation is within the constitutional power of the legislature, provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action after the passage of the statute and before the bar takes effect.
2. A limitation of six months after the passage of a statute, within which actions for lands sold for taxes may be brought, is not repugnant to the Constitution of the United States.
3. A statute barring certain actions if not brought within six months after its passage is not unconstitutional on the ground that it does not allow any opportunity to assert one's rights even within the period limited, if it does not take away any right of action, although the remedy available is not certain.
4. A decision that a person was not in possession of land involves no Federal question which can be reviewed by the Supreme Court of the United States on writ of error to a state court.

[No. 41.]

Argued April 19, 20, 1897. Decided October 18, 1897.

IN ERROR to the Court of Appeals of the State of New York to review a judgment of that court affirming a judgment of the Supreme Court of that State in favor of the People of the State of New York, plaintiff, against Benton Turner, defendant, for the recovery, by replevin, of a quantity of logs cut by defendant within the forest preserve of that State. *Affirmed.*

See same case below, 145 N. Y. 451.

Statement by Mr. Justice **Gray**:

This was an action of replevin, brought April 11, 1887, in behalf of the state of New York by the forest commissioners of the state against Turner, in the supreme court of the county of Franklin and state of New York, to recover a quantity of logs cut by him upon lands in that county and within the forest preserve of the state, between September 1, 1886, and March 25, 1887. The answer denied the allegations of the complaint, and alleged that at the time mentioned therein the defendant was the owner and in possession of the lands.

The material facts of the case, as found by a referee, were as follows: On October 12, 1877, the lands being then owned by one Norton, were sold by the comptroller of the state of New York for unpaid taxes of the years from 1866 to 1870 inclusive, and were bid in by the comptroller in behalf of the state, and conveyed by him to the state by deed dated June 9, 1881, and recorded June 8, 1882. The defendant, more than nine years after that sale, acquired Norton's title in the land. The land was wild forest land, uncultivated, unimproved, unenclosed, and with no dwelling house or other building thereon. Neither the state nor any officer thereof ever took actual possession of the land; and no part of it was in occupancy of any person on October 12, 1879, when the *period of two years allowed by law for re- [91 demption from the comptroller's sale expired.

At the trial before the referee, the defendant, in order to prove the invalidity of the comptroller's deed by reason of illegality in the assessment of the taxes for the years 1867 and 1870, offered to show that the oath of the assessors to the assessment roll of 1867 was taken on August 10, instead of on the 3d Tuesday of August; and that the assessors omitted to meet on the 3d Tuesday of August, 1870, to review their assessments for that year.

The plaintiff objected to the evidence as immaterial, because the comptroller's deed was made conclusive evidence of those matters by

NOTE.—*What statute of limitations governs; effect of new statutes; lex fori, and not lex loci, governs,*—see note to Townsend v. Jemison, 13: 194.

As to contracts limiting the time within which action must be brought; waiver of; estoppel as to,—see note to Southern Exp. Co. v. Caldwell, 22: 556.

That neither time nor statute of limitations runs against the state, see note to Gibson v. Chouteau, 20: 534.

As to limitation of time in equity cases, see notes to Pratt v. Carroll, 3: 627, and Thomas v. Brockenbrough, 6: 287.

As to loss of cause of action by lapse of time pending suit, see note to McAfee v. Reynolds (Ind.) 18 L. R. A. 211.

As to implied exceptions in statute of limitations, see note to Shellenberger v. Ransom (Neb.) 25 L. R. A. 564.

the statute of New York of 1885, chap. 448, which is copied in the margin.† The defendant **92**]contended that this *statute was invalid as contrary to the 1st section of the 14th article of Amendment to the Constitution of the United States. But the referee sustained the plaintiff's objection to the evidence, and directed judgment for the plaintiff, which was accordingly rendered by the court, and affirmed by the court of appeals. 145 N. Y. 451. The defendant sued out this writ of error.

Messrs. **Frank E. Smith** and *Thomas F. Conway* for plaintiff in error.

Messrs. **T. E. Hancock,** Attorney General of the state of New York, and **William Henry Dennis** for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

On May 15, 1885, the legislature of New York, by the statute of 1885, chap. 283, declared that all the lands then owned or thereafter acquired by the state of New York within certain counties (one of which was Franklin county) should constitute and be known as the forest preserve; and established a forest commission of three persons, styled forest commissioners, to "have the care, custody, control, and superintendence of the forest **93**] *preserve," and "to maintain and protect the forests now in the forest preserve, and to promote, as far as practicable, the further growth of forests thereon;" and authorized them to appoint a warden and other officers, and to exercise various powers to carry out its object.

At the date of the passage of that statute, the time allowed by law for the redemption of lands from sale by the comptroller for nonpayment of taxes was two years from the time of sale. N. Y. Stat. 1855, chap. 427, § 50.

On June 9, 1885, the legislature of the state passed the statute of 1885, chap. 448, to take immediate effect, which provided that all conveyances thereafter executed by the comptroller, of lands in the same counties, sold by him for nonpayment of taxes and having been recorded for two years in the clerk's office of the county in which the lands lay, should, "six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular" and as required by law; but that all such conveyances and the taxes and tax sales on which they were based, should "be subject to cancelation, as now provided by law, on a direct application to the comptroller, or an action brought before a competent court therefor, by reason of the legal payment of such taxes or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid."

The land now in question was sold by the comptroller to the state October 12, 1877; the time allowed by law for redeeming the land from that sale expired October 12, 1879; the comptroller's deed to the state was made June 9, 1881, and recorded June 8, 1882. It had therefore been on record for three years when the statute of June 9, 1885, was passed and took effect; and by the terms of this statute, on December 9, 1885, the comptroller's deed became conclusive evidence that there was no irregularity in the assessment of any of the taxes for nonpayment of which the land had been sold and *conveyed to the state. **[94** This action was brought April 11, 1887.

The statute, according to its principal intent and effect, and as construed by the court of appeals of the state, was a statute of limitations. *People* v. *Turner*, 117 N. Y. 227; *Same* v. *Same*, 145 N. Y. 451. It is well settled that a statute shortening the period of limitation is within the constitutional power of the legislature, provided a reasonable time, taking into consideration the nature of the case, is allowed for bringing an action after the passage of the statute and before the bar takes effect. *Terry*

†An Act to Amend Chapter Four Hundred and Twenty-Seven of the Laws of Eighteen Hundred and Fifty-Five, Entitled "An Act in Relation to the Collection of Taxes on Lands of Nonresidents and to Provide for the Sale of Such Lands for Unpaid Taxes."

Sec. 1. Section sixty-five of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An Act in Relation to the Collection of Taxes on Lands of Nonresidents and to Provide for the Sale of Such Lands for Unpaid Taxes," is hereby amended so as to read as follows:

§ 65. Such conveyances shall be executed by the comptroller, under his hand and seal, and the execution thereof shall be witnessed by the treasurer or deputy comptroller; and all such conveyances that have been heretofore executed by the comptroller, and all conveyances of the same lands by his grantee or grantees therein named, after having been recorded for two years in the office of the clerk of the county in which the lands conveyed thereby are located, and all outstanding certificates of a tax sale heretofore held by the comptroller that shall have remained in force for two years after the last day allowed by law to redeem from such sale, shall, six months after this act takes effect, be conclusive evidence that the sale and all proceedings prior thereto, from and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed by law to redeem, were regular and were regularly given, published, and served according to the provisions of this act, and all laws directing or requiring the same or in any manner relating thereto: and all other conveyances or certificates heretofore or hereafter executed or issued by the comptroller shall be presumptive evidence of the regularity of all the said proceedings and matters hereinbefore recited, and shall be conclusive evidence thereof from and after the expiration of two years from the date of recording such other conveyances, or of four years from and after the date of issuing such other certificates. But all such conveyances and certificates and the taxes and tax sales on which they are based shall be subject to cancelation, as now provided by law, on a direct application to the comptroller, or an action brought before a competent court therefor, by reason of the legal payment of such taxes, or by reason of the levying of such taxes by a town or ward having no legal right to assess the land on which they are laid.

Sec. 2. The provisions of this act are hereby made applicable only to the following counties, *viz.*, Clinton, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Sullivan, Ulster, Warren, and Washington, but shall not affect any action, proceeding, or application pending at the time of its passage; nor any action that shall be begun, proceeding taken, or application duly made, within six months thereafter for the purpose of vacating any tax sale or any conveyance or certificate of sale made thereunder.

Sec. 3. This act shall take effect immediately.

v. *Anderson*, 95 U. S. 628, 632, 633 [24: 365, 366]; *In re Brown*, 135 U. S. 701, 705-707 [34: 316, 318].

The statute now in question relates to land sold and conveyed to the state for nonpayment of taxes; it applies to those cases only in which the conveyance has been of record for two years in the office where all conveyances of lands within the county are recorded; and it does not bar any action begun within six months after its passage. Independently of the consideration that before the passage of the statute the plaintiff had had eight years since the sale, and three years since the recording of the deed, during which he might have asserted his title, this court concurs with the highest court of the state in the opinion that the limitation of six months, as applied to a case of this kind, is not repugnant to any provision of the Constitution of the United States.

It was argued in behalf of the plaintiff in error that the statute was unconstitutional, because it did not allow him any opportunity to assert his rights, even within six months after its passage. But the statute did not take away any right of action which he had before its passage, but merely limited the time within which he might assert such a right. Within the six months, he had every remedy which he would have had before the passage of the statute. If he had no remedy before, the statute took none away. From the judgments of the court of appeals in the case at bar, and in the subsequent case of *People, Millard*, v. *Roberts*, 151 N. Y. 540, there would appear to have been some difference of opinion in that court upon the question whether his proper remedy **95**]was by direct application *to the comptroller to cancel the sale, or by action of ejectment against the comptroller or the forest commissioners. But as that court has uniformly held that he had a remedy, it is not for us to determine what that remedy was under the local Constitution and laws.

It was also argued that the plaintiff in error was in possession of the land and could not be put to his action. But the decision below that he was not in possession involved no Federal question, or any other question of law, but a mere inference of fact from the evidence, which this court is not authorized to review on writ of error. *Dower* v. *Richards*, 151 U. S. 658 [38: 305]; *Egan* v. *Hart*, 165 U. S. 188 [41: 680].

Judgment affirmed.

UNITED STATES, *Appt.*,
v.
SIMON GOLDENBERG *et al.*, Composing the Copartnership of Goldenberg Brothers & Company.

(See S. C. Reporter's ed. 95-103.)

Payment of duties, when necessary to review.

Payment of the full amount of the duties ascertained to be due upon the liquidation of an entry of merchandise is not required by the act of June 10, 1890, § 14, to be made by the importer within ten days after the liquidation of such duties, where the goods were entered for consumption, in order to enable the protesting importer to have the exaction and classification reviewed by the general appraisers and by the courts.

[No. 35.]

Argued and Submitted October 14, 1897. Decided October 25, 1897.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit of a question for the decision of this court in a case in that court on appeal by the United States from a judgment of the Circuit Court of the United States for the Southern District of New York reversing the decision of the board of general appraisers, which affirmed the decision of the collector in the rejection of certain protests and in the classification of certain merchandise for duty. *Question answered in the negative.*

Statement by Mr. Justice **Brewer:**

The 14th section of the act of Congress approved June 10, 1890 (26 Stat. at L. 131, 137, chap. 407) is as follows:

"That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage) shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within ten days after 'but not before' such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of three general appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port, or at any other port, which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such who shall liquidate the entry *accordingly, except in cases where [**97** an application shall be filed in the circuit court within the time and in the manner provided for in § 15 of this act."

Upon this section, after stating the facts of this case showing its pertinency, the circuit

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect,—see note to Greely v. Thompson, 13: 397.

court of appeals of the second circuit has certified to us the following question:

"Was the payment of the full amount of the duties ascertained to be due upon the liquidation of the entry of the merchandise required to be made by the importers, as well as the giving notice of dissatisfaction or protest, within ten days after the liquidation of such duties, where the goods, as in the present case, were entered for consumption, in order to enable the protesting importers to have the exaction and classification reviewed by the board of general appraisers and by the courts?

The Attorney General for appellant submitted upon the brief of **Edward B. Whitney**, formerly Assistant Attorney General:

This case arose under the customs administrative act of June 10, 1890. The only question relates to the timeliness of the payment of duties

The merchandise whose dutiable classification was in issue in this proceeding was important and entered for consumption at the port of New York on June 20, 1891. The entry was liquidated July 16, protests were filed July 21, and the duties were paid July 27, 1891.

The case turns upon § 14 of the customs administrative act.

The question is discussed in certain decisions of the general appraisers, but cursorily.

The point appears very technical. The importer failed by but a single day to pay his duties within the time limited. Such accidents are rare and due to the importers own carelessness or that of his agents. The question is an important one, however, because under the importers' construction of the statute they may and sometimes do indefinitely postpone a review of the collector's decision by simply refusing to pay the duties.

The practice was stated as follows by the Secretary of the Treasury to Attorney General Miller (20 Ops. Atty. Gen. 185, 186): "The practical result of this ruling is an accumulation in the customhouses of large numbers of protests, which may be made for speculative purposes and which are not promptly transmitted to the board of general appraisers because of the failure of the importers to pay the increased duties against the exaction of which they file their protest. The importers are thus enabled to take the initiatory step in suit for recovery of duties, full payment of which has not been made, and delay indefinitely the decision by the general appraisers of the question raised by the protest, with a view of taking advantage of decisions which may hereafter be made in other cases, thereby defeating one of the chief purposes of the administrative act, which was to secure the prompt disposition of questions arising under the tariff laws and discourage the filing of mere speculative protests."

Attorney General Miller therefore states the question as follows (20 Ops. Atty. Gen. 187): "Whether the payment of duties thereby required must, like the protest, be made within ten days after liquidation, or, to state the question differently, whether Congress intended to favor the importer, by permitting him not only to have possession of his goods, but to keep the government out of its revenue at pleasure, or, certainly, until judgment could be recovered against him in a plenary suit outside the statute of June 10, 1890; for it is precisely this advantage that is given the importer by the decision of the board of general appraisers of November 26, 1890, as the constructive practice complained of shows."

A literal interpretation of the statute favors the importers This is due to the repetition of the word "shall" before the words "pay the full amount of the duties." If the second (italicized) "shall" were omitted, the literal interpretation of the statute would favor the government contention.

The consequences of a literal interpretation of the statute are so remarkable that even Judge Townsend, in sustaining the importers' contention in the present case, does not adhere to it. He in effect inserts after the second "shall" the ambiguous words "within a reasonable time."

The government contends that the second "shall" was inadvertently used and should be disregarded.

The general principles of construction applicable to this case are familar. Revenue laws, like other laws, "should be so construed as to carry out the intention of the legislature in passing them."

125 Baskets of Champagne v. *United States* (*Cliquot's Champagne*), 70 U. S. 3 Wall. 114, 145 (18: 116, 121); *United States* v. *Stowell*, 133 U. S. 1, 12 (33: 555, 558)

If, therefore, the wording of a clause is such as clearly to indicate that it requires correction in order to effectuate the intent of the legislature, the correction will be made either by striking out a word which has inadvertently crept in, or substituting one word for another.

Union Ins. Co. v. *United States*, 73 U. S. 6 Wall. 759, 764 (18: 879, 882); Endlich, Interpretation of Statutes, §§ 295 *et seq.*, and cases cited.

"If no sensible meaning can be given to a word or phrase, or if it would defeat the real object of the enactment, it may, or rather it should, be eliminated." Endlich, Interpretation of Statutes, § 301. A recent instance of the rule that the intent governs the latter is to be found in *McKee* v. *United States*, 164 U. S. 287 (41: 437).

These cases are especially applicable when, as here, the sentence to be construed is long and involved, so that an error might easily creep in and remain unnoticed; and still more, when the sentence bears indubitable evidence of carelessness of construction. The quotation marks about the words "but not before" in this sentence show that it was never revised by a skilful hand. Such errors of style as the repetition of this word "shall" at the wrong place are common, and are much less likely to catch or offend the eye than these sporadic quotation marks.

Strictly speaking, Judge Townsend is correct in saying that this statute contains no ambiguity. As, however, it contains the strongest evidence of unskilful construction, the court is at liberty to correct a plain mistake if it is impossible to reconcile the literal interpretation of the statute with its clear intent.

The statute makes a distinction between

merchandise entered in bond and merchandise entered for consumption. The former words are equivalent to merchandise entered for warehouse. Since 1846 imported merchandise (regularly entered) has been classified into merchandise entered for consumption and merchandise entered for warehouse. The provisionally estimated duties upon the former class of merchandise must be paid before the importer can get possession of his property. Duties upon the latter class are payable at any time within three years at the importer's option. The history of this system is set forth in *Barney* v. *Rickard*, 157 U. S. 352 (39: 730), and the system still exists.

The reason for omitting the requirement of payment in the case of merchandise entered for warehouse is clear. If the requirement were extended to that class of merchandise, it would prevent any settlement of the legal questions involved until the importer was ready to withdraw his goods from warehouse; or it would require him to pay the duties while the goods were still in warehouse, and thus destroy the advantages of the warehouse system.

On the other hand, it is clear that the requirement is unnecessary as to the estimated duties which the importer must pay in order to get possession of goods which are entered for consumption.

The importance of the question is in relation to duties upon goods which have gone into the possession of the importer upon payment of the amount estimated by the collector at the time of the original entry, which estimate is thereafter found to have been too low. This class of importations contains a considerable proportion of those which are accompanied by fraud. The provisional estimate of duties is of course usually based upon the statements of the invoice. When the collector finds upon the final estimate or so-called "liquidation" of the duties that his estimate was too low, the goods have passed into the importer's hands, and the government's sole remedy is by suit. Instances of such suits are to be found in *United States* v. *Schlesinger*, 120 U. S. 109 (30: 607) and *Patton* v. *United States*, 159 U S. 500 (40: 233).

What is the effect of a literal interpretation upon such entries?

The finality of the collector's decision is destroyed by filing the protest. Until decision by the board of general appraisers it remains open to review. No decision from the board of appraisers can be obtained until the importer pays the full amount of the duties and charges.

The importer thus has it in his power to postpone indefinitely or forever any decision of these questions under the customs administrative act. Meanwhile the government may sue him; but the questions of fact, being undecided by the proper tribunal, will have to be submitted to a jury. The dutiable valuation of the goods is, indeed, already settled under § 13 of the act (replacing § 2930 of the Revised Statutes), but many questions of fact may remain open, such as "the controlling use of the article in question; or its similitude to some other article; or the values of its component materials; or its weight and fitness; or whether labor is necessary to fit it for use by the consumer; or its commercial designation."

Sonn v. *Magone*, 159 U. S. 417, 422 (40: 203, 204).

These questions of fact, together with the questions of law involved, must be submitted to the board of appraisers if the importer so elect, by paying the duties and charges. Otherwise they go to the court and jury. Is there any reason why the importer should be given such a right of election? Is it consonant with the intent and purpose of the customs administrative act, as shown either by its well-known history or by its internal evidence? Was it not the main purpose of the act to provide a special tribunal for the trial of all such questions of fact and law, and withdraw all questions of tariff interpretation from juries?

That this cannot be the true construction of the statute is recognized by Judge Townsend, who, therefore, instead of striking out the second "shall," inserts thereafter the words "within a reasonable time." But does this interfere any less with the letter of the statute than does the simple emendation which we suggest? Does it not rather import into it an altogether unworkable condition? Who is to decide whether the payment was made within a reasonable time? The collector, by transmitting or withholding the papers? Is he an officer who is likely to be charged by Congress with the decision of such a question as the reasonableness of time? Yet his decision, if he shall see fit to withhold the papers, is final and conclusive. It cannot be controlled by a writ of mandamus outside of the District of Columbia. *McIntire* v. *Wood*, 11 U. S. 7 Cranch, 504 (3: 420); *M'Clung* v. *Silliman*, 19 U. S. 6 Wheat. 598 (5: 340). Nor even in the District of Columbia can the courts interfere, either by mandamus or by mandatory injunction, with the decision of an executive officer upon a question involving the exercise of discretion.

Decatur v. *Paulding*, 39 U. S. 14 Pet. 497 (10:609); *Gaines* v *Thompson*, 74 U S. 7 Wall. 347 (19: 62); *Litchfield* v. *Richards* (*Litchfield* v. *Register and Receiver*), 76 U. S. 9 Wall. 575 (19: 681); *United States, Redfield*, v. *Windom*, 137 U. S. 636 (34: 811); *United States, International Contracting Co.*, v. *Lamont*, 155 U. S. 303 (39: 160); *Seymour* v. *United States, South Carolina*, 2 App. D. C. 240 and cases cited.

Yet, if reasonableness of time is the test, it must be the collector who is to decide it. It cannot be intended that this ruling should be reviewed upon a jury trial afterwards.

The learned district judge, in attempting to escape from the manifest impossibility of a literal interpretation of the statute, fell into another untenable position. It is impossible to believe that Congress intended to give the importer a choice of forum while denying that privilege to the United States. It is almost as hard to believe that Congress intended to make the right to review when the payment is not made within ten days dependent upon the permission of the collector, or even of his superior, the Secretary of the Treasury.

If, however, this court shall adopt Judge Townsend's theory, and thus in effect give the Secretary of the Treasury the right to impose a limit by general regulation upon the time

within which the importer may obtain a review in such cases, the decision in the case at bar will avoid the evils, feared by Secretary Foster and Attorney General Miller, as shown by their correspondence above quoted.

Mr **Edwin B. Smith,** for appellees:

The statute does not impose suggested limitation.

From February 26, 1845—when the act passed "a few days" (*Knoedler* v. *Schell*, 4 Blatchf. 428) after the majority decision in *Cary* v. *Curtis*, 44 U. S. 3 How. 236 (11: 576), took effect—the right of an importer to recover excess of duties illegally exacted has rested upon statutes, by which it is created, limited, and defined.

"The act in question was passed to change the law announced by that decision."

Kriesler v. *Morton*, 2 Curt. C. C. 241.

The importer's right "is regulated, as to all its incidents, by express statutory provisions."

Arnson v. *Murphy*, 109 U. S. 238, 243 (27: 920, 922); *Marine* v. *Lyon*, 62 Fed. Rep 153, 10 C. C. A. 318; *Birtwell* v. *Saltonstall*, 14 C. C. A. 205, 63 Fed. Rep. 1004, 1007.

There is no room for inference; and if the terms of the statute are not ambiguous, there can be no reasoning from analogy.

Marine v. *Lyon*, 62 Fed. Rep. 153, 10 C. C. A. 317, *207 1-2 lb. Papers S. Tobacco* v. *United States* (*The Cherokee Tobacco*), 78 U. S. 11 Wall. 620 (20: 229); *Knickbocker* v. *People*, *Lutz*, 102 Ill. 221.

Naturally, the estimate generally exceeds the duty assessed, the exceptions to this rule affording no ground for special legislation.

This payment is but preliminary and indefinite, a sum in gross and by estimate, intended to be large enough to cover the actual legal amount of duty, when ascertained.

Moke v. *Barney*, 5 Blatchf. 276.

The natural reading is the intended reading.

Davies v. *Miller*, 130 U. S. 284 (32: 932).

Applying judicial decisions to this section, it becomes evident the protest and the payment were dissevered from each other intentionally, — for a clear, just, obvious purpose.

At any time prior to payment, the collector can reconsider the liquidation, and so reliquidate as to conform to or obviate the objection raised by the protest. If he neglect or refuse to reliquidate, the protesting importer can pay and thereupon the collector "shall transmit the invoice and all the papers," etc., to the board.

Ten days were deemed sufficient time in which to formulate and file an importer's objections to the liquidation, or to determine if it was obnoxious to any; but it was not thought best to set any fixed time limitation to the collector's right to reliquidate, it being morally certain no importer would pay so long as he hoped to change the collector's mind, but could bring the matter before the board by making payment in case of refusal, or unreasonable delay.

Not questioning for a moment that revenue laws (or any other) are to be so construed as to carry out the manifest intention of the legislature, it must be conceded that the sole legislative intent of § 14 was to give a remedy to an importer aggrieved by any decision of a collector; and this was given with full knowledge of the cases declaring that he would be entitled to the benefit of doubtful phraseology and to interpret the language most beneficially for himself.

84 Edinburgh Review, July, 1846, p. 118; *Gurr* v. *Scuds*, 11 Exch. 191; *Hartranft* v. *Weigmann*, 121 U. S. 616 (30: 1015).

Justice Bradley was indubitably right when he declared, in *Barney* v. *Watson*, 92 U. S. 453 (23: 731), the act of 1845 superseded and repealed by the act of 1864. This statement was repeated in the opinion (per Matthews, J.) in *Arnson* v. *Murphy*, 109 U. S 238 (27: 920), where § 3011 is treated as subsequently—"now"—in force, only because it "appears as § 3011 of the Revised Statutes." 109 U. S. 241 (27: 921). The act of 1845 was revived by the misconception of the revisers, not called to the attention of Congress when the entire revision was adopted. This is all that is meant by *United States* v. *Schlesinger*, 120 U. S. 114 (30: 609).

Accordingly, for ten years—from June 30, 1864, to June 22, 1874—there was no statutory requirement of a payment of the duty, under duress of goods or otherwise, as a condition precedent to the review of the collector's assessment for duty.

The right to retain the goods was sufficient to compel payment of the duties or giving satisfactory security therefor. During this decade, a denial of a right to be heard upon the protest prior to payment was not declared by law.

If the purpose were not the same under existing as under previous laws, a notice of appeal would have taken the place of a protest.

The whole purpose of that notice is to give the collector opportunity to revise that decision.

Davies v. *Miller*, 130 U. S. 288 (32: 933); *Davies* v. *Arthur*, 96 U. S. 149 (24: 758); *Heinze* v. *Miller*, 144 U. S. 34 (36: 335).

The natural reading, adopted by Judge Townsend, being the only one which will give collectors the opportunity to consider the objections indicated by the protests to them, should not be departed from.

United States v. *Wiltberger*, 18 U. S. 5 Wheat 95, 96 (5: 42).

There are no such monstrous and absurd consequences involved as to require a departure from the natural and obvious meaning of the words here employed.

Beardstown v. *Virginia*, 76 Ill. 42; *Sneed* v. *Com.* 6 Dana, 339; *Fitzpatrick* v. *Gebhart*, 7 Kan. 47.

What is termed "the policy of the government" with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.

Hadden v. *Barney* (*Hadden* v. *The Collector*), 72 U. S. 5 Wall. 111, 112 (18: 519); *St. Paul, M. & M. R Co.* v. *Phelps*, 137 U. S. 533 (34: 769); *Vidal* v. *Philadelphia*, 43 U. S. 2 How. 198 (11: 234).

The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which fol-

lows as the natural and reasonable effect of their enactments.

Soon Hing v. *Crowley*, 113 U. S. 710 (28: 1147).

What the legislative intention was can be derived only from the words they have used, and we cannot speculate beyond the reasonable import of those words. The spirit of the act must be extracted from the words of the act, and not from conjectures *aliunde*.

Gardner v. *Collins*, 27 U. S. 2 Pet. 93 (7: 359); *Minor* v. *Mechanics' Bank*, 26 U. S. 1 Pet. 64 (7: 55); *Smith* v. *State*, 66 Md. 217.

It is never very safe ground, in the construction of a statute, to give weight to views of its policy which are themselves open to doubt and controversy.

Municipal Permanent Invest. Bldg. Soc. v. *Kent*, L. R. 9 App. Cas. 273; *King* v. *Barham*, 8 Barn. & C. 104.

Courts cannot imagine an intent and bind the letter of the act to it.

Maxwell v. *State*, *Baldwin*, 40 Md. 293; *Hyatt* v. *Taylor*, 42 N. Y. 261, 262; *Frye* v. *Chicago, B. & Q. R. Co.* 73 Ill. 403.

Mr. Justice **Brewer** delivered the opinion of the court:

The question must be answered in the negative. Such answer is demanded by the obvious and natural import of the language, giving to it the ordinary grammatical construction. This is practically conceded by counsel for the government, for he says in his brief: "A literal interpretation of the statute favors the importers;" and again, referring to the opinion of District Judge Townsend, he adds: "Strictly speaking, Judge Townsend is correct in saying that this statute contains no ambignity." There are two separate clauses, each prescribing a condition. One is, "shall within ten days after 'but not before' . . . give notice," etc., and the other, "shall pay the full amount of the duties," etc. In the latter no time is mentioned, and the clauses being independent, there is no grammatical warrant for taking the specification of time from the one and incorporating it in the other.

The primary and general rule of statutory construction is that the intent of the lawmaker **103**] is to be found in the *language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense (*Holy Trinity Church* v. *United States*, 143 U. S. 457 [36: 226]); it involves no injustice, oppression, or absurdity (*United States* v. *Kirby*, 74 U. S. 7 Wall. 482 [19: 278]; *McKee* v. *United States*, 164 U. S. 287 [41: 437]); there is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other. *Non constat* but that Congress believed it had sufficiently provided for payment by other legislation in reference to retaining possession until payment or security therefor; or that it failed to appreciate the advantages which counsel insists will inure to the importer in case payment does not equally with protest follow within ten days from the action of the collector; or that, appreciating fully those advantages, it was not unwilling that he should enjoy them. Certainly there is nothing which imperatively requires the court to supply an omission in the statute, or to hold that Congress must have intended to do that which it has failed to do. Under these circumstances, all that can be determined is that Congress has not specifically provided that payment shall be made within ten days as one of the conditions of challenging the action of the collector, and hence there is no warrant for enforcing any such condition. *An answer in the negative must therefore be certified to the Circuit Court of Appeals.*

COMPANIA DE NAVIGACION LA FLECHA [104

v.

WILLIAM W. BRAUER and Frederick C. Brauer, Copartners, Doing Business under the Firm Name of W. W. Brauer & Company, and the Reliance Marine Insurance Company, Limited, of Liverpool, *Appts.*

(See S. C. Reporter's ed. 104-124.)

Exceptions in bill of lading—negligence of carrier or his servant—question of fact—liability for cattle thrown overboard—on deck at owner's risk—wrongful jettison—barratry.

1. Exceptions in a bill of lading or charter party, inserted by the shipowner for his own benefit, are to be construed most strongly against him.
2. An exception, in a bill of lading, of perils of the sea or other specific perils, does not excuse the carrier from the obligation to use due care and skill in navigating the vessel and in carrying the goods, or exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants has contributed.

NOTE.—*From what liability a contract that a common carrier is not to be responsible for loss or damage will exonerate*, see note to New Jersey Steam Nav. Co. v. Merchants' Bank, 12: 465.

As to liability of common carrier for goods to be transported beyond termination of its line, see note to New York C. R. Co. v. Lockwood, 21: 627.

As to delivery by common carrier by water, see note to Richardson v. Goddard, 16: 412.

As to what is included in baggage for which carrier is responsible, see note to Hannibal & St. J. R. Co. v. Swift, 20: 423.

As to how far consignment of goods vests the property in consignee, and to whom is the carrier responsible for loss or injury, see note to Grove v. Brien, 12: 1142.

As to common carrier of live animals; duty and liability of,—see note to New York, L. E. & W. R. Co. v. Estill, 37: 292.

As to what is barratry, see notes to Waters v.

8. Concurrent decisions of the courts below upon a question of fact are to be followed unless clearly shown to be erroneous.

4. A carrier is liable for the loss of sound and uninjured cattle forcibly thrown or driven overboard in rough weather by order of the master of the ship, from unfounded apprehension on his part, in the absence of any pressing peril to the ship, and without apparent or reasonable necessity for their jettison, or any attempt to separate them from those which had already been injured by perils of the sea, although the bill of lading provides that they shall be carried on deck at the owner's risk, and that the ship is not liable for "accident to or mortality of the animals, from whatever cause arising," or for loss or damage due to perils of the sea, barratry, or by "accidents of navigation, of whatsoever kind, even when occasioned by the negligence or default or error in judgment of the pilot, master, mariners, or other servants of the shipowner."

5. The words in the bill of lading, "on deck at owner's risk," do not cover risks from all causes whatsoever, including negligent or wilful acts of the master and crew.

6. The wrongful jettison of the sound cattle by the act of the carrier's servants is neither an "accident to or mortality of the animals," nor "loss or damage occasioned by causes beyond his control, by the perils of the sea," nor a loss or damage "by collision, stranding, or other accidents of navigation."

7. Intentional fraud or breach of trust, or wilful violation of law, is necessary to constitute barratry.

[No. 39.]

Argued March 29, 30, 1897. Decided October 25, 1897.

ON A WRIT of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree of that court affirming the decree of the District Court of the United States for the Southern District of New York in favor of William W. Brauer *et al.*, libellants, against Compania de Navigacion la Flecha for the value of cattle cast overboard or negligently suffered to go overboard from the vessel Hugo. *Affirmed.*

See same case below, 57 Fed. Rep. 403, 61 Fed. Rep. 860, 35 U. S. App. 44.

Statement by Mr. Justice **Gray:**

This was a libel in admiralty in the district court of the United States for the southern district of New York by William W. Brauer and Frederick C. Brauer, residing and doing business as partners under the name of William W. Brauer & Company at Richmond in the state of Virginia, and by the Reliance Marine Insurance Company, Limited, of Liverpool, a corporation organized under the laws of Great Britain, against the Compania de Navigacion la Flecha, a corporation organized under the laws of Spain, and owner of the steamship Hugo, to recover for the loss of cattle shipped by the partnership October 24, 1891, on deck of the Hugo at New York for Liverpool under a bill of lading, the material parts of which are copied in the margin, the parts there *printed in ordinary type being in print,[105 and those in italics being in writing, in the original.†

The libel alleged that the vessel, having one hundred and*sixty-five head of live cattle[106 on board, sailed for the port of Liverpool on October 24, 1891; that "about October 31, 1891, the said vessel having encountered some rough weather, the master and crew of said vessel

Merchants' Louisville Ins. Co. 9: 692, and New Orleans Ins. Co. v. Albro Co. 28: 809.

As to bill of lading, how far may be varied, contradicted, or explained by parol evidence; effect of,—see note to King v. The Lady Franklin (The Lady Franklin), 19: 455.

As to duty to furnish cars for transportation and safe mode of delivery; duty to feed and water stock; responsibility of forwarding by connecting line; damages for failure to transport; liability for delay in shipment and delivery; liability for miscarriage and wrongful delivery; damages for negligent loss or injuries; notice of claim for damages; not liable for accidents; contracts limiting liability,—see note to Duntley v. Boston & M. R. Co. (N. H.) 9 L. R. A. 449.

As to extraordinary unloading of live stock in transitu, see note to Illinois C. R. Co. v. Petersen (Miss.) 14 L. R. A. 550.

As to duty as to loading live stock, see note to Benson v. Gray (Mass.) 13 L. R. A. 262.

†Received in apparent good order and condition, by the *Spanish steamer Hugo*, from *Wm. W. Brauer & Co.*, to be transported by the good steamship *Hugo*, now lying in the port of New York, and bound for *Liverpool, one hundred and sixty-five live cattle on deck. On deck at owner's risk, steamer not to be held accountable for accident to or mortality of the animals from whatever cause arising;* being marked and numbered as per margin (weight, quality, contents, and value unknown), and to be delivered in like good order and condition at the port of *Liverpool* (or so near thereto as she may safely get) unto *shippers' order* or to his or their assigns. *Freight prepaid in New York.* General average payable according to York-Antwerp rules.

It is mutually agreed that the ship shall have liberty to sail without pilots; to tow and assist vessels in distress; to deviate for the purpose of saving life or property; that the carrier shall have the liberty to convey goods in lighters to and from the ship at the risk of the owners of the goods; and, in case the ship shall be put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the goods to their destination by any other steamship.

It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters; by fire from any cause and wheresoever occurring; by barratry of the master or crew; by enemies, pirates, or robbers; by arrest and restraint of princes, rulers, or people, riots, strikes, or stoppage of labor; by explosion, bursting of boilers, breakage of shaft, or any latent defect in hull or machinery or appurtenances; by collisions, stranding, or other accidents of navigation of whatsoever kind (even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner, not resulting, however, in any case, from want of due diligence by the owners of the ship, or any of them, or by the ship's husband or manager); nor by decay, heating, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or the insufficiency of packages nor for land damage; nor for the obliteration, errors, insufficiency, or absence of marks or numbers, address or description; nor for risk of craft, hulk, or transhipment; nor for any loss or damage caused by the prolongation of the voyage.

. . . . . .

14. Also, that this contract shall be governed by British law, with reference to which law this contract is made.

And, finally, in accepting this bill of lading, the shipper, owner, and consignee of the goods, and the holder of the bill of lading, agree to be bound by all of its stipulations, exceptions, and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee, or holder.

became panic stricken, and drove overboard one hundred and twenty-six head of cattle; the said vessel did not incur any extraordinary or unusual stress of weather, and the act of said master and crew in driving overboard said cattle was wholly unnecessary, and the loss of said cattle was due to the incompetency and lack of skill of the master and crew;" that the vessel afterward arrived safely at Liverpool, and delivered to the shippers or their agents thirty-eight of the cattle in good condition, one having died; and that the insurance company, having insured the cattle, paid the partnership for the loss, and took an assignment of its rights of action against the steamer and her owners.

The answer alleged that the receipt, transportation, and delivery of the cattle were subject to the terms and conditions of a contract between the shippers and respondents, dated October 10, 1891 (which is copied in the margin†), **107**] and of the *bill of lading; admitted the sailing of the vessel with the cattle on board, and a loss of the cattle; denied the other allegations of the libel; and contained the following averments:

108] *"Further answering the said libel, the respondent avers that by the terms and conditions of the contract and bill of lading, under which the said cattle were received for transportation and delivery it was provided that the carrier should not be liable for loss or damage occasioned by causes beyond his control, by the perils of the seas or other waters, or by other accidents of navigation, even when occasioned by the negligence, default, or error in judgment of the master, mariners, or other servants of the shipowner, and that the cattle were carried on deck at the owner's risk, and under a special provision that the steamer should not be held accountable for accident to or mortality of the animals from whatsoever cause arising. There was a further provision that the contract should be construed and governed by the law as administered in the courts of Great Britain, with reference to which law the contract was stated to be and was made.

"And the respondent avers that the loss of said cattle was due to the perils of the sea encountered upon the said voyage, which broke certain of the cattlehouses and set the cattle adrift, and that during the continuance of the perils, and by reason thereof, certain of the cattle were washed overboard, and others were thrown about the deck, bruised and with broken limbs, and reduced to a dead, dying, or hopeless condition, and that upon such being taken to the gangways, they were washed over by the seas."

"And the respondent avers that the care given to said cattle was according to the best judgment of the master of said steamer, and that if he erred in his judgment or was in any degree negligent, which the respondent denies that still this respondent is absolved from accountability and responsibility by reason of the terms of the bill of lading; and also that, by the law as administered in the courts of Great Britain, the respondent, being itself without fault, is validly, under the terms of the said contract and bill of lading, absolved from all responsibility for any negligent or improper act or conduct on the part of the master, mariners, or other servants of the respondent."

It was stipulated by counsel "that the English judicial *decisions, as contained in [**109** the printed decisions of the law or admiralty courts, may be referred to by either party as evidence of the English common or maritime law as administered in the English courts."

†White Star Line. Cattle contract—Memorandum of agreement concluded at New York the 10th day of October, 1891, between H. Maitland Kersey, agent of the Spanish steamer Hugo, and Messrs. William W. Brauer & Co. of Richmond, Virginia.

The agent agrees to let to the said shipper suitable space, as undernoted, for the transportation of live cattle; this is to say:

On the steamer Hugo, intended to sail from New York about Oct. 24, 1891, for Liverpool, England.

For about one hundred sixty live cattle on the upper deck.

No other cattle to be carried this voyage.

The shipper agrees to ship all the cattle, as above mentioned, at the rate of 50 shillings, British sterling, for each animal shipped on open decks.

The shipper especially agrees to prepay freight on the above-mentioned shipments on date of sailing, in current funds at the rate for which prime bankers are selling sight bills on London, on the number of cattle shipped at New York, vessel lost or not lost, and irrespective of the number landed at the port of destination, and the shipper assumes all risk of mortality or accident, however caused, throughout the voyage.

Stalls to be put up at the ship's expense, and to be constructed to the satisfaction of the inspector or underwriters interested, and to the satisfaction of shipper, who will assume all responsibility for same and for various appliances for ventilation after shipment of cattle.

The steamer undertakes to supply sufficient good condensed or fresh water for the use of the animals during the voyage; also, water casks and hose.

Steamer to provide space, free of charge, for corn and strictly compressed fodder for animals, but freight, if demanded, shall be payable on any unusual excess of fodder landed at port of destination. If fodder be supplied that is not strictly compressed, a proportionate quantity may be carried on deck.

Steamer to supply suitable gangways and elevators for loading cattle.

Steamer to give free passage, over and back, and to supply bedding to drovers in charge of animals (not exceeding one man to every thirty cattle), and if not returning direct to port of sailing, to provide free intermediate passage back for foreman, and free steerage passage back for other attendants, by first available steamer of this line.

Steamer to give six running days' notice of her intended departure, and twelve hours' notice of the hour the cattle must be delivered to her, but such notices to be given or received are subject to become inoperative in case of strike or stoppage of labor.

Steamer guarantees to sail as soon after shipment of all the animals as tide and weather permit, or pay expenses of keep of animals at the rate of 50c. per head per day in full.

Steamer has privilege of exceeding her net register of tonnage in grain, upon paying to shippers the extra premium charged by the underwriters with whom the animals are insured.

Shippers to deliver cattle to the vessel between sunrise and sunset, at the dock or in the stream, at their option.

Shippers guarantee to deliver animals by expiry of notice, provided vessel is ready for them, or to pay for detention of steamer at the rate of £50 per day.

In case of nonarrival of vessel in time to sail from New York on or before November 4, 1891, shipper has option of cancelation.

The line form of live-stock bill of lading to be used for cattle shipped under this contract, and its conditions to govern any questions not provided herein, subject to U. S. government inspection.

Any dispute arising under this contract to be settled by arbitration in the usual way.

Dated New York, October 10, 1891.

H. Maitland Kersey.
Wm. W. Brauer & Co.

The conclusions of fact of the district judge were summed up in his opinion as follows:

"During three days from October 30 to November 1 inclusive, the vessel met heavy weather during which there was heavy rolling of the vessel. The cattle were in pens on deck; a few were forward under or near the turtle back, which were saved; the rest were in the vicinity of Nos. 3 and 4 hatches forward and aft of the engine room in pens built in the wings on the port and starboard sides of the ship, all of which were lost. The storm was heaviest on the afternoon and night of Saturday the 31st, the wind and seas coming first and heaviest from the northwest, but on Saturday hauling to the northward and to the east northeast, with cross seas. Some slight damage was done to a few pens on the 30th; more were broken on Saturday the 31st; but these were repaired, and the cattle put in place toward nightfall. About 5 o'clock on that day the after gangways were opened on each side, and about ten or twelve cattle that had become maimed and helpless were sent overboard through those gangways. The chief loss was during that night and the following morning, when, shortly after daylight, the captain gave orders to open the forward gangways also, and the whole deck was cleared of all the cattle, save the thirty-nine under the turtle back."

"Upon the whole testimony in this pitiful case, I am not disposed to pronounce any unfavorable judgment upon the handling of the ship by the master. His record as a master appears to have been good, and on any doubtful question of navigation he is entitled to the benefit of his record. He had some, though not large, experience in the transportation of cattle; and the experts called by each party place so much stress upon the special circumstances of the situation, the quality of the ship, and the necessary determination of the master's own judgment at the time, that, in the 110]circumstances *testified to, I do not find any conclusive proof adverse to the master's judgment as to the navigation of the ship.

"The evidence leaves not the least doubt in my mind, however, that the sacrifice of a considerable number of live cattle that were not maimed or substantially hurt was made on the morning of Sunday, the 1st of November, not from any pressing necessity, but solely from mere apprehension; and I am further persuaded that there was no reasonable or apparent necessity for the sacrifice. It was morning. The night was past. No one testifies to any pressing peril to the ship. The log does not hint of it. No reason appears why such cattle as could go about, and were actually going about, should not have been cared for and preserved. There was plainly no effort made to separate the sound from the unsound. Even the master says in answer to the question, 'Were these cattle standing up that went overboard? Answer. They were down. Some may have been up. I don't know.' His object plainly was to clear the deck of all the cattle from No. 3 aft, with no attempt to discriminate or save any. His state of mind is shown by his concluding words, 'We breathed happy when we saw it open' (No. 3 hatch)."

The district judge was of opinion that the stipulations of the bill of lading, so far as they undertook to exempt the respondent from accountability for the negligence of the master or crew, though valid by the law of England, were invalid by our law; and therefore decreed "that the libellants recover damages for such of the oxen as were of any market value and not fatally wounded or maimed at the time when the houses and cleats provided for them were designedly torn up, and which oxen were cast overboard or negligently suffered to go overboard through the open gangways on the morning of November 1st, and on the evening of the night previous;" and referred the case to a commissioner to ascertain and report the amount of such damage. 57 Fed. Rep. 403.

The commissioner reported that sixty-three of the cattle were thus voluntarily and unnecessarily sacrificed, and assessed damages for that number of cattle. The district court confirmed his report, and entered a decree accordingly for the libellants. 61 Fed. Rep. 860.

*Both parties appealed to the circuit [111 court of appeals, which adopted the conclusions of fact of the district court, and affirmed the decree upon the ground that the case was not within the exceptions in the bill of lading. 35 U. S. App. 44.

The respondent applied for and obtained a writ of certiorari from this court.

Mr. **Wilhelmus Mynderse** and *Messrs. Butler, Notman, Joline, & Mynderse,* for Compania de Navigacion la Flecha:

The action is prosecuted in the courts of the United States in attempted evasion of the agreement "that the contract shall be governed by British law."

The libellants, attracted apparently by the decision in the case of *The Brantford City,* 29 Fed. Rep. 373, have sought to build a similar case against the respondent, and have come far out of their way to bring suit in the same jurisdiction.

Liverpool was the port of destination. It was there that the insurance company, the principal libellant herein, and the only libellant that profits by the decree, had its principal offices, and it was there that the claim should have been presented and pressed, if presented and pressed at all.

Apparently no claim was presented there. But six months later the insurance company came to New York and instituted this suit.

They did not even have the excuse of coming here to enforce a lien upon the Hugo. The Hugo was not here. Jurisdiction over the respondent was obtained by attaching the steamer Enrique.

The libellants did not make proper provision for the cattle.

By the terms of the contract the steamer was to supply space, stalls, water for the cattle, and free transportation for the drovers in charge, not exceeding one man for every thirty cattle. The stalls were to be put up at the expense of the steamer to the satisfaction of the shippers, who agreed to assume all responsibility. There is no dispute that the stalls were properly constructed.

The shippers sent six men with their cattle

only two of these men have been produced as witnesses.

So conspicuously did the cattlemen abandon their posts and leave the burden of caring for the cattle upon the seamen, that the seamen claimed wages for performing the duties of the cattlemen.

The storm encountered by the Hugo was one of notable severity, and the losses of the cattle were due to the perils incident to the storm.

The steamer was intelligently and prudently managed and navigated during the storm

The opinion of the district judge and the opinion delivered by the majority of the judges of the circuit court of appeals are in error as to facts.

The proofs establish that efforts to preserve the cattle were made as long as efforts were in any way reasonable or practicable

But with the storm then raging and threatening to become worse, we submit that the judges below had no right to impose upon the master the duty of separating "the sound from the maimed." Such a requirement goes beyond the bounds of the practicable.

Who was to determine whether a beast was sound or injured? How was such person to measure the extent of the injuries? Was he bound to go among the struggling beasts on a wave swept deck?

We urge that it cannot be held that a single sound beast, or a beast with any commercial value, was lost negligently

The loss of those who went through the gangway was not a negligent loss; it was a loss incident to the gangways being open, open that the vessel might be freed from the dead and wrecked cattle.

The fact that the loss was a large one does not carry any presumption that it was a negligent loss.

Losses of cattle are incident to the business of transporting live cattle at sea They are losses that the libellant insurance company should be content to bear.

The law of Great Britain should be applied to the construction of the contract as set forth in the bill of lading, and the courts have erred in omitting to apply such law.

In the bill of lading the following provisions are found:

This contract shall be governed by the British law, with reference to which law this contract is made.

On October 10, 1891, two weeks before the bill of lading was issued, a contract had been made for the shipment of cattle "on the upper deck." That contract provided that this very bill of lading should be used, and specifically provided that the shipper "assumed all risks of mortality or accident, however caused, throughout the voyage."

In a recent case, it was held by this court that a similar preliminary contract was a mere memorandum between the parties, and that the relations of the parties were to be governed by the provisions of the bill of lading.

The Caledonia, 157 U. S. 124, 139 (39: 644, 649).

The general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country.

Liverpool & G. W. Steam Co. v. *Phenix Ins. Co.* (*The Montana*), 129 U. S. 397, 458 (32: 788, 798).

The court held in that case that there was nothing to indicate that the contracting parties looked to any other law than the law of the United States.

In the case under consideration, however, it is apparent that the parties did look to the law of England, that they deliberately chose it; that it was not an exaction from a shipper by a carrier, but that it was in accord with a preliminary contract, freely made and unobjected to

The cattle were destined to an English port. It was fitting that reference should be made to the law of that port. Any differences between shippers and shipowners would naturally be submitted to the law of the place where their relations terminated.

Moreover, the Reliance Marine Insurance Company (Limited), which represents the entire interest of the libellants, is a British corporation having its principal office in Liverpool, the port of the Hugo's destination.

The validity of the provisions of the bill of lading should be determined by the standard of what is "just and reasonable in the eye of the law"

New York C. R. Co v. *Lockwood*, 84 U. S. 17 Wall. 357, 380, 382 (21. 627, 640, 641).

It is just and reasonable to apply the British law—the law of the port of destination

The district judge declined to enforce the English law upon the ground that the stipulation in the bill of lading providing for the application of the British law was invalid as against the public policy of the United States.

A similar provision has, however, been sustained in the district court of Maryland.

The Oranmore, 24 Fed. Rep. 922, 927

The United States circuit court of appeals avoided any discussion of the application of the British law, disregarding certain of the exemption clauses, and holding in respect to others that the facts did not render the question of applying the British law material.

The case of *Oscanyan* v. *Winchester Repeating Arms Co.* 103 U. S. 261 (26: 539), which has been cited in opposition, is not pertinent, for the reason that the suit was founded on a *turpis causa*, arising and performed wholly within the United States; nor is the case of *Rousillon* v. *Rousillon*, L. R. 14 Ch. Div. 351, for the reason that the contract there sued upon was in fact enforced.

The provision in the bill of lading that the contract be governed by British law is not invalid.

It cannot be fairly said that there is a question in the case whether or not it is against the public policy of this country to permit a carrier by sea to exempt himself from the conse-

quences of his servants' negligence or error. The real question is whether it is against the public policy of this country to permit shipowner and shipper to agree in New York that their contract for a shipment of cattle from New York to England shall be construed according to the place where the final performance of the contract takes place, and where, if anywhere, differences as to the performance by the carrier of his engagements would naturally arise.

It is especially proper that where a contract relates to transportation on the high seas from one nation to another, the entire transaction not being under the jurisdiction of any one nation, the parties shall declare in their contract the jurisdiction by the laws of which they intend their contract to be governed.

With such declaration made, it is against public policy and against commercial integrity to permit either party, and especially the party with whom the right to select the forum rests, to insist that the law of the forum, and not the law stipulated in the contract, should be applied to the construction of the contract.

It has been said by this court that it is against public policy to permit a carrier to exempt himself from the consequences of the negligence of his servants.

New York C. R. Co. v. *Lockwood*, 84 U. S. 17 Wall. 357, 378 (21: 627, 639).

The rule has been extended from the strict obligations resting upon a carrier by land to cover those of a carrier by sea.

Liverpool & G. W. Steam Co. v. *Phenix Ins. Co.* (*The Montana*), 129 U. S. 397 (32: 788).

At the time this latter decision was made there was no legislative distinction between the obligations and rights of a carrier by sea and of a carrier by land.

Nor, indeed, was there any such distinction at the time these cattle were shipped upon the Hugo. But Congress, with whom certainly rests the right to declare the public policy of a country, have since that date passed an act which provides in terms that:

"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters," etc.

27 Stat. at L. 445, chap. 105, § 3.

The owners of the Hugo exercised "due diligence" in the selection of a master.

If, therefore, this loss had occurred subsequent to July 1, 1893, there would have been no recovery for the libellants under the laws of the United States.

Prior to July 1, 1893, there could be no recovery for the libellants according to the laws of Great Britain, and to those laws they should be remitted.

If this court will not re-examine the facts, and accepts the facts as found by a majority of the judges of the circuit court of appeals, still no liability rests upon the shipowner for the loss of libellants' cattle under the contract of shipment, such contract being covered by the law of Great Britain.

There are several exemption clauses to be considered.

It was recited in the bill of lading that the cattle were shipped "on deck at owner's risk."

That such a provision should be made respecting a shipment of live animals to be transported on the deck of a freight steamer across the Atlantic, at a tempestuous season of the year, was eminently proper, and due allowance for the risks assumed by the owner of the cattle was undoubtedly made in the rate of freight at which the cattle were accepted for carriage.

In the case of *Burton* v. *English*, a similar clause "The steamer shall be provided with a deck cargo if required at full freight, but at merchant's risk" was considered by the judges of the Queen's bench division, who substantially held that it relieved the shipowner from all responsibility for the acts of his servants, except responsibility to contribute in general average in case of lawful jettison or other lawful sacrifice.

Burton v. *English*, L. R. 12 Q. B. Div. 218, 219, 220.

Justice Bowen said, respecting the clause: "Now, that clearly is a stipulation in favor of the shipowners, and prima facie it seems to me meant to relieve them from the responsibility of some act of their servants by which they would otherwise be bound, and from the incidents of some risk which otherwise would fall upon them as carriers and under their contract of carriage. It would, I think, clearly cover improper jettison, also it would cover negligence of the captain or crew, occasionally stranding or collision, and any other acts, if any there be, of the servants of the shipowners for which they would otherwise be responsible."

Burton v. *English*, L. R. 12 Q. B. Div. 218, 223; *Lewis* v. *Great Western R. Co.* L. R. 3 Q. B Div. 195; *McCawley* v. *Furness R. Co.* L. R. 8 Q. B. 57.

A further clause of exemption is contained in the words: "Steamer not to be held accountable for accident to or mortality of the animals, from whatever cause arising."

The Caledonia, 157 U. S. 124, 139 (39: 644, 649).

That such an exemption is reasonable is now recognized by our own statutes.

27 Stat. at L. 445, chap. 105, § 3.

Barratry in a contract of carriage bears a different meaning than does the same word in a contract of insurance.

Carver, Carriage by Sea, 2d ed. pp. 107–109, §§ 99, 100.

If the immediate cause of loss is to be deemed an accident of navigation, the shipowner is freed from liability, even though such accident was remotely due to the negligence, default, or error in judgment of the pilot, master, or mariners of the ship.

Carver, Carriage by Sea, 2d ed. p. 110, § 101; *The Duero*, L. R. 2 Adm. & Eccl. Rep. 393; *Grill* v. *General Iron Screw Collier Co.* L. R. 1 C. P. 600; *The Cressington*, [1891] P. 152.

It is a matter of peculiar interest that this court should declare the effect of a clause which provides that the bill of lading should be governed by a law other than the law of the place of issue.

The question has arisen in numerous cases, but there is as yet no authoritative decision in any appellate tribunal.

The clause has been sustained as valid in the district court of the United States for the district of Maryland.

The Oramore, 24 Fed. Rep. 922.

It has been rejected as invalid in the district court of the United States for the southern district of New York, and in the district court of the United States for the district of Massachusetts.

The Brantford City, 29 Fed. Rep. 373, 396; *The Guildhall*, 58 Fed. Rep. 796; *The Iowa*, 50 Fed. Rep. 561.

No appellate tribunal has passed upon the validity of the clause, and no certainty can be felt by the enormous commercial and shipping interests using bills of lading until the question has been adjudicated in this court.

There is not involved any question as to abandoning the declarations of public policy already made by this court respecting the exemption of a carrier from the consequences of his servants' negligence.

There is not involved even the question of a modification of such declarations, because of the provisions of the Harter act.

27 Stat. at L. 445, chap. 105.

There is not involved any question of introducing the law of a foreign country for the construction of the terms of contracts made and performed here.

The question is whether a shipper and a shipowner may, in contracting here for the transportation of cargo from this country to a foreign country, validly stipulate that any disputes or differences under the contract shall be determined by the law of the country where the shipment is to be delivered.

We submit that it is "reasonable and just in the eye of the law" for the parties to agree to submit their rights to the law of the place where their relations will naturally terminate. If the court holds that such a stipulation is "reasonable and just in the eye of the law," then the contract must be sustained, even though such foreign law does differ from the law of the United States.

New York C. R. Co. v. *Lockwood*, 84 U. S. 17 Wall. 357, 380, 384 (21: 627, 640, 642).

No question has ever been raised in either pleadings or proofs as to the regularity of the clause in the bill of lading.

Mr. **W. W. MacFarland** and *Messrs. MacFarland & Parkin*, for Brauer *et al.:*

The burden of proof was upon the ship to justify the nondelivery of the cattle according to the contract for carriage. As to this point there is not understood to be any contention, the rule is perfectly well settled.

Wheeler, Carriers, 252, 253; *The E. M. Norton*, 15 Fed. Rep. 686; *Marx* v. *Britannia*, 34 Fed. Rep. 906; *Speyer* v. *The Mary Belle Roberts*, 2 Sawy. 1; *Cumming* v. *Barracouta*, 40 Fed. Rep. 498; *The Newark*, 1 Blatchf. 203; *The Sloga*, 10 Ben. 316; *The Shand*, 10 Ben. 300; *The Mangalore*, 23 Fed. Rep. 462; *The Juniata Paton*, 1 Biss. 17; *The Tangier*, 82 Fed. Rep. 230; *The Mascotte*, 48 Fed. Rep. 119.

It is equally well settled that those provisions of the bill of lading which purport to exempt the carrier from the negligence or misconduct of master and mariners are void, and that the device of referring the validity and construction of such provisions to a foreign law does not make them valid. The courts of no country give effect to terms in a contract which are contrary to the public policy of their own jurisdiction.

Liverpool & G. W. Steam Co. v. *Phenix Ins. Co.* (*The Montana*), 129 U. S. 397 (32: 788); *The Iowa*, 50 Fed. Rep. 561; *The Energia*, 56 Fed. Rep. 124; *Lewisohn* v. *National S. S. Co.* 56 Fed. Rep. 602.

These pens were built according to the regulations prescribed under the act of 1891. The corner stanchions, inside the rail underneath the turtle back, were 4×6. They were fastened by 2-inch stuff on the forward end as a bulkhead. The floors were composed of 2-inch spruce.

A copy of the regulations is handed up with this brief, and it will be seen that the pens are so constructed as to resist the severest storms and protect the cattle from injury from the seas.

Cattle pens are intended to be strong enough to withstand any sea known to experience, and if any sea were violent enough to break them down, it would have devastated the deck if it did not sink the ship; but they say it spared everything but the pens.

The storm was not severe enough to do any material damage either to cattle or ship.

It is conclusively established by the evidence for the libellants, confirmed by the evidence for the respondents, that when the engine was stopped on the afternoon of the 31st at 2:30, and as late as least as 5 P. M., the sea had done no substantial damage to ship or cattle pens; that what damage had been done had been repaired, and the cattle put back in their pens. And having safely reached this point the rest of the journey to the conclusion is very short and easy.

The burden is on the respondent, and it must pay for all cattle not shown to have been dead when thrown overboard. It does not relieve itself from liability by showing that some were destroyed by sea perils, unless it shows how many.

Cumming v. *The Barracouta*, 40 Fed. Rep. 498; *Speyer* v. *The Mary Belle Roberts*, 2 Sawy. 1.

Mr. Justice **Gray** delivered the opinion of the court:

The contract sued on was made in October, 1891, more than a year before the passage of the Harter act, and the case is unaffected by its provisions. Act of February 13, 1893, chap. 105 (27 Stat. at L. 445).

By the law of this country, before that act, as declared upon much consideration by this court, common carriers, by land or sea, could not, by any form of contract with the owner of property carried, exempt themselves from responsibility for loss or damage arising from negligence of their own servants; and any stipulation for such exemption was contrary

to public policy and void. *New York C. Railroad Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357 [21: 627]; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397 [32: 788].

By the modern decisions in England, on the other hand, made since it has become to us a foreign country, common carriers, except so far as controlled by the provisions of the railway and canal traffic act of 1854, were permitted to exempt themselves by express contract for responsibility for losses occasioned by negli-
118]gence of their *servants. *Peek* v. *North Staffordshire Railway*, 10 H. L. Cas. 473, 493, 494; *Steel* v. *State Line Steamship Co.* L. R. 3 App. Cas. 72; *Manchester, S. & L. Railway* v. *Brown*, L. R. 8 App. Cas. 703; *In re Missouri Steamship Co.* L. R. 42 Ch. Div. 321; *The Cressington*, [1891] P. 152.

In the case at bar, the decision of the district judge proceeded upon the ground that any stipulation directly exempting the carrier from all liability for negligence of his servants being void by our law as against public policy, the equivalent stipulation that the contract should be governed by the law of England was equally void, and could not be enforced in the courts of the United States. That decision is in accordance with the previous decision of the same judge in *The Brantford City*, 29 Fed. Rep. 373, and with several subsequent decisions of his. *The Energia*, 56 Fed. Rep. 124; *The Guildhall*, 58 Fed. Rep. 796; *Botany Worsted Mills* v. *Knott*, 76 Fed. Rep. 582. The like view has been taken by Judge Nelson in the district of Massachusetts in *The Iowa*, 50 Fed. Rep. 561; by Judge Benedict in the eastern district of New York in *Lewisohn* v. *National Steamship Co.* 56 Fed. Rep. 602; and by Judge Butler in the eastern district of Pennsylvania in *The Glenmavis*, 69 Fed. Rep. 472. See also *Oscanyan* v. *Winchester Repeating Arms Co.* 103 U. S. 261 [26: 539]; *Hamlyn* v. *Talisker Distillery*, [1894] A. C. 202, 209, 214; *Rousillon* v. *Rousillon*, L. R. 14 Ch. Div. 351, 369.

But it is unnecessary to express a decisive opinion upon the validity of the contract, because, assuming it to be valid and to govern the case, this court concurs with the circuit court of appeals in the opinion that the respondent was liable for the loss in question.

Exceptions in a bill of lading or charter party, inserted by the shipowner for his own benefit, are unquestionably to be construed most strongly against him. *The Caledonia*, 157 U. S. 124, 137 [39: 644, 648]; *The Majestic*, 166 U. S. 375, 386 [41: 1039, 1043]; *Norman* v. *Binnington*, L. R. 25 Q. B. Div. 475, 477; *Baerselman* v. *Bailey* [1895] 2 Q. B. 301, 305.

By the laws of both countries, the ordinary contract of a common carrier by sea involves an obligation on his part to use due care and skill in navigating the vessel and in carrying the goods; and an exception, in the bill of lad-
119] ing, of perils *of the sea, or other specified perils, does not excuse him from that obligation, nor exempt him from liability for loss or damage from one of those perils, to which the negligence of himself or his servants has contributed.

This rule of construction was fully established in this court before it had occasion to decide the question whether it was within the power of the carrier by express stipulation to exempt himself from all responsibility for the negligence of himself or his servants.

In the leading case of *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 47 U. S. 6 How. 344 [12: 465], a crate of William F. Harnden, in which was money belonging to the bank, was shipped upon a steamboat of the navigation company under an agreement stipulating that "the said crate, with its contents, is to be at all times exclusively at the risk of the said William F. Harnden; and the New Jersey Steam Navigation Company will not, in any event, be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, notes, bills, evidences of debt, or property of any and every description, to be conveyed or transported by him in said crate, or otherwise, in any manner, in the boats of the said company." This court held that the navigation company was not thereby exonerated from loss by fire arising from the negligence of that company or its servants; and the reasons for the decision were stated by Mr. Justice Nelson as follows: "The special agreement, in this case, under which the goods were shipped, provided that they should be conveyed at the risk of Harnden; and that the respondents were not to be accountable to him or to his employers, in any event, for loss or damage. The language is general and broad, and might very well comprehend every description of risks incident to the shipment. But we think it would be going farther than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands. . . . If it is competent at all for the carrier *to stipu-[**120** late for the gross negligence of himself, and his servants or agents, in the transportation of the goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties." 84 U. S. 6 How. 383, 384 [12: 482]. See also *The Hornet* [*Lawrence* v. *Minturn*], 58 U. S. 17 How. 100 [15: 58]; *Western Transportation Co.* v. *Downer*, 78 U. S. 11 Wall. 129 [20: 160]; *The Syracuse*, 79 U. S. 12 Wall. 167 [20: 382]; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 438 [32: 788, 791].

In England, likewise, it has long been recognized as a settled rule that under a contract to carry goods, containing an exception such as of "breakage or leakage," or of "barratry of the master or mariners," or of "perils of the sea," there still rests upon the carrier, not merely the duty to carry the goods if not prevented by the excepted perils, but also the obligation that he and his servants shall use due care and skill and shall not be negligent in carrying the goods. *Phillips* v. *Clark*, 2 C. B. N. S. 156; *The Helene*, L. R. 1 P. C. 231; *Lloyd* v. *General Iron Screw Collier Co.* 3 Hurlst. & C. 284; *Grill* v. *Same*, L. R. 1 C. P. 600, and L. R. 3 C. P. 476; *Czech* v. *General Steam Navigation Co.* L. R. 3 C. P. 14; *Steel* v. *State Line Steamship Co.* L. R. 3 App. Cas. 72, 87, 88; *Manchester, S. & L. Railway* v. *Brown*,

L. R. 8 App. Cas. 703, 709, 710; *The Xantho*, L. R. 12 App. Cas. 503, 510, 515.

The English case most resembling in its circumstances the case at bar is *Leuw* v. *Dudgeon*, briefly reported in L. R. 3 C. P. 17, note, and more fully in 17 L. T. N. S. 145, by which it appears to have been as follows: Cattle were shipped, some of them on deck, under a bill of lading containing these clauses: "Ship free in case of mortality and from all damage arising from the act of God, the Queen's enemies, fire, accidents from machinery, or boilers, steam, or other dangers of the seas, rivers, roadsteads, or steam navigation whatsoever." "The ship not liable for accident, injury, mortality, or jettison, whether shipped on deck or in the hold." On the vessel putting out to sea, she experienced fine weather and the sea was smooth, but there was a ground swell, and after she had been out some time she suddenly rolled over on her beam ends; the cattle pens gave way, and the cattle fell over to the starboard side, and in **121**] order to save the vessel it was *necessary to throw those on deck overboard. It was held that if the accident was owing to the vessel putting to sea with insufficient ballast, the owners were liable, notwithstanding the exemptions in the bill of lading, which included "jettison" as well as "accidents from dangers of the seas."

In that case, indeed (as in the case in this court of *The Caledonia*, above cited), the fault of the shipowner consisted in sending the ship to sea in an unseaworthy condition. But Mr. Justice Willes, who delivered the leading opinion, laid down the general rule that "the exceptions were intended to save the shipowner from liability for the effects of accident, and not to absolve him from the duty of exercising reasonable diligence." 17 L. T. N. S. 146. And he treated the case as coming within the principle of that rule as affirmed in the cases, above cited, of *Phillips* v. *Clark* and *Grill* v. *General Iron Screw Collier Co.*, in the one of which the clause "not to be accountable for leakage or breakage," and in the other the clause "accidents or dangers of the seas, rivers, or navigation, of whatever nature or kind soever, excepted," was held not to cover a loss, otherwise within the exception caused by the negligence of the master or crew. So, in *Steel* v. *State Line Steamship Co.*, above cited, Lord Blackburn said, in the House of Lords, that in construing such exceptions in a bill of lading exactly the same considerations would arise as to the duty of the shipowner to furnish a ship really fit for the purpose, as had been applied, in the series of cases of which *Phillips* v. *Clark* was the leading one, to the duty of himself and his servants to use due care and skill in carrying the goods.

In *Notara* v. *Henderson*, L. R. 7 Q. B. 225, 236, the court of exchequer chamber, in a considered judgment delivered by Mr. Justice Willes, held that the words "loss or damage arising from collision or other accidents of navigation occasioned by default of the master or crew, or any other accidents of the seas, rivers, and steam navigation, of whatever nature or kind, excepted," did not exempt the owner from negligence in omitting to take out and dry the cargo at a port of distress, because the authorities *(specially mentioning **122** *Grill* v. *General Iron Screw Collier Co.* above cited), "and the reasoning upon which they are founded, are conclusive to show that the exemption is from liability for loss which could not have been avoided by reasonable care, skill, and diligence, and that it is inapplicable to the case of a loss arising from the want of such care, and the sacrifice of the cargo by reason thereof."

In *Gill* v. *Manchester, S. & L. Railway*, L. R. 8 Q. B. 186, the court of Queen's bench, applying the same rule of construction, held that a provision in a contract for the carriage of cattle by railway, by which the railway company was not to be responsible for any loss or injury to the cattle "in the receiving, forwarding, or delivering, if such damage be occasioned by the kicking, plunging, or restiveness of the animal," did not relieve the company from liability for negligence of its servants in delivering a restive cow.

In *Lloyd* v. *General Iron Screw Collier Co.* above cited, Lord Bramwell said that the words "accident or damage from machinery, boilers, steam," could not apply to an explosion caused by the wilful act of the engineer. 3 Hurlst. & C. 292.

The passages quoted by the respondent from *Burton* v. *English*, L. R. 12 Q. B. Div. 218, 220, 223, as showing that the words "on deck at owner's risk" exempt the carrier from liability for unlawful jettison or for negligence of the master and crew, were *obiter dicta*, the only point decided being that those words did not exclude the right of the owner of the goods to recover in general average for a lawful jettison. See *Ralli* v. *Troop*, 157 U. S. 386, 396 [39: 742, 748]. The two other cases cited by the respondent were cases in which railway companies were held not to be responsible for the negligence of their servants under contracts essentially different from that now in question. One was an action by a passenger traveling as a drover accompanying cattle under a free pass, one of the terms of which was that he should travel at his own risk. *McCawley* v. *Furness Railway*, L. R. 8 Q. B. 57. The other was an action by a person who, knowing that the defendant had two rates of carriage, a higher rate when it took the ordinary liability of a carrier, and a lower rate when it was relieved *from all liability except that aris **123** ing from the wilful misconduct of its servants, delivered goods to be carried at the lower rate under a contract in which the only words defining the carrier's liability were "owner's risk." *Lewis* v. *Great Western Railway*, L. R. 3 Q. B. Div. 195.

Upon consideration of the conflicting testimony, with the aid of the careful arguments of counsel, no ground is shown for reversing or modifying the conclusions of fact reached by both courts below. Their concurrent decisions upon a question of fact are to be followed, unless clearly shown to be erroneous. *Morewood* v. *Enequist*, 64 U. S. 23 How. 491 [16: 516]; *The Richmond*, 103 U. S. 540 [26: 313], and cases cited; *The Conqueror*, 166 U. S. 110, 136 [41 937, 948].

By the facts so found, it appears that the cattle, for the loss of which a recovery has been permitted, were sound and uninjured ani-

mals, forcibly thrown or driven overboard, in rough weather, by order of the master, from unfounded apprehension on his part, in the absence of any pressing peril to the ship, and with no apparent or reasonable necessity for a jettison of the sound cattle, and no attempt to separate them from those which had already been injured by perils of the sea.

The clauses of the bill of lading (other than the reference to British law), on which the respondent relies, are those in the first paragraph, "on deck at owner's risk; steamer not to be held accountable for accident to or mortality of the animals, from whatever cause arising;" and those in the third paragraph, by which "it is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters;" by barratry of the master or crew;" or "by collisions, stranding, or other accidents of navigation, of whatsoever kind, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner."

The bill of lading itself shows that all the cattle to be carried under this contract were to be on deck. The words "on deck at owner's risk" **124**] cannot have been intended by *the parties to cover risks from all causes whatsoever, including negligent or wilful acts of the master and crew. To give so broad an interpretation to words of exception, inserted by the carrier and for his benefit, would be contrary to settled rules of construction, and would render nugatory many of the subsequent stipulations of the bill of lading.

The wrongful jettison of the sound cattle by the act of the carrier's servants cannot reasonably, or consistently with the line of English authorities already cited, or with our own decisions, be considered either as an "accident to or mortality of the animals," or as a "loss or damage occasioned by causes beyond his control, by the perils of the sea, or other waters," or yet as a loss or damage "by collisions, stranding, or other accidents of navigation." There having been no collision, stranding, or other accident of navigation, there was nothing to which the only stipulation in the bill of lading against the consequences of negligence, default, or error in judgment of the master and crew could apply.

There was no barratry, because there was neither intentional fraud or breach of trust, nor wilful violation of law, one of which, at least, is necessary to constitute barratry. *Patapsco Ins. Co.* v. *Coulter*, 28 U. S. 3 Pet. 222 [7: 659]; *Lawton* v. *Sun Mut. Ins. Co.* 2 Cush. 500; *Grill* v. *General Iron Screw Collier Co.* above cited.

The facts of the case, therefore, do not bring it within any exceptions of the bill of lading, assuming them to be valid.

Decree affirmed.

HENRY CRAEMER, *Appt.*,
v.
STATE OF WASHINGTON and W H. Moyer, Sheriff of King County, Washington.

(See S. C. Reporter's ed. 124-131.)

Complaint in habeas corpus—verdict in capital case—appointment of another day for execution of death penalty.

1. A complaint in habeas corpus alleging invalidity of process or proceedings under which the party is held in custody must set out copies of such process or proceedings, or the essential parts thereof, and mere averments of conclusions of law are inadequate.
2. A verdict of "guilty as charged" is sufficient under the Washington statutes, to sustain a sentence of murder in the first degree, where the indictment charged that degree as well as lower degrees.
3. The appointment of another day for the execution of the death penalty, in accordance with a statute, when the day first appointed has passed during the pendency of an appeal, is not in denial of due process of law or in violation of the Federal Constitution.

[No. 466.]

Submitted October 12, 1897. Decided October 25, 1897.

APPEAL from an order of the Circuit Court of the United States for the District of Washington refusing a writ of habeas corpus applied for by Henry Craemer. *On motions to dismiss or affirm. Affirmed.*

Statement by Mr. Chief Justice **Fuller:**

This was an appeal from a final order of the circuit court of the United States for the district of Washington refusing a writ of habeas corpus on the face of the petition therefor. The petition averred that Henry Craemer, the petitioner, was a citizen of the United States, residing in the county of King in the state of Washington; that he was unlawfully held in custody by the sheriff of that county, who was about to take his life, under certain alleged process and authority, "wholly without authority of law, without the jurisdiction of any court, contrary to the law, and contrary to the rights of your petitioner as a citizen of the United States under the Constitution of the United States."

"That on or about the 23d day of August,

NOTE.—*As to when habeas corpus may issue, and when not; and from what courts, and by what judges; what may be inquired into by writ of,*—see note to United States v. Hamilton, 1: 490.

As to what questions may be considered on habeas corpus, see note to *Ex parte* Carll, 27: 288.

As to suspension of writ of habeas corpus, see note to Luther v. Borden, 12: 581.

As to what is due process of law, see note to Pearson v. Yewdall, 24: 436.

As to jurisdiction of United States courts, see notes to *Re* Reinitz (C. C. S. D. N. Y.) 4 L. R. A. 236, and State, Cochran, v. Winters (Kan.) 10 L. R. A. 616.

As to province and office of writ, when may be used, see note to Chambers v. State, Barnard (Ind.) 11 L. R. A. 614.

As to presumption of innocence in habeas corpus proceedings, see note to State v. Jones (N. C.) 22 L. R. A. 678.

1894, he was charged by the state of Washington by information of three separate crimes in one count, to wit, the crime of murder in the first degree, to which the penalty of death attached upon conviction; murder in the second degree, to which a penalty of not less than ten nor more than twenty years' imprisonment in the penitentiary attached, and the offense of manslaughter, to which not less than two nor more than ten years' imprisonment in the penitentiary attached.

"That your petitioner was tried upon the said information upon issue joined in the superior court of King county.

"That to said issue a jury trying your petitioner did return him guilty of no greater offense than the offense of murder in the second degree, and by legal construction granting inferences and all presumptions in favor of your **126**] petitioner as *accused, finding your petitioner guilty of no higher offense than that of manslaughter.

"That the said jury in no wise found your petitioner guilty of murder in the first degree, to which the sentence and penalty of death could be inflicted.

"That the said verdict was rendered about the 12th day of September, 1894.

"That your petitioner appealed from the decision finding your petitioner guilty of murder in the second degree or of manslaughter to the supreme court of the state of Washington upon errors assigned, and the said judgment was affirmed.

"And, further, upon the validity of the process under which your petitioner was charged, to wit, as to whether or not your petitioner could be tried upon an information for his life, your petitioner appealed to the Supreme Court of the United States upon that point and that point alone, and the said Supreme Court dismissed said appeal, returning the said cause and all process to the supreme court of the state of Washington, to be dealt with as in manner and form of the law was both just and proper."

That no death warrant had been issued while the cause was on appeal, and that there had been no opportunity or occasion to complain in the supreme court of the state, or in any other court, as to the right to issue such warrant; that the cause was tried before Judge Humes, one of the judges of the superior court of the county of King; "that after the said cause had been disposed of in the supreme court of the state of Washington, and the Supreme Court of the United States, and returned to the superior court of the state of Washington for the execution of such process as would be legal in the premises," Judge Humes had been succeeded by Judge Jacobs; that on February 6, 1897, the state of Washington moved that petitioner be brought up for judgment and other process against him and that Judge Jacobs issue a warrant of death, and that petitioner duly objected to Judge Jacobs passing sentence of death upon him and issuing a death warrant to the sheriff, and insisted that the court was without jurisdic- **127**] tion *to make such an order; and that such order would be in denial of due process of law and in violation of article 6 and of article 14 of the Federal Constitution; but, notwithstanding his objections, petitioner was ordered to be executed on April 23, 1897.

That under the laws of the state of Washington, there was no time allowed further to appeal from that order to the supreme court of the state; that the governor of the state respited petitioner and stayed the execution of the death sentence until July 23, 1897; "that the next term of the supreme court of the state of Washington is not until the month of October, 1897, in which there would be any authority on the part of the court by any proceedings to review the unauthorized act of the said Judge Jacobs and of his honor the judge of the superior court," and the only remedy left petitioner as a citizen of the United States was application to the circuit court.

Petitioner prayed for the writ of habeas corpus and for the writ of certiorari to the superior court of the county of King ordering the record of the cause to be certified to the circuit court "for information, particularly the alleged information, the verdict, the judgments and the death warrant made in the premises, and all other journal entries and orders in the cause."

The appeal came before this court on motions to dismiss or affirm.

Messrs. **W. C. Jones,** *James F. McElroy,* and *Patrick Henry Winston* for appellees, in favor of motion.

Messrs **James Hamilton Lewis,** *Charles A. Riddle,* and *John W. Pratt* for appellant, opposed to motion.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Under existing statutory provisions appeal may be taken to this court from final decisions of the circuit courts in *habeas corpus, [**128** in cases, among others, where the applicant for the writ is alleged to be restrained of his liberty in violation of the Constitution or of some law or treaty of the United States, and if the restraint is by any state court or by or under the authority of any state, further proceedings cannot be had against him pending the appeal. Rev. Stat. §§ 763, 764, 766; act of March 3, 1885 (23 Stat. at L. 437, chap. 353).

Such being the law, it has happened in numerous instances that applications for the writ have been made, and appeals taken from refusals to grant it, quite destitute of meritorious grounds, and operating only to delay the administration of justice.

From the petition in this case it appeared that petitioner was held by the sheriff of King county, Washington, to be executed in pursuance of a judgment and sentence of death rendered by the superior court of that county, and warrant issued thereon; that that judgment had been affirmed by the supreme court of the state; and that this court had heretofore determined that it had no jurisdiction to interfere in revision of that judgment. See also *State* v *Cramer*, 12 Wash. 217; *Cramer* v. *State*, 164 U. S. 704 [41: 1183].

Nevertheless, petitioner insisted that the judgment against him was void because in contravention of the Constitution of the United States, and that the judgment of this court in dismissing his writ of error was not to be re-

garded, as he had not in fact seen fit to raise in maintenance of that writ the particular point on which he now relied.

That point seems to be that the verdict returned against him on the information on which he was tried was either so uncertain that judgment could not be entered thereon, or amounted to no mere than a verdict finding him guilty of murder in the second degree, or of manslaughter, in respect of either of which crimes the punishment of death was not denounced."

By § 754 of the Revised Statutes it is provided that the complaint in habeas corpus shall set forth "the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known." The general rule is un-
129]doubted that if the detention *is claimed to be unlawful by reason of the invalidity of the process or proceedings under which the party is held in custody, copies of such process or proceedings must be annexed to or the essential parts thereof set out in the petition, and mere averments of conclusions of law are necessarily inadequate. *Whitten* v. *Tomlinson*, 160 U. S. 231 [40:406]; *Kohl* v. *Lehlbach*, Id. 293 [40: 432]; Church, Habeas Corpus, 2d ed. § 91, and cases cited.

Copies of the information, the verdict, and the judgment thereon were not attached to this petition, nor the essential parts thereof stated, nor any cause assigned for such omission. In that regard the petition was wholy insufficient.

But reference was made to the record of the case in the superior court of King county, in the supreme court of the state, and in this court. The record here, to which we may properly refer (*Butler* v. *Eaton*, 141 U. S. 240 [35: 713]) shows that the information charged Craemer with the crime of murder in the first degree; that the jury "found him guilty as charged;" that he was adjudged guilty of the crime of murder in the first degree, and sentenced to death; that the judgment was affirmed; and that the writ of error to the state court was dismissed.

If the point now suggested was not in fact specifically raised in the supreme court of the state on appeal, or in this court on writ of error, it must not be assumed that any point on which the jurisdiction might have been sustained was overlooked.

Moreover, the settled law of the state was adverse to petitioner's contention as urged before the circuit court, and no ground existed which could justify that court in refusing to accept it.

The statutes of Washington define murder in the first degree, and prescribe the punishment of death upon conviction; the crime of murder in the second degree, and punishment by imprisonment in the penitentiary for a term not less than ten nor more than twenty years; and the crime of manslaughter, and punish-
130]ment by like imprisonment not less than one year nor more than twenty years, and a fine in any sum not *exceeding $5 000. 2 Hill's Codes, pp. 642, 644, 646; Wash. Penal Code, §§ 1, 3, 7, and 11. On an indictment or information charging an offense consisting of different degrees a jury may find the defendant not guilty of the degree charged, but guilty of any degree inferior thereto, and in all other cases defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged. The form of the verdict is also prescribed as follows: "We, the jury, in the case of the state of Washington, plaintiff, against ———, defendant, find the defendant (guilty or not guilty, as the case may be)." 2 Hill's Codes, 509; Penal Code, §§ 1319, 1320, and 1325; Laws Wash. 1891, 60, chap. 28, §§ 75, 76. The Code of the territory was to the same effect. §§ 786, 790, 793, 798, 1097, 1098, and 1103.

In *Timmerman* v. *Territory of Washington*, 3 Wash. Terr. 445, the defendant was indicted for the crime of murder in the first degree, and the jury returned a verdict in the statutory form. It was argued, on error, that the verdict was defective in that the defendant might have been found guilty of murder in the first or second degree, or of manslaughter, and that, therefore, the verdict was uncertain and sentence could not be pronounced upon him; but the supreme court of the territory held upon consideration of §§ 1097, 1098, and 1103 of the Code, which are §§ 1319, 1320, and 1325, as numbered in Hill's Code of the state, that if the jury found the defendant guilty of an offense of an inferior degree to that charged, the verdict must specify it, but if the verdict was intended to be guilty of the degree charged, there would be no necessity for so specifying it, and that the jury having used the statutory form there was no uncertainty as to the fact thus found; and that the objection was untenable.

In this case the verdict was "guilty as charged," and judgment of condemnation to death thereon was affirmed by the supreme court of the state, as has been said. 12 Wash. 217. The time appointed for execution having passed, the subsequent appointment of another day and the issue of the death warrant were in accordance with statute. Hill's Codes, §§ 1351, 1354.

*A part, then, from the insufficiency of [**131** the petition and the legal effect of the previous judgment of this court, the final order of the circuit court must be held to have been properly entered, in that the rendition of the judgment complained of involved no violation of the Constitution of the United States.

Order affirmed.

LEWIS MILLER, *Plff. in Err.*,
v.
CORNWALL RAILROAD COMPANY.

(See S. C. Reportor's ed. 131-133.)

Validity of statute—Federal question—insufficient claim.

1. The validity of a statute is drawn in question whenever the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial, and is denied.

NOTE. *As to jurisdiction in the United States Supreme Court where Federal question arises, or where are drawn in question statutes, treaty, or Constitu-*

2. A Federal question raised on the application for reargument, and nearly a year after the affirmance of a judgment by the supreme court of the state, is raised too late.

3. A claim that a statute is unconstitutional, and that it denies "inherent, indefeasible rights" guaranteed by the Constitution, and is not a "remedy by the due course of law" (using the words of a state Constitution), is presumed to refer to the state Constitution only, and is insufficient to raise a Federal question.

[No. 18.]

Argued October 13, 1897. Decided November 1, 1897.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment of that court affirming the judgment of the Court of Common Pleas of Lebanon County, Pennsylvania, in favor of the defendant, the Cornwall Railroad Company, in an action brought by Lewis Miller for damages for personal injuries from the company's negligence. *Dismissed.*

See same case below, 154 Pa. 473.

Statement by Mr. Chief Justice **Fuller:**

Lewis Miller brought his action against the Cornwall Railroad Company in the court of common pleas of Lebanon county, Pennsylvania, to recover damages for personal injuries sustained through the company's negligence [132]while he was *being carried on one of its trains. At the trial, the case was left to the jury, but the court reserved "the question as to whether there is any evidence of the defendant's negligence to go to the jury." A verdict was returned in plaintiff's favor, notwithstanding which judgment was entered for defendant on the point reserved. The decision turned on the conclusion that Miller was to be treated as if he was, at the time of the accident, an employee of defendant, because, though not in fact such employee, he came within the terms of the 1st section of an act of the general assembly of Pennsylvania, approved April 4, 1868 (Laws Pa. 1868, p. 58, No. 26, § 1), which reads as follows:

"Sec. 1. That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee: *Provided*, That this section shall not apply to passengers."

The court was asked by plaintiff to instruct the jury, among other points, as follows: "1. Lewis Miller, the plaintiff, was a passenger on the train when he received his injury." "2. The act of April 4, 1868, is unconstitutional and void." "3. The right of the plaintiff to have remedy for his injury was a well-known and clearly defined common-law right, one of the inherent indefeasible rights guaranteed to all citizens by the Constitution. The act of April 4, 1868, can therefore not be invoked by the defendant against the plaintiff. And it is not remedy by the due course of law." But the court refused to do so. The case was taken by appeal to the supreme court of Pennsylvania and the first, second, and third errors assigned were to the refusals to give the foregoing points, in their order. The words "inherent indefeasible rights" and "remedy by the due course of law" were placed in quotation in point three, as given in the third assignment. The judgment was affirmed by the supreme court, on February 27, 1893, at the January term of that year. 154 Pa. 473. On *January 8, 1894, appellant Miller filed [133 a motion for reargument on these grounds:

"1. Because of material errors of fact into which the court fell, in the consideration of the case, and which, we believe, led to the affirmance of the judgment of the court below.

"2. Because the plaintiff desires to present the case for review on the point raised, by the second assignment of error, as to the constitutionality of the act of April 4, 1868, under 14th Amendment to the Constitution of the United States. The question was not orally argued for want of time and the judgment is not in shape for such a review.

"3. General reargument."

A reargument was refused, and this writ of error th sued out.

Messrs. **A. Frank Seltzer** and **Benjamin Morris Strouse** for plaintiff in error.

Messrs. **Wayne MacVeagh** and *Howard C. Shirk* for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The contention of plaintiff in error is that the 1st section of the act of April 4, 1868, is invalid because in contravention of the 14th Amendment, in that it deprives him of due process of law and denies him the equal protection of the laws.

The validity of a statute is drawn in question whenever the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial, and is denied. *Baltimore & Potomac Railroad Co.* v. *Hopkins*, 130 U. S. 210, 224 [32: 908, 913]. And under § 709 of the Revised Statutes if the ground on which the jurisdiction of this court is invoked is that the validity of a state law was drawn in question as in conflict with the Constitution of the United States, and the decision of the state court was in favor of its validity, this must appear *on the face of the rec[134 ord, before the decision below can be re-examined here. *Dibble* v. *Bellingham Bay Land Company*, 163 U. S. 63, 70 [41: 72, 74].

The record in this case discloses no attempt to question the validity of the particular statute, in the state courts, as in contravention of the Federal Constitution, unless in the points requested to be given in the trial court and the refusal to give them, for even if it could be held that such question was raised on the ap-

tion, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Jackson, Hart, v. Lamphire, 7: 679, and Commercial Bank v. Buckingham, 12: 169.

plication for reargument, nearly a year after the judgment of the common pleas was affirmed by the supreme court, the suggestion came too late. *Texas & Pacific Railway Co.* v. *Southern Pacific Company*, 137 U. S. 48 [34: 614]; *Loeber* v. *Schroeder*, 149 U. S. 580 [37: 856]; *Pim* v. *St. Louis*, 165 U. S. 273 [41; 714].

We have no jurisdiction on a writ of error to a state court to declare a state law void on account of its collision with a state Constitution, and it was long ago held that where it was objected in the state courts that an act of the state was "unconstitutional and void," the objection was properly construed in those courts as raising the question whether the state legislature had the power under the state Constitution to pass the act, and not as having reference to any repugnance to the Constitution of the United States. *Porter* v. *Foley*, 65 U. S. 24 How. 415 [16: 740].

By the Constitution of Pennsylvania it has always been declared that all men "have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness;" and also "that all courts shall be open, and every man, for an injury done him in his lands, goods, person, or or reputation, shall have remedy by the due course of law, and right and justice administered without sale, denial, or delay." Const. Pa. 1790, art. 9, §§ 1, 11; Const. Pa. 1838, art. 9, §§ 1, 11; Const. Pa. 1873, art. 1, §§ 1, 11.

The presumption as to point two is that it referred to the state Constitution, and this was made certain by point three, which quotes from that instrument.

From the report of this case in 154 Pa. 473, it [135 is apparent *that the state supreme court assumed that it was dealing under the assignments of error only with the state Constitution, as was also the fact in *Kirby* v. *Pennsylvania Railroad Co.* 76 Pa. 506, where the question of the constitutionality of the 1st section of the act in question was directly passed upon, and the section sustained.

We agree with counsel in the statement, made on the application for reargument, in respect of a review of this judgment by this court because thereby the state supreme court had decided in favor of the validity of the act when drawn in question as repugnant to the Constitution of the United States, that "the judgment is not in shape for such a review."

Writ of error dismissed.

RICHARD H. FLETCHER, *Plff. in Err.*,
v.
BALTIMORE & POTOMAC RAILROAD COMPANY.

(See S. C. Reporter's ed. 135-144.)

Negligence, when a question of fact—duty of railroad company—injury from throwing wood from a moving train—persons on the street.

1. The negligence of a railroad company in allowing employees habitually to throw off pieces of firewood near their homes, from a moving train on which they were returning from work, without any caution except that they should be careful not to hurt anyone, is a question for the jury.
2. A railroad company is bound to use ordinary care and caution to avoid injuring persons and property which may be near its track.
3. Knowingly permitting employees to continue the habit of throwing sticks of wood from a moving repair train for their own use when returning from work, although the act is beyond the scope of their employment and totally disconnected therewith, renders a railroad company liable for any injury caused by such an act, if such injury might have been reasonably feared.
4. A railroad company owes to the general public or to individuals who may be in the streets through which its tracks are laid the duty of using reasonable diligence to see to it that those persons who are on its trains shall not be guilty of any act which may reasonably be called dangerous and liable to result in injuries to persons on the street.

[No. 56.]

Argued October 20, 21, 1897. Decided November 1, 1897.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment of that court affirming a judgment of the Supreme Court of that District in favor of the defendant, the Baltimore & Potomac Railroad Company, in an action brought by Richard H. Fletcher, plaintiff, to recover damages for personal injuries received by reason of the negligence of defendant's agents and servants. *Reversed*, and cause remanded with directions to reverse the judgment and for a new trial.

See same case below, 6 App. D. C. 385.

The facts are stated in the opinion.

Mr. **Franklin H. Mackey** for plaintiff in error.

Messrs. **William Henry Dennis** and *Enoch Totten* for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

This action was brought by the plaintiff in error to recover damages from the defendant corporation for personal injuries which he alleged he received by reason of the negligence of its agents and servants.

The evidence given upon the trial upon the part of the plaintiff tended to show that on or about the 16th day of May, 1890, the defendant was a railroad corporation *doing busi- [137 ness in the District of Columbia, and that on the day above mentioned, at the city of Washington in that District, the plaintiff was in the employment of the defendant and had been working at its workshop; that he had finished his work for the day at about a quarter of six in the evening, and leaving the shop he started for his home. When he reached the intersection of South Capitol street and Virginia avenue he stopped for a moment, and while standing on the pavement on the south side of the railway track, which was in the middle of Virginia

NOTE.—*As to servant and agent distinguished*, see note to Meyer v. Graham (Neb.) 18 L. R. A. 146.

As to the relation of the proximate-cause doctrine to the rule of liability of a master for injuries to his servant caused by the combined negligence of himself and a fellow servant; proximate cause; "a" proxi-

avenue, a repair train of the defendant corporation passed by him on its return from work for the day. Some of the testimony showed that the train was passing at the rate of 20 miles an hour, while other testimony showed a much less rate of speed. As the train passed the plaintiff one of the workmen on board threw from the car on which he was standing a stick of bridge timber about 6 inches square and about 6 feet long. It struck the ground and rebounded, striking the plaintiff and seriously and permanently injuring him. The defendant had been in the daily habit for several years of running out of Washington and Alexandria a repair train of open flat cars loaded with its employees, and the train returned every evening about 6 o'clock and brought the workmen back to their homes. These men were allowed the privilege of bringing back with them, for their own individual use for firewood, sticks of refuse timber left over from their work after repairing the road, such as old pieces of bridge timber, cross ties, etc. It was the constant habit of the men during all these years to throw off these pieces of firewood while the train was in motion at such points on the road as were nearest their homes where the wood was picked up and carried off by some of the members of their families or other person waiting there for it. The only caution given the men on the part of the servants or agents of the company was that they should be careful not to hurt anyone in throwing the wood off. The foreman of the gang was the man who usually gave such instruction.

This evidence having been given, the plaintiff rested, and the defendant then moved for the di-
138 rection of a verdic in its *favor, which motion was granted, and the judgment entered on the verdict, having been affirmed by the court of appeals (6 App. D. C. 385), is now before us for review.

In this ruling of the courts below we think there was error.

We are not called upon to say that the defendant was in fact guilty of negligence. The courts below have held, as matter of law, that the company was not liable, and hence a verdict in its favor was directed. On the contrary, we think the question whether the defendant was negligent was one which should have been submitted to the jury.

The plaintiff at the time of the accident had finished his employment for the day, and had left the workshop and grounds of the defendant, and was moving along a public highway in the city with the same rights as any other citizen would have. The liability of the defendant to the plaintiff for the act in question is not to be gauged by the law applicable to fellow servants, where the negligence of one fellow servant by which another is injured imposes no liability upon the common employer. The facts existing at the time of the happening of this accident do not bring it within this rule A railroad company is bound to use ordinary care and caution to avoid injuring persons or property which may be near its track. This is elementary. (Shearman & Redfield on Negligence [3d ed.] § 477, and cases cited in notes.) The duty to use ordinary care and caution is imposed, as we think, upon the company to the extent of requiring from it the use of reasonable diligence in the conduct and management of its trains, so that persons or property on the public highway shall not be injured by a negligent or dangerous act performed by anyone on the train, either a passenger or an employee acting outside and beyond the scope of his employment. The company does not insure against the performance of such an act, but it rests under an obligation to use reasonable diligence to prevent its occurrence. An act of such a nature, either by a passenger or by an employee outside the scope of his duties and employment, is not to be presumed, and therefore negligence on the part of the company in failing to prevent the act could not probably be shown by proof of a *single act of that [**139** kind, even though damage resulted, where there was nothing to show the company had any reason to suppose the act would be committed. Negligence on the part of the company is the basis of its liability, and the mere failure to prevent a single and dangerous act as above stated would not prove its existence. The persons on this train were employees, in fact, and were being transported to their homes by the company which had, during the time of such transportation, full control over their actions. Whether or not they were through with their work is not material.

If the act on the car were such as to permit the jury to find that it was one from which, as a result, injury to a person on the street might reasonably be feared, and if acts of a like nature had been and were habitually performed by those upon the car to the knowledge of the agents or servants of the defendant, who with such knowledge permitted their continuance, then in such case the jury might find the defendant guilty of negligence in having permitted the act, and liable for the injury resulting therefrom, notwithstanding the act was that of an employee and beyond the scope of his employment and totally disconnected therewith. Knowledge on the part of the defendant, through its agents or servants, that passengers or employees upon its trains were in the habit of throwing out of the windows newspapers, or other light articles, not in their nature dangerous, would not render the company liable on the ground of negligence, although on some one occasion an individual might be injured by such act. The result in that case would be so unexpected, so extraordinary, and so unnatural, that a failure to prevent the custom could not be said to be

mate cause as distinguished from "the" proximate cause; right to consider relative negligence; liability exists where master's negligence was an essential element; cases where the negligence of the master was the efficient cause.—see note to Lutz v. Atlantic & P. R. Co. (N. M.) 16 L. R. A. 819.

As to combined negligence of master and coservants, see note to Huss v. Michigan C. R. Co. (Mich.) 7 L. R. A. 500.

As to damages for personal injury from negligence, see note to Pennsylvania Co. v. Roy, 26: 141.

As to master's duty to furnish suitable and safe machinery and appliances, and liability to servant for their being insufficient or out of repair, see note to Richmond & D. R. Co. v. Elliott, 37: 728.

negligence. But if a passenger upon a train or an employee of the company upon one of its cars should supply himself with a quantity of stones for the purpose of throwing them off the train as it passed through a city, can it be possible that under such circumstances, if this intended use of the stones came to the knowledge of those who had the conduct of the train, it would not be their duty to prevent the act? And would it be any answer for the company, when charged with negligence in knowingly or 140] negligently permitting such *passenger or employee to throw the stones, to say that the person throwing them was a passenger, or, if an employee, that he had completed his work for the day and was being transported to his home on the car of the company, and that the act was without the scope of his employment? Surely not. It is not a question of scope of employment or that the act of the individual is performed by one who has ceased for the time being to be in the employment of the company. The question is, Does the company owe any duty whatever to the general public, or, in other words, to individuals who may be in the streets through which its railroad tracks are laid, to use reasonable diligence to see to it that those who are on its trains shall not be guilty of any act which might reasonably be called dangerous and liable to result in injuries to persons on the street, where such act could by the exercise of reasonable diligence on the part of the company have been prevented? We think the company does owe such a duty, and if, through and in consequence of its neglect of that duty, an act is performed by a passenger or employee which is one of a series of the same kind of act and which the company had knowledge of and had acquiesced in, and if the act be in its nature a dangerous one, and a person lawfully on the street is injured as a result of such an act, the company is liable. Any other rule would in our opinion be most disastrous, and would be founded upon no sound principle.

We feel quite clear that, from the evidence in this case, it was for the jury to say whether the custom was sufficiently proved, and whether the act was of a nature from which injury to a person on the street might reasonably be expected, and also whether such acts had theretofore been performed with the knowledge and consent of the agents and servants of the defendant, and whether the company was guilty of an omission of the duty which it owed to the plaintiff as one of the public lawfully using the street where the track was. We do not say that the jury should be instructed to find that the defendant was guilty of negligence in case they found from the evidence that this custom was known to its officers or agents, but we do say that the custom being known, whether 141] *it was negligence or not for the company to permit it under all the circumstances was a question to be decided by the jury and not by the court. The company of course is not an insurer of the safety of the public in the highway along or near which its road may run, but it is bound, as we have stated, to use reasonable diligence to see to it that no dangerous acts which may result in injury to persons lawfully on the highway shall be committed by persons who are on its trains, whether as passengers or employees. If it neglect that duty, then there is a liability on its part to respond in damages for the injury resulting from that neglect.

The fact that this custom had existed for some time without any injuries having been received by anyone is not a legal bar to the liability. It may be addressed to the jury as an argument upon the question whether the act was in its nature dangerous, and whether under all the circumstances the company was guilty of any negligence in permitting its continuance; but if the character of the act complained of is such that a jury might upon the evidence fairly say that injury to others might reasonably be apprehended, the fact that none such had theretofore occurred is not an answer, as matter of law, to the charge of negligence in continuously permitting acts of that nature. As against the contention that this act was not in its nature dangerous it might be urged to the jury that the caution given to be careful showed that there might be danger in the performance of the act itself. It would be for the jury to answer the question.

We are not able to see the bearing upon this case of the case of *Walton* v. *New York Central Sleeping Car Company*, 139 Mass. 556. In that case there was but a single act, that of throwing the bundle from the train by the porter of the parlor car; there was no evidence that any officer of the company on the train had the least reason to suppose the porter intended to do the act or that it had been habitually done before; no evidence of any custom known to the defendant by which at that or any other particular point the porter of the car habitually and frequently threw bundles from the moving train. Acquiescence on the part of the defendant *after knowledge of the custom could[142 not from the one act be imputed to it. Very probably, a single act so performed by the porter without the knowledge or assent of the defendant—performed for his own purposes and not in the scope of his employment, unexpected and wholly disconnected from his duties—would not render the defendant liable for the injuries resulting to a third person from such act. If, however, it had been proved in that case that it was the custom on the part of the porters on that car to throw these bundles off while the train was in motion, and that this custom was known to the officers of the company, and was permitted by them, with the simple injunction that the porters should take care and not hurt anybody, and if the jury found that the act was one dangerous in its nature, we think there is no doubt that the defendant would be liable for the injuries resulting from any one of such acts.

The court in the case cited, while holding the defendant not responsible, said: "The defendant is not responsible if the injury to the plaintiff was done by Maxwell, the servant of the defendant, without the authority of the defendant, and not for the purpose of executing defendant's orders or doing the defendant's work, and not while acting as such servant in the scope of his employment." The important point was, it is to be observed, that the act of Maxwell, although the servant of the defendant, was without its authority, knowledge, or acquiescence. In this case, upon the evidence

submitted, the jury might be asked to infer knowledge on the part of the defendant of the existence of the custom and acquiescence on its part in such custom, and that therefore the acts of the individuals in throwing the timber were acts which were performed with the authority of the defendant. The act would be performed with the authority of the defendant, if, being aware of the custom, the defendant or its agents permitted such acts and made no effort to prevent their performance and issued no orders forbidding them. If the jury should also find that the act was one of a dangerous nature, from which injury to an individual on the roadside might reasonably be expected, then the jury might find the defendant 143]*guilty of a neglect of duty in permitting its performance.

We do not think the case of *Snow* v. *Fitchburg Railroad*, 136 Mass. 552 [49 Am. Rep. 40], can be distinguished from this case by reason of the simple fact that the person injured was a passenger who was at the station and upon the platform where the mail bag was thrown. It may be true the defendant owes a higher duty to its passengers, in the shape of a greater degree of care, than it does to the public generally, but it is a question only of degree. It owes a duty to the public not to injure anyone negligently, and the facts in this case make it a question for the jury to say whether it has not been guilty of negligence resulting in plaintiff's injury.

Considerable stress was laid upon the case of *Walker* v. *Hannibal & St. Jo. Railroad Company*, 121 Mo. 575 [24 L. R. A. 363], as an authority against the principle which we have above referred to. We have examined that case and regard the facts therein set forth as so materially different that the case cannot be regarded as opposed to the views we have stated. The baggagemaster in gratuitously taking in his car the drills (not properly baggage), which he threw out at the station as he passed through, was held not to have been acting within the scope of his employment, and as there was no proof of knowledge on the part of the railroad authorities, it was held that the railroad company was not responsible for this act of the baggagemaster not done in the scope of his employment and of which they had no notice. It is stated in the opinion that the trainmaster, the superintendent of the defendant, and also the general agent were all ignorant that the drills were being carried by the baggageman on the passenger train, and, in speaking of the act and the arrangement under which it was performed, the court said: "The arrangement seems to have been one between plaintiff, for the lime company, and James, the train baggageman, with reference to something not in the line of his employment, and of which his employer had no knowledge and gave no consent."

Upon the whole, we think it was a question for the jury to say whether the custom was 144] proved; whether, if proved, it *was known to and acquiesced in by those in charge of the train as servants of the company; whether it was a dangerous act, from which injury to a person on the street might reasonably be apprehended, and if so, whether there was a failure on the part of the defendant to exercise reasonable care, in view of all the circumstances, to prohibit the custom and prevent the performance of the act.

For these reasons we are of the opinion that *the judgment should be reversed*, and the cause remanded to the court of appeals of the District of Columbia, with directions to reverse the judgment of the supreme court of the District of Columbia and to remand the case to that court with directions to grant a new trial.

INTERSTATE COMMERCE COMMISSION, *Appt.*,
v.
ALABAMA MIDLAND RAILWAY COMPANY *et al.*

(See S. C. Reporter's ed. 144–177.)

Power of Interstate Commerce Commission to prescribe rates—competition, when to be considered—application to such Commission—questions of fact—review by the courts.

1. Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates, either maximum or minimum or absolute, nor has it authorized the Commission to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates which it has determined to have been in the past reasonable and just.
2. Competition between rival routes, which affects rates, is a fact to be considered in determining whether property transported to a competitive point for less rates than are charged for property to an intermediate point on the same line is carried under "substantially similar circumstances and conditions," as that phrase is found in § 4 of the Act to Regulate Commerce; but such competition is not applicable to § 2 of the act.
3. An application to the Interstate Commerce Commission for relief from the operation of § 4 of the Act to Regulate Commerce is not necessary in order to entitle the carrier to adjust its rates with reference to the dissimilarity of circumstances and conditions, including the existence of competition, and to justify such rates in the courts when complained of.
4. Whether there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of carriage have been substantially similar or otherwise, is a ques-

NOTE.—*As to power of Congress to regulate commerce*, see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.

As to interstate commerce; regulation of; power of Congress, how far exclusive,—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

As to tonnage tax, see note to Inman Steamship Co. v. Tinker, 34: 118.

As to internal commerce; regulation by states; matters incidentally affecting; regulation of occupations,—see note to New York v. Budd (N. Y.) 5 L. R. A. 559.

As to state power to regulate freights and fares, see notes to Cleveland, C. C. & I. R. Co. v. Closser (Ind.) 9 L. R. A. 754, and St. Louis & S. F. R. Co. v. Gill (Ark.) 11 L. R. A. 452.

As to power of states to control or impose burdens upon interstate telegraph and telephone companies, see note to Postal Teleg. Cable Co. v. Baltimore (Md.) 24 L. R. A. 161.

tion of fact depending on the matters proved in each case.

5. The decision of the Interstate Commerce Commission on a charge that rates are unjust and unreasonable or make unjust discriminations and preferences in violation of § 3 of the Act to Regulate Commerce is subject to review in the courts on a consideration of the allegations and evidence of the parties, giving effect, however, to the findings of fact by the Commission as prima facie evidence of the matters therein stated.

[No. 203.]

Argued March 12, 15, 16, 1897. Decided November 8, 1897.

APPEAL from a decree of the United States Circuit Court of Appeals for the Fifth Circuit affirming the decree of the Circuit Court of the United States for the Middle District of Alabama dismissing a suit in equity brought by the Interstate Commerce Commission against the Alabama Midland Railway Company *et al.*, to compel their obedience of certain orders made by said Commission requiring said defendants to cease and desist from charging or collecting any greater compensation for services than is specified in said orders. *Affirmed.*

See same case below, 74 Fed. Rep. 715 [5 Inters. Com. Rep. 685].

Statement by Mr. Justice **Shiras:**

On the 27th day of June, 1892, the Board of Trade of Troy, Alabama, filed a complaint before the Interstate Commerce Commission at Washington, District of Columbia, against the Alabama Midland Railway Company and the Georgia Central Railroad Company and their connections, claiming that in the rates charged for transportation of property by the railroad companies mentioned and their connecting lines there is a discrimination against the town of Troy, in violation of the terms and provisions of the Interstate Commerce Act of Congress of 1887.

The general ground of complaint is, that Troy being in active competition for business with Montgomery, the defendant lines of railway unjustly discriminate in their rates against the former, and give the latter an undue preference or advantage in respect to certain commodities and classes of traffic. The specific charges insisted on at the hearing, and to which the testimony relates, are:

1. That the Alabama Midland Railway and the defendant roads forming lines with it from Baltimore, New York, and the east to Troy and Montgomery charge and collect a higher rate on shipments of class goods from those cities to Troy than on such shipments *through Troy* to Montgomery; the latter being the longer distance point by 52 miles.

2. That the Alabama Midland Railway and Georgia Central Railroad and their connections unjustly discriminate against Troy and in favor of Montgomery in charging and collecting $3.22 per ton to Troy on phosphate rock shipped *147 from the South Carolina and Florida fields and only $3 per ton on such shipments to Montgomery, the longer distant point by both of said roads; and that all phosphate rock carried from said fields to Montgomery over the road of the Alabama Midland has to be hauled through Troy.

3. That the rates on cotton, as established by said two roads and their connections, on shipments to the Atlantic seaports, Brunswick, Savannah, and Charleston, unjustly discriminate against Troy and in favor of Montgomery, in that the rate per hundred pounds from Troy is 47 cents, and that from Montgomery, the longer distance point, is only 40 cents, and that such shipments from Montgomery over the road of the Alabama Midland have to pass through Troy.

4. That on shipments for export from Montgomery and other points, within the so-called "jurisdiction" of the Southern Railway & Steamship Association to the Atlantic seaports, Brunswick, Savannah, Charleston, West Point, and Norfolk, a lower rate is charged than the regular published tariff rate to such seaports, and that Montgomery and such other points are allowed by the rules of said association to ship through to Liverpool *via* any of these seaports at the lowest through rates on the day of shipment, which may be less than the sum of the regular published rail rate and the ocean rate *via* the port of shipment; that this reduction is taken from the published tariff rail rate to the port of shipment; that this privilege being denied to Troy is an unjust discrimination against that town in favor of Montgomery and such other favored cities, and that it is also a discrimination against shipments which terminate at such seaports in favor of shipments for exports.

5. That Troy was unjustly discriminated against in being charged on shipments of cotton *via* Montgomery to New Orleans the full local rate to Montgomery by both the Alabama Midland and Georgia Central.

6. That the rates on "class" goods from western and northwestern points, established by the defendants forming lines from those points to Troy, are relatively unjust and discriminatory *as against Troy when compared [148 with the rates over such lines to Montgomery and Columbus.

The Commission, having heard this complaint on the evidence theretofore taken, ordered, on the 15th day of August, 1893, the roads participating in the traffic involved in this case "to cease and desist" from charging, demanding, collecting, or receiving any greater compensation in the aggregate for services rendered in such transportation than is specified, as follows, to wit:

1. On class goods shipped from Louisville, Kentucky, St. Louis, Missouri, or Cincinnati, Ohio, to Troy aforesaid, no higher rate of charge than is now charged and collected on such shipments to Columbus, Georgia, and Eufaula, Alabama.

2. On shipments of cotton from Troy aforesaid through Montgomery, Alabama, to New Orleans, Louisiana, no higher rate of charge than 50 cents per hundred pounds.

3. On shipments of cotton from Troy aforesaid for export through the Atlantic seaports, to wit, Brunswick, Savannah, Charleston, West Point, or Norfolk, no higher rate of charge to these ports than is charged and collected on such shipments from Montgomery aforesaid.

4. On shipments of cotton from Troy aforesaid to the ports of Brunswick, Savannah, or Charleston, no higher rate of charge than is charged and collected on such shipments from Montgomery aforesaid through Troy to said ports.

5. On shipments of class goods from New York, Baltimore, or other northeastern points to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid.

6. On shipments of phosphate rock from South Carolina and Florida fields to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid.

The defendants having failed to heed these orders, the Commission thereupon filed this bill of complaint in the circuit court of the United States for the middle district of Alabama, in equity, to compel obedience to the same. On the hearing in said court the bill of
149]complaint was dismissed, *and complainant, the Interstate Commerce Commission, appealed the cause to the United States circuit court of appeals for the fifth judicial circuit, at New Orleans, Louisiana. And, thereupon, in said last-named court, on the 2d day of June, 1896, the decree of the said circuit court of the United States for the middle district of Alabama was in all things duly affirmed; and from this judgment and decree the appellant has appealed to this court.

***Messrs.* L. A. Shaver, Edward B. Whitney** Assistant Attorney General, and *George F. Edmunds*, for appellant:

Brief by Mr. George F. Edmunds, on behalf of the appellant, on the question of the jurisdictional power of the Interstate Commerce Commission to make the order it did in this case, that the charge exacted by the carriers in respect of the particular goods in question should not exceed a certain named sum which the Commission, upon complaint, answers, issues, proofs, and hearing, found to be reasonable and just.

It is submitted with respectful confidence that the interstate commerce law is in all its civil aspects a remedial one.

At the time of its passage the railway carriers were the absolute and irresponsible masters of all interstate commerce. The several states in trying to break up, or at least to mitigate, the unjust tryanny of these great corporations and combinations that held the largest part of the intercourse of the people in their grasp (and which in many instances undertook to control political as well as commercial affairs), found themselves baffled and practically defeated in their efforts by the national constitutional provision that only Congress could regulate interstate commerce. In this state of affairs, and to redress such enormous grievances, the Interstate Commerce Act was passed for the intended benefit of the whole body of the citizens of the Republic having a common grievance and a common interest in the vast commercial intercouse between all the states. This legislation was, therefore, in the very highest sense, and to the last degree, remedial.

Being thus remedial, the statute ought to be construed liberally to the attainment of the ends in view. Instead of being given the narrowest possible application and construction, it should, it is humbly submitted, be applied and construed by the judiciary in the largest latitude fairly consistent with its language. It ought not to be frittered away by the refinements of criticism, or made ineffectual because it does not possess all the inclusive and exclusive qualities of a plea in abatement, and may not be "certain to a certain intent in every particular." It is, perhaps, questionable taste for the bar to cite authority for this proposition, but it may be permitted to refer to a few of the vast number of the authorities on the subject.

Wilkinson v. *Leland*, 27 U. S. 2 Pet. 627 [7: 542]; *Silver* v. *Ladd*, 74 U. S. 7 Wall. 219 [19: 138]; *Beaston* v. *Farmers Bank*, 37 U. S. 12 Pet. 102 [9: 1017]; *United States* v. *Bank of North Carolina*, 31 U. S. 6 Pet. 29 [8: 308]; *Bank of United States* v. *Lee*, 38 U. S. 13 Pet. 107 [10: 81]; Broom, Legal Maxims, 5th Am. ed. from 3d London ed. p. 80.

But the contention on the other side is that, while the Commission has power to decide what shall not be done, it has no power in the very same case to do complete justice by declaring what shall be done by the carriers in the given matter. We may well quote here the language of Broom's Legal Maxims: "Again, in construing an act of Parliament, it is a settled rule of construction that cases out of the letter of a statute, yet within the same mischief or cause of the making thereof, shall be within the remedy thereby provided; and, accordingly, it is laid down, that for the sure and true interpretation of all statutes (be they penal or beneficial, restrictive or enlarging, of the common law) four things must be considered: First, what was the common law before the making of the act; second, what was the mischief for which the common law did not provide; third, what remedy has been appointed by the legislature for such mischief; and fourth, the true reason of the remedy, and then the duty of the judges is to put such a construction upon the statute as shall suppress the mischief, and advance the remedy—to suppress subtle inventions and evasions for continuing the mischief *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the act *pro bono publico*. In expounding remedial laws, then, the courts will extend the remedy so far as the words will admit." It is submitted that the words of the statute in question do not require the application of the foregoing rules, being too plain for their application. If they are not, then the rule should be applied.

What, then, is the statute? At the risk of reiteration, I quote the crucial parts of some of the sections bearing on the subject of this brief:

"Sec. 1. . . . All charges made for any services rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

"Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transporation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transporation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of un just discrimination, which is hereby prohibited and declared to be unlawful.

"Sec. 3 That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction," etc.

Sections 6 and 7 control the regulation of through rates, and provide against devices to break up continuous transportation, and for a general control of the Commission over that subject

Section 9 provides that persons claiming to be damaged in respect of the matters embraced in the acts may complain to the Commission.

Section 11 establishes the Commission, and secures to it a nonpartisan character and a freedom from private interest or bias.

"Sec. 12 (as amended). That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted; and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act . . and for the purposes of this act the Commission shall have power to require by subpœna the attendance and testimony of witnesses, and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation. . . .

"Sec. 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention to the provisions thereof, may apply to said Commission by petition which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the some in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

. .

"Sec 14. That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found. . . .

"Sec. 15. That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice of said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both . . .

"Sec. 16. That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by this act it shall be lawful for the Commission, or for any company or person interested in such order or requirement, to apply in a summary way by petition to the circuit court of the United States sitting in equity, . . . alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; . . . and said court shall proceed to hear and determine the matter speedily as a court of equity, . . . in such manner as to do justice in the premises; and to this end such court shall have

power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition."

These sections, by general, comprehensive, and specific language (only short, possibly, of the inclusive and exclusive strictness and fullness required in pleas in abatement at common law), place within the jurisdictional power and duty of the Interstate Commerce Commission the investigation, hearing, and determination of all questions of dispute between the public and its component citizens and localities and the carriers. There is no limitation of the clear phrases of these various sections. The duty of the carrier is set forth in all its aspects, both of affirmative duty and of prohibition. The 1st section requires that "all charges shall be reasonable and just." The 2d section prohibits special personal favoritism by secret devices. The 3d section prohibits preferences between persons or localities and kinds of traffic. The 4th section prohibits charging more for a shorter than for a longer distance. The 12th section provides that the Commission shall have authority to "inquire into the management of the business of all common carriers," and that "the Commission is hereby authorized and required to execute and enforce the provisions of this act." There is no part of it that the statute does not expressly require the Commission to cause to be completely executed. The method of this execution is pointed out by the prescribed modes of procedure provided for in §§ 13, 14, 15, and 16. And all this to be done on due application, under due procedure of notice, evidence, and hearing of all the parties. How, then, can it be said by the most hypercritical refiner that the Commission has no jurisdiction to decide, for instance, what is "reasonable and just" as provided in § 1? Has the Commission only the power to repeat the words of the statute, and say to the carrier proved to be guilty of extortion: "You must desist from extortion, and be reasonable and just?" Would not that be a palpable mockery of either administrative or judicial justice?

If the statute had contained only the 1st and 12th sections with the procedure sections, could this court doubt the power of the Commission to decide the matter, and require the very conduct on the part of the carrier that the Commission had found to be "reasonable and just?" To hold otherwise would be to ignore and flout the plainest possible use of language, if the statute be within the competence of Congress to pass.

But the rightful power of Congress to enact the law is not disputed. That the legislative department of any government, state or national, has power to regulate the conduct of any full or quasi public business, is too obvious for discussion. State legislatures, in respect of their internal commerce and polity, possess, and have always exercised, the power of controlling all such business through agents (by whatever names they may be called), to whom is deputed the execution of the sovereign will according to the principles and rules laid down by the legislative power. The innumerable instances of this need not be cited. Indeed, government could not be, and it has never been, carried on in any other way.

Again: § 2 prohibits the unjust discrimination between persons, *i. e.*, between the traffic that citizens may be engaged in, or between citizens engaged in the same traffic. The Commission is, by the proper methods of procedure, to "enforce" this provision. Is the power of the Commission exhausted in saying to the discriminating carrier, "You shall not discriminate," and stop there? Must it not say, if it does its duty in enforcing the act and redressing the grievances found to exist, that it will enforce the law by deciding what the nature and degree of the discrimination is and by requiring that such degree of discrimination shall be effaced altogether by affirmative conduct of equality, or by a charge of no more than the ascertained rightful sum to the parties aggrieved?

Without referring in detail to the other provisions of the statute above quoted, it is safe to say that the plain purpose, and clear, comprehensive language, of the act show that the whole and all of the duties and obligations of the carrier to its customers and toward localities, etc., are to be enforced by the Commissioner; not a part of them, not a half of any of them, but all and every part of all of them. It is like algebra, in which neither side of the equation can possibly be considered or worked without the other. A complaint may be filed before the Commission (as in this case) alleging that the carrier ought not to charge for a described service more than the just and reasonable sum of 50 cents the 100 pounds, while in fact it is exacting $1 the 100 pounds. Suppose the carrier appears and confesses that 50 cents per 100 is a reasonable and just price, and that it does exact $1, but insists that the Commission has no jurisdiction to require the confessed reasonable charge to be made, and that it only has jurisdiction to require the cessation of the $1 exaction, thus leaving the carrier to continue to plunder its customers of 49 cents per 100 with absolute impunity, as far as the Commission is concerned, until a new complaint shall have been instituted and the 49-cent charge again declared to be unreasonable. That this is shocking to all our natural sense of justice no one can dispute. Why, then, should the broad, comprehensive, and specific language of the statute be "cabined, cribbed, confined" to produce such a state of the law? The citation from Broom may be well remembered in this connection.

The statute certainly requires the carrier to refrain from exacting more than a reasonable price (§ 1); to refrain from drawbacks, rebates, etc., and all other unjust discriminations (§ 2); to refrain from giving preferences or unequal advantages to persons or localities (§ 3); to refrain from exacting more for a short than for a long haul (§ 4); to refrain from all devices to break up continuous passage from road to road (§ 7). I repeat in this connection that § 12 provides that the Commission shall have authority to "inquire into the management of the business," etc., and to obtain "full and complete information necessary to perform the duties and carry out the objects for which it was created." And I repeat the inquiry, What were the duties and objects for which it was

created? The same section answers the question in terms so clear that neither cavil nor sophistry can confuse or obscure them.

But it is said that the commission is not a judicial body and cannot exercise judicial powers. Granted in the strict sense of the terms; but, in every civilized country, administrative officers have always lawfully exercised many powers in every department of government which are in their nature judicial; for every power which involves the exercise of judgment, opinion, and decision is of that nature. Such are the powers exercised by the Secretary of the Interior as to many land questions; the Secretary of the Treasury and some of his subordinates, as to customs, etc.; the various commissions that have existed from time to time for nearly a century to settle land claims; and many others.

That Congress had the power to establish interstate "rates" in the largest sense of the word cannot be doubted. And that it had the power to establish a Commission to do the same thing is, it is submitted, equally clear. It is assumed, for the purpose of this case, that it did neither in the sense to which I am now referring. It adopted a policy short of this, and provided clear descriptions and requirements concerning the duties of the carriers in all the aspects that touch their conduct toward their patrons and toward the localities and sections of the country; and established the Commission to execute and enforce all these provisions—not a part of them, and not a part of any one of them; not negatively merely, but affirmatively and fully, to the end that real conformity by the carrier to the requirements of the act should be obtained, and, as the act declares, obtained speedily, by procedure formal and ceremonious, in which all parties in interest were to be heard, and it provided for a decision of the particular question and the particular grievance thus brought to the attention of the Commission and examined by it; and in case of refusal to obey the act provided for a suit to be brought in a judicial court of "equity," which court is required to hear and determine "the matter speedily as a part of equity," with all that the phrase implies. The Commission is to inquire into "anything done or omitted to be done" by any common carrier subject to the provisions of the act in contravention to the provisions thereof; and it authorized the Commission to require the carrier to "satisfy the complaint" or answer; and then, after hearing, to require the carrier "to cease and desist from such violation, or to make reparation, or both." How can this be done short of a decision upon the whole matter? To again illustrate, let it be supposed that the sole complaint was that the carrier was exacting double what was just and reasonable for a particular service, and that this, on due notice to both sides, was found to be true. This would be a palpable violation of the act. But the Commission is authorized to require the carrier to cease and desist from doing that very wrong. Does the carrier do so unless and until he reduces his exaction to the true point of justice and reason? To hold otherwise it would be, it is submitted, trifling both with grammar and common justice. If the statute had conferred the very same power, and in the very same words, upon a court of equity instead of the Commission, could the power of the court to redress the whole grievance be doubted? But the admitted power of the Commission to command the desistance from a charge of 100 cents per 100 pounds is no less "judicial" than a requirement not to charge more than the sum found to be reasonable and just. And the two things are precisely the same in principle and legal effect, and are inseparable.

On the subject of "reparation" provided for in § 3, I observe again that this section is to be enforced by the Commission. How is this possibly to be done otherwise than by commanding action by the carriers suited to the nature of the case, so as to obliterate the whole undue preference, etc., and how possibly otherwise can reparation be made to a locality? Reparation means "restoration" of the right. No such exercise of the power by the Commission is either "fixing rates" or prejudging a matter, as referred to by Mr. Justice Shiras in the *Social Circle Case.*

The words "lawful order" mean an order the Commission has jurisdiction to make. An order may be lawful and at the same time erroneous, so that if the Commission made an order in a matter over which they had jurisdiction, which was merely an error of judgment as to precisely the degree of reparation, for instance, the carrier ought to make, the order would still be lawful. In such a case the court is to "hear and determine the matter," that is, the whole subject, as a court of equity, . . . in such manner as to do justice in the premises:" that is, complete justice in the whole premises. "Premises" is not merely the particular order that the Commission has made, but it is the whole subject that had been duly brought before the Commission and on due notice and hearing had been acted upon. It is that duty which rested with the circuit court and is now imposed upon this court.

All the preceding action described is not "fixing rates" in the sense that state commissioners of railways are authorized by legislature to establish general rates for all classes and for all railways, as is contended for by the defendants. We make no such claim. The action of the Commission and the action of this court, on what is really an appeal from and a review of its judgment, is the trial and determination of a particular case, and determining for that particular case what the conduct of the carrier shall be in respect of the particular dispute involved in it. It is the exertion of no general power to prejudge or to fix rates, nor is it the exertion of any power to fix rates in general. If this distinction be observed, there is no difficulty whatever. This is precisely in accord with what Mr. Justice Shiras said. After stating what had happened before the Commission, and stating that in the circuit court evidence was introduced which had not been laid before the Commission, showing that the rate to Birmingham had been forced down by the coming in of a new competitive road, and that the circuit court had thereupon found that the evidence was sufficient to overcome the findings of the Commission, and that the rate complained of was not unreasonable; and after stating that the

circuit court of appeals had adopted the views of the circuit court in respect to the reasonableness of the rate from Cincinnati to Atlanta, and "as both courts found the existing rate to have been reasonable, we do not feel disposed to review their finding on the matter of fact," he then condemned the conduct of the carriers in lying by. He then says: "Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates was mooted in the courts below and is discussed in the briefs of counsel." He says: "We do not find any provision in the act which expressly or by necessary implication confers such power" and so forth. He then says: "The reasonableness of the rate in a given case depends on facts, and the function of the Commission is to consider these facts and give them the proper weight. If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fix a rate, that rate is prejudged by the Commission to be reasonable." In this proposition we entirely concur, but in this case the identical question was raised by the petitions, and an issue was made, evidence was taken on both sides, and the facts found, so that the sum fixed as reasonable by the Commission was not prejudged. And he adds that, "subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate so as to give undue preference or advantage, or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were at common law." Here again it will be seen that reasonableness and unreasonableness, justice and injustice, preference, advantage, prejudice, disadvantage are the very subjects that he says are within the competence of the Commission to determine. If the Supreme Court had been of opinion that the action of the Commission in its decision in regard to the Atlanta rate was beyond its jurisdictional power, they would have so said, and affirmed the judgment on that ground; but in distinct terms they affirm the judgment of the circuit court and the court of appeals upon the express ground that the Commission is in error in its finding of fact.

The judiciary of the United States have recently been able, without the special aid of any act of Congress, to preserve the interstate carriers from being despoiled by unlawful interference with their operations. It is to be hoped for the good name of Congress and for the public welfare and contentment that the same judiciary will find that Congress has adequately provided for protecting the people from being despoiled by the carriers, and that it is within the clear competence of the Commission and the courts to make these provisions effectual.

Messrs. **Edward Baxter** and *E. A. Wiley*, for appellees:

In order to constitute an unjust discrimination under § 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but in either case it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions."

Interstate Commerce Commission v. *Baltimore & O. R. Co.* 145 U. S. 281 (36: 705), 4 Inters. Com. Rep. 92.

English cases, under the railway and canal traffic act 1854: *Hozier* v. *Caledonia R. Co.* 1 Nev. & Macn. 27–32; *Jones* v. *Eastern Counties R. Co.* 1 Nev. & Macn. 45–47; *Foreman* v. *Great Eastern R. Co.* 2 Nev. & Macn. 202; *Harris* v. *Cockermouth R. Co.* 1 Nev. & Macn. 97–180; *Liverpool Asso.* v. *London & N. W. R. Co.* 7 Ry. & Canal Traffic Cases, 135; *Phipps* v. *London & N. W. R. Co.* [1892] 2 Q. B. 229.

The case of *Mansion House Asso.* v. *London & S. W R. Co.* [1895] 1 Q. B. 932, was cited approvingly, and quoted from, by the United States circuit court for the middle district of Tennessee, in *Interstate Commerce Commission* v. *Louisville & N. R. Co.* 73 Fed. Rep. 423, 424.

If in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its so doing will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar the statute is not violated.

Interstate Commerce Commission v. *Atchison, T. & S. F. R. Co.* 50 Fed. Rep. 300, 301, 4 Inters. Com. Rep. 323; *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.* 56 Fed. Rep. 942, 4 Inters. Com. Rep. 332; *Interstate Commerce Commission* v. *Alabama Midland R. Co.* 69 Fed. Rep. 230, 5 Inters. Com. Rep. 308; *Behlmer* v. *Louisville & N. R. Co.* 71 Fed. Rep. 839.

In passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interests of the carrier, the relative quantities or volume of the traffic involved, the relative cause of the service and profit to the company, and the situation and circumstances of the respective customers with reference to each other as competitive or otherwise.

Interstate Commerce Commission v. *Baltimore & O. R. Co.* 43 Fed. Rep. 53, 3 Inters. Com. Rep. 192; *Re Louisville & N. R. Co.* 1 I. C. C. Rep. 59, 1 Inters. Com. Rep. 278.

Competition is one of the circumstances or conditions contemplated by the 4th section.

Ex parte Koehler, 31 Fed. Rep. 319, 1 Inters. Com. Rep. 317; *Missouri P. R. Co.* v. *Texas & P. R. Co.* 31 Fed. Rep. 862, 4 Inters. Com. Rep. 434; *Ex parte Koehler*, 25 Fed. Rep. 75; *Interstate Commerce Commission* v. *Atchison, T. & S. F. R. Co.* 50 Fed. Rep. 306, 4 Inters. Com. Rep. 323; *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.* 56 Fed. Rep. 943, 4 Inters. Com. Rep. 332.

It is the fact of competition, and not the kind of competition, that creates the substantial dissimilarity in the circumstances and conditions of transportation.

Interstate Commerce Commission v. *Cincinnati, N. O. & T. P. R. Co.* 56 Fed. Rep. 944, 4 Inters. Com. Rep. 333.

Competition is of controlling force.

Raworth v. *Northern P. R. Co.* 5 I. C. C. Rep. 246, 3 Inters. Com. Rep. 857.

It has been repeatedly held that there is no law which requires the Alabama Midland Railway and the Louisville & Nashville Railroad to make joint through rates on cotton from Troy to New Orleans.

Atchison, T. & S. F. R. Co. v. *Denver & N. O. R. Co.* 110 U. S. 680 (28: 296); *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. R. Co* 41 Fed. Rep. 563, 2 Inters. Com. Rep. 763; *St. Louis Drayage Co.* v. *Louisville & N. R. Co.* 65 Fed. Rep. 41, 5 Inters. Com. Rep. 137; *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.* 37 Fed. Rep. 572, 2 L. R. A. 289, 2 Inters. Com. Rep. 351; *Oregon Short Line & U. N. R Co.* v. *Northern P. R. Co.* 51 Fed. Rep. 474, 4 Inters. Com. Rep. 249; *Chicago & N. W. R. Co.* v. *Osborne*, 10 U. S. App. 430, 52 Fed. Rep. 915, 4 Inters. Com. Rep. 257, 3 C. C. A. 347; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. R. Co.* 59 Fed. Rep. 402, 403, 4 Inters. Com. Rep. 537; *Little Rock & M. R. Co.* v. *St. Louis S. W. R. Co.* 27 U. S App. 380, 63 Fed. Rep. 778, 779, 11 C. C. A. 417, 26 L. R. A. 192, 4 Inters. Com. Rep. 854.

The Commission has no power to fix rates.

Interstate Commerce Commission v. *Louisville & N. R. Co.* 73 Fed. Rep. 429; *Interstate Commerce Commission* v. *Lehigh Valley R. Co.* 74 Fed. Rep. 787, 788.

The question as to what were proper rates was a question of fact.

Texas & P. R. Co. v. *Interstate Commerce Commission*, 162 U. S. 235 (40: 593).

This court has said: "We do not find any provision of the act that expressly, or by necessary implication, confers a power to fix rates."

Cincinnati, N. O. & T. P. R. Co. v. *Interstate Commerce Commission*, 162 U. S. 196 (40: 939).

The Commission has no power to make rates generally. Its power in respect to rates is to determine whether those which the road imposes are for any reason in conflict with the statute.

Thatcher v. *Delaware & H. C. Co.* 1 C. C. Rep. 155, 156, 1 Inters. Com. Rep. 356.

The functions of the Commission are those of referees or special commissioners, appointed to make preliminary investigation of and report upon matters for subsequent judicial examination and determination.

Kentucky & I. Bridge Co. v. *Louisville & N. R. Co.* 37 Fed. Rep. 613, 2 L. R. A. 289, 2 Inters. Com. Rep. 351.

The "judgment" or "determination" as to whether a particular rate is reasonable is to be rendered, not by the Commission, but by the court.

Kentucky & I. Bridge Co. v. *Louisville & N. R. Co.* 37 Fed. Rep 614, 2 Inters. Com. Rep. 351, 2 L. R. A. 289; *Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 43 Fed. Rep. 43, 3 Inters. Com. Rep. 192; *Interstate Commerce Commission* v. *Lehigh Valley R. Co.* 49 Fed. Rep. 177, 3 Inters. Com. Rep. 726; *Interstate Commerce Commission* v. *Atchison, T. & S. F. R. Co.* 50 Fed. Rep. 295, 4 Inters. Com. Rep. 323; *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.* 56 Fed. Rep. 926, 4 Inters. Com. Rep. 332.

Mr. Justice **Shiras** delivered the opinion of the court:

Several of the assignments of error complain of the action of the circuit court of appeals in not rendering a decree for the enforcement of those portions of the order of the Interstate Commerce Commission which prescribed rates, to be thereafter charged by the defendant companies, for services performed in the transportation of goods.

Discussion of those assignments is rendered unnecessary by the recent decisions of this court, wherein it has been held, *after [**162** elaborate argument, that Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates, either maximum, or minimum, or absolute; and that, as it did not give the express power to the Commission, it did not intend to secure the same result indirectly by empowering that tribunal, after having determined what, in reference to the past, were reasonable and just rates, to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just. *Cincinnati, New Orleans, & Texas Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 184 [40: 935]; *Interstate Commerce Commission* v. *Cincinnati, New Orleans, & Texas Pacific Railway Company*, 167 U. S. 479 [42: 243].

Errors are likewise assigned to the action of the court in having failed and refused to affirm and enforce the report and opinion of the Commission, wherein it was found and decided, among other things, that the defendant common carriers which participate in the transportation of class goods to Troy from Louisville, St. Louis, and Cincinnati, and from New York, Baltimore, and other northeastern points, and the defendant common carriers which participate in the transportation of phosphate rock from South Carolina and Florida to Troy, and the defendant common carriers which participate in the transportation of cotton from Troy to the ports of New Orleans, Brunswick, Savannah, Charleston, West Point, or Norfolk, as local shipments or for export, have made greater charges, under substantially similar circumstances and conditions, for the shorter distance to or from Troy than for longer distances over the same lines in the same direction, and have unjustly discriminated in rates against Troy, and subjected said place and dealers and shippers therein to undue and unreasonable prejudice and disadvantage in favor of Montgomery, Eufaula, Columbus, and other places and localities and dealers and shippers therein, in violation of the provisions of the Act to Regulate Commerce.

Whether competition between lines of transportation to Montgomery, Eufaula, and Columbus justifies the giving to *those cities a[**163** preference or advantage in rates over Troy, and, if so, whether such a state of facts justifies a departure from equality of rates without authority from the Interstate Commerce Commission under the proviso to the 4th section of the act, are questions of construction of the statute, and are to be determined before we reach the question of fact in this case.

It is contended, in the briefs filed on behalf

of the Interstate Commission, that the existence of rival lines of transportation, and, consequently, of competition for the traffic, are not facts to be considered by the Commission, or by the courts, when determining whether property transported over the same line is carried under "substantially similar circumstances and conditions," as that phrase is found in the 4th section of the act.

Such, evidently, was not the construction put upon this provision of the statute by the Commission itself in the present case, for the record discloses that the Commission made some allowance for the alleged dissimilarity of circumstances and conditions, arising out of competition and situation, as affecting transportation to Montgomery and Troy respectively, and that, among the errors assigned, is one complaining that the court erred in not holding that the rates prescribed by the Commission in its order made due allowance for such dissimilarity.

So, too, in case *Re Louisville & Nashville R. R. Co.* 1 I. C. C. Rep. 77 [1 Inters. Com. Rep. 287], in discussing the long and short haul clause, it was said by the Commission, per Judge Cooley, that "it is impossible to resist the conclusion that in finally rejecting the 'long and short haul clause' of the House bill, which prescribed an inflexible rule, not to be departed from in any case, and retaining in substance the 4th section as it had passed the Senate, both Houses understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the longer distance; but that they were, instead, leaving the door open for exceptions in certain cases, and among others in cases where the circumstances and conditions **164** of the traffic were affected by the *element of competition, and where exceptions might be a necessity if the competition was to continue. And water competition was beyond doubt especially in view."

It is, no doubt, true that in a later case, *Railroad Commission of Georgia* v. *Clyde Steamship Co. et al.* 5 I. C. C. Rep. 327 [4 Inters. Com. Rep. 120], the Commission somewhat modified their holding in the *Louisville & Nashville Railroad Company Case*, just cited, by attempting to restrict the competition that it is allowable to consider to the cases of competition with water carriers, competition with foreign railroads, competition with railroad lines wholly in a single state; but the principle that competition in such cases is to be considered is affirmed.

That competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed, substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the Act to Regulate Commerce, has been held by many of the circuit courts. It is sufficient to cite a few of the number: *Ex parte Koehler*, 31 Fed. Rep. 319 [1 Inters. Com. Rep. 317]; *Re Missouri P. Ry. Co.* 31 Fed. Rep. 862 [4 Inters. Com. Rep. 434]; *Interstate Commerce Commission* v. *Atchison, T. & S. F. R. Co.* 50 Fed. Rep. 306 [4 Inters. Com. Rep. 323]; *Interstate Commerce Commission* v. *Cincinnati, New Orleans, & Tex. Pac. R. Co.* 56 Fed. Rep. 943 [4 Inters. Com. Rep. 332]; *Behlmer* v. *Louisville & Nashville R. Co.* 71 Fed. Rep. 835; *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.* 73 Fed. Rep. 409.

In construing statutory provisions, forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable. *Denaby Main Colliery Company* v. *Manchester, S. & L. Rw. Co.* L. R. 11 App. Cas. 97; *Phipps* v. *London & North Western Railway*, [1892] 2 Q. B. 229.

But the question whether competition as affecting rates is an element for the Commission and the courts to consider *in applying [**165** ing the provisions of the Act to Regulate Commerce is not an open question in this court.

In *Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 145 U. S. 263 [36: 699 4 Inters. Com. Rep. 92], it was said, approving observations made by Jackson, circuit judge (43 Fed. Rep. 37 [3 Inters. Com. Rep. 192]), that the Act to Regulate Commerce was "not designed, . . . to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons traveling over the road; . . . [that] it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail; [that] it is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable;" and, accordingly, it was held that the issue by a railway company, engaged in interstate commerce, of a "party-rate ticket" for the transportation of ten or more persons from a place situated in one state or territory to a place situated in another state or territory, at a rate less than that charged to a single individual for a like transportation on the same trip, does not thereby make "an unjust or unreasonable charge" against such individual within the meaning of the 1st section of the Act to Regulate Commerce; nor make "an unjust discrimination" against him within the meaning of the 2d section; nor give "an undue or unreasonable preference or advantage" to the purchasers of the party-rate ticket within the meaning of the 3d section.

In *Texas & Pac. Railway* v. *Interstate Commerce Commission*, 162 U. S. 197 [40:940], it was held that "in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage the welfare of the communities occupying the localities where the goods

166] *are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment. That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."

To prevent misapprehension, it should be stated that the conclusion to which we are led by these cases, that, in applying the provisions of the 3d and 4th sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, competition which affects rates is one of the matters to be considered, is not applicable to the 2d section of the act.

As we have shown in the recent case of *Wight v. United States*, 167 U. S. 512 [42: 258], the purpose of the 2d section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor, and we there held that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.

This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, the phrase under 167]*consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation—among which we find the fact of competition when it affects rates.

In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the 3d and 4th sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration.

It is further contended, on behalf of the appellant, that the courts below erred in holding, in effect, that competition of carrier with carrier, both subject to the Act to Regulate Commerce, will justify a departure from the rule of the 4th section of the act without authority from the Interstate Commerce Commission, under the proviso to that section.

In view of the conclusion hereinbefore reached, the proposition comes to this, that, when circumstances and conditions are substantially dissimilar, the railway companies can only avail themselves of such a situation by an application to the Commission.

The language of the proviso is as follows:

"That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to *charge less for longer than shorter [168 distances for the transportation of persons or property, and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

The claim now made for the Commission is that the only body which has the power to relieve railroad companies from the operation of the long and short haul clause on the account of the existence of competition, or any other similar element which would make its application unfair, is the Commission itself, which is bound to consider the question, upon application by the railroad company, but whose decision is discretionary and unreviewable.

The first observation that occurs on this proposition is that there appears to be no allegation in the bill or petition raising such an issue. The gravamen of the complaint is that the defendant companies have continued to charge and collect a greater compensation for services rendered in transportation of property than is prescribed in the order of the Commission. It was not claimed that the defendants were precluded from showing in the courts that the difference of rates complained of was justified by dissimilarity of circumstances and conditions by reason of not having applied to the Commission to be relieved from the operation of the 4th section.

Moreover, this view of the scope of the proviso to the 4th section does not appear to have ever been acted upon or enforced by the Commission. On the contrary, in the case of *Re Louisville & Nashville R. R. Company* v. *Interstate Commerce Commission*, 1 I. C. C. Rep. 57 [1 Inters. Com. Rep. 280], the Commission, through Judge Cooley, said, in speaking of the effect of the introduction into the 4th section of the words "under substantially similar circumstances and conditions," and of the meaning of the proviso: "That which the act does not declare unlawful must remain lawful if it was so before; and that which it fails to forbid the carrier is left at liberty to do without permission of anyone. The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances *and conditions; and, there- [169

fore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar the statute is not violated. . . . Beyond question the carrier must judge for itself what are the 'substantially similar circumstances and conditions' which preclude the special rate, rebate, or drawback, which is made unlawful by the 2d section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences; but the special rate, rebate, or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and as Congress clearly intended this it must also, when using the same words in the 4th section, have intended that the carrier whose privilege was in the same way limited by them should in the same way act upon its judgment of the limiting circumstances and conditions."

The view thus expressed has been adopted in several of the circuit courts *Interstate Commerce Commission* v. *Atchison, T. & S. F. R. R. Co.* 50 Fed. Rep. 300 [4 Inters. Com. Rep. 323]; *Interstate Commerce Commission* v. *Cincinnati, New Orleans, & Tex. Pac. Ry. Co.* 56 Fed. Rep. 942; *Behlmer* v. *Louisville & Nashville R. Co.* 71 Fed. Rep. 839; and we do not think the courts below erred in following it in the present case. We are unable to suppose that Congress intended, by the 4th section and the proviso thereto, to forbid the common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them so to do, much less do we think that it was the intention of Congress that the decision of the Commission, if applied to, could not be reviewed by the courts. The provisions of § 16 of the act, which authorizes the court to "proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in **170**]*the premises, and to this end, such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition," extend as well to an inquiry or proceeding under the 4th section as to those arising under the other sections of the act.

Upon these conclusions, that competition between rival routes is one of the matters which may lawfully be considered in making rates, and that substantial dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line, we are brought to consider whether, upon the evidence in the present case, the courts below erred in dismissing the Interstate Commerce Commission's complaint.

As the 3d section of the act, which forbids the making or giving any undue or unreasonable preference or advantage to any particular person or locality, does not define what, under that section, shall constitute a preference or advantage to be undue or unreasonable, and as the 4th section, which forbids the charging or receiving greater compensation in the aggregate for the transportation of like kinds of property for a shorter than for a longer distance over the same line, under substantially similar circumstances and conditions, does not define or describe in what the similarity or dissimilarity of circumstances and conditions shall consist, it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact depending on the matters proved in each case. *Denaby Main Colliery Company* v. *Manchester, S. & L. Railway Co.* 3 Railway & Canal Traffic Cases, 426; *Phipps* v. *London & North Western Railway* [1892] 2 Q. B. 229; *Cincinnati, N. O. & Tex. Pac. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 194 [40: 935, 937]; *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 197, 235 [40: 940, 953].

*The circuit court, after a consideration[**171** of the evidence, expressed its conclusion thus:

"In any aspect of the case, it seems impossible to consider this complaint of the Board of Trade of Troy against the defendant railroad companies, particularly the Midland and Georgia Central railroads, in the matter of the charge upon property transported on their roads to or from points east or west of Troy, as specified and complained of, obnoxious to the 4th or any other section of the interstate commerce act. The conditions are not substantially the same, and the circumstances are dissimilar, so that the case is not within the statute. The case made here is not the case as it was made before the Commission. New testimony has been taken; and the conclusion reached is that the bill is not sustained; and that it should be dismissed; and it is so ordered." 69 Fed. Rep. 227 [5 Inters. Com. Rep. 308].

The circuit court of appeals in affirming the decree of the circuit court, used the following language:

"Only two railroads, the Alabama Midland and Georgia Central, reach Troy. Each of these roads has connections with other lines, parties hereto, reaching all the long distance markets mentioned in these proceedings. The Commission finds that no departure from the long and short haul rule of the 4th section of the statute as against Troy as the shorter-distance point, and in favor of Montgomery as the longer distance point, appears to be chargeable to the Georgia Central. The rates in question, when separately considered, are not unreasonable or unjust. As a matter of business necessity they are the same by each of the railroads that reach Troy. The Commission concludes that as related to the rates to Montgomery, Columbus, and Eufaula, the rates to and from Troy unjustly discriminate against Troy; and, in the case of the Alabama Midland, violate the long and short haul rule.

"The volume of population and of business at Montgomery is many times larger than it is at Troy. There are many more railway lines

running to and through Montgomery connecting with all the distant markets. The Alabama river, open all the year, is capable, if need be, of bearing to Mobile on the sea the burden of 172 all the goods of every class that *pass to or from Montgomery. The competition of the railway lines is not stifled but is fully recognized, intelligently and honestly controlled and regulated, by the traffic association in its schedule of rates. There is no suggestion in the evidence that the traffic managers who represent the carriers that are members of that association are incompetent, or under the bias of any personal preference for Montgomery or prejudice against Troy that has led them, or is likely to lead them, to unjustly discriminate against Troy. When the rates to Montgomery were higher a few years ago than now, actual, active, water-line competition by the river came in, and the rates were reduced to the level of the lowest practicable paying water rates, and the volume of carriage by the river is now comparatively small; but the controlling power of that water line remains in full force, and must ever remain in force as long as the river remains navigable to its present capacity. And this water line affects to a degree less or more all the shipments to or from Montgomery from or to all the long-distance markets. It would not take cotton from Montgomery to the south Atlantic ports for export, but it would take the cotton to the points of its ultimate destination, if the railroad rates to foreign marts through the Atlantic ports were not kept down to or below the level of profitable carriage by water from Montgomery through the port of Mobile. The volume of trade to be competed for, the number of carriers actually actively competing for it, a constantly open river present to take a large part of it whenever the railroad rates rise up to the mark of profitable water carriage, seem to us, as they did to the circuit court, to constitute circumstances and conditions at Montgomery substantially dissimilar from those existing at Troy, and to relieve the carriers from the charges preferred against them by its Board of Trade. We do not discuss the third and fourth contention of the counsel for the appellant further than to say that within the limits of the exercise of intelligent good faith in the conduct of their business and subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discrimi-
173 nate so as to give undue preference *or advantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits. The carriers are better qualified to adjust such matters than any court or board of public administration, and, within the limitations suggested, it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business." 21 C. C. A. 51 [41 U. S. App. 453, 74 Fed. Rep. 715, 5 Inters. Com. Rep. 685].

The last sentence in this extract is objected to by the Commission's counsel, as declaring that the determination of the extent to which discrimination is justified by circumstances and conditions should be left to the carriers. If so read, we should not be ready to adopt or approve such a position. But we understand the statement, read in the connection in which it occurs, to mean only that, when once a substantial dissimilarity of circumstances and conditions has been made to appear, the carriers are, from the nature of the question, better fitted to adjust their rates to suit such dissimilarity of circumstances and conditions than courts or commissions; and when we consider the difficulty, the practical impossibility, of a court or a commission taking into view the various and continually changing facts that bear upon the question, and intelligently regulating rates and charges accordingly, the observation objected to is manifestly just. But it does not mean that the action of the carriers, in fixing and adjusting the rates, in such instances, is not subject to revision by the Commission and the courts, when it is charged that such action has resulted in rates unjust or unreasonable, or in unjust discriminations and preferences. And such charges were made in the present case, and were considered, in the first place by the Commission and afterwards by the circuit court and by the circuit court of appeals.

*The first contention we encounter, [174 upon this branch of the case, is that the circuit court had no jurisdiction to review the judgment of the Commission upon this question of fact; that the court is only authorized to inquire whether or not the Commission has misconstrued the statute and thereby exceeded its power; that there is no general jurisdiction to take evidence upon the merits of the original controversy; and, especially, that questions under the 3d section are questions of fact and not of power, and hence unreviewable.

We think this contention is sufficiently answered by simply referring to those portions of the act which provide that, when the court is invoked by the Commission to enforce its lawful orders or requirements, the court shall proceed, as a court of equity, to hear and determine the matter and in such manner as to do justice in the premises.

In the case of *Cincinnati, N. O. & Texas Pacific R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184 [40: 935], the findings of the Commission were overruled by the circuit court after additional evidence taken in the court, and the decision of the circuit court was reviewed in the light of the evidence and reversed by the circuit court of appeals, and this court, in reference to the argument that the Commission had not given due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged, held that as the question was one of fact, peculiarly within the province of the Commission, and as its conclusions had been accepted and approved by the circuit court of appeals, and as this court found nothing in the record that made it our duty to draw a different conclusion, the decree of the

circuit court of appeals should be affirmed. Such a holding clearly implies that there was power in the courts below to consider and apply the evidence and in this court to review their decisions.

So, in the case of *Texas & Pacific Railway Company* v. *Interstate Commerce Commission*, 162 U. S. 197 [40: 940], the decision of the circuit court of appeals, which affirmed the validity of the order of the Commission, upon the ground that, even if ocean competition should be regarded as creating a dissimilar condition, 175] yet that, *in the case under consideration, the disparity in rates was too great to be justified by that condition, was reversed by this court, not because the circuit court had no jurisdiction to consider the evidence and thereupon to affirm the validity of the order of the Commission, but because that issue was not actually before the court, and that no testimony had been adduced by either party on such an issue; and it was said that the language of the act authorizing the court to hear and determine the matter as a case of equity, "necessarily implies that the court is not concluded by the findings or conclusions of the Commission."

Accordingly our conclusion is that it was competent, in the present case, for the circuit court, in dealing with the issues raised by the petition of the Commission and the answers thereto, and for the circuit court of appeals on the appeal, to determine the case upon a consideration of the allegations of the parties and of the evidence adduced in their support, giving effect, however, to the findings of fact in the report of the Commission as prima facie evidence of the matters therein stated.

It has been uniformly held by the several circuit courts and the circuit courts of appeal, in such cases, that they are not restricted to the evidence adduced before the Commission, nor to a consideration merely of the power of the Commission to make the particular order under question, but that additional evidence may be put in by either party, and that the duty of the court is to decide, as a court of equity, upon the entire body of evidence.

Coming at last to the questions of fact in this case, we encounter a large amount of conflicting evidence. It seems undeniable, as the effect of the evidence on both sides, that an actual dissimilarity of circumstances and conditions exists between the cities concerned, both as respects the volume of their respective trade and the competition, affecting rates, occasioned by rival routes by land and water. Indeed, the Commission itself recognized such a state of facts by making an allowance in the rates prescribed, for dissimilarity resulting from competition, and it was contended on behalf of the 176] Commission, *both in the courts below and in this court, that the competition did not justify the discriminations against Troy to the *extent* shown, and that the allowance made therefor by the Commission was a *due* allowance.

The issue is thus restricted to the question of the preponderance of the evidence on the respective sides of the controversy. We have read the evidence disclosed by the record, and have endeavored to weigh it with the aid of able and elaborate discussions by the respective counsel.

No useful purpose would be served by an attempt to formally state and analyze the evidence, but the result is that we are not convinced that the courts below erred in their estimate of the evidence, and that we perceive no error in the principles of law on which they proceeded in the application of the evidence.

The decree of the Circuit Court of Appeals is accordingly affirmed.

Mr. Justice **Harlan** dissenting:

I dissent from the opinion and judgment in this case. Taken in connection with other decisions defining the powers of the Interstate Commerce Commission, the present decision, it seems to me, goes far to make that Commission a useless body for all practical purposes, and to defeat many of the important objects designed to be accomplished by the various enactments of Congress relating to interstate commerce. The Commission was established to protect the public against the improper practices of transportation companies engaged in commerce among the several states. It has been left, it is true, with power to make reports, and to issue protests. But it has been shorn, by judicial interpretation, of authority to do anything of an effective character. It is denied many of the powers which, in my judgment, were intended to be conferred upon it. Besides, the acts of Congress are now so construed as to place communities on the lines of interstate commerce at the mercy of competing railroad companies engaged in such commerce. The judgment in this case, if I do not misapprehend its scope and effect, *proceeds [177 upon the ground that railroad companies, when competitors for interstate business at certain points, may, in order to secure traffic for and at those points, establish rates that will enable them to accomplish that result, although such rates may discriminate against intermediate points. Under such an interpretation of the statutes in question, they may well be regarded as recognizing the authority of competing railroad companies engaged in interstate commerce—when their interests will be subserved thereby—to build up favored centers of population at the expense of the business of the country at large. I cannot believe that Congress intended any such result, nor do I think that its enactments, properly interpreted, would lead to such a result.

AMADO CHAVES *et al.*, *Appts.*,
v.
UNITED STATES *et al.*

(See S. C. Reporter's ed. 177-197.)

Spanish grant—insufficient exception thereto.

1. A Spanish grant on a petition by twenty persons "in unison," which is made on the express condition that it is to be settled by at least twenty citizens and the lands to be distributed in equal parts, and under which judicial possession is given by delivering to each one of the twenty settlers 300 varas of land, is not subject to an exception by a so called certificate of the alcalde

NOTE.—*As to Missouri private land claims*, see note to Les Bois v. Bramell, 11: 1051.

to the effect that after the allotments had been made eighteen of the twenty allottees assented to be deprived of any right or title to lands which had just been assigned to them because of a claim of the other two that they had been previously in possession under a former grant, as such an exception would be repugnant to the grant.

2. An *ex parte* correspondence between the Mexican governor and an alcalde, in which the latter presents the claim by two of several allottees under a grant to twenty, to the effect that they had title under an earlier grant, when the other settlers had no knowledge of this correspondence and when the governor's reply expressly declined to adjudicate the matter for lack of jurisdiction in respect of documents "sanctioned by former governors," cannot affect the rights of such other allottees, although the governor gives his individual opinion that the land actually occupied by the claimants under a former grant could not be claimed by the other allottees.

[No. 4.]

Argued October 12, 1897. Decided November 15, 1897.

APPEAL from a decree of the Court of Private Land Claims dismissing a petition filed by heirs and legal representatives of Francisco Garcia de Noriega *et al.* for the confirmation of an alleged Spanish grant in the county of Bernalillo, New Mexico. *Affirmed.*

Statement by Mr. Chief Justice **Fuller:**

This was a petition filed by heirs and legal representatives of Francisco Garcia de Noriega and José Antonio Garcia de Noriega for the confirmation of an alleged grant made by Governor Concha January 27, 1788, of 9,752.57 acres, called the cañon de San Diego, situated in the county of Bernalillo, New Mexico, and included within a grant of 116,288.89 acres by Governor Chacon, March 6, 1798, alleged in the petition to have been to the "town of the cañon de San Diego."

The granting papers of 1788 were produced and placed in the archives of the government by claimants in 1879. As translated by the government, they read as follows:

Señor Governor Don Fernando de la Concha:

We, Francisco Garcia de Noriega, interpreter for the Navajos, and José Antonio Garcia de Noriega, with the most profound respect appear before your Excellency and state, sir, that a cañon which is called San Diego being found vacant, having seen that cultivation may be had and some animals pastured therein, we prostrate ourselves at the royal feet of your Excellency's grandeur solely to ask and pray that you deign in the name of his Majesty to favor us by giving us the said cañon for the purposes mentioned, on account of finding ourselves lacking land for planting, and deserving that his Majesty should favor us we ask as a grant the said cañon; on account of all which we ask and pray that your Excellency be well pleased to command that what we request be done, that by your so doing we shall receive great benefit and favor, etc.

Francisco Garcia de Noriega. (Scroll.)
José Antonio Garcia. (Scroll.)

Santa Fé, January 27, 1788.

I grant, in the name of the King, the cultivation and working of the land which the petitioners ask for, the chief alcalde of the Queres, Don Antonio Armenta, placing them *in[179 possession thereof, provided that no prejudice results to the Indians and residents settled in that vicinity, and it having been so done, following this decree he shall place the said taking of possession without prejudice to a third party, in order to copy it in the government book, and to write it out on stamped paper when the same shall reach this province.

Concha. (Scroll.)

At this cañon of San Diego on the sixth day of the month of February, of the year one thousand, seven hundred and eighty-eight, I, Don Antonio de Armenta, chief alcalde and war captain of the jurisdiction of the Queres, by virtue of the authority that is conferred upon me by Señor Don Fernando de la Concha, Knight Commander of Mora in the Order of Santiago, lieutenant colonel of the royal armies, civil and military governor of this province of New Mexico, being at the said cañon, having cited the natives of the pueblo of Jemez, who are the adjoining owners to said land, and having designated to them that which was their own they were well suited on account of receiving no injury by the giving of said cañon, and also knowing that it is the will of our Sovereign that his lands be peopled by his vassals in whatever surplus there may be, and finding no obstacle whatever that could interfere with it, and exercising the authority that is conferred upon me, I went to said cañon of San Diego, and no one appearing who had a better right, nor there being any prejudice to a third party who might make objection, and said Indians, Francisco Garcia de Noriega, interpreter for the Navajos, and his brother, José Antonio Garcia de Noriega, being present and understanding it all, I took them by the hand, I conducted them over said lands, they pulled up grass, threw stones to the four cardinal points, and we all said together three times, "Long live the King, our Lord (whom may God preserve)," as evidence of true possession, which they received quietly and peaceably without any opposition, their boundaries being the following: On the north side, the waterfall (salto del aqua); on the south side, the junction of the rivers and also a point of a red table land (una mesa*colorada), and lands[180 of said Indians. With respect to the east and the west there is nothing more than some very high table lands on both sides of the cañon, which (table lands) serve as boundaries. And, there resulting no prejudice whatever, they were satisfied with them (the boundaries); and in order that it may so appear I, said chief alcalde, Don Antonio de Armenta, signed it, together with my two attending witnesses with whom I act for lack of a public or royal notary, of which there is none of any kind in all this government, to all of which I certify.

The interlineation "river" is valid.

Antonio de Armenta. (Scroll.)

(Armenta's scroll.)

Witness: Salvador Antonio Sandoval. (Scroll.)

Witness: Nicolas Ortiz. (Scroll.)

There are some differences between petitioners' translations and those of the government, the principal being in the opening words of the alleged grant, which in Spanish were: "Concedo en nombre del Rey el cultivo y labor de la tierra que solicitan los Supplicantes," etc. These words are translated by petitioners: "I grant in the name of the King, for cultivation and working, the land that the petitioners solicit;" and by the government: "I grant, in the name of the King, the cultivation and working of the land which the petitioners ask for."

The granting papers of the grant of 1798 were as follows:

Seal Third. [Seal.] Two Rials.
For the years one thousand, seven hundred and ninety-eight and ninety-nine.
To the Lieutenant Colonel and Governor of this Province:

Francisco and Antonio Garcia, brothers, and interpreters of the Navajo nation, in unison with Miguel Garcia, Joaquin Montoya, Salvador Garcia, José Manuel Garcia, Juan José Gutierez, Juan de Aguilar, Blas Nepumuceno Garcia, Bartholomew Montoya, José Montoya, Tomas Montoya, Juan Domingo Martin, José [181] Gonzales, Salvador Lopes, Antonio *Abad Garcia, Miguel Gallego, Marcos Apodaca, José Miguel Duran, and José Maria Jaramillo, appear before your excellency in the most approved manner the law requires and may be necessary, and state that a quantity of vacant and uncultivated land lies in the cañon of San Diego, adjoining the boundaries of the land belonging to the Indians of the town of Jemez; and whereas the settlement thereof would be beneficial to the provinces, and advantageous to our present families and descendants to be settling upon these lands with our property and cultivating the same, we pray your excellency to be pleased to grant this aid and settlement that we petition for to the persons herein mentioned; being pleased at the same time to order, in the name of his Majesty (whom may God preserve), that we may receive from the boundaries beyond the land granted to the Indians of the pueblo, our petition calling for from east to west to the middle arroyo called Los Torreones, and the line running from north to south to the Valleeelo de la Cueva which is in front of the waterfall, and in a transverse line from said middle arroyo to the Rito de la Jara. We also protest that we will not injure with our persons or stock a few trees which the Indians claim as their own, although they are planted beyond the limit of the lands which belong to them. Therefore we humbly pray your excellency to be pleased to order our request to be complied with, granting us the vacant land asked for; by doing which we will receive grace, and we swear, in due form, that our petition is not made through malice; and one signed, the others not knowing how.

José Miguel Garcia.

Decree.

In view of the foregoing petition made by José Miguel Garcia and other citizens therein mentioned, in regard to settling in the cañon known as San Diego de Jemez, where the interpreters of the Navajo nation were temporarily stationed, I grant to them the aforesaid land in the name of the King, our sovereign, with the express condition that it is to be settled by at least twenty citizens; that the lands are to be *distributed in equal parts, and [182] that they are not allowed or authorized, for themselves or their heirs, to sell or dispose of the lands granted to them. It being his Majesty's will, according to his last orders, that the lands should descend from father to son, or his heirs in a direct line; and if any colonist, to suit his own conscience, should desire to remove, under any pretext whatever, his possession or share shall remain for the benefit of the one taking his place, in which case the residents of the same place, or persons marrying there, shall be preferred, and for which no remuneration whatever shall be exacted by the person voluntarily absenting himself, or expelled or banished by the authorities on account of his bad conduct; that besides the subdivision above mentioned, a sufficient amount of land is to be left for pastures and watering places as well as to allow for the increase of the settlement, if such may be the case (which is likely to occur)—(torn)—order of the chief justice of that jurisdiction, Don Antonio Armenta, to place the parties in possession under the rules prescribed by law. Chacon.

Possession.

In the cañon de San Diego de los Jemez, on the fourteenth day of the month of March, in the year one thousand, seven hundred and ninety-eight, I, Don Antonio Armenta, chief justice of the pueblo of Jemez, by virtue of the authority conferred upon me by my superior, Don Fernando Chacon, gentleman of the order of Santiago, lieutenant colonel of the royal armies, political and military governor of this province of New Mexico, being at the aforesaid place, and having summoned the natives of said pueblo of Jemez, to whom, having measured the league belonging to them, I found a surplus of 2,100 varas, which they had before arriving at the cañon de San Diego, all of which they claimed as their own, without having any right to them in any manner; and believing that it is the wish of our sovereign that his land be settled upon by his subjects wherever a surplus may be found, and finding no impediment whatever, and using the authority in me vested, I proceeded to the surplus lands, and finding no one with a better title, and Francisco Garcia, *Antonio [183] Garcia, Navajo interpreters, Miguel Garcia, Joaquin Montoya, Salvador Garcia, José Manuel Garcia, Juan José Gutierrez, Juan de Aguilar, Juan Blas Pumuceno Garcia, Bartolome Montes, Tomas Montoya, José Montoya, Juan Domingo Sangil, Salvador Lopez, José Gonzales, Antonio Abad Garcia, Miguel Geallgos, Marcos Apodaca, José Miguel Durán, and José Jaramillo, being present, all interested and well-informed in regard to the matter. I took them by the hand, walked them over said lands, they pulled up grass, threw stones towards the four winds, and we all cried at once, three times, Live the King our sovereign (whom may God preserve), in proof of legal possession, which they received quietly and peaceably without any opposition whatever, because, after concluding all these ceremonies, I delivered to each one of the said settlers three hundred

varas, with which they were well satisfied, leaving the remainder for the benefit of all, and without any other lands being left for any person to enter; and in order to prevent any other from coming to meddle and create difficulties between the citizens, as well as the Indians, I gave time to understand which were their boundaries, which are: On the north, the Vallecito de la Cueva; on the south the termination of the Indian league. On the east, the boundary of Vallecito; and on the west, the opening towards the middle arroyo and the Rito de la Jara; and no injury resulting to anyone they were all satisfied, and in order that it may so appear, I, the said chief justice, signed with my two attending witnesses in the absence of a public or royal notary, there being none within the limits of all this government, to which I certify.

Antonio de Armenta.

Witnesses:
Salvador Lopez.
José Miguel Garcia.

In 1879, when the documents of 1788 were produced by claimants and filed in the archives, the following certificate was also brought forward by them and put on file:

In the cañon de San Diego de Jemez on the fourteenth day of the month of March, year [184] 1798, before me, Antonio *de Armenta, and there being assembled all the citizens who took possession of the said cañon, together with Francisco Garcia de Noriega and Antonio Garcia de Noriega, two brothers of the first possessors, said Garcias declared in a loud and clear voice, which all heard, because they shouted it with much distinctness, and they all unanimously agreed to abide by what was said by the said Garcias, and their reasons were these: Friends and brothers, now each of you is about to take the lands, which His Majesty has granted and donated to you; but you are all notified that the lands, which we first and in our first grant, we have been possessing, be all of you aware that I and my brother are going to enjoy the same freely, without any of those present, nor their children nor anybody else shall desire to interpose obstacles, and because as first possessors we have the right to enjoy said lands and to cultivate them with full title, as well ourselves, our children, and our successors; and so that none of those who are present may plead ignorance we have so spoken to-day, there being no one absent. The said Garcias having made all the remarks, all unanimously replied that they asked reasonable justice and that neither by themselves, their children, nor successors would there be interposed any suit or demand against them at any time, and if they perchance should wish to do so they would take the case until leaving them in peace concerning the said land which they had been so justly possessing.

All here set forth I, said chief justice, witness, for all of the citizens declared that it was not to them any imposition that the Messrs. Garcias should enjoy the lands which they were heretofore cultivating, and that it may so appear whenever requisite I will make this document in favor of the said two Garcias, I sign the same with those of my attendance in the aforesaid cañon in said day, month, and year, to which I certify. Anto. de Armenta.

It also appeared that there were among the old archives the following:

*Governor: The interpreter of the Na-[185] vajos, Antonio Garcia, has presented to me a document executed to him by the former alcalde of this jurisdiction, Antonio de Armenta, under the decree of Don Fernando de la Concha, as appears from the grant itself, and the whole of the Jemez cañon, having been settled under an order of Don Fernando Chacon in a royal grant made to them and in which it embraced the lands granted to the Garcias, whence results contention between the one and the others the latter grantees alleging title to all the land; and I, deeming that the title claimed by Antonio Garcia is founded in law, he having been the prior settler for the period of ten years, with the condition that at the time they were given possession all the new settlers gave their consent, as said Garcia makes appear by a document which the alcalde executed to the two brothers and which I inclose to you, together with the grant of the Garcias, so that after seeing you may order whatever you shall deem proper, and may, if Garcia has a right to the land claimed, confirm and approve the same, to obviate all questions which will necessarily result if the latter be not decided by your superiority that the land of the Garcias is included or not in the grant of the last settlers and whether a copy of this grant be taken so that the original, which is the one I inclose, may remain in the archives of the government confirmed by you, and the same to be done with a copy, subject to what you may direct, which will be the best and most correct, your ordering what I shall do to avoid proceedings annoying your attention. God preserve you many years. Ignatio Sanchez Vergara.

Santa Ana, 1st of December, 1808.
Lieutenant Colonel José Manrique.

Advised of your official communication of the first instant and documents you accompany.

I will state to you that the subject does not require any decision of mine inasmuch as the grant of the Garcias makes their right clear, which grant being the older always has a preference. *The last settlers cannot deny to[186] the Garcias a better title and so these should always remain on the same grant which they have held hitherto; and if the said new settlers do not coincide you will not permit them recourse for and such which they may possess, they will not have the royal audience of Guadalajara, as the documents referred to were sanctioned by former governors of this province and the said royal audience alone can annul them; with which I answer your official communication before mentioned. I return to you the documents mentioned that you may deliver them to the party interested. God preserve you many years.

Santa Fé, 13th of December, 1808.
To the alcalde of Jemez.

On the 4th day of June, 1859, certain claimants for themselves and in the name of the

actual settlers petitioned the surveyor general of New Mexico, Pelham, for a confirmation of the grant of March 6, 1798, who took action thereon. In the proceedings it appeared from the evidence that a town existed on the grant some sixty years before and was in existence when the United States took possession, and the testimonio of the original granting papers, heretofore given, certified to as correct and genuine by the alcalde, Don Antonio Armenta, with his attending witnesses, on March 16, 1798, in due form, "at the verbal request of the parties," which was then on file in the office of the surveyor general, was considered and acted on by him. The surveyor general made his report to Congress, under date June 10, 1859, approving the grant, and stating that "the evidence shows that the town has been in continuous occupation of the claimants, and was in existence when the United States assumed sovereignty over the country." The grant was thereupon confirmed by Congress June 21, 1860 (12 Stat. at L. 71, chap. 167, § 3). The patent for this grant was issued October 21, 1881, to the original twenty grantees and those claiming under or through them.

In 1879 Amado Chaves, for himself and the other heirs of the two Garcias, petitioned the then surveyor general Atkinson, for the approval and confirmation of the grant of 1788, **187**] *and in the proceedings before him the papers of that date, together with the certificate of Alcalde Armenta of March 14, 1798, were produced and filed, and considered with the correspondence of 1808 and sundry depositions. The surveyor general approved the grant March 22, 1880, and transmitted a certified transcript of the papers for the action of Congress, but the grant was not confirmed.

The evidence tended to show that Francisco and Antonio Garcia were two Spanish brothers who were interpreters for the Navajos; that Francisco was killed in 1807, and that Antonio died in 1835.

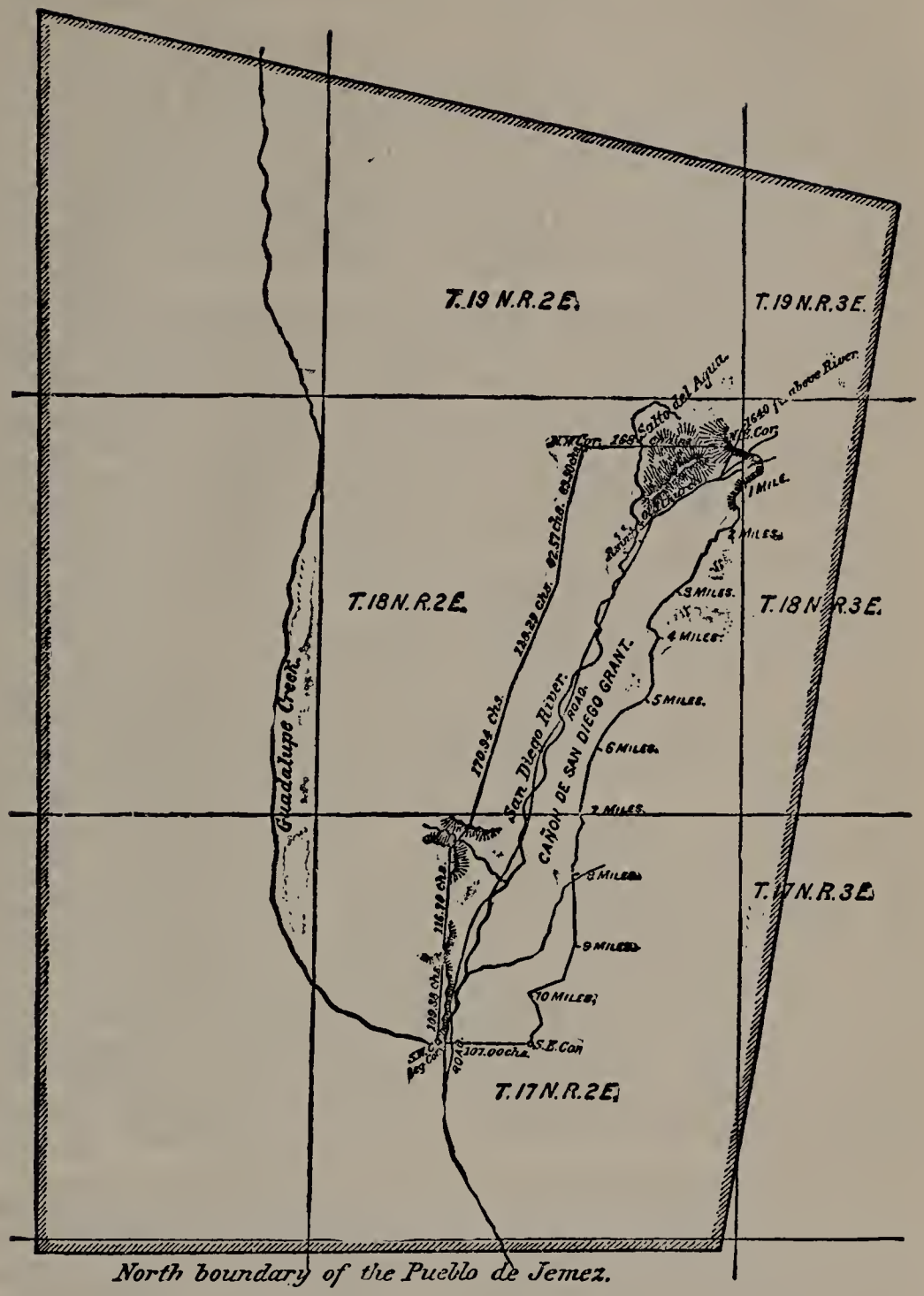
The depositions of two witnesses, one of them the great grandson of Francisco Garcia, born in 1827, and the other the grandson of Antonia Garcia, born in 1807, were taken by Surveyor General Atkinson in January, 1880. Both gave the south boundary of the tract sued for as the junction of the San Diego and the Guadalupe rivers, "and the lands of the Indian pueblo of Jemez." Both testified that the tract was reputed to belong to the heirs of the two Garcias; that Francisco was reputed to have lived thereon; and that Antonio, who survived until 1835, lived there to their knowledge.

In addition to these depositions, petitioners called as a witness another great grandson of Francisco, born in 1850, who testified that his grandmother was born on the tract, and that "she said the land was occupied and cultivated by them," the two Garcias. What particular part of the tract she was born on and the particular place of occupancy and cultivation did not appear.

The evidence on behalf of the government was to the effect that Antonio Garcia occupied land several hundred varas in extent, running north from the north boundary line of the Indian pueblo, which was subsequently sold by Antonio's grandson to one of the witnesses, who thereupon took up his residence in Antonio's house; that Antonio said that he had "lands in the Indian's league;" "from the Pueblo Indian league up north;" that the ranches were in the cañon and divided into portions of 300 varas each; that heirs of the original grantees or persons claiming under them still held *original allotments north of the [**188** junction of the rivers; and that the smaller grant was not generally known.

The survey of May 18, 1880, was as follows:

189



Plat of the Cañon de San Diego Grant, surveyed by Rob't G. Marmon, U. S. Deputy Surveyor, May, 1890. Scale 80 chains—1 in.

The court of private land claims, two members dissenting, held that the claim under the grant of 1788 had been abandoned, and dismissed the petition.

Mr. **Henry M. Earle** for appellants.

Messrs. **Matthew G. Reynolds,** Special Assistant to the Attorney General, and **John K. Richards,** Solicitor General, for appellees.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By the Spanish law in force at the time of the alleged grant of 1788 lots and lands were distributed to those who were intending to

settle, and it was provided that "when said settlers shall have lived and labored in said settlements during the space of four years, they are hereby empowered, from the expiration of said term, to sell the same, and freely to dispose of them at their will as their own property." But confirmation by the audiencia, or the governor, if recourse to the audiencia was impracticable, after the four years had elapsed, was required in completion of the legal title. Laws Indies, lib. IV., tit. 2, law 1; Royal Order of 1754; 2 White's New Recop. 48, 62. This is admitted except that it is said that confirmation was not needed, and was not usually had, until the settler sought to exercise the power of disposition.

It was also provided that it should "not be lawful to give or distribute lands in a settlement to such persons as already possess some in another settlement, unless they shall leave their former residence and remove themselves to the new place to be settled, except where they shall have resided in the first settlement during the four years necessary to entitle them to fee-simple right, or unless they shall relinquish their title to the same for not having fulfilled their obligation." Lib. IV., tit. 12, law 2; 2 White's New Recop. 49.

190] *We are of opinion that the granting papers in this record taken together do not justify the presumption of settlement and working by the two Garcias on the tract contained in the grant of 1788, for the ten years prior to 1798, or for four years thereof, or any confirmation of the grant thereupon; but that the contrary is to be inferred from the testimony in respect of possession; and that Armenta's certificate of 1798 and the correspondence of 1808 conduct to no other result.

The two Garcias were interpreters to the Indians and they may not unreasonably be supposed to have resided, in that capacity, at the pueblo, or on lands claimed by the Indians as appurtenant thereto. The language of the petition and decree of 1788 was perhaps somewhat peculiar, and it is manifest that Governor Chacon regarded "the cultivation and working of the land" by them as not permanent in character, for when the petition for the grant of 1798 was presented to him on behalf of the two Garcias and eighteen others, he referred in his decree to the interpreters as "temporarily stationed" on the tract solicited, and must be assumed to have been aware of the nature of their occupation.

The petition of 1798 was a petition for settlement, and it nowhere intimates that the two Garcias, petitioners "in unison" with the other eighteen proposing to settle, claimed an independent interest in the cañon de San Diego by virtue of the alleged grant of 1788, but on the contrary it states that "a quantity of vacant and uncultivated land lies in the cañon of San Diego, adjoining the boundaries of the land belonging to the Indians of the town of Jemez," and that "the settlement thereof would be beneficial to the provinces and advantageous to our present families and descendants." The terms of the decree are entirely inconsistent with the recognition of such a claim, and so is the act of judicial possession. In that act the alcalde, Armenta, states that in the cañon de San Diego de los Jemez, having summoned the natives of the pueblo of Jemez, to whom was measured the league belonging to them, he found a surplus of 2,100 varas, which the Indians had, before arriving at the cañon de San Diego, and were claiming as their own, but to which he *says they had no right in any manner; **[191** and believing that it was the wish of the sovereign that his lands be settled by his citizens wherever a surplus was found, finding no impediment, and using the authority in him vested, and finding no one with a better title, and Francisco Garcia and Antonio Garcia, the Navajo interpreters, and the eighteen other petitioners (naming them), being present, "all interested and well informed in regard to the matter," he took them over the lands, performing the usual formal acts in proof of legal possession, "which they received quietly and peaceably without any opposition whatever, because, after concluding all these ceremonies, I delivered to each one of the said settlers 300 varas, with which they were well satisfied, leaving the remainder for the benefit of all, and without any other lands being left for any person to enter;" and he gave them time to understand the boundaries, which were: "On the north, the Vallecito de la Cueva; on the south, the termination of the Indian league. On the east, the boundary of Vallecito; and on the west, the opening towards the middle arroyo and the Rito de la Jara;" adding: "and no injury resulting to anyone, they were all satisfied." Of these boundaries the southern was the north boundary of the Indian pueblo, and in making the subdivision Armenta apparently started from that boundary, and, after reaching the junction of the Guadalupe and the San Diego, followed up the San Diego, which flowed through the cañon. He made the distance from the north boundary of the pueblo to the south boundary of the cañon 2,100 varas, and, therefore, if he subdivided that space, must have allotted at least 3,900 varas within the alleged grant of 1788, for he certified that he delivered to "each one of the said settlers 300 varas," which would be 6,000 varas in all for twenty settlers. The government survey shows that distance to have been something short of 3,400 varas. If Armenta meant by the "said settlers" the eighteen co-petitioners, and left to the interpreters as contra-distinguished from these settlers what they were cultivating between the two boundaries, then 5,400 varas were allotted to the eighteen within the grant of 1788.

In any view, allotments were made north of the south *boundary of the grant now **[192** claimed, which was entirely embraced by the grant of 1798.

The evidence for the petitioners did not show where the two interpreters were located and what the particular tract was that was reputed to belong to them in fee, but the evidence for the government tended sufficiently to establish that they did not actually cultivate any part of the grant of 1788 prior to 1798. It must be conceded that wherever the interpreters were, they were together, and it is quite clear from the testimony that Antonio Garcia, who survived until 1835, when one of the witnesses was twenty years old, cultivated and claimed ownership of land not within the boundaries of the grant of 1788, but between

the south boundary of that tract and the north boundary of the Indian pueblo; and the presumption is that this was so in respect of Francisco.

It is true that when Armenta gave juridical possession under the grant of 1788 he described the south boundary as "the junction of the rivers and also a point of a red table land and lands of said Indians." But at that time the Indians claimed to the junction of the two rivers, and no attempt was then made by Armenta to determine the boundary of the pueblo, as it would seem would have been the case if the grant had been of land for settlement with the intention of acquiring the legal title.

When the proceedings were had before the surveyor general in 1879–80, the original papers of 1788 were produced by claimants, and also an independent paper purporting to have been signed by Armenta on the 14th day of March, 1798, at the cañon, stating "there being assembled all the citizens who took possession of the said cañon, together with Francisco Garcia de Noriega, and Antonio Garcia de Noriega, two brothers of the first possessors;" and that "the said Garcias declared in a loud and clear voice, which all heard, because they shouted it with much distinctness, and they all unanimously agreed to abide by what was said by the said Garcias, and their reasons were these: Friends and brothers, now each of you is about to take the lands, which His Majesty has granted and donated to you; but you are all notified that the [193] *lands, which we first and in our first grant, we have been possessing, be all of you aware that I and my brother are going to enjoy the same freely, without any of those present, nor their children nor anybody else shall desire to interpose obstacles, and because as first possessors we have the right to enjoy said lands and to cultivate them with full title, as well ourselves, our children, and our successors." And "all unanimously replied that they asked reasonable justice and that neither by themselves, their children, nor successors would there be interposed any suit or demand against them at any time;" and that they should be left "in peace concerning the said land which they had been so justly possessing." And to this Armenta bore witness, because "all of the citizens declared that it was not to them any imposition that Messrs. Garcias should enjoy the lands which they were heretofore cultivating."

There is nothing to show and we think the presumption cannot be indulged that this so-called certificate was brought to the attention of Governor Chacou, and the alcalde certainly had no authority in himself to make an exception to the grant.

The grant of 1798 was a grant for settlement, and by the allotments contemplated to be made and which were made, so many parcels, of 300 varas each, specifically situated in whole or in part within the cañon and the alleged grant of 1788, were set off, so that if an exception could have been created by this independent paper it involved the proposition that after the allotments had been made, eighteen of the twenty allottees assented to be deprived of any right or title to the lands which had just been assigned to them, and would have been repugnant to the grant.

Again, there was no intimation of such an exception in the petition, the decree, or the act of juridical possession, nor any mention of the execution of this paper in that act, nor does it appear that it was placed in the archives with the title papers, and when Armenta certified to the testimonio on the 16th of March, 1798, he did not include nor make any mention of this certificate. Moreover, it was not attested by witnesses, as required in the instance of official documents, in the *ab- [194] sence of a public or royal notary, of which there was "none within the limits of all this government," as Armenta certified in the act of juridical possession. It is impossible to treat this paper as of legal validity as an exception, and to give it the same force and effect as the act of juridical possession or as if it were a direct reconveyance.

But treating the paper as genuine and entitled to consideration as evidence, it amounts to nothing more than the statement of an assent on the part of the eighteen that the Garcias should not be disturbed as to the particular land they were cultivating, which we are satisfied from the evidence was not within the grant of 1788 at all. It furnishes no basis for permitting the Garcias to repudiate the official action of the alcalde in making the allotments to their copetitioners, they having been present, participating in the proceedings, and parties to the transaction from the beginning.

This brings us to consider the papers of 1808, which consist of a communication of Alcalde Vergara to Governor Manrique and an unsigned note purporting to be the governor's reply thereto. The alcalde states that "the interpreter of the Navajos, Antonio Garcia," has presented to him a document in his favor, executed by the former alcalde, Armenta, under the decree of Governor Concha, "as appears from the grant itself, and the whole of the Jemez cañon having been settled under an order of Don Fernando Chacon in a royal grant made to them, and in which it embraced the lands granted to the Garcias, whence results contention between the one and the others, the latter grantees alleging title to all the lands; and I, deeming that the title claimed by Antonio Garcia is founded in law, he having been the prior settler for the period of ten years, with the condition that at the time they were given possession all the new settlers gave their consent, as said Garcia makes appear by a document which the alcalde executed to the two brothers and which I inclose to you, together with the grant of the Garcias, so that after seeing you may order whatever you shall deem proper and may, if Garcia has a right to the land claimed, confirm and approve of the same, to obviate all questions which will necessarily result if the *latter be not decided by your superiority [195] that the land of the Garcias is included or not in the grant of the last settlers."

It will be perceived that the controversy is asserted to be, not whether the Garcias' land included that of the other settlers, but whether the land of the latter embraced that of the

Garcias. It is this question which the governor is asked to determine. The "others" are plainly the eighteen settlers, and they are the grantees who are said to be alleging title to all the lands. The reply of the governor stated that the subject did not require his decision, "inasmuch as the grant of the Garcias makes their right clear, which grant being the older always has a preference;" and that the last settlers could not deny to the Garcias a better title, and so these "should always remain on the same grant which they have held hitherto." And he added that "if the said new settlers do not coincide," he should not permit them recourse, for "as the documents referred to were sanctioned by former governors of this province," the royal audiencia of Guadalajara alone could annul them.

This correspondence was entirely *ex parte* and without the knowledge of the other settlers, and was in no respect judicial action. The reply signified the individual opinion of the governor, not that the new settlers could be driven from their own holdings, but that they could not claim the land actually occupied by the Garcias. And he expressly declined to adjudicate in the premises because unable to take jurisdiction in respect of documents "sanctioned by former governors." Now what had been sanctioned in 1798 by Governor Chacon was the grant and allotments of that date, and it does not appear that in 1808 the validity of those allotments was questioned. The communication of Vergara related to the land that had been formerly cultivated by the Garcias and to which they were given a preferred right by Armenta at the time of delivering juridical possession in 1798; and Vergara stated that the whole of the cañon had, when he wrote, been settled under the grant of that year.

The court of private land claims held that **196**] Governor *Chacon was justified in regarding the petition to him as in the nature of a request on the part of the Garcias to make to the twenty petitioners a grant of the whole tract within the boundaries specified and as an offer of release of all claims to any part of the land by virtue of the grant of 1788; that the act of juridical possession showed that the twenty petitioners, including the Garcias, were placed in possession and each received 300 varas of land, leaving the remainder to be held in common; that the certificate of Armenta of 1798 was probably signed before the act of juridical possession, and reasonably bore the construction that the petitioners had agreed, in pursuance of an original understanding, that a colony of twenty persons should be formed, of which the two Garcias should be members, to settle in the cañon and that the Garcias should surrender all claim under the grant of 1788, and accept their proportion of the new grant with the new settlers, share and share alike; that the Garcias accepted the agreement of their cograntees as a guaranty that in any distribution of the land which might be made their allotments should cover the particular portion which they had theretofore been cultivating; that by thereafter accepting their allotments the Garcias became parties to the official action of the alcalde and were bound by it; and that they each accepted 300 varas as their equal part in compliance with the terms of the grant and of the agreement, and to their entire satisfaction. On the other hand, it might fairly be argued that Armenta in the act of juridical possession in 1798 left to the Garcias all the land which they were actually cultivating south of the south boundary of the grant of 1788, and assigned to the eighteen last settlers 5 400 varas north of that boundary and in the grant itself, and that the certificate of 1798 was merely in authentication of an assent to the allotment to the Garcias, as cosettlers with the eighteen, of lands previously possessed by them south of the grant of 1788, and not to an exception of that grant out of the grant of 1798. Although the Garcias, if they should be regarded as prior settlers, did not "leave their former residence and remove themselves to the new place to be settled," they brought *themselves into connection [**197** with it and relinquished whatever rights they had outside of the particular land resided on and cultivated. The 2,100 varas were surplus lands so far as the Indians were concerned, and vacant in the sense that the Indians had no title to them, yet nevertheless the interpreters may have been in occupation thereon as outlying Indian lands, and upon the surplus being ascertained may have asserted a superior right to what they were there cultivating, and demanded that that be conceded in the distribution under the new grant. If this were so, it would satisfactorily explain the certificate of Armenta and the contention referred to by Vergara.

We are not dealing with the rights of the Garcias as between them and other claimants, but with the rights of the Garcias as between them and the government of Spain, and in that regard the question is whether that government conveyed to others what had already been conveyed to the Garcias. Whether, then, the Garcias did or did not take 300 varas each north of the south boundary of the grant of 1788, they would be equally bound by their participation in the grant of 1798, although in the distribution thereunder they were allotted even more than that south of that boundary under the circumstances.

Accepting either construction of the documents and in the light of all the evidence, the conclusion of the court below was correct.

The suggestion that some of the allotments may have been in the cañon Guadalupe finds no such support in the record as to require consideration.

Decree affirmed.

PUEBLO OF ZIA *et al.*, *Appts.*, [198
v.
UNITED STATES *et al.*

(See S. C. Reporter's ed. 198-207.)

Spanish grant, when only a license for pasturage.

A grant to pueblos "for pasturing the stock and horses," providing that "they will hold the

NOTE.—*As to Missouri private land claims*, see note to Les Bois v. Bramell, 11: 1051.

same with legitimate title under this royal grant so that they be not molested by any Spanish citizen or citizens taking their stock thereupon, deeming the pasturage to be common;" but stipulating that in case of necessity the horses of the royal garrison of Santa Fé may be kept there "where they have been accustomed to graze;" such grant being made on a petition stating that the pueblos have considered this "as their pasture ground," and that it has been used in urgent cases for horses of the royal garrison, and that they are aware that there are "applicants to acquire the same by grant, which will cause them very great injury;" in consideration of which they ask that the place may be declared the legitimate pasture grounds and pastures of the pueblos,—constitutes a mere license for pasturage, which, if not revoked by subsequent grants, was revoked by the treaty of Gaudalupe Hidalgo ceding the territory to the United States, and cannot, therefore, be confirmed by the court of private land claims.

[No 5.]

Argued October 12, 1897 Decided November 15, 1897.

ON APPEAL from a decree of the Court of Private Land Claims dismissing the petition of the Puehlos of Zia, Santa Aña, and Jemez for the confirmation of a Spanish grant. *Affirmed.*

Statement by Mr. Justice **Brown:**

This was a petition by the pueblos of Zia, Santa Aña, and Jemez for the confirmation of what is known as the Ojo del Espiritu Santo grant, containing about 382,849 acres.

The testimonio, or official copy of the pro-**199**]ceedings, opens *with the following petition to the governor and captain general, presented in 1766, by Felipe Tafoya, as the agent of these pueblos:

His excellency, the governor and captain general:

I, Felipe Tafoya, lawyer of this town of Santa Fé, appear before your excellency in full legal form, for and in the name of Cristoval, Indian governor of the pueblo of Zia, and Thomas, chief war captain of said pueblo, who come under appointment from their casique, and of the other inhabitants of their Republic, and, sir, in the name of the aforenamed, and of the community of the pueblos of Santa Aña and of Jemez, do state that they, from their foundation, have considered as their pasture ground, in the vicinity of their said pueblos, a valley commonly called the Holy Ghost Spring, and that in some urgent cases, the same, as is known, is used as a pasture ground for the horses of this royal garrison, and the said parties being aware that the said valley has had, in its vicinity, some applicants to acquire the same by grant, which will cause them very great injury, as they have consiclerable cattle, sheep, goats, and horses for the royal service, and not having any other place in which to pasture them, particularly the people of the pueblo of Zia, the greater part of whose fields are upland, and some of them in the glens of said valley, adjoining their said pueblo. In consideration of all of which, I ask and pray that your excellency, in the name of His Majesty (whom may God preserve), be pleased to declare said valley to be the legitimate pasture grounds and pastures of the pueblos, directing that the boundaries thereof be designated to them, that is, on the east, the pueblos aforesaid, on the west, the summits of the Puerco river, on the north, a place called the Ventana, where some Navajo Apaches reside, and on the south, the lands of the citizen settlers of said Puerco river, and, should your excellency order to be done as I have requested, the said parties, my clients, will receive grace with the justice which I ask, and declare in their name that this is not in dissimulation, and so forth.

Felipe Tafoya.

*Upon the receipt of this petition and [**200** on June 16, 1766, Velez Cachupin, governor and captain general, made an order commissioning the chief alcalde of said pueblos, Bartolomé Fernandez, "to the end that, having examined the boundaries which they mentioned as of the Holy Ghost Spring, where they state they pasture their stock and horses, he reports to me the leagues the same may embrace from north to south and from east to west, and whether the aforesaid three pueblos have the cattle, sheep, goats, and horses proportional to the boundaries asked for their grazing, and also whether or not any citizen or citizens are damaged by said boundaries under any prior valid grant and possession held by them, which the said chief alcalde will perform with all possible veracity."

Fernandez reported that he proceeded to examine the lands and their boundaries, and after establishing the quantity, found that they were "only suitable for pasturing live stock, which is abundant at said pueblos, though the said three republics have no other lands on which to sustain their stock, and it being, as it is true, that none of the aforementioned boundaries will injure anyone holding or to hold possession of lands within the same, which proceedings I placed on record," etc.

Upon this report the captain general made the following decree:

In the town of Santa Fé, on the sixth day of the month of August, one thousand, seven hundred and sixty-six, I, Thomas Velez Cachupin, governor general of this Kingdom of New Mexico, and in view of what is petitioned for by the three pueblos of Santa Aña, Zia, and Jemez, of the Queres nation, and of the report which their chief alcalde, Bartolomé Fernandez, makes, that they have held said lands for their live stock, which at present is abundant, without having any other places in which to pasture them, except those referred to in their petition, together with the small watering places mentioned in said report, declare that I would grant, and I did grant, in the name of His Majesty (God preserve him), the *aforesaid lands for pas [**201** turing the stock and horses of the aforesaid three pueblos of Santa Aña, Zia, and Jemez, with the boundaries, from north to south, from the place Ventana to the stone ford of the Puerco river, the boundaries also of the citizens of the place San Fernando of Nuestra Señora de la Luz: and from east to west, from the pueblo of Zia to the said Puerco river, the eastern edge, the whole of the valley of the

Holy Ghost Spring being embraced within the center and within the boundaries of this grant, with the condition and stipulation: that in case of necessity the horses of this royal garrison of Santa Fé may and shall be kept in said valley, the same being a place where they have been accustomed to graze; wherefore the aforementioned three pueblos are to place no obstacle in the way, nor claim damages therefor; and the aforementioned boundaries being for the future considered those of the aforementioned three pueblos, they will hold the same with legitimate title under this royal grant, so that they be not molested by any Spanish citizen or citizens, taking their stock thereupon, decming the pasturage to be common. And I direct the chief alcalde, Bartolomé Fernandez, to go and give to the aforementioned three pueblos royal possession of this grant, and the boundaries therein set forth, taking with him the justices and seniors of each one of them, and placing his proceedings on record, following this my granting decree, which he will return to me, in order to furnish to each pueblo the proper testimonio of the whole, and deposit the original in the archives of this government, where it shall remain.

And I so provided, granted, ordered, and signed, acting with two attending witnesses in the absence of notaries, there being none of any kind in this jurisdiction.

Thomas Velez Cachupin.

Witness: Carlos Fernandez.

Witness: Domingo Sabadia.

In compliance with this decree of the governor and captain general, Bartolomé Fernandez, the alcalde, made report to the governor that he proceeded to the aforementioned pueb-
202] los, *and, in company with the governors, casiques, and other authorities, proceeded to the lands asked for by the natives of the said three republics, and summoning the contiguous land holders, took by the hand the aforesaid governors and the magistrates, "and conducted them over said land; and they shouted, 'Long life to the King, our sovereign, whom may God preserve,' and they cast stones, and pulled up grass, in sign of possession, which I gave them, and which they received quietly and peaceably, without any oppositiou whatever, under the conditions mentioned in the aforesaid grant," etc.

The claim was presented to the surveyor general under the law of July 22, 1854, and through the Secretary of the Interior reported to Congress for confirmation, but no action was ever taken. The petitioners also produced evidence tending to show that since the date of the grant they have been continuously and openly in possession of the property, pasturing their cattle upon it and cultivating certain portions, under a claim of exclusive right thereto by virtue of the grant; that they are now in the open and notorious occupation of the same as the owners in fee, except a portion of it which may be in conflict with a certain grant called the Santissima Trinidad Galvana Ignacio Sanchez Veraga tract, in regard to which they admit they have released the same unto the claimants thereof. The continuity and exclusiveness of this possession were denied by the witnesses produced by the govern ment.

In defense it was shown by the government that three subsequent grants were made, one in 1815 to Luis Maria Cabeza de Baca, known also as the Ojo del Espiritu Santo grant; another in 1786, known as the San Isidro grant, and another made 1798, known as the cañon de San Diego grant, in connection with which parol evidence was admitted to show a conflict between these grants and that of the petitioners to a large, if not to the entire, extent of their grant.

Upon this state of facts the court of private land claims made a decree rejecting the grant, and dismissing the petition of petitioners upon the ground that the grant was not in fee, but a license to pasture. From this decree the petitioners appealed to this court:

Mr. **Henry M. Earle** for appellants.

Messrs. **Matthew G. Reynolds,** Special Assistant to the Attorney General, and **John K. Richards,** Solicitor General, for appellees.

Mr. Justice **Brown** delivered the opinion of the court:

The main question in this case is whether the language of the documents which make up the testimonio indicates anything more than the grant of a right to these pueblos to pasture their cattle upon the lands in question—a right somewhat akin to the right of common under the English law, and one which appears to have been frequently granted under the Spanish law. *United States* v. *Huertas*, 33 U. S. 8 Pet. 475 [8: 1015]; *United States* v. *Davenport's Heirs*, 56 U. S. 15 How. 1 [14: 575].

The words of the several documents set forth in the testimonio certainly favor this interpretation: Thus, in the petition, there is no application for a grant of vacant land for cultivation and pasturage, as is usual in this class of cases, but a statement that the pueblos "have considered as their pasture ground in the vicinity of their pueblos, a valley commonly called the Holy Ghost Spring" (which, it seems, had been used in some cases as the pasture ground for the horses of the royal garrison), and that some applicants were desirous of acquiring the same by public grant, "which will cause them very great injury, as they have considerable cattle, sheep, goats, and horses for the royal service," and have no other place in which to pasture them. There was no claim of a grant of the lands, such as the other applicants were seeking to acquire, but a request to have them *considered as their pasture ground*, and as the pasture ground for the horses of the royal garrison. The prayer bears out this construction of the statement of the petition. It asks, not for a grant of the land, but that his excellency will "be pleased to declare said valley to be the legitimate pasture grounds and pastures of the pueblos," directing a designation of their boundaries, etc.

*The order of the captain general upon [204
this petition and the report of the chief alcalde are addressed only to the ascertainment of the boundaries, and to the fact whether there was any other prior grantee in possession, and throw but little light upon the granting act.

The final grant or decree, however, states that the captain general granted the aforesaid

lands "for pasturing the stock and horses of the aforesaid three pueblos," designating the boundaries, and with the stipulation that in case of necessity the horses of the royal garrison of Santa Fé might be kept in the valley where they had been accustomed to graze, and decreed that the aforementioned three pueblos "will hold the same, with legitimate title, under this royal grant, so that they be not molested by any Spanish citizen or citizens, taking their stock thereupon, deeming the pasturage to be common." The alcalde was further directed to give royal possession of the grant which he certifies in the act of possession that he did by taking by the hand the governors and war captains of the pueblos with their magistrates, and conducting them over the land, and making a livery of seisin by shouting, "Long life to the King, our sovereign (whom may God preserve)," and casting stones and pulling up grass in sign of possession, "which I gave them and which they received quietly and peaceably without any opposition whatever, under the conditions mentioned in the aforesaid grant," and subsequently attesting these formalities with witnesses.

There is nothing in any of these instruments to indicate that the pueblos desired, or that the governor intended to grant, anything beyond a common, whereon the inhabitants of the pueblos might pasture their stock in conformity with ancient usage. When it is considered that the valley was already used as a pasture ground for the horses of the royal garrison, it is to be inferred that the rights of these pueblos were practically the same as those of the royal garrison, and were not intended to involve a conveyance of a fee of the land. It is true that by the common law of England livery of seisin was only necessary to be made upon the granting of an estate of freehold, either by inheritance or for life (2 **205**]Bl. Com. 314); *but under Spanish law it seems to have been a feature commonly connected with the delivery of possession of the land, though to what extent is somewhat uncertain.

The granting clause is not in the usual form of a grant of vacant lands to the grantee for cultivation and pasturage upon condition of actual possession for a number of years. Nor are there any words indicating an intention to pass a fee simple, such as found in some of the Spanish grants, para adquirir légitimo derecho de propiedad y señorio, "in order to acquire legitimate right of property and dominion." These words, propiedad y señorio, carry the idea of complete ownership, and seem to be practically the same as the words "fee simple" under the common law.

Upon the contrary, the grant in question provides that the grantees "shall hold the same with legitimate right" of possession (para que lo posean con derecho légitimo) "under this royal grant, so that they be not molested by any Spanish citizen taking their stock thereon, deeming the pasture to be common." It would seem to have been the intention of the governor by these words to vest the pueblos simply with the right to the use of the lands without intending to estop himself, or his successors, from making a subsequent disposition of the same by a grant in fee. This construction is also borne out by the fact that within a few years thereafter a grant was made of the entire tract to other parties. As remarked in the opinion of the court below, "it seems quite unreasonable to suppose that, if this area in controversy had been granted as an estate in fee to the land, the same granting authority would have deliberately granted a portion of the same land to a third party only twelve years after the former grant, repeat a like act in 1815 and afterwards, and that, too, of land situate near the capital, grazed upon by the royal horses of the capital garrison, and the local alcalde directed in every case to report officially whether the land proposed to be granted was unoccupied, or that the grant would be to the injury of third parties. This grant was prayed solely as a pasturage right; it seems to have been granted for that purpose alone, and it appears that the governor afterwards treated it as such, and disposed *of[**206** the paramount title to a large part of the land upon the same view."

In the absence of direct testimony it is somewhat difficult to ascertain with precision the laws of Spain with respect to grants of pueblo lands; but in 2 White's New Recopilacion, 254, it is stated by Nicholas Garrido, apparently acting for the Duke of Alagon, in a communication addressed to the governor of Florida, that "the concession of a great extent of land for the rearing and pasture of cattle constitutes no more than the usufruct of it, for the time agreed upon, but the grantee has not, nor never had, the most remote right to solicit the proprietorship, for there is no law or regulation upon which to found it, and consequently the land does not go out of the class of public lands, since it is the same as if it were held on rent. Those who have obtained those concessions as recompense for services are in the same class with the others, and can allege no other right than what is extended to all those who have suffered losses, and faithfully followed the cause of his majesty." From the correspondence, of which this opinion was a part, and which was considered by this court in *United States* v. *Clarke*, 33 U. S. 8 Pet. 436, 459 [8: 1001, 1009], it would seem that there was a recognition by the governor and civil authorities of Florida of a distinction between absolute grants of land and "allotments of land made for raising cattle, which may not have titles of proprietorship" (2 White, New Recop. 252), the latter of which did not vest in the grantee the ownership of the lands. Certainly if a grant in these terms were made in a state in which the common law prevails, it would be treated simply as a license to pasture, terminable at the will of either party. Such information as we are able to obtain regarding the law of Spain favors a like interpretation of this grant.

The evidence of possession in this case was perfectly consistent with the grant, which on its face vested the pueblos with such possession, and besides the testimony was of such a vague and contradictory character as to throw but little light upon the nature of the occupation.

The case of *United States* v. *Huertas*, 33 U.S. 8 Pet. 475 [8: 1015], relied upon *by the [**207**

petitioners, seems rather to bear against them. It is said by Chief Justice Marshall, in his brief opinion, that the governor in his decree making the concession states his own knowledge of the facts set forth in the petition, namely, the many and great services rendered to the government in an insurrection. He grants the 10,000 acres with the precise condition to use the same for the purpose of raising cattle, "without having the faculty of alienating the said tract without the knowledge of this government;" but, he adds, that on the 20th of July, 1816, three years after the concession, Governor Coppinger granted a complete title to this land, reciting the decree made by Governor Kindelan, and the boundaries of the land It was this second grant which evidently fixed the title of the grantee, notwithstanding the limitations of the prior grant.

Upon the whole, we are of opinion that the court below was correct in holding that the grant in question did not vest the title to the land in the petitioners, but was a mere license to use them for pasturage, and that such license, if not revoked by the subsequent grants, was revoked by the treaty of Guadalupe Hidalgo, ceding this entire territory to the United States (*Wallis* v. *Harrison*, 4 Mees. & W. 538; *Cook* v. *Stearns*, 11 Mass. 538; *Harris* v. *Gillingham*, 6 N. H. 9 [23 Am. Dec. 701]; *Cowles* v. *Kidder*, 24 N. H. 379 [57 Am. Dec. 287]; *Blaisdell* v. *Portsmouth, G. F. & C. Railroad*, 51 N. H. 483; *Coleman* v. *Foster*, 37 Eng. L. & Eq 489; *Prince* v. *Case*, 10 Conn. 375 [27 Am. Dec. 675]); and that in the language of § 13 of the act of March 3, 1891 (26 Stat. at L. 854, chap. 539) creating the court of private land claims, the title to the land in question was not one "lawfully and regularly derived from the government of Spain," or "one that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant had a lawful right to make perfect, had the territory not been acquired by the United States."

The decree of the court below is therefore affirmed.

208] MANUEL CRESPIN *et al.*, *Appts.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 208-218.)

Judicial notice of Mexican laws—power of prefect—allowance of similar grants—adverse possession—length of time.

1. Judicial notice of the laws of Mexico as they existed at the time of an alleged grant of lands must be taken by the Supreme Court of the United States in determining the validity of such grant.
2. A prefect had no power to make a grant of public lands under the laws of Mexico as they existed in 1840.
3. The fact that similar grants have been confirmed by Congress, or received the approval of the Mexican authorities, is not decisive in favor of recognizing the validity of a Mexican grant.
4. Adverse possession since the acquisition of the territory by the United States from Mexico, however exclusive or notorious, cannot be regarded as an element of perfect title to Mexican land which can be confirmed by the court of private land claims, even if there could be in any case a right, as against the Mexican or Spanish government, to a grant by prescription or adverse possession.
5. Six or eight years' possession of Mexican lands prior to the date of the treaty with Mexico is insufficient, under the Spanish or Mexican laws, to constitute a title as against the sovereign.

[No. 6.]

Argued October 12, 1897. Decided November 15, 1897.

APPEAL from a decree of the Court of Private Land Claims dismissing the petition of Manuel Crespin *et al.* for the confirmation of a grant in Bernalillo County, New Mexico. *Affirmed.*

Statement by Mr. Justice **Brown:**

This was a petition by Crespin and about forty others for the confirmation of what is commonly known as the San Antonito grant, situated in Bernalillo county, New Mexico, and alleged to contain 32,000 acres.

Plaintiffs claimed as the heirs and legal representatives of the original grantees, and set forth in their petition that, on March 24, 1840, the Republic of Mexico, through Antonio Sandoval, "the prefect or superior political chief of the district of Bernalillo, thereunto duly authorized by the laws, usages, customs, superior orders and decrees of the said Republic, or of its duly constituted and competent authorities," granted and delivered possession of this tract of land unto the grantees therein named; that the original grant or expediente of title remained in the office and formed a part of the archives of the said prefect, and that an official copy or testimonio was at the time delivered to the grantees as a complete and final title in fee.

That the petitioners were unable to find the original expediente, which, with a large part of the other public archives, was lost, destroyed, or stolen, and that the official copy or testimonio has also been stolen; but that, while the expediente was in the archives of the prefecture, a testimonio, or *true copy, there [209 of was made by one Rumaldo Chaves for his own use, and that such copy was prior to 1846 transferred and delivered by said Chaves, by indorsement thereon, unto Gaspar Atencio, one of the grantees of the original grant, for his uses and purposes, and has ever since remained in his possession.

The petitioners further alleged, upon information and belief, that the grant was finally confirmed and approved by Governor Manuel Armijo and the departmental assembly, and

NOTE.—*As to Missouri private land claims*, see note to Les Bois v. Bramell, 11: 1051.

As to what necessary to constitute adverse possession; requisites of,—see note to Ricard v. Williams, 5: 598.

As to mortgagor's possession not adverse, see note Higginson v. Mein, 2: 664.

As to occupancy necessary to constitute adverse possession, see note to Ewing v. Burnet, 9: 624.

As to champerty; purchase of land in suit,—see note to Lewis v. Bell, 15: 203.

that by virtue thereof an allotment was made in severalty to each of the grantees, and juridical possession given to such grantees by José Trujillo, in accordance with the decree of the prefect and the laws then competent and in force in said territory, and that the grantees since then have been in open and notorious possession of the tract. The remaining allegations of the petition are immaterial.

Upon the trial of the case plaintiffs offered in evidence a petition addressed to "Señor Prefect Don Antonio Sandoval" by "Juan José Garcia and Gaspar Atencio, residents of the demarcation of Albuquerque," stating that they and their constituents, finding themselves without tillable land by which to subsist, "and there being back of the Sandia mountain a tract of land called San Antonito, the fertility of which and the increase of whose waters all invite its cultivation, by this means the commendable promotion of agriculture and the progressive benefit of the petitioners will be accomplished," they inform the prefect "that it is fifteen years, a little more or less, since this tract was donated to Cristobal Jaramillo, deceased; yet, moreover, in all this space of time, said land has not been cultivated at all, and if this has been forfeited in accordance with our laws, we humbly beg your honor to be pleased to grant us what we ask, as it is without prejudice to a third party."

In compliance with this petition, the prefect, signing himself simply "Sandoval," made an order, under date of March 21, 1840, that the petition be transmitted to the justice of the peace of Los Ranchos to report in detail the nature of the land and the need of the petitioners.

210] *On the following day, José Trujillo, the justice, filed his report, stating that, after having fully informed himself as to the nature of the lands, "it is fitted for agriculture, very pleasing and very delightful for a life of tranquillity, very favorable to everything for a most comfortable living," and that the petitioners are in need of landed property, with the exception of three persons named, who are known to have land, but do not count upon it because they are in debt and have it secured by said lands, and that all the others have not such property.

Upon this report Sandoval made the following decree:

Barelas, Mar. 24, 1840.

One of the most commendable and beneficial things to a people being the promotion of agriculture, let this petition be transmitted to the justice of the peace of Los Ranchos, in order that with all the customary formalities he give the possession solicited by the parties in interest, without prejudice to a third party, and only for cultivation, the lands necessary, leaving free the pastures and watering places, which under no circumstances ought to be interfered with; and after this is done he shall make a full report to this prefecture.

Sandoval.

Francisco Sarracino, Secretary.

In compliance with this decree, Trujillo, justice of the peace, reported that he had given juridical possession of the lands to the petitioners and their associates to the number of twenty-seven, who were each given 100 varas, except two of the petitioners, who were given 150, in the usual form of livery of seisin under Spanish grants.

The testimonio, or official copy, of these papers, was not made by the secretary of the prefect Sandoval, but by Rumaldo Chaves, the clerk of the justice of the peace Trujillo, and seems to have been made for the personal use of Chaves, and afterwards transferred by indorsement to Gaspar Atencio, who appears, from the document, to have been one of the leading petitioners, and received, according to the allotment, 150 varas.

*Plaintiffs next offered in evidence the[**211** following hijuela, or certificate of allotment, executed April 11, 1840, by José Trujillo, purporting to show an allotment of 100 varas of land at San Antonito to Vicente Samora under the decree of the prefect Sandoval:

The citizen José Trujillo, justice of the peace of the jurisdiction of los ranchos de Albuquerque, does hereby certify in form of law that 100 varas of land at San Antonito were donated to Vicente Samora in accordance with and as stated in the general grant made by me, the said justice of the peace, by virtue of the decree of March 24th made by the prefect Don Antonio Sandoval. The foregoing certificate is given at the ranchos this 11th day of April, 1840, I signing it with my two attending witnesses, to which I certify.

José Trujillo [rubric.]

Attending witness:
Rumaldo Chavez. [rubric.]
Attending witness:
Pablo Roman Sisneros. [rubric.]

Plaintiffs further offered to refer to other cases and documents for the purpose of showing that other grants had been made by prefects, which were recognized and confirmed by the proper Mexican authorities, and, also, that several of such grants had been confirmed by the Congress of the United States.

These documents were all objected to by the government, and were admitted subject to these objections. Some further explanatory oral testimony was introduced in support of petitioners' claim, but no evidence was offered on behalf of the government.

Upon this state of facts, the court delivered judgment, dismissing the petition and rejecting the grant, whereupon the plaintiffs appealed to this court.

Mr. **Henry M. Earle** for appellants.

Messrs. **Matthew G. Reynolds,** Special Assistant to the Attorney General, and **John K. Richards,** Solicitor General, for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

The principal question urged upon the attention of the court in this case is whether, under the laws of Mexico as they existed in 1840, it was within the power of a prefect to make a grant of public lands.

In endeavoring to ascertain what were the laws of Mexico at any particular time, of

which we are bound to take judicial notice (*Fremont* v. *United States*, 58 U. S. 17 How. 542, 557 [15: 241, 245]; *Romero* v. *United States*, 68 U. S. 1 Wall. 721 [17: 627]), we are somewhat embarrassed by the frequency with which the government was changed—usually by revolutionary violence—between the time the Republic gained its independence in 1821 and the treaty of Guadalupe Hidalgo in 1848, under which the northern provinces of Mexico were ceded to the United States. These changes were sometimes accompanied by decrees annulling the acts of previous governments, canceling grants, and putting new regulations in force with respect to the disposition of public lands. That these difficulties are of long standing is evident from the comments of Chief Justice Marshall in the case of *Soulard* v. *United States*, 29 U. S. 4 Pet. 511 [7: 938], in which the court announced itself as unable to form a satisfactory judgment by reason of its inability to obtain proper information with regard to the laws and principles upon which the transfer of Spanish titles depended, and therefore postponed the final disposition of the case until such information could be obtained.

In view of this and similar difficulties, this court, as early as 1832, in *United States* v. *Arredondo*, 31 U. S. 6 Pet. 691 [8: 547], laid down as a general proposition that the grant itself was prima facie evidence of its own validity, and that it would be presumed to have been regularly issued until the contrary appeared, or such reasons were offered for doubting its authenticity as were sufficient in law to [213] rebut the legal presumption. *To the same effect are *United States* v. *Clarke*, 33 U. S. 8 Pet. 436 [8: 1001]; and *United States* v. *Percheman*, 32 U. S. 7 Pet. 51 [8: 604]; *Strother* v. *Lucas*, 37 U. S. 12 Pet. 410, 437 [9: 1137, 1147]; *Reynolds* v. *West*, 1 Cal. 322, 326; *Jones* v. *Garza*, 11 Tex. 186, 207.

The courts of California have carried this principle so far as to hold, though apparently with some fluctuation of opinion, that a grant of a pueblo lot made by an alcalde raises a presumption that the alcalde was a properly qualified officer, that he had authority to make the grant, and that the land was within the boundaries of the pueblo. *Reynolds* v. *West*, 1 Cal. 322; *Cohas* v. *Raisin*, 3 Cal. 443; *Hart* v. *Burnett*, 15 Cal. 530; *Payne* v. *Treadwell*, 16 Cal. 220; *Leese* v. *Clark*, 18 Cal. 535; *Donner* v. *Palmer*, 31 Cal. 500.

In considering their methods of disposing of public lands, this court has had frequent occasion to uphold the validity of grants made by the governors of the Spanish and Mexican provinces, who appear to have been sometimes also called "political chiefs." Indeed, under the regulations for the colonization of the Mexican territories of November 21, 1828, the political chiefs were expressly authorized to grant the public lands of their respective territories. Reynolds's Land Laws, 141; *United States* v. *Workman*, 68 U. S. 1 Wall. 745 761 [17: 705, 710]; *Hornsby* v. *United States*, 77 U. S. 10 Wall. 224, 231 [19: 900]; *Vanderslice* v. *Hanks*, 3 Cal. 27; *Leese* v. *Clark*, 3 Cal. 17; *Same* v. *Same*, 18 Cal. 535, 546. But see *Jones* v. *Garza*, 11 Tex. 186. A similar power seems also to have been vested in the Spanish intendants. Reynolds's Land Laws, 59, 60; *United States* v. *Clarke*, 33 U. S. 8 Pet. 436, 452 [8: 1001, 1007].

Prefects were functionaries well known in the Roman law, and under the Empire were clothed with extensive powers, both judicial and administrative. With the decline of the empire they seem to have lost their importance and to have finally disappeared; but, after remaining in abeyance for some hundreds of years after its fall, the office was revived in the eighth year of the French Republic (1800), and bestowed upon the heads of the departments into which the country had been divided by the national assembly in 1790. In the performance *of their duties they were [214] aided by a council of prefecture. The prefect was charged with the administration of local affairs, and was practically the representative of the central government in public matters. The title was carried into several states whose legislation was framed upon the model of the Code Napoleon, but, until the establishment of the Republic, was apparently unknown in Mexico. It seems to have been recognized, however, prior to 1836, since by the constitutional law or decree of December 29 of that year, defining the powers of the president and governors, there was given to the latter the authority "to appoint the prefects, to approve the appointment of the subprefects of the department, to confirm that of the justices of the peace, and to remove any of these officials." Reynolds's Land Laws, 205.

By the law of March 20, 1837, for regulating provisionally the interior governments of the departments, it is provided, by article 1, that "the interior government of the departments shall be in charge of the governors, departmental councils (juntas), prefects, subprefects, common councils, alcaldes, and justices of the peace;" that it shall be the duty of the governors to appoint the prefects, etc. The power of the prefects is thus defined: Art. 77: "They shall regulate administratively and in conformity with the laws the distribution of the common lands (tierras comunes) in the towns of the district, provided there is no litigation pending with regard to them, the right being reserved to the parties in interest to apply to the governor, who, without further appeal, shall decide what is most proper, with the concurrence of the departmental council (junta)." Reynolds's Land Laws, 221. This is the only act to which our attention is called which defines their functions.

It is difficult to say exactly what is meant by the power "to regulate administratively" the distribution of the common lands in the towns of the district. But it would not seem to include the power to make grants of public lands generally, though it might have justified in this case the special allotment (hiyuela) to Vicente Samora, had it been made by the prefect. The power given to the governor to make *grants of public lands, which was ex- [215] pressly given by the regulations of November 21, 1828 (though the constitutional decrees of 1836 and 1837 were silent upon the subject), taken in connection with the limited powers conferred upon the prefects by the law of March 20, 1837, apparently preclude

the idea that the more general power of granting public lands was intended to be conferred upon the latter—in other words, the limited authority conferred upon them by article 77 repels the inference of more extensive powers which had theretofore been vested in the governors, and in the governors alone.

Plaintiffs' counsel offered to show in this connection that other grants had been made by prefects, which had been recognized and confirmed by the proper Mexican authorities, and that several such grants had been confirmed by the Congress of the United States; but they were not regarded by the court below as sufficient to establish a general custom to recognize grants made by prefects as valid and legal. Indeed, the power given to prefects to regulate administratively the distribution of the common lands would seem to presuppose a prior grant to the pueblo, made by a higher authority, and to have been intended merely to authorize the prefect to make distribution of such common lands among the inhabitants of the pueblo.

The only case we have been able to find in which the power of prefects to make grants of public lands is discussed is that of *Ohm* v. *San Francisco*, 92 Cal. 437. In that case the complaint alleged that the state of California was, prior to July 13, 1848, a political department of the Republic of Mexico, and was subdivided into pueblos, constituting political municipalities, supplied with such officials as the Republic or governor chose to appoint; that such officers could grant and distribute lands of the municipalities; that the pueblo of Yerba Buena, or San Francisco, was one of such municipalities, and was provided with a prefect appointed by the Republic and the governor of California who was empowered, among other things, to make a grant and distribution of lands to private persons in fee within his district and said municipality. It seems that [216 the grant in this case had been *approved by the governor of the department by virtue of his superior power to grant vacant lots within the boundaries of the Republic, and had been subsequently confirmed by the district court.

The rarity of the question involved, and the special familiarity of the supreme court of California with Spanish and Mexican land grants, will justify a somewhat lengthy transcription from its opinion concerning the power of prefects: "We cannot find," said the court on page 451, "in any of the laws or ordinances of Spain and Mexico to which we have been referred, any authority conferred upon prefects to make grants in fee of the pueblo lands. It is not contained in the decree of the Spanish Cortes of January 4, 1813; nor in the plan of Piric; nor in the Mexican law of colonization of 1824; nor in the regulations of 1828; nor, we think, in the law of March 20, 1837, to which the prefect himself refers as the source of his authority. The clause of this act cited and relied on by the appellant is given in the original Spanish and in translation at page 314, addenda, Dwinelle's Colonial History of San Francisco. In terms it merely authorizes the prefects in their respective districts to 'regulate executively' the distribution of the common lands of the pueblos, provided there are no law suits pending in the courts concerning them, saving a right of appeal to the governor. The law writers do not agree in their construction of this article. Dwinelle thinks it conferred authority to make grants of the pueblo lands for the pueblo. Halleck thinks that it merely conferred a power to regulate the temporary use of the common lands. This court has decided that it did not expressly confer power to grant lands in private ownership. *Hart* v. *Burnett*, 15 Cal. 572. As a matter of history it is known that the prefects very rarely attempted to exercise such power,—not more than two or three instances, including this grant to Scherrebeck, appearing in the records of San Francisco, and one of those subsequent to the conquest, by Horace Hawes. It is also well known as a fact and as matter of law that the claim of such power by the prefects has been repudiated by the city from the beginning. The complaint here shows that the validity *of this Scherrebeck grant was denied [217 by the city as early as 1853, and ever since. The Van Ness ordinance, passed in 1855, and ratified by the legislature in 1858, practically confirmed all previous grants of pueblo lands made by any ayuntamiento, town council, alcalde, or justice of the peace of the former pueblo or of the city, but was entirely silent as to grants by prefects. Even the allegations of the complaint do not show that the prefect had power as agent, and acting in behalf of the pueblo, to alienate its lands in fee. He is said to have authority to make grant and distribution of lands within the pueblo limits, but this power may have been derived from the departmental authorities, and exercised independently and against the will of the municipal authorities. And this appears to have been the case with the Scherrebeck claim. The making of the grant was opposed by the alcalde, the only municipal officer who appears to have had anything to do with it; but it was approved by the governor and the superior authorities."

In the case under consideration there was no evidence that the grant of the prefect ever received the sanction or approval of the governor, the ayuntamiento (town council), or other superior authority of the Mexican Republic; and we do not think the fact that similar grants may have been confirmed by Congress, or received the approval of the Mexican authorities, is decisive in favor of recognizing its validity. In its adjudication of these cases, the court of private land claims is subject to certain statutory restrictions upon which previous confirmations by Congress of imperfect grants have no proper bearing. *Rio Arriba Land & C. Co.* v. *United States*, 167 U. S. 298, 308 [42: 175, 178]. We are of opinion that it was beyond the power of the prefect to make the grant in question.

Nor do we think that petitioners are entitled to this grant by prescription or adverse possession, since under § 13 of the act creating the court of private land claims the title to the land must have been "lawfully and regularly derived from the government of Spain or Mexico," and one which, if not complete and perfect at the date of the acquisition of the property by the United States, "the claimant would *have had a lawful right to make perfect [218 had the territory not been acquired by the

United States." This would preclude the idea that possession since the date of the treaty, however exclusive and notorious, could be regarded as an element going to make up a perfect title. There was no evidence of more than six or eight years' possession prior to the date of the treaty, and this, under any construction of the Spanish or Mexican laws, would be insufficient to constitute a title as against the sovereign. Indeed, it may be open to doubt whether under the legislation of Mexico public lands are not imprescriptible; but if it be otherwise, it would seem that under the decree of the King of Spain of July 16, 1819, nothing less than a possession of forty years could be deemed or respected as creating title by adverse possession. 2 White's New Recopilacion, 562.

The disposition we have made of this case renders it unnecessary to consider whether the document offered in evidence to establish the plaintiffs' title, which was neither the expediente, nor the testimonio, or official copy, thereof —and was merely an unsworn and unverified copy of the testimonio—was admissible at all.

If there be any hardship to the petitioners in the rejection of this grant, they must apply for relief to another department of the government. We are bound by the language of the act creating the court of private land claims. *Its decree in this case was correct, and it is therefore affirmed.*

A. B. ROFF, *Plff. in Err.*,
v.
LOUISA BURNEY, as Administratrix of B. C. Burney, Deceased.

(See S. C. Reporter's ed. 218-224.)

Former adopted citizen of Indian nation, rights of—when may sue in United States court.

1. The withdrawal of the adoption of a citizen by an Indian nation, by a statute expressly repealing and annulling the grant of citizenship, is sufficient to destroy all personal rights founded on the mere status created by the grant of citizenship.

2. A former member of an Indian nation, who is still a resident of the Indian territory and a citizen of the United States, but no longer a member of the Indian nation, may sue a member of that nation in the United States court for that territory.

[No. 34.]

Submitted October 15, 1897. Decided November 29, 1897.

IN ERROR to the United States Court for the Indian Territory on a certificate as to the jurisdiction of that court to review a judgment of that court sustaining a plea to its jurisdiction in an action brought by A. B. Roff, plaintiff, against Louisa Burney, administratrix, etc. *Reversed*, and case remanded with instructions to overrule the plea to the jurisdiction.

Statement by Mr. Justice **Brewer:**

*This case comes from the United States [219 court for the Indian territory on a certificate as to jurisdiction. The amended complaint filed in that court November 6, 1893, besides stating a cause of action in favor of the plaintiff against the defendant, alleges the following facts bearing on the question of jurisdiction: That the plaintiff is a natural-born citizen of the United States of America; has never renounced his allegiance to said government, and has never taken an oath of allegiance to any foreign government of any kind whatever; that he has ever been and is yet a citizen of the United States; that the legislature of the Chickasaw nation, on October 7, 1876, passed the following act:

"Sec. 1. Be it enacted by the legislature of the Chickasaw nation, That the right of citizenship is hereby granted to the following-named children and nephews of William H. Bourland: Amanda, Matilda, Gordentia, and Run Hannah."

That by this act, which was simply a confirmation of a prior statute, passed in 1857, the parties named therein became adopted citizens of the Chickasaw nation; that he was duly and legally married to one of the parties named therein, to wit, Matilda Bourland, while she was such adopted citizen; that thereafter, and on October 11, 1883, the legislature of the Chickasaw nation passed another act, as follows:

"Sec. 1. Be it enacted by the legislature of the Chickasaw nation, That the right of citizenship granted to the following named children and nephews of W. H. Bourland, Amanda, Matilda, Gordentia, and Run Hannah, approved October 7, 1876, the same is hereby repealed and annulled.

"Sec. 2. Be it further enacted, That the governor is hereby directed and required to remove said parties and their descendants beyond the limits of this nation, and that this act take effect from and after its passage."

And that since the passage of the last-named act the Chickasaw government and all the officials thereof have refused to recognize this plaintiff as a member of the Chickasaw tribe, or a citizen of said Chickasaw nation, and that the courts of that nation have refused to entertain jurisdiction of any controversy between him and any member of the tribe of *Chickasaw Indians, and still refuse to [220 entertain jurisdiction of such controversies.

Article 7 of the treaty of June 22, 1855, be-

NOTE—*As to Indians; jurisdiction to punish crimes committed by or against; crime in United States territory; on reservations within state limits; by Indians against Indians; United States or territorial courts; crime committed by nontribal Indian or off from reservation; regulation of commerce*,—see note to State v. Campbell (Minn.) 21 L. R. A. 169.

In tribal relation not citizens of state, see note to Earl v. Wilson (Minn.) 7 L. R. A. 125.

As to purchase of real property from, see note to Briggs v. Sample (C. C. Dist. Kan.) 10 L. R. A. 132.

As to right to remedies in court, see note to Missouri P. R. Co. v. Cullers (Tex.) 13 L. R. A. 542.

As to Indians and Indian tribes, their status and rights; jurisdiction and control over them,—see note to Worcester v. Georgia, 8: 483.

tween the United States and the Choctaw and Chickasaw tribes (11 Stat. at L. 612) is as follows:

"So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits; excepting, however, all persons with their property, who are not by birth, adoption, or otherwise citizens or members of either the Choctaw or Chickasaw tribe."

Article 38 of the treaty with the same tribes, of date April 28, 1866, provides (14 Stat. at L. 95):

"Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw nations according to his domicil, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw."

Section 6 of the act creating the United States court in the Indian territory, approved March 1, 1889 (25 Stat. at L. 784, chap. 333), reads:

"That the court hereby established shall have jurisdiction in all civil cases between citizens of the United States who are residents of the Indian territory, or between citizens of the United States, or of any state or territory therein, and any citizen of or person or persons residing or found in the Indian territory, and when the value of the thing in controversy, or damages or money claimed, shall amount to $100 or more: *Provided*, That nothing herein contained shall be so construed as to give the court jurisdiction over controversies between persons of Indian blood only."

221] *This was amended by the act of May 2, 1890, which, in § 30 (26 Stat. at L. 94), contains this proviso:

"*Provided, however*, That the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties."

And in § 31 (p. 96) it was also provided:

"But nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood, or adoption, are the sole parties, nor so as to interfere with the right and power of said civilized nations to punish said members for violation of the statutes and laws enacted by their national councils where such laws are not contrary to the treaties and laws of the United States."

Mr. **C. L. Herbert** for plaintiff in error.

Messrs. H. C. Potterf and *W. F. Bowman* for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The condition of the Indians and Indian tribes within the limits of the United States is anomalous. The tribes, though in certain respects regarded as possessing the attributes of nationality, are held to be not foreign, but domestic dependent nations. *Cherokee Nation* v. *Georgia*, 30 U. S. 5 Pet. 1 [8: 25]; *Worcester* v. *Georgia*, 31 U. S. 6 Pet. 515 [8: 483]; *Choctaw Nation* v. *United States*, 119 U. S. 1 [30: 306]; *Cherokee Nation* v. *Kansas Railway Company*, 135 U. S. 641 [34: 295]. While the Indians and the territory which may have been specially set apart for their use are subject to the jurisdiction of the United States, and Congress may pass such laws as it sees fit prescribing the rules governing the intercourse *of the Indians with one another [222 and with citizens of the United States, and also the courts in which all controversies to which an Indian may be a party shall be submitted (*United States* v. *Rogers*, 45 U. S. 4 How. 567 [11: 1105]; *United States* v. *Kagama*, 118 U. S. 375 [30: 228]; *Gon-shay-ee, Petitioner*, 130 U. S. 343 [32: 973]; *Cherokee Nation* v. *Kansas Railway Company*, *supra*), the mere fact that a citizen of the United States has become a member of an Indian tribe by adoption may not necessarily cancel his citizenship. As said by Chief Justice Taney, in *United States* v. *Rogers*, *supra* (573 [11: 1107]), "whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished." Indeed, by § 43 of chap. 182, 26 Stat. at L. 99, provision is made for the naturalization of members of the Indian tribes in the Indian territory, with a proviso "that the Indians who become citizens of the United States under the provisions of this act do not forfeit or lose any rights or privileges they enjoy or are entitled to as members of the tribe or nation to which they belong."

Now, according to this complaint, plaintiff was a citizen of the United States. Matilda Bourland was not a Chickasaw by blood, but one upon whom the right of Chickasaw citizenship had been conferred by an act of the Chickasaw legislature. The citizenship which the Chickasaw legislature could confer it could withdraw. The only restriction on the power of the Chickasaw nation to legislate in respect to its internal affairs is that such legislation shall not conflict with the Constitution or laws of the United States, and we know of no provision of such Constitution or laws which would be set at naught by the action of a political community like this in withdrawing privileges of membership in the community once conferred. The Chickasaw legislature, by the second act, whose meaning is clear, though its phraseology may not be beyond criticism, not only repealed the prior act, but canceled the rights of citizenship granted thereby, and further directed the governor to remove the parties named therein and their descendants beyond the limits of the nation. This act was *not one simply taking effect [223 as of the date of its passage, and then withdrawing rights admitted to have been theretofore legally granted, but was retroactive in its scope, and purported to annul and destroy all that had ever been attempted to be done in respect to the matter. Whether any rights

of property could be taken away by such subsequent act need not be considered. It is enough to hold that all personal rights founded on the mere status created by the prior act fell when that status was destroyed. Plaintiff never took any oath of allegiance to the Chickasaw nation; never in terms relinquished his full rights as a citizen of the United States. Doubtless, by intermarriage with one who was at the time by legislative act a Chickasaw citizen, he acquired the rights and privileges of a member of that tribe or nation, but when that which was the foundation upon which such acquisition rested was taken away by act of the nation, then all those rights and privileges ceased. The tie which bound him to the nation was his wife's citizenship. That tie the nation destroyed. Its destruction released him. That such was the effect of this legislative act is established by the conduct of the Chickasaw government and all its officials, for they have refused to recognize plaintiff as any longer a member of the Chickasaw nation, and the courts of that nation have declined to entertain jurisdiction of any suits brought by him against a Chickasaw. The validity of the act withdrawing citizenship from the wife of plaintiff, and the consequent withdrawal from plaintiff of all the rights and privileges of citizenship in the Chickasaw nation, has been practically determined by the authorities of that nation, and that determination is not subject to correction by any direct appeal from the judgment of the Chickasaw courts. It follows, therefore, that his right as a citizen of the United States to appeal to the Federal courts to take jurisdiction of his claims against one of the Chickasaw nation must be sustained, for it cannot be that a citizen of the United States residing in the Chickasaw nation can be wronged without an opportunity of redress in some judicial tribunal. We are of opinion, therefore, that the plea to the juris-
224]diction was wrongfully sustained, and *the judgment of the United States Court for the Indian Territory will be reversed*, and the case remanded, with instructions to overrule the plea to the jurisdiction.

OGDEN CITY, *Appt.*,
v.
JAMES C. ARMSTRONG, William Driver, *et al.*

(See S. C. Reporter's ed. 224–241.)

Separate interests of claimant cannot be united to give jurisdiction—consent of property owners to street improvement—equitable relief against void assessments—cloud on title—statutory remedy—when not exclusive.

1. The distinct and separate interests of claimants in a suit for relief against assessments cannot be united for the purpose of making up the amount necessary to give this court jurisdiction on appeal.
2. The fact of consent by the requisite number of property owners, to be manifested by failure to object, is jurisdictional and in the nature of a condition precedent to the exercise of the power to levy taxes for a street improvement, under Utah Sess. Laws 1890, chap. 41.
3. Equitable jurisdiction for relief against void assessments for paving, to be collected in ten annual instalments, may be invoked where there is no plain and adequate remedy by certiorari and it is necessary to prevent a multiplicity of suits, as well as to relieve the property owners from a cloud upon their title.
4. Relief against an existing or imminent cloud on title, although it is created by a void assessment, may be granted where the illegality or fatal defect does not appear on the face of the record but must be shown by evidence *aliunde* which may possibly be lost, or when a deed given on a sale for the taxes would be presumptive evidence of good title in the purchaser.
5. The exclusiveness of a statutory remedy against irregular assessments does not extend to an assessment that is entirely void, under a statute which leaves questions of a jurisdictional character open to judicial inquiry.
6. The exclusiveness of a remedy for recovering back payments of illegal, inequitable, and unjust special taxes or assessments, under Utah Sess. Laws 1890, § 1, p. 38, does not extend to the case of a tax which is wholly void and illegal.

[No. 127.]

Argued November 11, 1897. Decided November 29, 1897.

APPEAL from a decree of the Supreme Court of the Territory of Utah affirming the decree of the Fourth Judicial District Court of that Territory in favor of the plaintiffs, James C. Armstrong *et al.*, in an action brought by them against Ogden City, a municipal corporation, restraining the city and its officers from levying assessments upon the property of the plaintiffs and others similarly situated for the purpose of paving a street in that city. *Affirmed as to one appellee, and as to the other appellees, dismissed.*

See same case below, 12 Utah, 476.

Statement by Mr. Justice **Shiras**:

The original bill in this case was filed in May, 1892, in the fourth judicial district court of the late territory of Utah, against Ogden City, a municipal corporation, and its mayor and the members of its common council; and it was thereby sought to restrain the city and its officers from levying assessments upon the real estate of the plaintiffs and others similarly *situated, for the purpose of paving a [225 portion of one of the streets of the city.

To this bill a demurrer was filed, which was sustained by the district court, and a judgment was entered dismissing the bill. On appeal to the supreme court of the territory that judg-

NOTE.—*As to validity of assessments upon abutting property made by charging upon each piece the cost of the improvement in front of it; grading and paving streets; sidewalks*,—see note to Davis v. Litchfield (Ill.) 21 L. R. A. 563.

As to exemption from assessment for, see note to Illinois C. R. Co. v. Decatur (Ill.) 1 L. R. A. 613.

As to what are public improvements; taxation for, —see note to *Re* Kingman (Mass.) 12 L. R. A. 417.

As to jurisdiction to avert; who may maintain bill to quiet title or remove cloud,—see note to Miller v. Cook (Ill.) 10 L. R. A. 293.

As against tax as a cloud, see note to Odlin v. Woodruff (Fla.) 22 L. R. A. 699.

ment was reversed, and the cause remanded to the court below. An answer to the bill was then filed, denying substantially the equities of the bill. Subsequently, on April 9, 1894, a supplemental bill was filed, bringing in additional parties complainant, and alleging that since the filing of the original bill the defendants had passed the ordinance assessing the properties of the plaintiffs, and were about to expose to sale the real estate described in the original and supplemental bills to satisfy the assessments, and threatened to continue to sell said real estate annually for ten years as each instalment of said assessment became due, whereby the plaintiffs had been compelled to pay certain amounts, stated in detail, in order to prevent a sale of their property, and to prevent a cloud upon their titles; and that certain real estate belonging to some of the plaintiffs had been sold by the city to satisfy the illegal assessments. The prayers were for a decree declaring the ordinance and assessments to be void, restraining the defendants from proceeding thereunder; that an account be ordered of the amounts paid by plaintiffs under protest; that plaintiffs have judgment for the same; that the sales of real estate be set aside, and for general relief. An answer was filed to the supplemental bill denying specifically all of its allegations, but admitting that the ordinance in question was passed as alleged. It alleged affirmatively that the plaintiffs were estopped to complain as in the supplemental bill alleged; that the same did not state facts

When a court of equity will restrain the collection of a tax; equitable relief against illegal taxation.

An action for an injunction will not lie to restrain the collection of a tax upon an illegal assessment, where there is a remedy to review and correct the assessment by certiorari, or to strike it from the roll by mandamus. Mutual Ben. L. Assur. Co. v. New York Supers. 3 Abb. App. Dec. 344, 2 Abb. Pr. N. S. 233, 32 How. Pr. 359, 3 Keyes, 182, Affirming 33 Barb. 322, 20 How. Pr. 416, and also Affirming 8 Bosw. 683.

Equity will not restrain the execution of a deed of land sold for taxes on the ground that the proceedings were irregular, or even void in some particulars. Thus, an error consisting in a misnomer of the defendant corporation on the assessment books will not authorize the relief. Nor will the fact that property subject to taxation has not been listed warrant the interference. Warden v. Fond du Lac County Supers. 14 Wis. 618; Kellogg v. Oshkosh, 14 Wis. 624; O'Neal v. Virginia & M. Bridge Co. 18 Md. 1, 79 Am. Dec. 669; Exchange Bank v. Hines, 3 Ohio St. 1.

In a case of mere noncompliance with some particular direction of the statute, aside from which the tax is sufficiently regular, or where the irregularities relate only to the time in which the different steps were taken, and do not affect the principle of taxation or the groundwork of the proceedings, relief in equity will not be allowed, such irregularities being regarded as merely technical defects, which, while they can never be wholly avoided, do not go to the merits of the proceedings. Mills v. Gleason, 11 Wis. 470, 78 Am. Dec. 721; Mills v. Johnson, 17 Wis. 599.

Nor will alleged irregularities in the sale of lands for taxes afford ground for the interference of equity to restrain the purchaser from afterward selling the same lands, the two sales being entirely independent of and distinct from each other. St. Louis v. Goode, 21 Mo. 216

Where an act of legislature, held by the court to be constitutional, exempted certain property from taxation, an injunction has been allowed against the enforcement of a tax upon such property. Illinois C. R. Co. v. McLean County, 17 Ill. 291.

An act of legislature whose terms authorize a transfer or sale of the taxing power of the state with reference to certain corporations, releasing them on certain conditions from further taxation, being held unconstitutional, its enforcement may be enjoined. Mott v. Pennsylvania R. Co. 30 Pa. 9, 72 Am. Dec. 664.

Fraud has been held a sufficient ground to warrant a court of equity in a departure from the general rule of noninterference with the collection of taxes. Thus, where an assessor, after having accepted without objection a list of taxable property, afterward and without notice arbitrarily increases the list, the taxpayer having no knowledge of the matter until after the time for redress at law has expired by limitation, the collection of the tax may be enjoined. Cleghorn v. Postlewaite, 43 Ill. 428.

Equitable relief has also been allowed against the enforcement of a tax imposed for the payment of judgments obtained through fraud and collusion. Newcomb v. Horton County, 18 Wis. 566.

But equity will not interpose to restrain the collection of a tax for the payment of judgments rendered against a municipal corporation, on the ground that the bonds on which the judgments were founded were without consideration, and were obtained by fraud, where such defense might have been pleaded to the action at law. Muscatine v. Mississippi & M. R. Co. 1 Dill. 536.

Where an assessment of personal property has been reduced by a town board of revision, and afterward raised to the original amount by a county board of supervisors without notice of their intended action to the property owner, the tax is regarded to the extent thus increased as an unauthorized assessment by persons having no authority, and as such it may be enjoined. Darling v. Gunn, 50 Ill. 424.

In general, courts of equity will not interfere with the collection of taxes because of mistakes in judgment on the part of the officers assessing the tax, if they have acted fairly and impartially, and where they are not charged with bad faith. LeRoy v. New York, 4 Johns. Ch. 352.

But an exception to this rule has been allowed where, under a mistake as to the place where the personal property of a railroad was to be taxed, its capital stock was taxed in a wrong locality, and in such case an injunction has been granted. Mohawk & H. R. Co. v. Clute, 4 Paige, 384.

But in no case will the collection of a tax be enjoined where it is not shown that the injury resulting from its enforcement would be irreparable, and this fact must appear in the bill by issuable averments. Ritter v. Patch, 12 Cal. 298.

He who would have equity must himself do equity, and where complainant has not paid that portion of the tax which is clearly valid, to which no objection is offered and which can easily be distinguished from the illegal, the injunction will be denied, since the collection of a legal tax will not be restrained to prevent the enforcement of an illegal one. Hersey v. Milwaukee County Supers. 16 Wis. 186, 82 Am. Dec. 713; Bond v. Kenosha, 17 Wis. 284; Mills v. Johnson, 17 Wis. 599; Howes v. Racine, 21 Wis. 515; Palmer v. Napoleon Twp. 16 Mich. 176; Taylor v. Thompson, 42 Ill. 10; Montgomery County Comrs. v. Elston, 32 Ind. 27, 2 Am. Rep. 327.

Where one has assented to the levying of a tax, either by directly petitioning that it be assessed for certain purposes, or by standing idly by and failing to avail himself of the remedy provided by law for questioning the regularity of the proceedings, he is estopped from obtaining relief in equity, even

sufficient to constitute a supplemental complaint; that the cause of action was barred by the statute of limitations; that there was a misjoinder of parties plaintiff, and that there was a misjoinder of causes of action.

On the 27th day of October, 1894, findings were signed, and judgment entered, giving the plaintiffs the relief prayed for in both the original and the supplemental bill. The decree 226]of *the court below was on appeal affirmed by the supreme court of the territory, from whose decree an appeal was taken and allowed to this court.

The findings of fact were as follows:

1. That the plaintiffs were at the date of the filing of the complaint in this action residents and taxpayers in Ogden City, Weber county, Utah territory, and brought this action concerning a matter of general interest in all taxpayers in said Ogden City on their own behalf and on the behalf of all others similarly situated.

2. That the defendants, except Ogden City, at the time of the bringing of this action were the mayor and members of the common council of said Ogden City, defendant.

3. That on the 7th day of March, 1892, proceedings were had by the common council of said Ogden City as follows:

"Finance committee recommending immediate creation of three paving districts as follows: District No. 2, Twenty fifth street

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though the proceedings were absolutely null and void. Kellogg v. Ely, 15 Ohio St. 64; Jackson v. Detroit, 10 Mich. 248; Weber v. San Francisco, 1 Cal. 455; Peoria v. Kidder, 26 Ill. 351.

The owner of city lots, who, with full notice of all the proceedings, encourages contractors to go on with the grading of a street and assures them that they shall be paid, is estopped from invoking the aid of equity to enjoin the collection of a special tax upon his lots to pay for such grading. Sleeper v. Bullen, 6 Kan. 300.

A court of equity is not a court of errors to review the acts of public officers in the assessment and collection of taxes, nor will it revise their decision upon matters within their discretion if they have acted honestly. Livingston v. Hollenbeck, 4 Barb. 9; Clinton School District's Appeal, 56 Pa. 315; O'Neal v. Virginia & M. Bridge Co. 18 Md. 1, 79 Am. Dec. 669; Heywood v. Buffalo, 14 N. Y. 534; Brooklyn v. Meserole, 26 Wend. 132.

So, where a particular manner is provided by law, or a particular tribunal designated, for the settlement and decision of all errors or inequalities on behalf of persons dissatisfied with a tax, they must avail themselves of the legal remedy thus prescribed, and will not be allowed to waive such relief and seek in equity to enjoin the collection of the tax. Hughes v. Kline, 30 Pa. 227; Maeklot v. Davenport, 17 Iowa, 379; Merrill v. Gorham, 6 Cal. 41; Peoria v. Kidder, 26 Ill. 351.

But an exception has been allowed to the rule where the grievanee complained of consisted in the mode and form of the collection of the tax rather than in the rate or assessment, and where no remedy is provided by law for such improper mode and form of collection an injunction may be allowed. Miller v. Gorman, 38 Pa. 309.

And where the bill seeks to restrain a taxing officer from selling personal property for taxes, and complainants show the exact damage in dollars and cents which they would sustain by reason of the sale, an injunction will not be allowed, the proper remedy being at law. Conley v. Chedic, 6 Nev. 222.

The most generally recognized exception to the rule that equity will not interfere with the collection of the revenue because of defects or illegalities in the proceedings is in cases where the proceedings if not enjoined would result in clouding the title to real estate. Thus, where the defect is not merely a formal one, but works a substantial injury to complainant's rights, resulting in a cloud upon his title, the injunction will be granted. Mitchell v. Milwaukee, 18 Wis. 93; Crane v. Janesville, 20 Wis. 305; Heywood v. Buffalo, 14 N. Y. 534; Mutual Ben. L. Ins. Co. v. New York Supers. 33 Barb. 322; Morris Canal & Bkg. Co. v. Jersey City, 12 N. J. Eq. 227; Siegel v. Outagamie County Supers. 26 Wis. 70.

And where the proceedings sought to be set aside are valid upon their face, and extrinsic facts are necessary to be proved to show their invalidity or illegality, equity will interfere to prevent a cloud upon title. Dean v. Madison, 9 Wis. 402; Heywood v. Buffalo, 14 N. Y. 534.

So, where two lots have been assessed together as the property of a person owning but one of them, and a gross tax has been imposed upon the two, the case is regarded as falling within the exception, and the injunction may be allowed. Crane v. Janesville, 20 Wis. 305.

Where the relief is sought to prevent a cloud upon title it will only be granted in those cases where the illegality or irregularity complained of exists *dehors* the record. And where the objection to the validity of the tax or assessment appears upon the face of the tax proceedings, or upon the face of the proceedings by which alone the adverse party can claim title to the land sold for the unpaid tax, equity will not enjoin. Van Rensselaer v. Kidd, 4 Barb. 17; Bouton v. Brooklyn, 15 Barb. 393; Robinson v. Gaar, 6 Cal. 275; Bucknall v. Story, 36 Cal. 67; Van Doren v. New York, 9 Paige, 388; Dean v. Madison, 9 Wis. 402; Wiggin v. New York, 9 Paige, 17.

But where by statute a tax deed is made prima facie evidence of the regularity of all the proceedings incident to the assessment and sale, if the tax has been imposed contrary to law, such a cloud upon the title will result as to warrant the interference of equity. Palmer v. Rich, 12 Mich. 414; Jenkins v. Rock County Supers. 15 Wis. 11.

Mere vagueness, however, or inaccuracy in the description of land to be sold for taxes, is not sufficient to warrant an injunction against the sale on the ground of preventing a cloud upon title, since, if the tax is justly due, the cloud may easily be avoided by payment. Burlington & M. River R. Co. v. Spearman, 12 Iowa, 112.

And where the description in a tax deed is so defective as to render the deed utterly void a court of equity will not interfere. Head v. James, 13 Wis. 642.

A city assessment without authority of law will be enjoined, even where no question as to cloud upon title is raised. Foster v. Kenosha, 12 Wis. 617; Toledo, W. & W. R. Co. v. Lafayette, 22 Ind. 262.

Even though the tax be authorized by act of legislature, yet where the city authorities have disregarded and failed to comply with all the requirements of the statutes, equity will enjoin a sale of land for such taxes on the ground that the proceedings are *coram non judice* and void. Baltimore v. Porter, 18 Md. 284, 79 Am. Dec. 686.

Where an act of legislature has extended the city limits by taking in a large amount of lands not necessary for city purposes, the sole object being to make them liable for city taxes, the collection of such taxes may be properly enjoined. Langworthy v. Dubuque, 13 Iowa, 86.

Though relief by injunction is more freely granted in cases of municipal assessments, still if

from the west line of Washington avenue to the west line of Wall avenue.

"Councilor Dee moved to lay on the table for one week. Motion lost.

"Councilor McManus moved to adopt the motion. Carried."

4. That the above were the only proceedings had by said council of Ogden City in regard to the creation of said paving district prior to the publication of the notice hereinbelow mentioned; and upon the same day the following proceedings were had:

"Councilor Spencer moved the following motion, in pursuance of the proceedings already taken in ordering the creation of three paving districts:" I move that the council adopt the accompanying notice of intention, and that the same be published for twenty days, beginning with to-morrow morning, Tuesday, March 8th. Said notice was read and Councilor Dee moved to lay on the table for one week. Motion lost, Dee and Elliott voting "aye;" Calvert, Cannon, Graves, McManus, Shurtliff, and Spencer voting "nay." The original motion was then put and carried, Calvert, Cannon, Graves, McManus, Shurtliff, and Spencer voting "aye," and Dee and Elliott voting "nay."

*5. That thereupon, on March 9, 1892, [227 in the Ogden Daily Standard the following notice of intention mentioned above was published, to wit:

"Notice of intention of the city council of Ogden City of creating a district for paving

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the objections may be urged and the grievances adjusted in a court of law, equity will not interfere with the assessment. McBride v. Chicago, 22 Ill. 574; Ottawa v. Chicago & R. I. R. Co. 25 Ill. 43.

And where, by the proceedings of the corporate authorities in making the assessment, a remedy is provided by all persons aggrieved, and the proceedings may be removed by certiorari to the proper tribunal, an injunction will not be granted. Betts v. Williamsburgh, 15 Barb. 255.

An injunction will not be allowed to restrain the exercise of municipal authority of a city in the levying and collection of a tax, on the ground that the passage of an ordinance with relation to the tax is in violation of the city charter. Page v. St. Louis, 20 Mo. 137.

Nor will the relief be granted against the levying of taxes by a municipal corporation because of the extension of the town limits by act of legislature, contrary to the wishes of the property owners in the tract included in the extension, the statute being held constitutional. Manly v. Raleigh, 4 Jones, Eq. 370.

Where a city has itself created a nuisance by the construction of its streets in such a manner as to cause the water to stand upon certain lots, it cannot, for the purpose of abating the nuisance, tax the lots themselves, and a sale of such lots for payment of the tax will be enjoined. Weeks v. Milwaukee, 10 Wis. 243.

Although a city charter provides that no contracts beyond a certain sum shall be entered into by the city except with the lowest bidder, after advertising, an injunction will not lie at the suit of the lotowners to restrain the enforcement of a tax for paving streets with a patented pavement which is the exclusive property of one firm. Hobart v. Detroit, 17 Mich. 246, 97 Am. Dec. 185; Harlem Gaslight Co. v. New York, 33 N. Y. 309. And see dissenting opinion of Dixon, Ch. J., in Dean v. Charlton, *infra*. But see, *contra*, Dean v. Charlton, 23 Wis. 590, 99 Am. Dec. 205.

The circuit courts of the United States will interfere to restrain the collector of internal revenue from the collection of a tax improperly assessed. Georgia v. Atkins, 1 Abh. U. S. 22.

And it has been held that the courts of a state may also interfere to restrain revenue officers of the United States from collecting a revenue tax unauthorized by law. Georgia v. Atkins, 35 Ga. 315.

But a bill to enjoin the enforcement of a tax under the revenue laws, in the nature of a bill of peace, will not lie in favor of a number of persons joined as complainants whose only interest in common is in resisting the tax, they having no common interest in the subject-matter on which it is levied. Cutting v. Gilbert, 5 Blatchf. 259.

Where the tax upon shares in national banks exceeds the rate of taxation imposed upon banks of the state, its collection may be enjoined, but only upon payment of a sum which shall be a fair equivalent for the tax on the banks of the state. Frazer v. Siebern, 16 Ohio St. 614.

But a national bank is not entitled to an injunction restraining the collection of a tax upon its shares of stock on the ground that they are illegally assessed against the bank instead of the shareholders, it not appearing that an action for damages would not afford a complete remedy, and no circumstances of irreparable mischief being shown. First Nat. Bank v. Meredith, 44 Mo. 500.

The proceedings preliminary to the actual levy of a tax will not be enjoined, whether it is about to be imposed upon personalty or realty, since the person at whose instance the suit is brought cannot from the nature of the case obtain redress until the amount of his own tax has been ascertained by actual levy. Miller v. Grandy, 13 Mich. 540.

Nor will a tax be enjoined because complainant has paid previous assessments which were illegal, and which he now seeks to have set off against the tax in question. Fremont v. Mariposa County, 11 Cal. 361.

Nor will equity interfere if the proceedings, originally defective, have been subsequently cured by act of legislature. Cowgill v. Long, 15 Ill. 202.

Where a tax upon a franchise has been illegally imposed the proper remedy is at law, and no relief will be allowed in equity against its collection. DeWitt v. Hays, 2 Cal. 463, 56 Am. Dec. 352.

Nor will the collection of assessment for paving and improving streets be enjoined on the ground that such paving is an interference with the rights and franchises of a plank-road company having the right to use the street, the injunction being sought, not by the company, but by an adjacent lotowner. Bragg v. Detroit, 5 Mich. 336.

The issuing of bonds and the levying and collecting of a tax in aid of subscriptions to a railroad by a county court will not be enjoined on the ground of want of jurisdiction in the court to take such proceedings without a vote of the people, since a sale of the taxpayer's property under such proceedings would not devest the owner of his title, and he can maintain an action at law for the property and for damages for its detention. State, Connelly, v. Parkville & G.R. R. Co. 32 Mo. 496; Sayre v. Tompkins, 23 Mo. 443.

Great depreciation in the value of a particular property, as a watering place, resulting from the condition of the country during a civil war, affords no ground for relief in equity against a tax assessed against such property upon its valuation before the war. White Sulphur Springs Co. v. Robinson, 3 W. Va. 542.

And an entire tax or assessment should not be enjoined on the ground that too much has been assessed. Indianapolis v. Gilmore, 30 Ind. 414.

Where the jurisdiction of equity has attached for

and of paving and macadamizing the streets therein and to defray the expenses of such improvement by local assessment.

"The city council of Ogden City, situate in the county of Weber, territory of Utah, gives notice that it intends to make the following improvements, to wit, pave and macadamize the following streets: Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue. This district shall be known as paving district No. 2. The boundaries of the district to be affected and benefited are the lines running one hundred and fifty feet back and parallel with the outer lines of each side of the streets on each and every block and for the full length thereof therein. The estimated cost of such improvement is $40,000. For the payment of the costs and expenses thereof the city council intends to levy local taxes upon the real estate lying and being within said paving district and to the extent of the benefits to such property by reason of such improvement. The city council will, on March 29, 1892, at 10 A. M., hear objections in writing and from any and all persons interested in said local assessment. By order of the city council.

"T. P. Bryan, City Recorder."

6. That on March 29, 1892, at 9:55 o'clock, D. H. Peery and sixty-eight others, including all the plaintiffs in this action and in the supplemental complaint, who were then the owners of real property within the said paving district No. 2, and with frontage on Twenty-fifth street within the said paving district, filed a protest with the said recorder of said Ogden City, protesting against the levying of any local assessment against or upon their property for the purpose of paving said street within said district; that said persons so protesting owned and protested for more than one half of the whole *frontage on said Twenty-fifth [228 street within said district, to wit, 2 414 feet; that after said hour of 10 A. M. of said day certain persons who had protested to the amount of 302½ feet withdrew their protests, leaving at all times 2,111½ feet frontage on said Twenty-fifth street in said district still protesting against the said local assessment; that the total number of feet fronting on said Twenty-fifth street in said paving district, as mentioned in said notice of intention above set forth, was 3,960, of which 660 feet belonged at said time and still belong to said Ogden City, and were then and are now used for public purposes by the said city, and 125 feet of said frontage were then and are now the property of the said Ogden City, and was public school property, used and owned for public schools.

7. That notwithstanding said protest of said abutting property owned on said Twenty fifth street in said paving district No. 2, and without giving any other or further notice except as hereinbefore stated, the said city council,

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the purpose of annulling a tax certificate improperly issued and void, the court may properly proceed to enjoin a sale of personal property to satisfy the tax. Hamilton v. Fond du Lac, 25 Wis. 490.

Equity will not interfere by injunction to restrain the enforcement of tax proceedings on the ground of irregularities or errors in the assessment of the tax, or in the execution of the power conferred upon taxing officers, the remedy at law being deemed sufficient in such cases. Macklot v. Davenport, 17 Iowa, 379; Center & W. Gravel Road Co. v. Black, 32 Ind. 468; Warden v. Fond du Lac County Supers. 14 Wis. 618; Kellogg v. Oshkosh, 14 Wis. 624; Exchange Bank v. Hines, 3 Ohio St. 1; Jackson v. Detroit, 10 Mich. 248; Williams v. Detroit, 2 Mich. 560; Greene v. Mumford, 5 R. I. 472, 73 Am. Dec. 79; Schofield v. Watkins, 22 Ill. 66; Chicago, B. & Q. R. Co. v. Frary, 22 Ill. 34; Merritt v. Farris, 22 Ill. 303; Munson v. Minor, 22 Ill. 594; Metz v. Anderson, 23 Ill. 463.

Injunction to restrain collection of an illegal and erroneous tax assessed on the owner of personal property is not allowable; and the action cannot be maintained unless the complaint shows that it would prevent a multiplicity of actions or irreparable injury to the freehold, or that extrinsic evidence is needed to evade an apparently legal lien. Pacific Mail S. S. Co. v. New York, 57 How. Pr. 511.

A bill in equity will not lie to restrain a sale of personal property seized for the collection of a tax, in the absence, at least, of any showing that the property possessed any peculiar value not capable of compensation in damages; the remedy at law is ample. Henry v. Gregory, 29 Mich. 68.

The collection of a tax will be restrained when the purpose for which it is to be expended is unconstitutional. Riggsbee v. Durham, 94 N. C. 800; Markoe v. Hartranft (Pa.) 6 Am. L. Reg. N. S. 487.

The collection of all taxes, including those justly due, will not be enjoined because part are erroneous. Buck v. Miller (Ind.) 37 L. R. A. 384.

The excessive amount of a tax levy is not ground for an injunction against the whole tax; but the amount which could be lawfully imposed should be tendered by one who asks relief in equity against the tax. Wells, F. & Co.'s Express v. Crawford County, 63 Ark. 576, 37 L. R. A. 371.

Though the collection of a tax has been restrained on the ground of its unconstitutionality, where there was no adequate remedy at law and the injury was irremediable and threatened the destruction of complainant's franchise, yet in general the unconstitutionality of the act will not warrant the interference by injunction. Foote v. Liucke, 5 McLean, 616; Mechanics' & T. Branch of State Bank v. Deholt, 1 Ohio St. 591; Exchange Bank v. Hines, 3 Ohio St. 1.

But where the officers levying the tax were improperly elected and their action is therefore void, or where the tax was levied by less than the requisite majority of a board of supervisors, an injunction may be allowed. Kiuyon v. Duchene, 21 Mich. 498; Cumberland County Supers. v. Webster, 53 Ill. 141.

Mere proof that an assessment is illegal is not sufficient ground for an action to restrain the collection of the tax. Postal Teleg. Cable Co. v. Grant, 33 N. Y. S. R. 997, Appeal dismissed, 128 N. Y. 633; Susquehanna Bank v. Broome County Supers. 25 N. Y. 312; Rome, W. & O. R. Co. v. Smith, 101 N. Y. 684.

An injunction before trial may be granted to prevent a sale and issue of a tax deed, as a threatened cloud upon title, if plaintiff makes a prima facie case and is ready to perform the requirements of equity as to valid taxes on the land in question. Litchfield v. Brooklyn, 10 Misc. 74; Pettit v. Shepherd, 5 Paige, 493, 28 Am. Dec. 437; Oakley v. Williamsburgh Trustees, 6 Paige, 262; Sanders v. Yonkers, 63 N. Y. 489; King v. Townshend, 141 N. Y. 358; Fonda v. Sage, 48 N. Y. 179.

The court will not sustain an action to restrain the collection of a tax except under circumstances of great necessity, and to prevent irreparable damage. Brass v. Rathbone, 8 App. Div. 78; Rome, W. & O. R. Co. v. Smith, 39 Hun, 332.

on the 4th day of April, 1892, passed the following resolution, to wit:

"*Resolved*, That the city proceed as speedily as possible to the paving of Twenty-fifth street district with Utah sandstone blocks; that the city engineer be instructed to prepare the necessary specifications at once and submit the same at the next meeting of the council; that the competition of said work be restricted to bona fide residents of Ogden, and that so far as it is possible only Ogden labor be employed in the performance of the work."

8. That on May 2, 1893, said city council of Ogden City passed a resolution instructing the city recorder to advertise for bids for the paving of Twenty-fifth street in said district; which notice was as follows:

"To paving contractors: Bids will be received by the city recorder of Ogden City until 12 o'clock M. May 23, 1892, for the paving of Twenty-fifth street, in Ogden City, from Washington to Wall avenue, according to the specifications of the city engineer of Ogden City, on file in the city recorder's office. Competition is restricted to bona fide residents of Ogden City. The city reserves the right to reject any and all bids. Specifications will be furnished on application to the city recorder."

229] *9. That no specifications had been made by the city prior to this time, but afterwards new specifications were made and filed providing for the paving, grading, and curbing of said Twenty-fifth street, and were adopted by the city council; which specifications provided for the paving of said street with asphaltum and the sides of the street with sandstone blocks and curbing the street, and the contract which was awarded for the doing of said work provided that the contractor should keep the said street in repair for two years after the work upon the same was finished.

10. That the plaintiffs in this action were at the date of the filing of the complaint herein, to wit, May 21, 1892, the owners of the real property mentioned in the complaint, but upon the trial of this action it appeared that John Broom and William Chapman were deceased; Samuel Chapman, administrator of the estate of William Chapman, and Hester Broom, administratrix of the estate of John Broom, were substituted as plaintiffs, and said other parties were still the owners of the property mentioned as belonging to them in the complaint in this action.

11. That said plaintiffs had upon filing their complaint obtained a temporary injunction against the said defendants, but afterwards a demurrer to said complaint was sustained by the said court and said complaint ordered dismissed; which ruling was afterwards by the supreme court of the territory of Utah reversed, and the said cause was ordered remanded, with directions to the defendant to answer said complaint.

12. That the said council, in spite of the protest hereinbefore mentioned, proceeded and at the time of the filing of the complaint in this action had upon its passage the ordinance attached as Exhibit B to the complaint in this action, and afterwards, on the 22d day of March, 1893, passed the ordinance which is hereto attached and marked **Exhibit A** and made a part of these findings.

13. That on the 9th day of April, 1894, the plaintiffs filed a supplemental complaint in this action and asked that Mathias Biel, Joseph Clark, George W. Lashus, Lamoni Grix, Carl Sorenson, J. E. Horrocks, and Ann Horrocks, J. S. Lewis, *Lindsey R. Rogers, Patrick[230 Healey, Joseph Morely, Zilpha J. Stephens, W. C. Warren, Almira C. Baker, D. H. Stephens, Mary A. Stephens, Elizabeth Stephens, and the Ogden Union Depot & Railway Company, a corporation, be made parties to this action; which supplemental complaint was ordered by the court to be filed; that at the time of the filing of the supplemental complaint the said parties (except the Ogden Depot & Railway Company, a corporation) were and still are the owners of real estate fronting on said Twenty-fifth street (and said plaintiff last named was the owner of real estate assessed with said special tax, but not included in said paving district) included in said paving district, and upon the trial of this action D. H. Peery, Jr., and the Realty Company of Kittery, Maine, a corporation, and J. Pingree and Zilpha J. Stephens, Carrie Lewis, and George W. Murphy were added as parties plaintiff, and were at the date and still are the owners of real estate in said district fronting on said Twenty-fifth street, the pleadings having been allowed to be amended by the court in accordance with such facts.

14. That said Ogden City, in pursuance of said ordinance of March 22, 1893, was about to expose the real estate described in the original and supplemental complaints to sale to satisfy the illegal assessment imposed by said ordinance, and that the parties plaintiff in this action after their said property had been advertised for sale and was about to be sold to satisfy the said illegal assessment then due, paid under protest to said Ogden City, in order to prevent the sale of their property, the following amounts, to wit, J. C. Armstrong, $95.04; Mathlas Biel, $63; Joseph Clark, $48; Samuel Chapman, for the William Chapman estate, $49.20; Joseph Clark, for Clark, Emmet, and Thompson, $30; William Driver, $60; H. I. Griffin, $23.76; Lamoni Grix, $24.90; Ann Horrocks and James E. Horrocks, $124.80; Geo. W. Lashus, $60; H. D. and J. S. Lewis, $82.09; Carrie Lewis, $30; Joseph Morely, $36; Patrick Healey, for Patterson and Healey, $30; Joseph Clark, for Patterson & Clark, $60; L. R. Rogers, $74.04; J. H. Spargo, $48; D. M. Stephens, $14.70; Carl S. Sorenson, $20.40; W. C. Warren, $48; *Geo. M. Kerr, guardian[231 of the Nichols heirs, $160.08; D. H. Peery, Jr., $24; Realty Company of Kittery, Maine, $748.80; Job Pingree, $35.40; Ogden Union Depot & Railway Company, a corporation, $118.80; Geo. W. Murphy, $154.20.

15. That said plaintiffs are without any speedy and adequate remedy at law for the recovery of said amounts without a great multiplicity of the suits, and said assessment constitutes a cloud upon the title of the various plaintiffs to their several parcels of realty, and that said city asserts that it will annually for nine years hereafter levy assessments upon said real estate for the payment of said paving

and collect the same from the said parties plaintiff, and has already caused to be sold the property of certain of the plaintiffs under and by virtue of said assessment.

16. That the number of feet frontage in said paving district was 3,300, as the same is described in the ordinance, Ex. A.; that the difference between the district described in the ordinance and the district described in the notice of intention consisted of 660 feet of the public property of the said Ogden City, and the lots affected by the said assessment and described in said ordinance varied in depth, some being 75 feet deep and others 150 feet deep, and that the property owned by the various parties plaintiff in this action varied greatly in depth; that no ascertainment of actual benefits to the property assessed was ever made in order to determine the amount of assessment or to determine whether the amount assessed exceeded the actual benefits to the property by reason of the improvement, but the cost of the improvement was assessed upon the property abutting and fronting upon Twenty-fifth street within the said paving district at an ordinary rate of $12 per front foot without any finding or attempt to find the amount of actual benefits to the property; that the said improvement was made without any general plan and form of public improvement having been adopted by the said Ogden City, and the actual benefits to the property assessed for said improvement were not equal and uniform, nor was said assessment equal and uniform.

Messrs. **R. H. Whipple,** *T. D. Johnson,* and *James N. Kimball* for appellant.

Mr. **E. M. Allison, Jr.,** for appellees.

Mr. Justice **Shiras** delivered the opinion of the court:

The first question to be determined is whether the amount in controversy is sufficient to give us jurisdiction of the appeal.

Although no motion was made to dismiss the appeal, it was suggested at the argument that, as it was not competent to make up the sum necessary to give this court jurisdiction by uniting the several sums for which each taxpayer was liable, this was such a case, and that therefore we should dismiss the appeal.

Undoubtedly, it is the well-settled rule of this court that, in a suit in equity brought in the circuit court by two or more persons on several and distinct demands, the defendant can appeal to this court as to those plaintiffs only to each of whom more than $5,000 is decreed. *Russell* v. *Stansell,* 105 U. S. 303 [26:989], was a case in its facts much like the present one. There land within a particular district was assessed for taxation, each owner being liable only for the amount wherewith he was separately charged; a bill of complaint was filed by a number of them, praying for an injunction against the collection of the assessment, and from a decree dismissing the bill an appeal was taken to this court. It was held that, while the complainants were permitted, for convenience and to save expense, to unite in a petition setting forth the grievances of which complaint was made, the object was to relieve each separate owner from the amount for which he personally, or his property, was found to be accountable, and that such distinct and separate interests could not be united for the purpose of making up the amount necessary to give this court jurisdiction on appeal.

The same conclusion was reached in *Gibson* v. *Shufeldt,* 122 U. S. 27 [30: 1083], where the previous cases were fully discussed.

*An examination of this record discloses [233 that none of the complainants, save one, was assessed with an amount sufficient to have enabled him to bring the case here on appeal, and accordingly, under the doctrine of the cases cited, this appeal must be dismissed as to such parties.

But it appears that the Realty Company of Kittery, a corporation of the state of Maine, a party complainant in the supplemental bill, had been assessed, under the ordinance complained of, for the sum of $748.80, as an instalment for one year, and had been compelled to pay the same, and that the city was threatening to continue said proceedings and to sell the real estate of said company annually for nine years as each instalment for a like sum became due. The liability of that company then, under the ordinance and assessment complained of, amounted to the sum of $7,488, and as that company could, had the decree of the court below been adverse to it, have brought the case here on appeal, so, upon the authorities above referred to, it is competent for the defendant city to do the same.

Upon the merits, the first and most important question to consider is whether the city council had jurisdiction to assess and collect the paving tax.

The proceedings were initiated and the tax sought to be levied and collected under the provisions of chapter 41 of the Session Laws of 1890 of the late territory of Utah. The 13th section thereof reads as follows:

"In all cases before the levy of any taxes for any improvements provided for in this act the city council shall give notice of intention to levy said taxes, naming the purposes for which the taxes are to be levied, which notice shall be published at least twenty days in a newspaper published within said city. Such notice shall describe the improvements so proposed, the boundaries of the district to be affected or benefited by such improvements; the estimated cost of such improvements; and designate the time set for such hearing. If at or before the time so fixed written objections to such improvements signed by the owners of one half of the front feet abutting upon that portion of the street, avenue, or alley *to be so improved [234 be not filed with the recorder, the council shall be deemed to have acquired jurisdiction to order the making of such improvements."

The bill alleged, the answer admitted, and the trial court found that the notice of intention to pave in district No. 2, and to defray the expenses thereof by levying a local tax on abutting property owners, was published on March 9, 1892, and in which it was stated that the city council would on March 29, 1892, at 10 o'clock A. M., hear objections in writing from any and all persons interested in said local assessment.

The sixth finding of the trial court was as follows:

"That on March 29, 1892, at 9:55 o'clock, D.

H. Peery and sixty eight others, including all the plaintiffs in this action and in the supplemental complaint, who were then owners of real property within the said paving district No. 2, and with a frontage on Twenty-fifth street within the said paving district, filed a protest with the said recorder of said Ogden City protesting against the levying of any local assessment against or upon their property for the purpose of paving said street within said district; that said persons so protesting owned and protested for more than one half of the whole frontage on said Twenty-fifth street within said district, to wit, 2,414 feet; that after said hour of 10 A. M. of said day certain persons who had protested to the amount of 302½ feet withdrew their protests, leaving at all times 2,111¾ feet frontage on said Twenty-fifth street in said district still protesting against said local assessment; that the total number of feet fronting on said Twenty-fifth street in said paving district, as mentioned in said notice of intention above set forth, was 3,960 feet, of which 660 feet belonged at said time and still belongs to said Ogden City, and was then and is now used for public purposes by said city, and 125 feet of said frontage was then and is now the property of the said Ogden City, and was public school property, used and owned for public schools."

It is contended on behalf of the appellant that the city council, on April 4, 1892, determined that less than half of the whole frontage had protested, and that, as the city council was acting principally in a proceeding duly inaugu-
235] rated, such *action cannot be reviewed in an equitable action to restrain the collection of the tax, but should be reviewed, if at all, by certiorari, in which action the whole record would be removed to the district court.

So far as this proposition involves questions of facts as to the proportion of frontage covered by the protests, we, of course, accept finding, on that subject made by the trial court, and approved and adopted by the supreme court of the territory. *Stringfellow* v. *Cain*, 99 U. S. 610 [25: 421]; *Haws* v. *Victoria Copper Mining Co.* 160 U. S. 303 [40: 436].

But the argument seems to be that when once that question of fact was determined by the city council, proceeding under the statute, their determination cannot afterwards be challenged in a collateral proceeding; that while it would not be conclusive in an action by certiorari to set aside the assessment, it is conclusive as against a proceeding by injunction to prevent the collection of the tax. It is said that the jurisdiction of the city council attached when by resolution or ordinance and publication it gave notice of its intention to make the improvement in question.

We agree with the courts below in thinking that no jurisdiction vested in the city council to make an assessment or to levy a tax for such an improvement, until and unless the assent of the requisite proportion of the owners of the property to be affected had been obtained, and that the action of the city council in finding the fact of such assent was not conclusive as against those who duly protested. The fact of consent, by the requisite number, in this case to be manifested by failure to object, is jurisdictional, and in the nature of a condition precedent to the exercise of the power.

"Where the power to pave or to improve depends upon the assent or petition of a given number or proportion of the proprietors to be affected, this fact is jurisdictional, and the finding of the city authorities or council that the requisite number had assented or petitioned is not, in the absence of legislative provision to that effect, conclusive; the want of such assent makes the whole proceeding void." 2 Dill. Mun. Corp. 4th ed. § 800, where numerous cases *from the different states [236 are cited in support of that proposition.

In *Zeigler* v. *Hopkins*, 117 U. S. 683 [29: 1019], a similar question was thus stated and decided:

"There is in reality but a single question presented for our consideration in this case, and that is whether, in an action of ejectment brought to recover the possession of lands sold for the nonpayment of taxes levied to defray the expenses of opening Montgomery avenue generally, and not in obedience to an order of a court of competent jurisdiction to meet some particular liability which had been judicially established, the landowner is estopped from showing, by way of defense, that the petition for the opening presented to the mayor was not signed by the owners of the requisite amount of frontage; and this depends on whether the owner is concluded (1) by the acceptance of the petition by the mayor and his certificate as to its sufficiency and the action of the board of public works thereunder; or (2) by the judgment of the county court confirming the report of the board of public works. This precise question was most elaboratcly considered by the supreme court of California in *Mulligan* v. *Smith*, 59 Cal. 206, and decided in the negative, after full argument. With this conclusion we are entirely satisfied. It is supported by both reason and authority."

It is next contended on behalf of the appellant that if the city council wrongfully took jurisdiction, in face of the facts shown in or upon the face of its own proceedings, then the tax is absolutely void on its face, and the plaintiffs must seek their remedy at law; and further, if the city council wrongfully and falsely made its record to show facts sufficient to give it jurisdiction, when such facts never existed, then in order to get into equity plaintiffs must plead all such facts, and that even in such a case certiorari is, under the laws of Utah, a plain and perfect remedy.

It is doubtless true that the collection of a tax will not be restrained on the ground that it is irregular or erroneous. Errors in the assessment do not render the tax void; and usually there are legal remedies for all such mere irregularities *and errors as do not go to [237 the foundation of the tax, and parties complaining must be confined to these. As was held by this court in *Dows* v. *City of Chicago*, 78 U. S. 11 Wall. 108 [20: 65]: "A suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal. There must exist in addition special circumstances, bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity

of suits or produce irreparable injury or, where the property is real estate, throw a cloud upon the title of the complainant."

But the present case would seem plainly to be one of equitable jurisdiction within the doctrine of that case. What is complained of is no mere irregularity or error in the assessment. As we have seen, there was an entire want of jurisdiction in the common council to proceed for want of the assent of the requisite proportion of property owners, and the assessment and tax were, therefore, void. That there was no plain and adequate remedy by certiorari would seem to be evident. Upon that writ nothing could have been shown by evidence of facts outside of the record. It is true that, in some of the states, provision is made by statute to bring such evidence in, but such is not shown to have been the case here. It is an admitted fact upon the face of the pleadings that the common council actually found that the necessary jurisdictional fact existed, and that such a finding was made a matter of record. The plaintiffs alleged in their bill and the defendants in their answer denied that the finding of the jurisdictional fact by the common council was not a true finding. Such an issue required evidence *dehors* the record of the proceedings before the council in order to impeach their finding. The record of this case discloses that a large amount of oral evidence was introduced by the complainants, and admitted without objection by the defendants, to show ownership by the contesting parties, and to show that the common council were mistaken in finding that the requisite number had not protested.

Not only, however, was there a want of an adequate remedy in proceeding by a writ of [238 certiorari, but, we think, *equitable jurisdiction was properly invoked to prevent a multiplicity of suits, and also to relieve the plaintiffs from a cloud upon their title.

The finding on this fact of the case was as follows:

"That said plaintiffs are without any speedy and adequate remedy at law for the recovery of said amounts without a great multiplicity of suits, and said assessment constitutes a cloud upon the title of the various plaintiffs to their several parcels of realty, and that said city asserts that it will annually for nine years hereafter lay assessments upon said real estate for the payment of said paving and collect the same from the said parties plaintiff, and has already caused to be sold the property of certain of the plaintiffs under and by virtue of said assessment."

If a tax is a lien upon lands, it may then constitute a cloud upon the title; and one branch of equity jurisdiction is the removal of apparent clouds upon the title, which may diminish the market value of the land, and possibly threaten a loss of it to the owner. It is doubtless true that it has been held by this and other courts that if the alleged tax has no semblance of legality, and if upon the face of the proceedings it is wholly unwarranted by law, or for any reason totally void, as disclosed by a mere inspection of the record, such a tax would not constitute a cloud, and that the jurisdiction which is exercised by courts of equity, to relieve parties by removing clouds upon their title, would not attach.

But when the illegality or fatal defect does not appear on the face of the record, but must be shown by evidence *aliunde*, so that the record would make out a prima facie right in one who should become a purchaser, and the evidence to rebut this case may possibly be lost, or become unavailable from death of witnesses, or when the deed given on a sale of the lands for the tax would be presumptive evidence of a good title in the purchaser, so that the purchaser might rely upon the deed for a recovery of the lands until the irregularities were shown, the courts of equity regard the case as coming within their jurisdiction, and have extended relief on the ground that a cloud on the title existed or was *imminent. *Dow* [239 v. *City of Chicago*, 78 U. S. 11 Wall. 108 [20: 65]; *Hannewinkle* v. *Georgetown*, 82 U. S. 15 Wall. 547 [21: 231].

Undoubtedly, for merely irregular assessments, where the authorities have jurisdiction to act, the statutory remedy is also the exclusive remedy. But when the statute, as in this case, leaves open to judicial inquiry all questions of a jurisdictional character, it is well settled that a determination of such questions by an administrative board does not preclude parties aggrieved from resorting to judicial remedies.

Thus, in *Emery* v. *Bradford*, 29 Cal. 75, the supreme court of California, while holding that the remedy of an owner of a lot in San Francisco assessed for work on a street in front of the same, if dissatisfied with the decision of the superintendent of public streets, is an appeal from such decision to the board of public supervisors, and that, if the proceedings are such that the proper officers have jurisdiction to act, their determinations are valid, and can only be reviewed in the mode provided by the statute, said that where "there are acts to be performed of a jurisdictional character essential to the validity of the assessment, it is not to be supposed that the conclusiveness of the decision of the board of supervisors is to extend to that class of cases."

So, in *Wright* v. *City of Boston*, 9 Cush. 242, the supreme judicial court of Massachusetts, in holding that objections to a tax for some defect or irregularity in making the assessment must be taken advantage of by appeal, stated the proposition thus: "For any defect or irregularity in the course of proceeding in making the assessment, any ground of objection, which does not go to show the whole proceeding a nullity, he [the owner] must take his appeal, if he has one."

In *Union Pacific Railway Co.* v. *Cheyenne*, 113 U. S. 516, 525 [28: 1098, 1102], this court, through Mr. Justice Bradley, said: "But it is contended that the complainant should have sought a remedy at law and not in equity. It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must *be presumed that the law fur- [240 nishes a remedy for illegal taxation. It often

happens, however, that the case is such that the person illegally taxed would suffer irremedial damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made would be a grievance which would entitle him to go into a court of equity for relief."

Numerous cases to the same effect may be found cited in Cooley on Taxation, 543.

Again, it is contended on behalf of the appellant that the defendants cannot recover the taxes paid by them under protest because the Sessions Laws of Utah, 1890, § 1, p. 38, provides that "any party, feeling aggrieved by any such special tax or assessment or proceeding may pay said special tax assessed or levied upon his property, or such instalments thereof as may be due, at any time before the same shall be delinquent, under protest, and with notice in writing to the city collector that he intends to sue to recover the same, which notice shall particularly state the alleged grievances and grounds thereof; whereupon such party shall have the right to bring a civil action within sixty days thereafter, and not later, to recover so much of the special tax as he shall show to be illegal, inequitable, and unjust, the cost to follow the judgment, to be apportioned by the court as may seem proper, which remedy shall be exclusive."

As respects this contention we agree with the supreme court of the territory, that this statute applies to cases where there are only errors, irregularities, overvaluations, or other defects which are not jurisdictional, but that where the council, not having the jurisdiction to levy the tax, could not proceed under the statute, the taxpayers need not proceed under the statute to recover the money paid. Where the tax was wholly void and illegal, as in this [241 case, the *statute and its remedies for errors and irregularities have no application.

Our conclusion is that the decree of the Supreme Court of the Territory of Utah, so far as it respects the Realty Company of Kittery, is affirmed, and that as to the other appellees the appeal is dismissed.

CHARLES M. DENNISON, *Appt.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 241-250.)

Fee of chief supervisor of elections—burden of proof—res judicata.

1. A chief supervisor of elections is entitled to 15 cents a folio, for drawing instructions to supervisors relative to their duties.
2. A chief supervisor of elections is not entitled to fees for making copies of applications for appointment of supervisors; nor for entering and indexing letters of instruction to them, or special reports of supervisors of election relating to registration, election, or compensation of supervisors, or reports on applications for their appointment, or payrolls of such supervisors, or for certifying the same to the marshal; nor for more than one folio for each of their oaths; nor for entering and indexing applications to be appointed supervisors; nor for entering and indexing their oaths and those of the special deputy marshal, but is entitled to a fee for filing such oaths. He is not entitled to fees for making, entering, and indexing mail lists of supervisors' names and postoffice addresses; or receiving lists from the same; or depositions of inability of supervisors to discharge their duties; but is entitled to a fee for filing such depositions.
3. The government has the burden of showing that an excessive number of folios are charged for in the account of a chief supervisor of elections, when he makes oath that the services have been necessarily performed and the item has been allowed by the district court.
4. A decision in favor of certain claims approved by the district court, on the ground that such approval threw the burden of proof against him on the government, without passing on the legality of the separate items, is not *res judicata* as to the validity of similar items in another case.

[No. 84.]

Argued and Submitted November 2, 1897. Decided November 29, 1897.

APPEAL from a judgment of the Court of Claims in favor of Charles M. Dennison, chief supervisor of the Northern District of New York, against the United States, for his fees and disbursements in certain general elections, etc. *Affirmed as modified.*

See same case below, 25 Ct. Cl. 304.

Statement by Mr. Justice **Brown:**

This was a petition by the chief supervisor for the northern district of New York for fees and disbursements connected with the general election of 1890, amounting to $16,612.79, of which $2,752.60 were disallowed by the Treasury Department; for like fees and disbursements connected with the *general elec[242 tion of 1892, amounting to $18,998.94, of which $2,581.75 were disallowed; and also for fees connected with the examination of witnesses to show that certain supervisors, who had been appointed in the city of Troy to attend a Congressional election in 1888, had been deterred from discharging their duties by violence, or threats of violence, by disorderly persons. This account amounted to $624.65, of which $102.65 were disallowed.

The petition alleged that all these accounts had been approved and allowed by the district court.

Upon a finding of facts which do not differ materially from those set up in the petition, the court of claims directed a judgment in favor of the petitioner for $678.10, whereupon petitioner appealed to this court.

Mr. **Richard Randolph McMahon** for appellant.

Messrs. **Louis A. Pradt,** Assistant Attorney General, and **Felix Brannigan,** Assistant Attorney, for appellee.

NOTE.—*As to constitutional prohibition against change of salary during term as affecting fees*, see note to Gobrecht v. Cincinnati (Ohio) 23 L. R. A. 609.

As to extra pay or compensation to officers, see note to United States v. Macdaniel, 8: 587.

Mr. Justice **Brown** delivered the opinion of the court:

The duties of chief supervisors are prescribed by statute. U. S. Rev. Stat. §§ 2020, 2026 Their fees are also fixed by statute. § 2031. To entitle a supervisor to a valid claim against the government he must make it appear that the services performed were required by the letter of the former sections, or were such as were actually and necessarily performed in the proper execution of the duties therein prescribed. It must also appear that his charges therefor are covered by the latter section or if they are not fixed in the very words of that section, that, by analogy to some other service, he is entitled to make a corresponding charge. If the services are only performed for his own convenience, or are manifestly unnecessary or useless—even if they be such as he judges proper himself—they cannot be made the basis of a claim against the government.

243] *The petitioner in this case made a claim for his services in the general elections of 1890 and 1892 in the aggregate sum of $35,611.73, of which but $4,265.13 appear to have been for disbursements. Of this very large amount there was disallowed but $5,334.35, an amount which was further reduced by the judgment in his favor of $678.10 to $4,656.25, which is the amount in dispute here.

If the petitioner be entitled by law to the further sum claimed for what are in the main clerical services, he must receive judgment for them; but as the dates of the approval of his accounts show that his services did not extend over a period of more than six months, he has at least no reason to complain of the illiberality of the government.

The approval of the district court goes only to the facts that the services were rendered as stated in the accounts, and that, in certain matters of discretion, the discretion was properly exercised. *United States* v. *Jones*, 134 U. S. 483 [33: 1007]; *United States* v. *Barber*, 140 U. S. 177, 179 [35: 398, 399]. Neither of these cases requires the allowance of charges obviously unnecessary.

The items disallowed by the court below will be considered in their order:

1.—Item 4. Drawing instructions to supervisors, relative to their duties, 106 folios at 15 cents a folio, $15.90. As this charge was expressly allowed in *United States* v. *McDermott*, 140 U. S. 151, 154, ¶ 5 [35:391, 393], and in *United States* v. *Poinier*, 140 U. S. 160, 163, ¶ 3 [35: 395, 396], we do not understand why the item was rejected. Apparently it was an oversight. The Attorney General concedes the allowance in his brief.

2.—Item 5. Making copies of applications from different cities for the appointment as supervisors, to be annexed to the reports made to the judge, 1950 folios at 15 cents a folio, $279.50. United States Revised Statutes, § 2012, requires that the court, when opened, shall proceed to appoint and commission under the hand of the judge two resident citizens of each election precinct, who shall be of different political parties, etc., as supervisors. Section 2026 seems to contemplate that the judge shall obtain his information as to the competency of the persons receiving these appointments through the chief supervisor, *who is charged [**244** with the duty of receiving the applications of all persons for appointments to such positions; of presenting such applications to the judge, and furnishing information to him in respect to the appointment of such supervisors. The law does not require or contemplate that the original applications shall be retained by the chief supervisor, but rather that they shall be presented to the judge, who may preserve them or not as he sees fit. There is not the slightest necessity for making copies of them. The offices to be filled are purely temporary, and as soon as the election is held and the reports made the supervisors are *functi officio*. The office of the applications is even more temporary than that of the supervisors, since as soon as the appointments are made the applications have served the purpose for which they were intended. To speak of them as the official records of the chief supervisor is to dignify them with a title and importance entirely foreign to their real functions. To retain the originals and furnish the judge with copies is only to burden the government with an utterly useless expense. There is nothing to show that these copies were ordered by the court.

3.—Items 7, 8, 10, 13, 14, 21, and 27 are all of one class, and fall within the same general principle. They are for entering and indexing special letters of instruction to each local supervisor, containing a notice of the supervisor's appointment and general directions with regard to the method of obtaining his commissions or concerning the proper discharge of the duties of his office; some inclosing blank reports to be made of proceedings at the meeting of the boards of registration; others requiring a report of the vote cast; still others notifying the supervisors of the days allowed and the amount due, with special orders requiring them to verify their lists; and similar directions germane to the proper discharge of their functions. The aggregate amount of these items is $1,447.65.

We see no reason for entering or indexing these letters of instructions. There was no necessity for making separate memoranda of them,—much less copying them or preserving *duplicates. The regular course of busi-[**245** ness of the office would authorize one to infer that instructions were sent to the local supervisors in each case, and the names in the supervisors' commissions would show to whom these instructions were sent. We held in the case of *United States* v. *McDermott*, 140 U. S. 151, 154 [35: 391, 393], that the chief supervisor was entitled to 15 cents per folio for preparing and furnishing proper instructions to supervisors, and that he was also entitled to the expenses of printing copies of such instructions for the use of the local supervisors, but that he was not entitled to a folio charge for each copy so furnished.

It is equally clear that he is not entitled to a charge for entering and indexing them, as they are no proper part of the records of his office. Letters of instructions are not "records" in any sense of the word.

4.—Items 9, 22, 23, and 24 are for entering and indexing special reports of the supervisors of election, either of the proceedings at the

meeting of the board of registry or of other matters connected with the registration, election, or compensation of the supervisors.

Petitioner is doubtless entitled to a fee of 10 cents under U. S. Rev. Stat. § 2031, for filing and caring for each of these special reports, which are a proper part of the records of the office, but we think the entering and indexing them were an unnecessary burden upon the government. These items are therefore disallowed.

5.—Items 11 and 25. Entering and indexing reports on presentation of applications for the appointment of supervisors of election, which reports furnished information to the judge in respect to the qualifications of each applicant, $355.95 and $101.10. These reports are made to the judge, and are no part of the records of the chief supervisor's office. By § 2031, the charge for "entering and indexing" can only be made where the papers are a part of the records of the office. In view of the temporary character of these appointments, the word "record" should receive a narrow construction, and be limited to such documents and entries as might subserve some useful purpose in the future. The office of [246]*these reports is performed when they are submitted to the judge and the appointments are made. If he deems them of any importance, their custody belongs to the court, and not to the supervisor. The copying and entering of them upon his records can be of no possible utility. It belonged to the court to determine for itself what should be done with the originals.

6.—Item 12. Entering and indexing pay rolls of supervisors of election and certifying the same to the marshal, $76.95. It appears to have been the duty of the chief supervisor, under the instructions of the Attorney General, to audit and certify the amount due the supervisors, but we see no necessity for preserving copies of them in the records of the supervisor's office. The charge in this case is not for auditing and certifying the amounts, but for *entering*, by which we understand *copying*, and indexing the pay rolls, which we consider an unnecessary burden.

7.—Items 15 and 28 include charges to the amount of $630.60, for drawing oaths of supervisors, two folios. The controller allowed one folio for each oath. The oath contained the statement formerly required by § 1756, that the affiant had never borne arms against the United States, etc., which was repealed by the act of May 13, 1884 (23 Stat. at L. 21), the repealing act providing that in the future every person appointed to any office should take the oath prescribed by § 1757. The oath thus prescribed is less than one folio in length. The case is evidently not one for a liberal construction of the statute. These items are accordingly disallowed.

8.—Item 17. Auditing claims of and drawing pay rolls of supervisors of election for their claims for service, and certifying the same to the marshal for payment, 773 folios, of which the controller disallowed 531 folios, the difference being $81.60. There is no finding in connection with this item as to whether the count of the supervisor or of the controller was correct. Nor is any reason given for the disallowance of the 531 folios. As the account was verified by the oath of the claimant that each and every service charged therein had been necessarily performed, and as the district court allowed the item, we *think it was [247 incumbent upon the government to show that the claimant charged for an excessive number of folios. We are therefore of opinion that this item should be allowed.

9.—Item 18. Entering and indexing applications of persons applying to be appointed supervisors of election, etc., $286.95. This was not a charge for *filing* recommendations for appointments or for indexing *appointments*, which charges were allowed in *United States* v. *Poinier*, 140 U. S. 160 [35: 395], but for entering and indexing the applications. As we have already held that the law does not contemplate that these papers shall become the records of the office, the service was evidently wholly unnecessary.

10.—Items 19 and 20. Entering and indexing the oaths of supervisors and special deputy marshals, of which the controller allowed a part and disallowed a larger part, the difference being $671.70. It does not appear why the controller allowed less than one half of these items; but as we think the whole charge should have been disallowed, it is unnecessary to seek an excuse for disallowing a moiety. It is true that U. S. Rev. Stat. § 2027, requires the commissioners, with all due diligence, to forward to the chief supervisor all oaths of office administered to any supervisor of election, in order that the same may be properly preserved and filed. They thereby become a part of the records of the chief supervisor's office, and he is properly entitled to a fee for filing the same; but it does not, therefore, follow that he is entitled to a separate fee for entering and indexing them. As we observed in *Poinier's Case*, page 162 [35: 396], "it does not, however, follow that every paper which the law authorizes to be filed must therefore be recorded or copied. To entitle a paper or document to be recorded it should have some permanent value. Where the original paper is preserved or filed, such, for instance, as the pleadings, exhibits, depositions, or other papers in a common suit at law or equity, no necessity ordinarily exists for its being recorded. As a charge of 10 cents for filing these informations was allowed by the department, the exception to this item for recording and indexing is therefore sustained." The same remarks are applicable to the charge in this case. *The petitioner was entitled[248 to 10 cents for filing and caring for every paper to be filed by him; but he does not thereby become entitled to a separate fee for entering and indexing them.

11.—Item 26. Making, entering, and indexing records, such as mail lists containing supervisors' names and postoffice addresses, with columns for checking matter sent out by mail, and also receiving lists, etc. These lists are obviously no part of the record, and the item should be disallowed.

12.—Item 31. Entering and indexing certain depositions and evidence taken in the matter of the claim made that certain supervisors had been unable to discharge the duties of their office by reason of violence and threats of violence, $172.35. For the reasons already

stated with reference to the items for entering and indexing oaths, we think that the supervisor was entitled to a charge of 10 cents for filing these depositions, but he is not entitled to the large charge of $172.35 for entering and indexing them. This charge is also disallowed.

The underlying vice of the petitioner's theory throughout this whole account consists in the assumption that every paper or document which comes into or issues from his hands, or is prepared by him officially, even though it be for a purely temporary purpose, constitutes an official record, and that it is within his discretion that every such paper shall be entered (copied) in durable books and indexed in a permanent form. This is not the case. Even in courts of justice, which are a permanent feature of every civilized government, the judgment record which the clerk is authorized to enter in a book kept for that purpose does not include every paper found in the files of the case, nor even the depositions of witnesses, but is confined to the pleadings and proceedings necessary to make up a complete history of the suit. Much more is this the case with the records of the chief supervisor, which exist only for a temporary purpose, and after a year or two lose practically their entire value. It is true that the chief supervisor is entitled to exercise a certain discretion as to what papers he shall enter upon a **249**]permanent book, but to enter a *hundred letters, each of which must be substantially a copy of every other, excepting the address, is so manifestly an abuse of his discretion that no court should tolerate it for a moment. It is not for us to determine what are the records which should be entered and indexed. It is sufficient to say that, for the purposes of this case, we have no difficulty in determining what are not.

The plea of *res judicata*, arising from the fact that the claimant brought an action in 1887 in the court of claims to recover for various items of service of the same nature and description as those claimed in this case, and that the court found in his favor and rendered judgment against the United States for the amount claimed, is not well taken. There is no finding of fact in connection with this plea, and we can only judge of what the issue was by reading the opinion of the court of claims. 25 Ct. Cl. 304. From this opinion it appears that the items of the account were not passed upon in detail, but that the court rendered judgment in favor of the claimant upon the ground that the approval of the account by the district court, under the decision in *United States* v. *Jones*, 134 U. S. 483 [33: 1007], threw upon the government the burden of disproving the correctness of the several items. That the court did not approve the items as charged is evident from its statement that "on the argument it was maintained by the counsel for the government that the claimant had failed to establish the *quantum* of his services and expenditures by competent evidence; and, as to many of the items, such is the opinion of the court."

Further than this, however, the suit under consideration is not for the *same* items as those allowed in the former case, but for *similar* items, and the case falls within our ruling in *Cromwell* v. *County of Sac*, 94 U. S. 351 [24: 195], that "where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." There was no issue raised and decided in the former case as to the legality of the several items considered separately, but such issue is clearly raised in this case.

*While we think the judgment of the [**250** court of claims was correct with respect to all the items involved in this case, with the exception of two, the aggregate amount of which is $97.50, for its error in respect to those two *the judgment will have to be varied by increasing the same from $678.10 to $775.60, and subject to such increase it is in all other respects affirmed.*

GEORGE F. UNDERHILL, *Plff. in Err.*,
v.
JOSÉ MANUEL HERNANDEZ

(See S. C. Reporter's ed. 250-254.)

Acts of foreign government—not to be reviewed by courts of this country—judicial notice—acts of military commander, not the subject of a personal action.

1. The acts of a foreign government done within its own territory cannot be brought into judgment in the courts of this country.
2. Every sovereign state is bound to respect the independence of every other sovereign state; and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.
3. This court is bound to take judicial notice of the facts that flagrant civil war existed in another country, that the revolution was successful, and that the revolutionary government was recognized by the United States as the government of the country; and for information as to those facts this court may consult the Department of State.
4. The acts of a military commander in a foreign country, representing the authority of the revolutionary party as a government which afterwards succeeded and was recognized by the United States, cannot be made the subject of a personal action against him in the courts of this country.

[No. 36.]

Argued October 22, 25, 1897. Decided November 29, 1897.

ON A WRIT of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the Eastern Dis-

NOTE.—*That dominion acquired over conquered or ceded territory does not devest the vested rights of individuals to property; former laws continue until altered by new sovereign,*—see note to Delassus v. United States, 9: 71.

trict of New York in favor of the defendant, José Manuel Hernandez, in an action brought by George F. Underhill against him for damages for detention and confinement of Underhill by defendant while a military commander in Venezuela. *Affirmed.*

See same case below, 26 U. S. App. 573.

Statement by Mr. Chief Justice **Fuller:**

In the early part of 1892 a revolution was initiated in Venezuela against the administration
251]thereof, which the revolutionists *claimed had ceased to be the legitimate government. The principal parties to this conflict were those who recognized Palacio as their head and those who followed the leadership of Crespo. General Hernandez belonged to the anti-administration party, and commanded its forces in the vicinity of Ciudad Bolivar. On the 8th of August, 1892, an engagement took place between the armies of the two parties at Buena Vista, some 7 miles from Bolivar, in which the troops under Hernandez prevailed, and on the 13th of August, Hernandez entered Bolivar and assumed command of the city. All of the local officials had in the meantime left, and the vacant positions were filled by General Hernandez, who from that date and during the period of the transactions complained of was the civil and military chief of the city and district. In October the party in revolt had achieved success generally, taking possession of the capital of Venezuela October 6, and on October 23, 1892, the Crespo government, so called, was formally recognized as the legitimate government of Venezuela by the United States.

George F. Underhill was a citizen of the United States, who had constructed a waterworks system for the city of Bolivar under a contract with the government, and was engaged in supplying the place with water, and he also carried on a machinery repair business. Some time after the entry of General Hernandez, Underhill applied to him as the officer in command for a passport to leave the city. Hernandez refused this request, and requests made by others in Underhill's behalf, until October 18, when a passport was given and Underhill left the country.

This action was brought to recover damages for the detention caused by reason of the refusal to grant the passport; for the alleged confinement of Underhill to his own house; and for certain alleged assaults and affronts by the soldiers of Hernandez's army.

The cause was tried in the circuit court of the United States for the eastern district of New York, and on the conclusion of plaintiff's case, the circuit court ruled that upon the facts plaintiff was not entitled to recover, and direct-
252]ed a *verdict for defendant on the ground that "because the acts of the defendant were those of a military commander, representing a *de facto* government in the prosecution of a war, he was not civilly responsible therefor." Judgment having been rendered for defendant, the case was taken to the circuit court of appeals, and by that court affirmed upon the ground "that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government." 26 U. S. App. 573 [65 Fed. Rep. 577]. Thereupon the cause was brought to this court on certiorari.

Messrs. **Walter S. Logan** and *Charles M. Demond*, for plaintiff in error.

Messrs. **F. R. Coudert, Jr.**, *F. R. Coudert*, and *Joseph Kling* for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Nor can the principle be confined to lawful or recognized governments, or to cases where redress can manifestly be had through public channels. The immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact. Where a civil war prevails, that is, where the people of a country are divided into two hostile parties, who take up arms and oppose one another by military *force, generally speaking for-
[253 eign nations do not assume to judge of the merits of the quarrel. If the party seeking to dislodge the existing government succeeds, and the independence of the government it has set up is recognized, then the acts of such government from the commencement of its existence are regarded as those of an independent nation. If the political revolt fails of success, still if actual war has been waged, acts of legitimate warfare cannot be made the basis of individual liability. *United States* v. *Rice*, 17 U. S. 4 Wheat. 246 [4: 562]; *Fleming* v. *Page*, 50 U. S. 9 How. 603 [13: 276]; *Thorington* v. *Smith*, 75 U. S. 8 Wall. 1 [19: 361]; *Williams* v. *Bruffy*, 96 U. S. 176 [24: 716]; *Ford* v. *Surget*, 97 U. S. 594 [24: 1018]; *Dow* v. *Johnson*, 100 U. S. 158 [25: 632], and other cases.

Revolutions or insurrections may inconvenience other nations, but by accommodation to the facts the application of settled rules is readily reached. And where the fact of the existence of war is in issue in the instance of complaint of acts committed within foreign territory, it is not an absolute prerequisite that that fact should be made out by an acknowledgment of belligerency, as other official recognition of its existence may be sufficient proof thereof. *The Three Friends* [*United States* v. *The Three Friends*], 166 U. S. 1 [41: 897].

In this case, the archives of the state department show that civil war was flagrant in Venezuela from the spring of 1892; that the revolution was successful; and that the revolutionary government was recognized by the United States as the government of the country, it being, to use the language of the Secretary of State in a communication to our minister to Venezuela, "accepted by the people, in the

possession of the power of the nation and fully established."

That these were facts of which the court is bound to take judicial notice, and for information as to which it may consult the Department of State, there can be no doubt. *Jones* v. *United States*, 137 U. S. 202 [34: 691]; *Mighell* v. *Sultan of Johore*, [1894] 1 Q. B. 149.

It is idle to argue that the proceedings of those who thus triumphed should be treated as the acts of banditti or mere mobs.

We entertain no doubt upon the evidence **254**]that Hernandez *was carrying on military operations in support of the revolutionary party. It may be that adherents of that side of the controversy in the particular locality where Hernandez was the leader of the movement entertained a preference for him as the future executive head of the nation, but that is beside the question. The acts complained of were the acts of a military commander representing the authority of the revolutionary party as a government, which afterwards succeeded and was recognized by the United States. We think the circuit court of appeals was justified in concluding "that the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government."

The decisions cited on plaintiff's behalf are not in point. Cases respecting arrests by military authority in the absence of the prevalence of war, or the validity of contracts between individuals entered into in aid of insurrection, or the right of revolutionary bodies to vex the commerce of the world on its common highway without incurring the penalties denounced on piracy, and the like,—do not involve the questions presented here.

We agree with the circuit court of appeals, that "the evidence upon the trial indicated that the purpose of the defendant in his treatment of the plaintiff was to coerce the plaintiff to operate his waterworks and his repair works for the benefit of the community and the revolutionary forces," and that "it was not sufficient to have warranted a finding by the jury that the defendant was actuated by malice or any personal or private motive;" and we concur in its disposition of the rulings below. *The decree of the Circuit Court is affirmed.*

255] HENRY PRATT *et al.*, *Plffs. in Err.*,
v.
PARIS GASLIGHT & COKE COMPANY.

(See S. C. Reporter's ed. 255-262.)

Evidence of the invalidity of a patent—when admissible in state court—power of state court to determine questions under patent laws.

1. Evidence of the invalidity of a patent and its infringement of a prior patent does not oust the jurisdiction of a state court in an ordinary action of assumpsit which is not removable to a Federal court, when the state court has jurisdiction both of parties and subject-matter as set forth in the declaration, and the question of the invalidity of the patent is incidental to a defense of the lack of consideration and of a rescission of the contract.

2. The power of state courts to determine questions arising under the patent laws is not precluded by U. S. Rev. Stat. § 711, excluding them from jurisdiction of "cases" arising under those laws.

[No. 85.]

Submitted November 2, 1897. Decided November 29, 1897.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment of that court affirming the judgment of the Circuit Court of that state in favor of the defendant, the Paris Gaslight & Coke Company, in an action brought by Henry Pratt *et al.*, for the recovery of an agreed sum for manufacturing and setting up an apparatus for the manufacture of water gas for defendant. *Affirmed.*

Statement by Mr. Justice **Brown**:

This was an action in assumpsit upon the common counts, by the persons constituting the firm of Henry Pratt & Company, to recover of the Paris Gaslight & Coke Company the agreed consideration of $4,850 for manufacturing and setting up at its works in the city of Paris, Edgar county, Illinois, an apparatus for the manufacture of water gas, in accordance with certain patents granted to Pratt and Ryan, April 22, 1884, and April 12, 1887, the component parts of said apparatus being set forth in the contract.

Defendant pleaded the general issue, and in addition thereto that the cause of action arose under a written contract, by which the plaintiffs agreed to keep the defendant harmless against any suits which might be brought against it for the infringement of any patents, and, if any such were brought, to defend the same at their own expense; further averring that the patents to Pratt and Bryan were void, and an infringement upon certain patents which had been granted to Springer and Lowe; that plaintiffs had not kept defendant harmless from suits for infringement, as provided for in such contract, and had not defended the same at their expense, but that a suit had been begun against defendant by the National Gaslight & Fuel Company in the circuit court of the United States for the southern district of Illinois, for *an infringement of the [**256** Springer patent; that defendant requested plaintiffs to defend it, which they had agreed to do, but that they wholly refused to defend it, and said suit is still pending; that defendant was compelled to, and did at once, quit using the apparatus by reason of such suit, and has wholly ceased to use it.

The third plea averred, in substance, that the plaintiffs obtained the contract upon false

NOTE.—*As to effect of decision of state courts in Federal courts; rule of property; questions of general or commercial law; effect of state decisions in other states; Federal questions,*—see note to Forepaugh v. Delaware, L. & W. R. Co. (Pa.) 5 L. R. A. 508.

As to adoption by Federal courts of remedies created by state statutes; preservation of equity jurisdiction; enlargement of equitable remedies; limitation or enlargement of equity powers; extending legal remedies; limiting equitable jurisdiction, see note to Leighton v. Young (C. C. 8th C.) 18 L. R. A. 288.

and fraudulent representations that their patents were not infringements upon any other patents, which representations the plaintiffs knew to be untrue; that plaintiffs further represented that the National Gaslight & Fuel Company had begun a suit against them for an infringement of the Springer patent, and had found that they had no claim, and assured plaintiffs that no suit would be brought against defendant, by the Gaslight & Fuel Company, nor by anyone else, and that the Company had abandoned all claim that plaintiffs' patents were an infringement upon theirs, which representations were false and fraudulent to the knowledge of the plaintiffs, who had before that time been notified by the Gaslight & Fuel Company that suit would be brought against anyone who might use the apparatus made by them.

The fourth plea alleged substantially the same representations as the third, and that, while plaintiffs were about to commence the construction of the apparatus, the National Gaslight & Fuel Company notified defendant that the plaintiffs' apparatus was an infringement upon the patents; that defendant thereupon notified plaintiffs that it would not accept such apparatus, and thereupon plaintiffs proposed that, if defendant would permit them to proceed, they would, before asking payment for the same, furnish defendant a good and sufficient bond indemnifying it against all damages that it might suffer by reason of any infringement, and upon defendant accepting such offer, plaintiffs refused to give such bonds as they had agreed, and still neglect to do so.

To these special pleas a general demurrer was filed by the plaintiffs, which was overruled by the court, and by leave of the court replications were filed, and upon the issues thus **257**] *joined a trial was had which resulted in a verdict for the defendant. A motion for a new trial being overruled, and judgment entered upon the verdict, the case was taken to the appellate court of Illinois, and from that court to the supreme court, which affirmed the judgment of the circuit court, whereupon plaintiffs sued out a writ of error from this court.

Mr. **John T. Richards** for plaintiffs in error.

Messrs. **George Hunt** and *James R. Ward* for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

The only Federal question presented by the record in this case turns upon the admissibility of evidence tending to show that the patents issued to the plaintiffs Pratt & Ryan were infringements upon a prior patent issued to Springer. Plaintiffs contend that the state court, by admitting such testimony, thereby assumed jurisdiction of a patent case, in violation of U. S. Rev. Stat. § 711, which declares that "the jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states. . . . Fifth. Of all cases arising under the patent-right or copyright laws of the United States."

The action, however, was not brought to test the validity of plaintiffs' patents, to recover damage for their infringement, or to enjoin their use by the defendant. The suit was an ordinary action of assumpsit upon the common counts for the price of a machine,—a patented machine it is true, but none the less subject to a common-law action to recover its value. No mention is made of a patent in the declaration, and the contract having been executed, the action was properly brought upon the common counts, notwithstanding the machine was sold under a written agreement. 2 Greenl. Ev. § 104. Defendant in its plea set up the contract, under *which the plaintiffs[**258** agreed to save the defendant harmless against any suit which might be brought against it for infringement, and to defend such suits at their own expense; and averred, among other things, that the patents were void and an infringement upon prior patents; that plaintiffs had not kept the defendant harmless against suits, but had refused to defend it against a suit brought by the National Gaslight & Fuel Company, by reason of which the consideration had wholly failed, and defendant had rightfully rescinded the contract. Manifestly if the defendant had no right to use the machine it was of no value to it, and the whole purpose of its purchase was frustrated.

Had the action been in the circuit court of the United States defendant would obviously have had the right to show that the plaintiffs' patents were void, and an infringement upon prior patents as an excuse for rescinding the contract. *Hayne* v. *Maltby*, 3 T. R. 438; *Nye* v. *Raymond*, 16 Ill. 153. Why should it not have the same right in a state court? It is evident that, unless it can prove the invalidity of the plaintiffs' patents, it might be completely at their mercy. It cannot, under our decisions, remove the case to a Federal court, as one arising under the Constitution or laws of the United States, since no claim was made by the plaintiffs in their declaration under such Constitution or laws. *Chappell* v. *Waterworth*, 155 U. S. 102 [39: 85]; *Walker* v. *Collins*, 167 U. S. 57 [42: 76]; *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454 [38: 511]. It could not file a bill against the National Gaslight & Fuel Company to test the validity of the patents, since the defendant, and not the Fuel Company, was the offending party. Nor could it have compelled the Fuel Company to sue it for an infringement had that company not chosen to do so. The Fuel Company did, however,

As to what constitutes infringement of patents; similarity of devices; designs; combinations; machines; construction of patent,—see note to Royer v. Coupe, 36: 1073.

As to prior use or sale, see note to Campbell v. New York, (C. C. S. D. N. Y.) 1 L. R. A. 48.

As to protection of right, see note to American Bell Teleph. Co. v. Cushman Teleph. & Service Co. (C. C. N. D. Ill.) 1 L. R. A. 799.

As to notes for patent rights, see note to First Nat. Bank v. Stockell (Tenn.) 20 L. R. A. 605.

As to liability of officers of a corporation for its infringement, see note to Nunnelly v. Southern Iron Co. (Tenn.) 28 L. R. A. 423.

As to when assignee may sue for infringement; when patentee must; when they must join,—see note to Wilson v. Rousseau, 11: 1141.

elect to bring such suit, which the plaintiffs were promptly notified by the defendant to defend; but they refused to do this, and now claim that defendant is incapacitated from contesting the validity of their patents, which contest they were bound under their contract to make in the suit brought against the defendant by the Fuel Company. It is possible
259]a bill would lie in the *circuit court of the United States to reseind the contract, but, having the right to reseind without suit, it ought not to be driven to this circuitous remedy.

The action under consideration is not one arising under the patent-right laws of the United States in any proper sense of the term. To constitute such a cause the plaintiff must set up some right, title, or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction, of these laws. *Starin* v. *New York*, 115 U. S. 248 [29: 388]; *Germania Ins. Co.* v. *Wisconsin*, 119 U. S. 473 [30: 461].

The state court had jurisdiction both of the parties and the subject-matter as set forth in the declaration, and it could not be ousted of such jurisdiction by the fact that, incidentally to one of these defenses, the defendant claimed the invalidity of a certain patent. To hold that it has no right to introduce evidence upon this subject is to do it a wrong and deny it a remedy. Section 711 does not deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of "*cases*" arising under those laws. There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint, or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals.

The jurisdiction of state courts over patent cases is not more exclusive than that of the district courts over cases of admiralty and maritime jurisdiction. Yet, when vessels have passed into the hands of an assignee or receiver, it has been the constant practice of courts of bankruptcy and equity to respect the liens given by the maritime law, to marshal such liens and direct their payment, precisely as a court of admiralty would have done. *Scott's Case*, 1 Abb. (U. S.) 336; *Re Kirkland*, 14 Fed. Cas. 677; *Re People's Mail Steamship Co.* 3 Ben. 226; High, Receivers, § 138.

260] *While the question has never arisen in this court in the exact form presented in this case, we have repeatedly held that the Federal courts have no right, irrespective of citizenship, to entertain suits for the amount of an agreed license or royalty, or for the specific execution of a contract for the use of a patent, or of other suits where a subsisting contract is shown governing the rights of the party in the use of an invention, and that such suits not only may, but must, be brought in the state courts. *Hartell* v. *Tilghman*, 99 U. S. 547 [25: 357]; *Wilson* v. *Sandford*, 51 U. S. 10 How. 99 [13: 344]; *Albright* v. *Teas*, 106 U. S. 613 [27: 295]; *Goodyear* v. *Day*, 1 Blatchf. 565; *Blanchard* v. *Sprague*, 1 Cliff. 288; *Dale Tile Mfg. Co.* v. *Hyatt*, 125 U. S. 46 [31: 683]; *Wade* v. *Lawder*, 165 U. S. 624 [41: 851]. Although in an action for royalties, if the validity and infringement of the patent are controverted, the case is considered as one "touching patent rights," for the purposes of an appeal to this court under U. S. Rev. Stat. § 699. *St. Paul Plow Works* v. *Starling*, 127 U. S. 376 [32: 251]. In this case the court expressly reserved the question whether the action should be considered as one arising under the patent laws of the United States within the meaning of § 711.

We are referred to but one case directly in point which favors plaintiffs' contention: *Elmer* v. *Pennel*, 40 Me. 430, in which, in a suit upon a note given for a patent right, proof that the patent was void as an infringement upon a prior one was held not to be admissible without that fact having been determined by a court of competent jurisdiction.

There is, however, an overwhelming weight of authority to the contrary. Beginning with the case of *Bliss* v. *Negus*, 8 Mass. 46, in which, in a similar action upon a note, it was held the defendant might show that the patent had been obtained by fraud and perjury, the supreme judicial court of Massachusetts has held steadily to the doctrine that where the question of the validity of a patent arises collaterally it will take jurisdiction of it. In *Dickinson* v. *Hall*, 14 Pick. 217 [25 Am. Dec. 390], evidence that the patent was void was held to be pertinent to show a total want of consideration for the defendant's note. The principal case, however, is that of *Nash* v. *Lull*, 120 Mass. 60 [3 Am. Rep. 435], in which the opinion of the court was delivered by *Mr. Justice[**261**] Gray, to the effect that any degree of utility or practical value in a patent will support the consideration paid for it; but that if it be wholly void, a note given for it is without consideration, and such issue may be tried in the state court as well as in the circuit court of the United States. See also, to the same effect, *Bierce* v. *Stocking*, 11 Gray, 174; *Lester* v. *Palmer*, 4 Allen, 145.

Like opinions have been pronounced in the courts of New Hampshire, Connecticut, New York, Pennsylvania, Indiana, Wisconsin, Illinois, and Missouri; and in all these states the principle seems well established that any defense which goes to the validity of the patent is available in the state courts. In these cases the validity of the patent was attacked upon different grounds, but we perceive no distinction in the principle involved. The patent may be void because the invention was well known before; or because it is useless or immoral; or because it is an infringement upon other prior patents; and it is no objection to the jurisdiction of the state court that the question of validity may involve the examination of conflicting patents, or the testimony of experts. It is the fact of its invalidity, and not the reasons for it, that is material. The cases are so numerous and uniform that a bare reference to them is all that is necessary. *Dunbar* v. *Marden*, 13 N. H. 311; *Rich* v. *Atwater*, 16 Conn. 409; *Sherman* v. *Champlain Transportation Co.* 31 Vt. 162; *Clough* v.

Patrick, 37 Vt. 421; *Burrall* v. *Jewett*, 2 Paige, 134; *Middlebrook* v. *Broadbent*, 47 N. Y. 443 [7 Am. Rep. 457]; *Continental Store Service Co.* v. *Clark*, 100 N. Y. 365; *Head* v. *Stevens*, 19 Wend. 411; *Harmon* v. *Bird*, 22 Wend. 113; *Cross* v. *Huntly*, 13 Wend. 385; *Saxton* v. *Dodge*, 57 Barb. 84, 115; *Geiger* v. *Cook*, 3 Watts & S. 266; *Slemmer's Appeal*, 58 Pa. 155, 163 [98 Am. Dec. 248]; *McClure* v. *Jeffrey*, 8 Ind. 79; *Nye* v. *Raymond*, 16 Ill. 153; *Page* v. *Dickerson*, 28 Wis. 694 [9 Am. Rep. 532]; *Rice* v. *Garnhart*, 34 Wis. 453 [17 Am. Rep. 448]; *Billings* v. *Ames*, 32 Mo. 265.

The claim made by the plaintiffs in error, that there was no competent evidence to show that their patents were an infringement upon the prior patents, was not specially assigned as 262]*error, either in the appellate court, or in the supreme court of the state, and is not noticed in either of the opinions of those courts. Under these circumstances it cannot be assigned as error here.

The judgment of the Supreme Court of Illinois is therefore affirmed.

EDWARD HODGSON, *Plff. in Err.*,
v.
STATE OF VERMONT.

(See S. C. Reporter's ed. 262-273.)

Information, when sufficient—due process of law.

1. An information in the words of a statute for selling intoxicating liquors without authority of law is not insufficient to constitute due process of law, although it does not give the particulars of the kind, quantity, price, and person to whom sold, when these are given by specifications to which the defendant is entitled as a matter of right.
2. An information, instead of an indictment, is sufficient to constitute due process of law in a prosecution.

[No. 26.]

Argued October 14, 15, 1897. Decided November 29, 1897.

IN ERROR to the Supreme Court of the State of Vermont to review a judgment of that court affirming the judgment of the County Court for the County of Addison in that State refusing to quash an information for selling liquor, and overruling a motion in arrest, and sentencing Edward Hodgson to pay certain fines and costs and to be confined in the house of correction at Rutland for a certain time upon a judgment of conviction of him for selling liquor contrary to a statute of the state. *Affirmed.*

See same case below, 66 Vt. 134.

Statement by Mr. Justice **Shiras:**

At the June term, 1892, of the county court for the county of Addison, in the state of Vermont, the plaintiff in error was tried and convicted "of one first offense and one second offense," upon an information for selling liquor, filed by the state's attorney. The information was as follows:

"Be it remembered that Frank L. Fish, state's attorney within and for said county, comes here into open court and in his own proper person, and upon his oath of office, gives said court to understand and be informed that Edward Hodgson of Orwell, in the county of Addison, and state of Vermont, on the 7th day of June, A. D. 1892, at Orwell, in the county of Addison aforesaid, did, at divers times, sell, furnish, and give away intoxicating liquor without authority, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

"And the said state's attorney, on his oath aforesaid, comes and gives said court further to understand and be informed that the said Edward Hodgson, prior to this time, to wit, at the December term of the county court held at Middlebury, in and for the county of Addison, on the first Tuesday of *December, A. D. [264 1891, before and by consideration of said court, was, as appears of record, convicted of selling, furnishing, and giving away intoxicating liquors, against the law in such case made and provided."

It is stated in the record that the state's attorney "likewise filed specifications in words and figures following:"

"In said case the state's attorney, for a specification, specifies, and says as follows: That he will rely upon, and expect to prove in the trial of said cause, the fact that the respondent, within three years before the filing of the information in the said cause, sold, furnished, and gave away intoxicating liquor to the following named persons, or to some one of them, that is to say:

[Here follow the names of sixty-six persons, whose residence is not given.]

"And the undersigned state's attorney states that he has also specified the offenses against said respondent with all the certainty as to the time and person, and he is now able from all the information he has in said cause; and the state's attorney reserves the right to amend these specifications if he shall have further evidence pursuant to the statute.

"And the state's attorney further specifies and relies upon the selling, furnishing, and giving away of intoxicating liquor by the respondent within three years before the filing of said information, to some person or persons now unknown to the state's attorney, and claims the right to add the names of such persons, when ascertained, to the specifications, and to make such other amendments in these specifications as the law and discretion of the court may admit."

This specification is not required by any statute, and forms no part of the information. It is, however, provided by statute that "*when* a specification is *required*, it shall be sufficient to specify the offenses with such certainty as to time and person as the prosecutor may be able, and the same shall be subject to amendment at any stage of the trial; and where the specification sets forth the sale, furnishing, or giving away to any person or persons unknown the witnesses produced may be in-

NOTE.—*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.

quired of as to such transactions with any per-
265]son,*whether named in the specification or not, and as the name of such person may be disclosed by the evidence it may be inserted in or added to the specification upon such terms as to a postponement of the trial for this cause as the court shall think reasonable." Stat. of Vt. 1886, No. 37.

It does not appear from the record that the specification was asked for by the respondent, nor whether the offenses of which he was convicted were for selling, furnishing, or giving away; or whether to either of the sixty-six persons named in the specification, or to some person or persons not named. These proceedings were based upon §§ 3802, 3803, 3859, 3860 of the Revised Laws of Vermont (Revision of 1880), as amended by No. 42 of the Acts of 1888, which are as follows:

"Sec. 3802. If a person by himself, clerk, servant, or agent, sells, furnishes, or gives away, or owns, keeps, or possesses with intent to sell, furnish, or give away, intoxicating liquor or cider, in violation of law, he shall forfeit for each offense to the state, upon the first conviction not less than five nor more than one hundred dollars, and may also be imprisoned in the discretion of the court not more than thirty days; upon the second and each subsequent conviction, not less than ten nor more than two hundred dollars for each offense, and shall also be imprisoned not less than one month nor more than one year.

"Sec. 3803. Justices shall have concurrent jurisdiction with the county court in prosecutions under the preceding section, and the same may be tried upon the complaint of a grand juror of the town, or of the state's attorney, before a justice or upon the information of the state's attorney, before the county court.

"Sec. 3859. Complaints for any offense against § 3572 (§ 3802) shall be substantially in the following form:

'State of Vermont } ss:
——— County, }

'To A. B., justice of the peace for the county of———, comes C. D., grand juror of
266] the town of———, in said county, *and complains that E. F., of———, on the ——— day of———, A.D.——, at———, did, at divers times, sell, furnish, or give away (as the case may be) intoxicating liquor, without authority, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

'C. D., Grand Juror.'

"Sec. 3860. Under the foregoing complaint every distinct act of selling, furnishing, or giving away may be proved, and the court shall impose a fine for each offense."

Before trial the plaintiff in error filed a motion to quash the indictment. This motion was overruled by the court, to which decision the plaintiff in error duly excepted. The case was carried by the plaintiff in error to the supreme court of Vermont upon exceptions to the overruling by the county court of his motion to quash, and upon other exceptions taken at the trial, and not material here, as they raise no Federal question. Judgment and sentence were stayed in the county court, to await the result of the hearing in the supreme court.

In that court the plaintiff in error filed a motion in arrest of judgment, which he was allowed by the court to do, and the same was taken into consideration and passed upon by the court.

The grounds set forth are, in substance: That the information upon which the conviction was had is insufficient and void, and lacking in substance in various particulars specified in the motion; that the respondent was deprived of his right to be informed of the nature and cause of the accusation against him; that he was convicted of two infamous crimes without due process of law, and denied by the state the equal protection of the law; that the statutes of Vermont under which the proceedings were had are in conflict with the provisions of the Constitution of the United States, and especially that provision of the 14th Amendment which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property *without due process of law, nor deny to[**267** any person the equal protection of the law."

The supreme court of Vermont affirmed the judgment of the county court refusing to quash the information, and overruled the motion in arrest, and proceeded to render judgment upon the verdict, and sentenced the plaintiff in error to pay a fine of $30 for the first offense and $70 for the second offense, with costs taxed at $197.36, and to be confined at hard labor in the house of correction at Rutland for the period of sixty days, "with alternative sentence." The alternative sentence is, that in case of failure to pay the fine and costs within twenty-four hours, the respondent be confined in the house of correction for the term of three days for each dollar, in addition to the period for which he is sentenced. Rev. Laws, § 4336.

The court decided, in substance, that the information was sufficient; that it constituted due process of law; that the statute did not infringe the requirements of the Constitution of the United States by depriving the accused of the equal protection of the laws or by subjecting him to cruel and unusual punishment.

The defendant thereupon sued out a writ of error to this court, which was allowed by the chief judge of the supreme court of the state of Vermont.

Messrs. **E. J. Phelps** and *W. H. Bliss* for plaintiff in error.

Messrs. **Frank L. Fish** and **C. A. Prouty** for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

At a former term of this court, in the case of *O'Neill* v. *Vermont*, 144 U. S. 323 [36: 450], we were asked to hold certain provisions of the laws of the state of Vermont concerning the importation and sale of intoxicating liquors void, because they *conflicted with the [**268** Constitution of the United States wherein it confers upon Congress exclusive power to regulate interstate commerce, and forbids cruel and unusual punishments. But the court was of opinion that the record in that case did not disclose that any Federal question had been

raised or decided in the supreme court of Vermont, and the writ of error was accordingly dismissed.

In the present case the assignments of error raised no question as to the character of the punishment inflicted upon the accused. Nor do the facts of the present case call upon us to consider the validity of those portions of the Vermont statutes which concern intoxicating liquors as articles of interstate commerce.

But certain Federal questions are sufficiently presented in this record, which have been argued with great ability, and which it is our duty to now consider.

The first contention is that the information under which the plaintiff in error was tried and convicted was defective in such essential particulars as to deprive him of his liberty and property without "due process of law." It is said that the information does not charge any specific offense; that it does not state with any reasonable certainty the time when the offenses charged, or any or either of them, occurred; that the name of no person to whom liquor was alleged to have been sold, furnished, or given away is stated; that neither the place where the sales are claimed to have taken place, the kind or quantity of intoxicating liquor so disposed of, nor any other circumstance that would tend to identify the transactions referred to, is stated; that such an information does not protect the accused in the least against being prosecuted for one crime and convicted of another; that under this information it is and must remain utterly uncertain what particular one of many offenses the accused was convicted of; that the record of an acquittal or conviction upon such an information forms no bar to a second prosecution for the same offense.

While we are not relieved from considering these obligations by the mere fact that the offenses charged arose under a statute, and were proceeded in in a court of a state, it is yet **269**]*obvious that our concern in them can go no further than to inquire whether the plaintiff in error was deprived of the rights and immunities secured to him by the Federal Constitution.

Several of the objections specified merely raise questions of form, and, as such, were conclusively ruled by the state court. But it is insisted that in all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him; that in no case can there be, in criminal proceedings, due process of law where the accused is not thus informed, and that the information which he is to receive is that which will acquaint him with the essential particulars of the offense, so that he may appear in court prepared to meet every feature of the accusation against him.

Conceding that this is a correct statement of the rights of an accused person, and that, if deprived of such rights, he may properly invoke the protection of the Constitution of the United States, our reading of this record has not satisfied us that the plaintiff in error has any just grounds of complaint. We adopt, in this regard, the views and language of the supreme court of the state.

"The offense created by the statute is the provision of intoxicating liquors without the authority of law either by a sale, furnishing, or giving away. There are no circumstances necessary to be set out to constitute either of these acts an offense. The terms of the statute as clearly import the prohibited offense as any terms can. The offense is neither heightened nor lessened by, nor dependent upon, the kind or amount of intoxicating liquor sold, nor upon the person to whom the sale, furnishing, or giving away is made, nor upon the amount of money received, nor upon whether made by the respondent or by someone for him. None of these particulars need be set forth to notify the respondent of the offense with which he is charged, and called upon to answer, nor to apprise the jury of what they are to convict or acquit him, nor to apprise the court of the sentence which it should impose. The prescribed form covers the offense in the exact and easily understood language of the statute which creates *it. This is sufficient. . . . [**270** It is not an ancient crime which has been from time immemorial clothed in special terms which, by long use, have become the most apt and definite ones to describe the exact crime. The statute sometimes prescribes the punishment of a common-law crime without defining it, or creates an offense and prescribes no form for an information. It such cases it is well held that the common-law requirements in charging it must be met. . . . [But it is sufficient to charge a statutory offense in the terms of the statute.] . . . The respondent contends that the prescribed form is defective in that it does not require the names of the persons to whom sales are claimed to have been made to be set forth; that sales must be made to some person. But this contention is based on the requirements of the common law, when applicable. The specification ordinarily would, and did in this case, supply this information. . . . It is also contended that the particulars of the kind of liquor, price, and name of the person to whom sold, should be set forth in the information, both to apprise the respondent of the evidence he has to meet, and to have the record protect him from a second conviction for the same offense. It is never necessary for the state to disclose what is merely its proof of the commission of the offense charged in the information. If the record does not itself identify the offense or offenses for which conviction has been had, on the trial of a subsequent prosecution, such identification may be made by parol testimony. If these particulars were set out in the information, resort might have to be had to parol proof to identify the offense for which conviction was had. It might occur that the same respondent made more than one sale of the same kind and quantity of liquor, to the same person, at the same price, at the same place, on the same day. Besides, by the common law, it has always been held that the prosecutor need not set forth the name of the person when unknown. It is sufficient to state that his name is unknown. . . . These particulars, of the kind, quantity, price, and person to whom sold, are seldom known to the prosecutor until revealed by the witness upon the stand. Without *these partic- [**271** ulars the prescribed form answers every essen-

tial requirement of the common law in regard to informations or indictments. The prescribed form sets forth in clear language, easily to be understood, 'the cause and nature of the accusation.' . . . By the use of the words 'at divers times,' on the day named, it notifies him that he may be called upon to meet more than one offense committed in one of the ways named. The prosecution is never confined to prove the offense on the day specified in the information, if the proof is within the time limited for the prosecution of the offense. The accused can of right call upon the prosecutor to specify more fully what is claimed to be included under these general terms. This is analogous to the common counts in assumpsit in civil cases which grew up under the common law. The defendant in a civil case is entitled to notice of what he is called upon to meet, as much as a respondent in a criminal case, and for the same reasons. Under these common counts it has always been held that the plaintiff might show any number of claims of the class described, and, for this reason, that the defendant was entitled, as a matter of right, to a bill of particulars, or specifications, and that such specifications supplied what was lacking by the generality of the count, in regard to the particulars and number of similar claims which the plaintiff would call upon the defendant to litigate. In this view the information, aided by specifications, is good by the rules of the common law. But whether it be or not, the legislature has an undoubted right to change and mould the forms of procedure so long as it does not deprive the accused of any constitutional right. . . . This class of cases is not exceptional in its manner of trial. They are proceeded with like all other cases. The selection and empaneling of the jury, the rules of evidence, burden of proof, and procedure in the trial, are the same as in all other criminal cases. What has been said in regard to the scope of the information, aided by specifications, to which the respondent was entitled as a matter of right, and which was furnished to him, and in regard to the order and manner of his trial, makes the respondent's 272]trial a trial by 'due process*of law,' or 'in accordance with the law of the land,' within the varying definitions of those general terms as claimed by the respondent's counsel." *State* v. *Hodgson*, 66 Vt. 134.

It is argued that the defects or insufficiencies of the information cannot be supplied by the specification, because the latter is not required by any statute and is not a matter of right. If this assumption was well founded it would strengthen the criticism urged against the information. But that such assumption is not well founded is shown by the opinion of the supreme court of Vermont above quoted, wherein it is held that the accused under these proceedings is entitled to a specification as a matter of right.

The defendant being entitled to a specification as a matter of right, under the decision of the supreme court of the state, the question of the validity of the information in the absence of any specification is not presented by this case, and we therefore express no opinion upon it.

It is further claimed that the conviction of the plaintiff and his sentence to infamous punishment was without due process of law, because he was not indicted by a grand jury. Discussion of this contention is unnecessary, because it was the very matter considered in *Hurtado* v. *California*, 110 U. S. 516 [28: 232], where it was ruled that the words "due process of law" in the 14th Amendment of the Constitution of the United States do not necessarily require an indictment by a grand jury in a prosecution by a state for murder. The views expressed in that case have been approved and followed in a number of subsequent cases of which a few may be cited. *Barbier* v. *Connolly*, 113 U. S. 27 [28: 923]; *Re Kemmler*, 136 U. S. 436 [34: 519]; *Ex parte Converse*, 137 U. S. 624 [34: 796]; *Hallinger* v. *Davis*, 146 U. S. 314 [36: 986].

We concede the proposition, so earnestly urged on behalf of the plaintiff in error, that by the 14th Amendment it is made the right and the consequent duty of this court, when a case has been duly brought before it, to inquire whether, in the enactment and administration of the criminal laws of a state, it is sought to arbitrarily deprive any person of his life, liberty, or property, or to refuse him the equal *protection of the laws, and that [273 such inquiry is not precluded or ended by the mere fact that the judgment complained of was reached by proceedings in a state court in pursuance of the provisions of a state statute. But we are contented to close this discussion by quoting the language of this court in *Ex parte Converse:* "We repeat, as has been so often said before, that the 14th Amendment undoubtedly forbids any arbitrary deprivation of life, liberty, or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses, but it was not designed to interfere with the power of the state to protect the lives, liberty, and property of its citizens; nor with the exercise of that power in the adjudications of the courts of a state in administering the process provided by the law of the state."

Finding no error therein, *the judgment of the Supreme Court of Vermont is affirmed.*

UNITED STATES, *Appt.*,
v.
EDGAR M. WILSON, Administrator of Thomas B. Van Buren, Deceased.

(See S. C. Reporter's ed. 273-278

Voluntary payment.

A voluntary payment of fees by a consul general to the United States, without any order or direction for their payment, or any objection or protest on his part, or any pretense that it was done to avoid a controversy with any department of the government, precludes any

NOTE.—*As to payment; when voluntary; protest,*—see note to De La Cuesta v. Insurance Co. of N. A. (Pa.) 9 L. R. A. 631.

As to recovery on quantum meruit, see note to Cadman v. Markle (Mich.) 5 L. R. A. 707.

claim by him against the government for a repayment of money thus paid on the ground that he was entitled to the fees.

[No. 296.]

Submitted October 26, 1897. Decided November 29, 1897.

APPEAL from a judgment of the Court of Claims in favor of Edgar M. Wilson, administrator, against the United States for certain fees claimed by him as consul general of the United States at the port of Yokohama, Japan. *Reversed*, with instructions to dismiss the petition.

See same case below, 31 Ct. Cl. 471.

The facts are stated in the opinion.

Messrs. **Joseph McKenna,** Attorney General, **Felix Brannigan,** Assistant Attorney, and *Joshua Eric Dodge,* Assistant Attorney General, for appellant.

Mr. **John S. Mosby** for appellee.

274] *Mr. Justice **Peckham** delivered the opinion of the court:

The court of claims in this case gave judgment in favor of the appellee upon these facts: Thomas B. Van Buren, a citizen of the United States, was appointed consul general of the United States at the port of Yokohama, Japan, and held office from June, 1874, until June, 1885. While at Yokohama, Mr. Van Buren received fees for certifying invoices of merchandise shipped from that port through the United States in bond to foreign countries amounting to the sum $4,115, which fees were paid into the Treasury of the United States under the rules, regulations, and requirements of the Departments of State and Treasury, requiring fees to be so accounted for and paid to the United States. There were 1,646 of these invoices. Of the merchandise so shipped, that covered by 523 of the invoices was stopped in transit, for consumption in the United States without further consular certificates, and the declarations or invoices and certificates made by the consul were accepted by the customs officers of the United States as sufficient. The fees collected for certifying these 523 invoices amounted to $1,307.50. The merchandise described in 478 of the 1,646 invoices passed in transit through the United States to foreign countries, and was exported from the United States. The fees collected for certifying these invoices amounted to $1,195. With regard to 645 of the 1,646 invoices, there was no evidence either that the merchandise described in the invoices was stopped in transit and entered for consumption in the United States, or that it passed in transit through the United States to foreign countries. The fees collected for certifying these invoices amounted to $1,612.50. Mr. Van Buren's accounts for the total of all these among other fees were settled at the Treasury Department, and in the settlements he was charged with these as for official fees.

The court of claims found that it was not shown that the reason for paying said fees into the treasury was to avoid controversy with any department of the government, or that Mr. Van Buren made any demand to have the fees refunded to him, or credited to him before said 275] accounts were finally settled, *or that before the final settlement of his accounts at the Treasury Department he made any objection or protest against said fees being charged to him as official fees. The court gave the claimant judgment for the total of the three sums above mentioned, being $4,115.

The judgment in this case was mainly based by the court below upon the case of *United States* v. *Mosby*, 133 U. S. 273 [33: 625], and it was there held that the invoices referred to in §§ 2853 and 2855, Revised Statutes, either as they stood originally, or as they were amended by the act of June 10, 1880, did not include invoices for the shipment of merchandise in transit through the United States to other countries, and that the law did not require a consul to issue certificates in such cases, that no provision was made for a fee for them in the regulations of 1874, or those of 1881, and that it did not appear that the regulations of the Treasury Department required a consul to perform any duty in relation to such goods. The claim of the claimant in regard to such fees was allowed as a proper claim against the government.

It is stated in the brief of counsel for the government herein that in the *Mosby Case* neither the court of claims nor this court was given the benefit of any information as to what transit invoices were, and it is now said that both the courts were mistaken in holding that the invoices in the *Mosby Case* were not those referred to in the above numbered sections of the Revised Statutes; and it is said that it now appears by the evidence before the court that such invoices are the identical invoices described by those sections, and that § 2860, in providing that, "no merchandise imported from any foreign place or country shall be admitted to an entry unless the invoice presented in all respects conforms to the requirements of §§ 2853, 2854, and 2855, and has thereon the certificate of a consul, vice consul, or commercial agent in those sections specified," makes it necessary to have the consular certificate given in this case.

We are not now called upon to question the decision in the *Mosby Case.* We think there is another ground upon which to base a reversal of the judgment herein, which is, *that [276 the payments made by Mr. Van Buren of the fees covered by his claim were wholly voluntary, and that the general rule applicable to voluntary payments should be enforced.

The petition in this case was not filed until the 30th of March, 1888, and Mr. Van Buren's term of service expired in June, 1885. From the commencement of that service in 1874 up to the termination of his office and the final settlement of his accounts, no whisper of any claim on his part against the government was ever heard from Mr. Van Buren. It does not appear that he had the least doubt that the government was entitled to all the fees paid over by him to it, and in all the various settlements of his accounts with the Treasury Department, and in his correspondence, so far as this record shows, no claim was ever made or hint given on his part that he had the least title to retain these fees or to recover them back if paid to the government. There is no pretense that he paid the fees into the treasury to avoid a controversy with any department of the gov-

ernment, or that he ever made any objection or protest against the fees being charged to him as official fees. The court of claims so finds in substance. If a voluntary payment can be made to the government, it seems to us that this is such a case, and unless it be declared that the law of voluntary payments is not applicable to the case of a payment by an official to the government, we think the payments made by the original claimant were voluntary. This is not a case of an order or direction for the payment of these moneys, given to Mr. Van Buren by the officers of the Treasury or State Departments; nor is it a case where the failure to pay the moneys might be regarded as disobedience to the peremptory order of a superior officer; nor a payment under duress. The facts show nothing but a voluntary payment of money to the government, without claim of any right to retain one penny of it.

In *United States* v. *Lawson*, 101 U. S. 164 [25: 860], the collector received an order in writing from the commissioner of customs, his superior, requiring him to account for all fees received by him as collector. Under that order he paid the fees in controversy into the treas-
277] ury, and it was held that *having thus paid them pursuant to a peremptory order of his superior officer, he was not precluded from thereafter recovering them in a suit against the United States.

To the same effect is *United States* v. *Ellsworth*, 101 U. S. 170 [25: 862], where the ruling in the *Lawson Case* is followed. In the *Ellsworth Case* the court said, after referring to the penalties for noncompliance with the requirements of the law in paying over moneys: "Viewed in the light of these penal provisions, the payments in question made under the peremptory order of the commissioner cannot be regarded as voluntary in the sense that the party making them is thereby precluded from maintaining an action to recover back so much of the money paid as he was entitled to retain. Call it mistake of law or mistake of fact, the principles of equity forbid the United States to withhold the same from the rightful owner."

In both of the cases, in addition to the general law upon the subject of moneys received for the use of the United States to be paid into the treasury, there was a distinct and peremptory order that the moneys in question should be paid, and it was in compliance with such order from a superior officer that the moneys were paid.

In *Swift & C. & B. Company* v. *United States*, 111 U. S. 22 [28: 341], the payments were held to be not voluntary because the purchaser of the stamps from the government had to take them on the terms which the government imposed or else go out of business. In that case, however, it appeared that the leading manufacturers of matches, among whom was William H. Swift (who upon the organization of the claimant corporation in 1870 became one of its large stockholders and treasurer), had made repeated protests to the officers of the internal revenue bureau against the methods adopted by it in computing commissions for proprietary stamps sold to those who furnished their own dies and designs. It appeared that the rule of the department was one adhered to during the whole time of its existence, and it was announced by the internal revenue commissioner that such ruling would not be altered, and as it was necessary for those in the business to have the stamps in order to continue their business, it was held by this *court[278 that they were not obliged to continuously protest, and that settlements made with the treasury officials upon the basis of the correctness of the custom of the department in regard to the sale of stamps and commissions thereon did not bar the claimant's right to recover the moneys which the department ought to have paid but did not; that the position of the parties was such as to render these continuous protests unnecessary. Various cases are cited by Mr. Justice Matthews, in delivering the opinion of the court, showing what amounts to an involuntary payment.

In the *Mosby Case*, *supra*, it appears that the claimant asserted his right to the moneys and had correspondence with the officers of the department in relation thereto, and only paid the moneys to avoid a contest with his superior officers.

Nothing in any case cited is inconsistent with the view that the payments in this case were wholly voluntary in their nature, and as such cannot be recovered back.

For these reasons, without considering other questions appearing in the record, we think *the judgment of the Court of Claims should be reversed*, and the case remanded to that court with instructions to dismiss the petition.

WILLIAM F. HOLTZMAN, *Plff. in Err.*,
v.
WILLIAM G. DOUGLAS *et al.*

(See S. C. Reporter's ed. 278–286.)

Adverse possession—extent of use of premises.

1. One who entered in subordination to the true title may, as the tenant of a third person, hold adversely in behalf of the latter when he recognizes the latter's claim of ownership and by agreement with him continues in possession, paying rent therefor to the claimant.
2. The use of premises which are unfenced, as a stone yard, although the material deposited does not cover every foot of the property, may constitute sufficient adverse possession, in connec-

NOTE.—*As to what constitutes adverse possession*, see note to Collett v. Vanderburgh County Comrs. (Ind.) 4 L. R. A. 321.

In case of ignorance or mistake as to boundary; claim and occupancy to fence; recognition of true line; effect of belief based on mistake; (a) cases holding mistake fatal; (b) cases holding possession the important fact; possession necessary; necessity of knowledge or dispute; possession following agreement as to boundary; acquiescence in boundary,—see note to Preble v. Central Maine R. Co. (Me.) 21 L. R. A. 829.

As to title by adverse possession, see notes to Collett v. Vanderburgh County Comrs. (Ind.) 4 L. R. A. 321; and Baker v. Oakwood (N. Y.) 10 L. R. A. 337.

tion with the payment of the taxes, to give title against the true owner after twenty years.

[No. 80.]

Argued November 1, 1897. Decided November 29, 1897.

IN ERROR to the Court of Appeals of the District of Columbia to review the judgment of that court affirming a judgment entered upon a trial before a jury in favor of defendants, William G. Douglas *et al.*, in an action brought by William F. Holtzman to recover possession of a lot in the city of Washington. *Affirmed.*

See same case below, 5 App. D. C. 397.

The facts are stated in the opinion.

Mr. **Arthur A. Birney** for plaintiff in error.

Messrs. **Job Barnard**, *James S. Edwards*, and *Henry E. Davis* for defendants in error.

Mr. Justice **Peckham** delivered the opinion of the court:

This is an action of ejectment, brought to recover the possession of a lot in the city of Washington, designated as lot No. 8 in square No. 941. The defendants set up adverse possession as a defense. Upon the trial before a jury a verdict was rendered in favor of the defendants, upon which judgment was entered, and an appeal taken to the court **280**]of appeals of *the District of Columbia, where the judgment was in all things affirmed (5 App. D.C. 397), and the plaintiff has brought the record here for review.

It appeared on the trial that the record title to the lot had been, at the time of his death, in one David A. Hall, who died December 24, 1870, and the heirs at law of Hall, by divers conveyances, conveyed this lot to the plaintiff in fee. The plaintiff proved also that the defendants at the commencement of this action were in possession of the premises through one Richard Rothwell, their tenant, and that they claimed to own the same as heirs at law of William Douglas, who died in September, 1865. The defendants, on their part, proved a deed of conveyance to William Douglas of the lot in question from the corporation of the city of Washington, the deed reciting a sale of the property for unpaid taxes assessed on the land in the name of David A. Hall, the deed being dated July 6, 1865, and recorded July 12, 1865, in the proper office. The deed was admitted in evidence to show color of title in the defendants.

The facts upon which the defense of adverse possession arises have been so well summarized in the opinion of the court of appeals, which was delivered by Mr. Justice Morris, that we take his statement thereof, as follows: "It was testified on behalf of the defendants, that, some time in the latter part of the same year, 1865, one Richard Rothwell, a stonecutter and builder, who owned and occupied an adjoining lot, deposited upon the rear of the lot in controversy some pontoons, which he had purchased from the United States, and which he stored there until he could make some disposition of them; and that he afterwards used a part of this lot for the deposit of stone and marble, which he used in his business. He testified that he had deposited three or four wagon loads of marble there as early as the year 1867; and that some of the pontoons remained on the lot four or five years. He also testified that, in the year 1870, he commenced to deposit stone there in large quantities; and that in 1872 he erected a small shed on the lot in which to carry on his work, and which he replaced with a larger structure in or about the year 1882.

*"Some time in the year 1867, Mrs. **[281** Douglas, the widow of William Douglas, apparently acting on behalf of his estate or of the estate of their children, had an interview with Rothwell and came to an understanding with him with reference to his continued occupancy of the lot, in pursuance of which understanding he agreed to pay as rent to her annually therefor a sum of money equal to the amount of taxes that should annually be assessed upon it, and he did so pay rent to her until her death in 1887; and after her death he paid the rent to her daughter, a Mrs. Wirt, down to about the time of the institution of this suit. During all this time, that is from 1867 to 1889, Rothwell continued to occupy the property, and paid rent therefor to the Douglases; and the latter paid the taxes annually for all the years from 1868 to 1893, both inclusive, except for the year 1870, during which there was an interregnum in consequence of the establishment about that time of a territorial form of government in the District of Columbia, the assessment of the property having been in the name of William Douglas since the year 1868, inclusive.

"By a stipulation filed in the cause since the argument, in order to supplement some omission in the printed record, it appears that, at the death of William Douglas, in 1865, four of his children were adults and two minors; and that Mrs. Douglas, the widow, was appointed guardian to the two latter, and filed in her guardianship accounts for several years the annual receipts for taxes on this lot paid by her, and was allowed credit for them by the court. It therefore appears that, with reference to this lot, she acted, not for herself or on her own individual account, but on behalf of the estate that was then in her children.

"There was a proposition on the part of Mrs. Douglas, apparently about the time of Rothwell's attornment to her, to inclose the lot with a fence. But to this Rothwell objected, on the ground that it would interfere with his use of it and with free access to it of his horses and wagons; and the project was abandoned, so that the lot was never actually inclosed, and the only evidences of occupation consisted in such use of the property as has been indicated. *The streets had not been actually **[282** laid out in that neighborhood otherwise than by their delineation on the map of the city; and the whole region was an open field with no definite landmarks to indicate to the casual observer the actual location of this lot."

This action was commenced on the 31st of May, 1889, and, as stated in the brief of the counsel for the plaintiff, the vital question for the jury was, Were the defendants in adverse possession prior to May 31, 1869? The evidence is uncontradicted that from a period as early as 1867 the defendants through their tenant, Rothwell, were in possession of the prem-

ises, and such possession was continued up to the commencement of this action; but it is claimed that because Rothwell had entered upon the land in 1865, without claiming to own the same or to be entitled to possession, and had deposited the pontoons and marble mentioned in the foregoing statement of facts, that he thereby became a tenant of the plaintiff's predecessors in title, and that he could not change the character of his possession, as being in subordination to them, by any agreement between himself and Mrs. Douglas without giving notice to them that such an agreement had been made.

The doctrine which the plaintiff seeks to set up, we think, is not applicable to the facts of this case. After the purchase at the tax sale, the delivery of the deed and the recording thereof, Mrs. Douglas in 1867 claimed title to the land and demanded possession thereof from Rothwell, and by reason of the understanding then arrived at between herself and Rothwell he became the tenant of Mrs. Douglas as the representative of the heirs at law of William Douglas, and such tenancy continued up to the commencement of this action. She went to him under a claim of ownership and of the right to immediate possession of the lot as owner. He then acknowledged her right, became her tenant, and paid rent to her. That certainly placed Mrs. Douglas, as the representative of the heirs, in possession of the lot. From that time the facts are sufficient upon which to base a claim of adverse possession. We think it was inaugurated when **283]** Rothwell, *under his agreement with Mrs. Douglas, acknowledged her right and paid her rent, and it was immaterial, so far as the heirs are concerned, that Rothwell had before that time entered upon the lot, although under no claim of title and presumably in subordination to the title of plaintiff's predecessors. *Harvey* v. *Tyler*, 69 U. S. 2 Wall. 328 [17: 871]. If Rothwell were himself asserting a title by adverse possession, while coming into possession in acknowledgment of and under the title of the owners, there might be an opportunity for the application of the doctrine contended for by plaintiff, and in such case Rothwell could not set up title by adverse possession while entering in subordination to the title of the owner, unless he first vacated and then retook possession as a hostile entry, or did some act necessarily evincing an intention to put an end to his tenancy. We are not dealing with Rothwell's rights or title. The defendants did all they were called upon to do in order to take possession and inaugurate an adverse holding, when they came with their tax deed, claimed to own the property described in it, and exercised an act of ownership by letting the lot to Rothwell as a tenant at a certain rent. When Rothwell recognized the claim of ownership and remained in possession from that time in subordination to the rights of Mrs. Douglas and the heirs at law, their adverse possession, so far as this point is concerned, was sufficiently inaugurated. Mrs. Douglas was no party or privy to the prior entry of Rothwell, and therefore, whatever the circumstances as proved in this case regarding such prior entry, her rights and those of the heirs cannot be in any way affected thereby. There is no pretense of any fraud or concealment in the case by anyone, certainly not by Mrs. Douglas. Neither she nor the heirs were bound, in order to maintain their rights, to give any written or verbal notice to the former owners that they were in possession through Rothwell; nor did the possession of Rothwell, as tenant of the Douglas heirs, fail to commence at the time of this agreement because he did not give notice to the former owners of his recognition of the title and right to the possession as claimed by Mrs. Douglas.

We are also of the opinion that there was evidence to be *submitted to the jury, that[**284** the possession of the defendants was in all other respects adverse within the meaning of the law upon the subject for more than twenty years before the commencement of this action. There is no doubt that the entry of defendants by means of the agreement mentioned was under a claim of title on the part of Mrs. Douglas and those whom she represented as the heirs at law of William Douglas. There was enough to authorize the jury to find that the possession was notorious and exclusive, continuous, actual, open, and adverse. *Ward* v. *Cochran*, 150 U. S. 597 [37: 1195].

Payment of the taxes, as described in the above statement of facts, is very important and strong evidence of a claim of title; and the failure of the plaintiff's predecessors to make any claim to the lot or to pay the taxes themselves, is some evidence of an abandonment of any right in or claim to the property. In *Ewing* v. *Burnet*, 36 U. S. 11 Pet. 41 [9: 624], it was held by this court that the payment of taxes on land for twenty-four successive years by the party in possession was powerful evidence of the claim of right to the whole lot upon which the taxes were paid. The same principle is held in *Fletcher* v. *Fuller*, 120 U. S. 534, 552 [30: 759, 764]. It is some evidence that the possession was under a claim of right and was adverse.

Although there was no fence around this lot during the period in question, yet it was occupied by the tenant for the purposes of his business, that of marble and stone cutting, and although every foot of the property was not covered by his material, yet it was placed upon the lot in a convenient manner to be used by him in the prosecution of his business, and in a manner which showed that his possession was not in connection with any others but was exclusive and perfect in himself.

We agree with the court below when, speaking through Mr. Justice Morris, it says that, "short of an actual inclosure, it is not easy to conceive of a use and occupation more sharply distinctive and adverse than the conversion of the property into a stone yard with the stone practically scattered all over it, according to the testimony of one or more of the witnesses. Nor should the fact be ignored in this connection, that for *upwards of twenty years the rec-[**285** ord owners of this property wholly neglected their duties to the public in regard to it, never sought to pay the taxes, and permitted the defendants to discharge the burden which it was incumbent upon themselves to bear, and it

might well be supposed that they had abandoned the property and acquiesced in the title which the defendants had acquired."

At the request of the plaintiff, the judge charged the jury that, "to defeat the claim of the plaintiffs in this action upon the defense of adverse possession the jury must find from the evidence that the defendants, in person or by their tenants, have for more than twenty years prior to the 31st of May, 1889, held actual, exclusive, continuous, open, notorious, and adverse possession of the said premises, and they cannot extend their possession by tacking it to the prior possession of any person who, during such prior possession, did not claim any title or right to the premises." *Ward* v. *Cochran*, 150 U. S. 597 [37: 1195].

This charge contains a statement of all the requisites for constituting an adverse possession according to the above-cited case.

And the jury were instructed that the defense of adverse possession was an affirmative one, and that it was incumbent upon the defendants to establish it by a clear preponderance of proof, and if the proof were equally balanced, they must find for the plaintiff.

At the request of the defendants the court gave the following instructions to the jury:

"If the jury find from the evidence that William Douglas, the ancestor of the defendants, bought at a tax sale held by the late corporation of Washington, so called, the property in controversy in this case, and paid the price bid for it by him at such sale, and received from said corporation of Washington a deed to said property, which was by him duly filed for record and recorded in the land records of the District of Columbia more than twenty years prior to the commencement of this suit; that thereupon the said property was assessed to the said William Douglas on the tax **286**] books of the city of Washington, *and the taxes thereon from that time until the beginning of this suit paid by the said William Douglas or his successors in title, the defendants in this case; that at a period of time more than twenty years before the commencement of this suit the said property was rented on behalf of the defendants to a person who took the same and held possession thereof as tenant of the defendants for the purposes of a stone yard, paying rent therefor from the date of making such arrangement with the defendants; and that, although the said property was not inclosed by a fence, yet the person so renting the same, either upon the whole or a part thereof during his occupancy, deposited stone used by him in his business, and that such use and possession of said property was continued by the occupant thereof actually, exclusively, continuously, openly, notoriously, adversely, and uninterruptedly for a period of twenty years next before the commencement of this suit, then the jury is instructed that the defendants are entitled to recover."

The plaintiff excepted to the granting of such request and to the charge as given. For the reasons already suggested, we think the exception not well founded. The charge as given was substantially correct, and there was evidence in the case upon which to found it. The first, second, and third requests to charge, made by counsel for plaintiff, involve the questions above discussed, and were properly refused. There are no other questions of sufficient doubt to render their discussion necessary. We are of opinion there is no error in the record, and *the judgment must be affirmed.*

EDWARD E. O'BRIEN, *Appt.*, [**287**

v.

BRICE ALAN MILLER *et al.*

(See S. C. Reporter's ed. 287-310.)

Construction of written contract — courts of admiralty act upon principles of equity—construction of bottomry bonds—loss of ship and cargo — recovery for loss of ship—master's authority to give bottomry bond—amendment of answer to a libel.

1. The lack of ambiguity in certain words when standing alone does not necessarily relieve them from the necessity of construction in ascertaining the meaning of the entire contract.
2. Courts of admiralty act upon enlarged principles of equity, rather than the strict rules of common law.
3. Bottomry bonds are favored in courts of admiralty and every fair presumption is to be made to support them when there is no suspicion of fraud.
4. The loss of a ship and cargo on which a bottomry bond has been given, including a portion of the cargo which had been transhipped to another vessel, does not make the bond void so as to relieve the cargo transhipped, although the defeasance release provides that the bond shall be void in case of the "loss of the said vessel."
5. A shipowner who recovers an award for the loss of his ship from another vessel which was in fault for a collision is liable, to the extent of such recovery, to the creditors of his ship, under U. S. Rev. Stat. §§ 4282 *et seq.*, limiting his liability to the amount or value of his interest in the vessel and freight.
6. A bottomry bond will not be presumed to have been executed by the master without proper authority, where it does not appear whether he had communication with the owners or not, or whether such communication was feasible or not, but it does appear that the hypothecation was necessary and for the best interests of the owners.
7. Refusal to permit the amendment of an answer to a libel in admiralty by setting up laches and *res judicata* is not an abuse of discretion, when the respondent was not misled and any loss sustained was the result of his own conduct, while the alleged decision was not on the merits.

[No. 40.]

Argued April 2, 1897. Decided November 29, 1897.

NOTE.—*As to bottomry and respondentia bonds and loans, what are*, see notes to Blaine v. The Charles Carter, 2: 636; and Conard v. Atlantic Ins. Co. 7: 189.

As to contracts, their interpretation and validity, see note to Bell v. Bruen, 11: 89.

As to collision; liability of tug and tow; obstruction to navigation,—see note to The Imperial (D. C. D. Or.) 3 L. R. A. 234.

As to admiralty; jurisdiction of,—see notes to The Curtis (D. C. E. D. Mo.) 3 L. R. A. 711; and Case v. Loftus (C. C. D. Or.) 5 L. R. A. 684.

ON A WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a decree of that court reversing the decree of the District Court of the United States for the Southern District of New York in favor of libellants in this action brought by Brice Alan Miller *et al.*, libellants, against Edward O'Brien, to recover a proportion of the sum paid on a bottomry and respondentia bond on account of loss at sea. *Decree of Circuit Court of Appeals reversed, and that of the District Court affirmed.*

See same case below, 35 Fed. Rep. 779, 59 Fed. Rep. 621, 35 U. S. App. 138.

The facts are stated in the opinion.

Mr. **Sidney Chubb** for appellant.

Messrs. **Wilhelmus Mynderse** and *Butler, Notman, Joline,* and *Mynderse* for appellees.

Mr. Justice **White** delivered the opinion of the court:

By a charter party executed at Valparaiso, Chili, on April 5, 1884, Gibbs & Company, of the place named, chartered the ship Andrew Johnson to carry a cargo of nitrate of soda from Iquique and Caleta "to any safe port in the United Kingdom or on the continent between Havre and Hamburg, both included, as ordered." After loading at the places named, the Andrew Johnson, pursuant to orders, sailed on July 15, 1884, for Hamburg, the cargo on board being consigned to the order of Antony Gibbs & Sons, a firm doing business in London. On the 4th of August following, the vessel, being in distress, put into Callao. Certain necessary repairs, which were advised by a duly appointed board of survey, were made, and, upon the recommendation of the board, 8,449 bags, or about 1,200 tons, of the nitrate of soda were transhipped to the British bark Mary J. Leslie, to be conveyed by that vessel to Hamburg.

To defray the expenses incurred in the port of refuge, the master of the Andrew Johnson executed a bottomry and respondentia bond to the firm of Grace Brothers & Company. This bond not only bound the ship Andrew Johnson and her cargo and freight, but also, in express terms, hypothecated the cargo tran shipped to the Mary J. Leslie. Although both cargoes were thus bound, the bond in its defeasance clause provided that it should be void "if during the said voyage an utter loss of the said vessel by fire, enemies, pirates, the 289] perils *of the sea or navigation, or any other casualty shall unavoidably happen." A copy of the bond is found in the margin.†

The two vessels sailed for Hamburg. The Leslie arrived, *but the Johnson perished at sea as the result of a collision with the British ship Thirlmere. After the arrival of the Leslie at Hamburg, demand was made upon the representatives *of Antony [290] [291] Gibbs & Sons, the consignees of the nitrate of soda, which had been shipped on the Leslie, for payment in full of the amount of the bond, and in order to obtain possession of the cargo, the consignees entered into an agreement by which the question of the liability of the nitrate of soda on the Leslie for the entire amount of the bond was to be determined by arbitration, the arbitrators to be selected by and their decision to be binding upon the respective parties. It is to be inferred that the only question controverted before the arbitrators was whether the use of the words "said vessel" in the defeasance clause of the bond operated to avoid the bond in consequence of the wreck of the Andrew Johnson and the loss of her cargo. The German lawyers who were selected as arbitrators found that the nitrate of soda on board the Leslie was bound for the whole amount of the bond, and that, therefore, the consignees were not entitled to the cargo unless they paid the bond. Their award was, as follows:

"We formulate the question which you, in the names of Messrs. Antony Gibbs & Sons and Messrs. Baring Brothers & Co. have submitted to our judgment, as follows:

"Whether the portion of the cargo of nitrate of soda of the *Andrew Johnson, brought [292] home per Mary J. Leslie, is liable for the whole amount of the bottomry bond, which was signed in Callao, and whether, consequently, the receiver of this portion of the cargo has to pay the whole of the bottomry bond, provided the value of this portion of the cargo is not less than the amount of the bottomry debt.

"This question we must answer in the affirmative, because, according to the law here, ship, freight, and cargo of the Andrew Johnson, as well as the portion of the cargo which was transhipped into the Mary J. Leslie, are jointly liable for the whole amount raised on bottomry at Callao, and, therefore, the Andrew Johnson and her cargo having become a total loss, the holder of the bottomry bond can come upon that portion of the cargo which was shipped by the Mary J. Leslie for the whole amount of his claim.

"Some doubt might be raised as to whether, according to the wording of the bottomry bond, the money was not lent or appeared to be lent contingent upon the safety of the An-

†Know all men by these presents, that I, James H. Killeran, master mariner and commander of the ship or vessel, called the Andrew Johnson, of Thomaston, Maine, of the measurement of nineteen hundred and thirty-eight tons or thereabouts, now lying in the port of Callao, am held and firmly bound to Messrs. Grace Brothers & Co., carrying on business at Lima and Callao under the firm of Grace Brothers & Company, in the penal sum of thirteen thousand, two hundred and thirty-seven Peruvian silver soles 72-100, at 40 pence to the sole, equal to two thousand two hundred and twelve pounds 5*s.* 9*d.* of good and lawful money of Great Britain, to be paid to the said Grace Brothers & Co., or any of them, or to their or any of their orders, certain attorney, executors, administrators, or assigns, or to such person or persons as they or any of them shall appoint by indorsement thereon in the name of their firm of Grace Brothers & Co. to receive the same.

For which payment, to be well and faithfully made, I bind myself, my heirs, executors, or administrators, and also the hull, boats, tackle, apparel, and furniture of said vessel and her cargo of nitrate of soda, including about twelve hundred tons of nitrate soda, transhipped on board the British bark Mary J. Leslie, of Liverpool, N. S., of 815 tons register, and of which W. S. MacLeod is now master, and the freight to be earned and become payable in respect thereof, firmly by these presents, sealed with my seal. Dated this fifteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas, the said vessel lately sailed from Caleta Buena, laden with a cargo of nitrate of soda, bound therewith to Hamburg in Germany, and during the

drew Johnson, and becoming due only after her arrival at her port of destination, but becoming null and void in the event of her non-arrival. We are of opinion, however, that this interpretation is not consistent with the real intention of the contracting parties, and that the wording referred to has originated in the not sufficiently careful use and employment of a form of bond which happened to be at hand. This seems the less doubtful to us for this reason, that if the bottomry bond were interpreted in this manner, the cargo of the Mary J. Leslie would be entirely liberated, after the loss of the Andrew Johnson occurred, and would not even bear a portion of the bottomry debt, which nevertheless had arisen out of a case of general average. Manifestly this cannot have been the intention of the parties interested."

Antony Gibbs & Sons paid the amount of the bond for account of Gibbs & Company, the consignors. Subsequently, the owners of the Andrew Johnson commenced legal proceedings against the Thirlmere to hold that vessel responsible for the collision by which the Johnson and her cargo were lost. The Thirlmere availed herself of the statute of Great Brit-

293]ain *limiting the liability of shipowners, and the result was an award finding the Thirlmere to be wholly at fault, and condemning her to pay the loss caused by the sinking of the Johnson. As their proportion of the ascertained value of the Thirlmere, the owners of the Johnson for ship and freight were allowed the sum of £6,557, 9*s*., 6*d*., but from this amount there was deducted about £1,500 for certain expenses. In the proceedings in question, the owners of the nitrate of soda which was on the Johnson also recovered their proportion of the value of the Thirlmere. On account of the loss of the Andrew Johnson, the Boston Marine Insurance Company paid to her owner the sum of $30,000, less $2,825.49, the amount of a premium note with interest, and out of the sum received by the owner of the Andrew Johnson for the ship and freight from the value of the Thirlmere, the owner of the Andrew Johnson, in April, 1896, remitted to the insurance company as its share thereof the sum of $11,456.05, and to correct some mistake in calculation the sum of $35.60 was also subsequently paid by the shipowner to the insurance company.

The present suit was commenced on July 20, 1887, by a libel *in personam* against the owner of the Andrew Johnson to recover the

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prosecution of the said voyage sprang a leak, whereby she took in water at sundry times to such an extent that it was deemed expedient by the said master, for the safety of the vessel and the benefit of all concerned, to bear up for Callao, which was accordingly done, and on arrival at Callao aforesaid the vessel was duly surveyed by competent surveyors and certain repairs were recommended to be done to enable the said vessel to continue the voyage with safety, and also to tranship to another vessel about twelve hundred tons of the cargo laden on board the aforesaid Andrew Johnson in order to enable her to proceed on her voyage with perfect safety.

And whereas all necessary repairs and supplies have been made to the said vessel, and the said portion of cargo transhipped to the Mary J. Leslie to enable her to prosecute her said voyage, and she is now in a seaworthy condition and ready to proceed to sea, but the said James H. Killeran having unavoidably incurred certain debts for such repairs and other necessary and lawful matters and things relating to his said vessel which he is totally unable to defray and make good, save and except upon the security of the bottom of his said vessel and her cargo and freight, hath been necessitated to raise the sum of thirteen thousand, two hundred and seventy-three Peruvian soles, 72-100 silver, or its equivalent in British sterling, for the payment of the debts incurred as aforesaid, and to enable the said vessel to proceed to sea on the said intended voyage, and which sum the said master has been unable to obtain on his own credit or that of the owners of the said vessel, or in any other way than by bottomry and hypothecation of the said vessel, her boats, apparel, cargo, and freight.

And whereas the said Grace Brothers & Co. have, at the request of the above-bounden James H. Killeran, agreed to lend and advance to him the sum of thirteen thousand, two hundred and seventy-three soles, 72-100 silver, or its equivalent, at forty pence as aforesaid, in British sterling, for the purposes aforesaid, upon his executing this present bond or obligation and hypothecation of the said vessel, her boats and apparel and her cargo, including that portion of the cargo transhipped to the Mary J. Leslie, and the freight to be earned and become payable in respect of the said voyage, and the said Grace Brothers & Co. are contented to stand to and bear the risk, hazard, and adventure thereof upon the hull, body, or keel of the said vessel Andrew Johnson, her boats, tackle, apparel, and furniture, together with the cargo laden on board as aforesaid, and the freight to be earned and become payable as aforesaid and for securing the repayment of the said sum of thirteen thousand, two hundred and seventy-three Peruvian soles, 72-100 silver, or its equivalent in British sterling, as aforesaid, the loan whereof is hereby acknowledged, he, the said James H. Killeran, doth by these presents mortgage, hypothecate, and charge the said vessel, her boats, tackle, apparel and furniture, and her cargo, including that portion of the cargo transhipped to the Mary J. Leslie, and the freight to be earned and become payable in respect of the said voyage, unto the said Grace Brothers & Co., their executors, administrators, and assigns.

Now, the condition of this obligation is such, that if the said vessel shall forthwith set sail from Callao aforesaid, and without unnecessary delay or deviation proceed on her intended voyage to Hamburg, and if the above-bounden James H. Killeran shall and do within the space of five days next after the arrival of the vessel at her final port of destination, and before commencing to discharge the cargo free of any average whatever at the then current rate of exchange on London, well and truly pay or cause to be paid unto the said Grace Brothers & Co. or any of them, their or any of their order, attorneys or attorney, executors, administrators, or assigns, or unto such person or persons as they or any of them shall appoint by indorsement under their or his hand or hands in the name of their or his firm of Grace Brothers & Co., or otherwise, upon this present obligation the sum of two thousand, two hundred and twelve pounds, 5*s*. 9*d*. British sterling money, being the principal money of this obligation, and the further sum of three hundred and eighty-seven pounds three shillings of like money for the maritime interest or bottomry premium thereon, at the rate of seventeen pounds, 10 per centum, making together the sum of two thousand, five hundred and ninety-nine pounds, 8*s*. 9*d*. British sterling, and also do and shall on demand, well and truly pay or cause to be paid unto the said Grace Brothers & Co., or any of them, or to their or any of their order, attorneys, indorsers, executors, administrators, or assigns, all such costs, charges, and expenses as they or any of them shall or may have incurred, sustained, or be put to in or about the recovery of the aforesaid principal money and premium, or any part thereof, or otherwise howsoever in the premises.

Or if during the said voyage an utter loss of the said vessel by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty, shall unavoidably happen to be sufficiently proved by the said James H. Killeran, then and in either of the said cases this obligation shall be void, or otherwise to be and remain in full force and virtue.

In testimony whereof, the said James H. Killeran hath, to these presents, and to a duplicate and triplicate thereof, set his hand and seal after careful reading, in the presence of the undersigned witnesses, the day and year first before written.

due proportion of the sum paid on the bond. Those joined as libellants were eleven in number; that is, all the members composing the firm of Gibbs & Company, the consignors of the nitrate of soda, and the members of the firm of Antony Gibbs & Sons, the consignees. The original libel is not in the record. Exceptions to it were filed on the ground that it did not state the nature of the action and that it did not state a cause of action. On June 6, 1888, the district judge overruled the exception to the want of clearness in the averments of the libel, but maintained the exception of no cause of action. Although the learned judge found that the bottomry bond had not been avoided by the loss of the Andrew Johnson and her cargo, and therefore that the payment made at Hamburg was necessary, he yet concluded that as the Andrew Johnson and her cargo had proved a total loss, nothing having been alleged in the libel as to a recovery by reason of such loss, the libellants were precluded
294] from *enforcing their claims *in personam* against the owner of the Johnson in consequence of the provision of the acts of Congress limiting a shipowner's liability for the acts and contracts of the master to the value of the ship and freight. 35 Fed. Rep. 779. As a result, on the 27th of June, 1888, an order was entered sustaining the exception of no cause of action, and directing that, unless the libel were amended, it be dismissed with costs. An amended libel was filed in July, 1888, to which an exception of no cause of action was again sustained, with leave further to amend. On January 4, 1889, the libel was for the second time amended, and this was also excepted to, on the ground of ambiguity, and that it did not state a cause of action. On the 24th of October, 1890, the libel was again amended by averring the loss of the Johnson, the fact that it had occurred by collision with the Thirlmere, the institution of proceedings against the Thirlmere by the owner of the Johnson, and the recovery in those proceedings on the ground that the collision had been caused solely by the fault of the former vessel. In June, 1891, respondent filed exceptions and an answer to this amended libel. The answer, among other things, averred as follows:

"This respondent admits that the owners of the ship Thirlmere, having taken appropriate proceedings under the statutes of the United Kingdom of Great Britain and Ireland, obtained a decree limiting their liability for said collision to a certain sum, which they thereupon paid into the court, and which said sum was distributed between the libellants and the respondent herein, and other parties and their attorneys, in part satisfaction of the damages by each of them sustained by reason of said collision, but this respondent denies that he received the said sum of £6,557, 9*s*., 6*d*., and avers that the amount received by him was much less than said sum."

No allusion was made in the pleadings of the respective parties to the fact that the owner of the Andrew Johnson had received the benefit of any insurance upon the vessel.

After the taking of proof the cause was heard on the exceptions and merits on November 23,
295] 1893. At the outset *of the hearing the trial court overruled all the exceptions to the third amended libel but that of no cause of action, and referred this latter exception to the merits. Before the case was finally submitted the respondent moved the court to be allowed to amend his answer so as to plead two additional and distinct defenses:

"First, to as much of the libellants' claim as arises out of the limited-liability proceedings in the English court as to the Thirlmere, the defense of laches on the part of the libellant in not sooner bringing that matter before the court.

"Also as to the same portion of his claim, the defense *res judicata*, because passed on by the English court."

This request was refused and exceptions to the refusal were noted. The court, on the merits, held that the bottomry bond, at the time of its payment, was a valid obligation; that in view of the fact that the bond embraced, not only the cargo on the Johnson, but also the cargo on the Mary J. Leslie, that the words "said vessel" in the defeasance clause must be considered as referring to the cargo on both vessels and therefore, the obligations of the bond were not avoided by the loss of the Johnson and her cargo; that the owners of the Johnson having recovered from the Thirlmere, up to the value of the latter vessel, damages for the collision, were not discharged from personal liability under the acts of Congress, inasmuch as the sum recovered from the Thirlmere was greater than the amount sought to be enforced *in personam* against the owner. 59 Fed. Rep. 621. In conformity to the opinion of the court, an interlocutory decree was entered on April 3, 1894, referring the matter to a special commissioner to ascertain and report the amount the libellants were entitled to recover. On April 10, 1894, the respondent again applied to the court for leave to amend his answer by setting up the two additional defenses of laches and *res judicata*, and the request was again denied. On June 5, 1894, the report of the commissioner was filed, finding the libellants entitled to the principal sum of $6,091.73, and on July 16, 1894, a final decree for that sum with interest and costs was duly entered. By the final decree seven of the libellants, that is to say, those who composed the firm of *Antony Gibbs & Sons, were dismissed [296 on the ground of a want of interest, the court having found that the bond was paid by the consignees for account of the consignors, and they therefore were alone interested in the suit. On appeal to the circuit court of appeals the judgment of the trial court was reversed. The appellate court concluded that the words "said vessel" in the defeasance clause of the bond were free from ambiguity, and left no room for construction, and, therefore, that the loss of the Andrew Johnson with her cargo had operated to avoid the bond according to its tenor, and that the payment made of the amount by the consignees was hence unnecessary, and gave rise to no legal claim against the master or owner of the Johnson. 35 U. S. App. 138 [67 Fed. Rep. 605]. In consequence of the allowance of a writ of certiorari, the cause is here for review.

In the discussion at bar many minor questions have been pressed upon our attention, but the pivotal controversy rests upon the as-

certainment of the true meaning of the bottomry bond, and the obligations, if any, which arose from its payment. We forego the present consideration of the more unimportant questions in order to at once approach the fundamental issues in the cause. The libellants assert that, from the terms of the bond as a whole, it manifestly results that the cargo of the Leslie was liable despite the loss of the Johnson and her cargo; that hence, the consignees of the cargo, on the Leslie, were obligated to pay the bond, and that on their doing so there arose a legal duty on the owner of the Johnson to pay the proper proportion thereof, which obligation, it is claimed, can be enforced despite the loss of the ship, since the owner had recovered and retained the amount awarded against the Thirlmere. On the other hand, the respondent asserts that the words of the bond providing for its avoidance in case of the loss of "said vessel" are free from ambiguity and give no room for construction, and that even if this be not the case in consequence of the loss of the Johnson, the consignors who paid the bond are not entitled, under the limited liability acts, to recover any proportion thereof.

There can be no doubt that, considered in [297] themselves and *alone, there is no ambiguity in the words found in the clause of the contract providing that "if during said voyage an utter loss of the said vessel by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty, shall inevitably happen, . . . this obligation shall be void." But the question presented involves not the interpretation of this language apart from the whole agreement, but is, on the contrary, the ascertainment of the meaning of the entire contract. The fallacy which underlies the assertion as to want of all ambiguity in the bond arises, therefore, from presupposing that in order to establish want of ambiguity in a contract a few words can be segregated from the entire context, and that because the words thus set apart are not intrinsically ambiguous, there is no room for construing the contract itself. In other words, the confusion of thought consists in failing to distinguish between the contract as a whole and some of the words found therein. If the erroneous theory were the rule, then, in every case, it would be impossible to arrive at the meaning of a contract, in the event of difference between the contracting parties, since each would select particular words upon which they relied, and thus frustrate a consideration of the whole agreement. The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them. *Boardman* v. *Reed*, 31 U. S. 6 Pet. 328 [8: 415]; *Chesapeake & O. Canal Co.* v. *Hill*, 82 U. S. 15 Wall. 94, [21: 64].

This general rule of construction should especially guide a court of admiralty in interpreting a contract of bottomry and respondentia.

In the exercise of their jurisdiction with respect to such bonds, courts of admiralty are not governed by the strict rules of the common law, but act upon enlarged principles of equity (per Story, J., in *The Virgin* [*The Virgin* v. *Vyfhius*], 33 U. S. 8 Pet. 550 [8: 1041]), and the same learned justice, in the case of *Pope* v. *Nickerson*, 8 Story, 486, said: "A court of admiralty in cases within its civil jurisdiction, acts as a court of equity, and construes instruments, *as a court or equity does, with [298] a large and liberal indulgence."

To quote the language of the judicial committee of the Privy Council in *The Prince George*, 4 Moore, P. C. C. 28: "Bottomry bonds, for the benefit of the shipowners and the general advantage of commerce, are greatly favored in courts of admiralty, and where there is no suspicion of fraud every fair presumption is to be made to support them."

We reach, then, under the light of these principles, the consideration of the contract, for the purpose of ascertaining its meaning and enforcing the intention of the parties to be derived from all the stipulations therein found. There can be no doubt that the terms of the bond included, not only the Andrew Johnson and her cargo, but the cargo transhipped on the Leslie, for the bond says: "For which payment, to be well and faithfully made, I bind myself, my heirs, executors, or administrators, and also the hull, boats, tackle, apparel, and furniture of the said vessel and her cargo of nitrate of soda, including about 1,200 tons of nitrate of soda, transhipped on board the British bark Mary J. Leslie, of Liverpool, N. S., of 815 tons register, and of which W. S. MacLeod is now master, and the freight to be earned and become payable in respect thereof."

In the recitals of the bond, where a statement is made of the facts creating the necessity for the loan, the intention of the master to include the cargo transhipped on the Leslie is also unequivocally expressed. Likewise in the recitals which relate to the conditions upon which the lenders have agreed to advance the money required, it is again stated that they have consented so to do upon the master's executing "this present bond or obligation and hypothecation of the said vessel, her boats and apparel, and her cargo, including that portion of the cargo transhipped to the Mary J. Leslie, and the freight to be earned and become payable in respect to the said cargo, and the said Grace Brothers are contented to stand to and bear the risk, hazard, and adventure thereof upon the hull, body, or keel of the said vessel Andrew Johnson, her boat, tackle, apparel, and furniture, together with the cargo laden on *board as aforesaid, and the freight to [299] be earned and become payable as aforesaid, and for securing the repayment of the said sum . . . he, the said James H. Killeran, doth by these presents mortgage, hypothecate, and charge the said vessel, her boats, tackle apparel, and furniture, and her cargo, including that portion of the cargo transhipped to the Mary J. Leslie and the freight to be earned and become payable in respect to the said voyage, unto the said Grace Brothers, their executors, administrators, and assigns."

The cargo on the Leslie having been hypothecated along with that on the Johnson, and the bond declaring that it was upon the faith of such hypothecation that the money

was advanced, the claim that because of the use of the word "vessel" in the singular, the bond was to be avoided by the loss of the Johnson, despite the arrival of the Leslie, amounts to contending that although both parties declared that the money was lent on the faith of both cargoes, and that without the pledge of both it would not have been advanced, yet that they immediately stipulated that it should be secured upon only one of the objects hypothecated.

Deriving the meaning of the parties from their situation and their intentions as declared in the contract, it becomes impossible in reason to construe the word "vessel" in the defeasance clause as not applying to both the Johnson and the Leslie. It is conceded that the value of the Johnson and her cargo was enormously in excess of the sum of the bond; this having been the case, to hold that the hypothecation of the cargo on the Leslie was only to be availed of in case of the arrival of the Johnson and her cargo, would be to determine that the cargo on board the Leslie was only to be resorted to by the bondholder, in the event recourse against that cargo should be superfluous. We cannot construe a contract for security so as to render the security available only in case resort to it should become unnecessary. True, it is sought to escape the dilemma resulting from this reasoning by saying that the object which the parties had in view was a resort to the cargo of the Leslie in case the Johnson and her cargo arrived in such a damaged condition as to render it necessary that **300**] the cargo *of the Leslie should be called upon for an average contribution. But this explanation only accentuates the dilemma, since it contends that the lenders were to have recourse to the cargo of the Leslie in case the security resulting from the Johnson and her cargo was partially impaired, and not in the event that it was wholly so. But, obviously, if the security of the cargo of the Leslie was contemplated and provided for by the parties, as it manifestly was, the contract should not be held as meaning that the security was to be availed of only in the event that the value thereof was required to pay a part of the debt, and it was not to be resorted to when a greater reason for so doing existed. There are many other conditions of the bond which with equal force refute the attempt to limit the word "vessel," in the defeasance clause, to the Johnson, and which irresistibly make the language of the defeasance clause harmonize with the nature and extent of the security afforded by the bond. Thus, the clause as to the arrival of the vessels made no distinction between the Johnson and the Leslie. It cannot be contended that if the Leslie had arrived at the port of destination before the Johnson, her cargo could have been discharged without payment of the bond.

The contemporaneous construction of the contract given by the masters of the Johnson and the Leslie is shown by the bill of lading which was given by the one and taken by the other for the nitrate of soda which was transhipped on the Leslie. On this bill of lading the following indorsement was placed:

"The 8,449 bags of nitrate of soda, as per this bill of lading, are included in and jointly responsible with the nitrate of soda specified in the bottomry and respondentia bond given to Messrs. Grace Brothers & Company as security for the payment of the Amer. ship Andrew Johnson's disbursements in Callao."

We conclude that to give the construction to the bond claimed by the shipowner would not only do violence to the expressed intentions of the parties and their contemporaneous interpretations of its meaning, but would also be adopting, to quote the language of Sir James W. Colvile in *The Great Pacific*, L. R. 2 P. C. 524, "so improbable an hypothesis that the construction is only to be admitted if there is no escape from it."

*We may properly say of the bond un- [**301** der consideration what was said by the supreme court of Pennsylvania in *Insurance Company of Pennsylvania* v. *Duval*, 8 Serg. & R. 147, in speaking of a form of respondentia bond in use in Philadelphia, which partook of the character of a loan coupled with a contract of insurance:

"Contracts of this kind are so different in different countries (although they resemble each other in some prominent features) that when disputes arise they are to be decided by the words of the particular contract in question, rather than by any principles of general commercial law. In the present instance, therefore, we must endeavor to ascertain the meaning of the bond and be governed by it."

In the case just referred to, the loan was upon goods laden upon a vessel, and it was a condition of the contract that the loan was to be paid within a certain period *after the return of the vessel* to Philadelphia, her home port, or in the event of an utter loss by certain enumerated sea risks, the bond was to be void. On the return voyage, the vessel was condemned and sold at an intermediate port, and the goods on board were sent to Philadelphia in other vessels and delivered to the defendants, and, according to an agreement annexed to the respondentia bond, were sold by them. In an action brought to recover the difference between the price realized from the sale and the amount of the loan, the defendants contended, among other defenses, that the terms of the bond did not make the repayment of the loan dependent upon the return of the goods, but upon the return of the vessel, and that as the vessel did not return, the day of payment had not arrived. The court pointed out the extraordinary consequences which would follow the construction contended for, and held that, even if under a literal interpretation the right to recover did not exist, a resort to the spirit of the contract and the intention of the parties would entitle the lender to judgment, as the goods and not the vessel were the sources from which the defendants expected to derive the means of payment.

Our conclusion being that the bond was not avoided by the loss of the Johnson, and was a valid and subsisting obligation, *at the [**302** time of its payment, by the owners of the cargo, on the Leslie, the question which arises is, Can the cargo owners recover by an action *in personam* against the shipowner the due average proportion of the expenses at the port of refuge, incurred for the benefit of the ship and freight? The manifest result of the obli-

gation of the cargo owners to pay the bond before they could obtain delivery of the goods was that they were obliged to discharge the part of the debt which was due by the ship Johnson. This, in effect, gave rise in their behalf to a claim against the ship for a breach of the contract of affreightment or charter party, by virtue of which the property of the owners was received on the Andrew Johnson to be transported to Hamburg, and there delivered to the order of the consignees named in the charter party on the payment of the freight therein specified. Had a portion of the cargo not been delivered, or been delivered in a damaged condition by the fault of the master, the right to proceed in admiralty to recover the damage sustained would have been clear. *The Schooner Freeman* [*The Freeman* v. *Buckingham*], 59 U. S. 18 How. 182 [15: 341]; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* [*The Montana*], 129 U. S. 397, 462 [32: 788, 799]. Delivering the cargo charged with a lien for an indebtedness of the shipowner is no different in principle or effect from the nondelivery of a portion or the whole in a damaged condition. It is also analogous in principle to a jettison of a portion of the cargo for the benefit of the ship, and the remainder of the cargo, when a clear right to contribution would exist, enforceable in admiralty. *Dupont* v. *Vance*, 60 U. S. 19 How. 162, 168 [15: 584, 586]. As said in the latter case by Mr. Justice Curtis, delivering the opinion of the court: "The right of the shipper to resort to the vessel for claims growing directly out of his contract of affreightment has very long existed in the general maritime law." And, whilst in the same case (page 169 [15: 586]), the power of the master to hypothecate or sell a part of the cargo to enable him to prosecute the voyage was declared to exist, the obligation of the shipowner, under the law of the sea, to reimburse the cargo owner for the due proportion of the loss, was clearly stated.

The shipowner being liable for his average **303**] portion of the *loss, the question is, Was he discharged therefrom by the loss of the Johnson and her cargo, although the owner has recovered and retains the sum awarded as damages against another ship for having brought about the loss? The answer to this question involves a consideration of the proper construction to be given to the act limiting the liability of shipowners.

The original act, approved March 3, 1851 (9 Stat. at L. 635, chap. 43), was carried forward into the Revised Statutes as §§ 4282 *et seq.*

Section 4283 declares that the liability of the owner of any vessel for various acts and things mentioned "shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

Section 4284 describes the liability as "the whole value of the vessel, and her freight for the voyage;" and § 4285 declares that it shall be a sufficient compliance with the law if the owner transfer his *interest in such vessel and freight, for the benefit* of the claimants, to a trustee.

Section 4283 was amended by the act approved June 26, 1884 (23 Stat. at L. 57, chap. 121), so as to do away with the restrictions upon the character of debts and liabilities against which the limitation might be asserted. This amendment, however, is not material to the question now considered.

The clear purpose of Congress was to require the shipowner, in order to be able to claim the benefit of the limited liability act, to surrender to the creditors of the ship all rights of action which were directly representative of the ship and freight. Where a vessel has been wrongfully taken from the custody of her owners or destroyed through the fault of another, there exists in the owner a right to require the restoration of his property, either in specie or by a money payment as compensation for a failure to restore the property. Manifestly, if the option was afforded the owner of the ship to receive back his property or its value, he could not, by electing to take its value, refuse to surrender the amount as a condition to obtaining the benefit of the act.

In *The City of Norwich* [*Place* v. *Norwich & N. Y. Transp. Co.*], 118 U. S. 486 [30: 142], where the obligation *of a shipowner to [**304** account for the sum of insurance recovered on the loss of his ship was fully considered, the fact was declared to be that the provisions of the act of Congress, just referred to, were in conformity with the general maritime law of Europe (502). The text of the Ordonnance de la Marine of 1681 and the opinions of Pardessus and other continental jurisconsults were referred to as the sources from which the principles embodied in the act of Congress were derived. The language of Pardessus clearly shows that, under the general maritime law, the obligation of the owner was to surrender a sum awarded as damages for the loss of his ship, and, if he did not, he could not avail himself of the limitation of liability. He says (Droit Commercial, part 3, title 2, chap. 3, § 2):

"The owner is bound civilly for all delinquencies committed by the captain within the scope of his authority, but he may discharge himself therefrom by abandoning the ship and freight; and, if they are lost, it suffices for his discharge to surrender *all claims in respect of the ship and its freight.*"

So, also, Kaltenborn, in a treatise published at Berlin in 1851, as translated and quoted in the dissenting opinion in *The City of Norwich* [*Place* v. *Norwich & N. Y. Transp. Co.*], *supra*, says:

"The Roman law, which held the owner absolutely liable with all his property, is nowhere put in practice, and was not current as early as the Middle Ages. Indeed, the Consulate of the Sea (chaps. 183, 224, 236), the law of Wisby, reasoning from articles 13 and 68, that the Hanse Towns, reasoning from article 2, title 10, render the owners, as a rule, answerable only to the extent of the ship's value; and the modern maritime laws free the owners, by the *abandon* of the ship and their several shares in the vessel, from all further liability for the ship enterprise, particularly for the acts and contracts of the captain. *In the ship are included all gains arising during the voyage, as well as the insurance.* Should the ship and the freight have perished, it is sufficient for exoneration of the owners *if all claims and causes of action having reference to the vessel and freight are abandoned by them.*"

The same doctrine is clearly recognized in
305]the provisions of *the General German Commercial Code, where, in article 778, it is provided as follows:

"Art. 778. In cases of general average, the compensation for sacrifice or damage takes, as against the ship's creditor, the place of that which the compensation is to make good.

"The same rule applies to the indemnity, which in case of loss or damage to the vessel or of nonpayment of freight when goods have been lost or damaged, is due to the shipowner by the party who has caused the damage by his illegal conduct.

"When the compensation or indemnity has been received by the shipowner, he is personally responsible to the ship's creditors to the extent of the amount received in the same manner as to the creditors of a voyage in case of encashment of the freight."

Indeed, that a right of action for the value of the owner's interest in a ship and freight is to be considered as a substitute for the ship itself was decided in this court in the case of *Sheppard* v. *Taylor*, 30 U. S. 5 Pet. 675 [8: 269]. That was a case where a vessel had been seized, condemned, and sold by the Spanish authorities because of a violation of the trade regulations of the Kingdom of Spain. The King of Spain subsequently ordered the proceeds of the vessel and cargo to be repaid to the owners, but this was not done; afterwards the owners, having become insolvent, assigned their claims for the restoration of the proceeds and for indemnity from Spain to their separate creditors, and the commissioners under the Florida treaty awarded to be paid to the assignees a sum of money, part for the cargo, part for the freight, and part for the ship. The officers and seamen having proceeded against the owners of the ship by a libel *in personam* for their wages, and having afterwards, by an amended libel *in personam*, claimed payment out of the money paid to the assignees of the owners under the treaty, it was held that they were entitled, towards the satisfaction of the same, to the sum awarded by the commissioners for the loss of the ship and her freight, with certain deductions for the expenses of prosecuting the claim before the commissioners.

306] *Mr. Justice Story, delivering the opinion of the court, said (p. 710 [8: 282]):

"If the ship had been specifically restored, there is no doubt that the seamen might have proceeded against it in the admiralty, in a suit *in rem* for the whole compensation due to them. They have, by the maritime law, an indisputable lien to this extent. This lien is so sacred and indelible that it has, on more than one occasion, been expressly said that it adheres to the last plank of the ship. [*Relf* v. *The Maria*], 1 Pet. Adm. Rep. note 186, 195; [*The Sidney Cove*], 2 Dod. Adm. Rep. 13; *The Neptune*, 1 Hagg. Adm. Rep. 227, 239.

"And in our opinion there is no difference between the case of a restitution in specie of the ship itself, and a restitution in value; the lien re-attaches to the thing and to whatever is substituted for it. This is no peculiar principle of the admiralty. It is found incorporated into the doctrine of courts of common law and equity. The owner and the lienholder, whose claims have been wrongfully displaced, may follow the proceeds wherever they can distinctly trace them. In respect, therefore, to the proceeds of the ship, we have no difficulty in affirming that the lien in this case attaches to them."

Nor does the ruling in *The City of Norwich* [*Place* v. *Norwich & N. Y. Transp. Co.*], *supra*, that the proceeds of an insurance policy need not be surrendered by the shipowner, conflict with the decision in *Sheppard* v. *Taylor*. The decision as to insurance was placed on the ground that the insurance was a distinct and collateral contract which the shipowner was at liberty to make or not. On such question there was division of opinion among the writers on maritime law and in the various maritime codes. But as shown by the full review of the authorities, found in the opinion of the court, and in the dissent in *The City of Norwich* [*Place* v. *Norwich & N. Y. Transp. Co.*], all the maritime writers and codes accord in the conclusion that a surrender, under the right to limit liability, must be made of a sum received by the owner, as the direct result of the loss of the ship, and which is the legal equivalent and substitute for the ship.

We conclude that the owner who retains the sum of the damages which have been awarded him for the loss of his ship and freight has not surrendered "the amount or value" (§ 4283) of *his interest in the ship; that[**307** he has not given up the "whole value of the vessel" (§ 4284); that he has not transferred "his interest in such vessel and freight" (§ 4285). It follows that the shipowner, therefore, in the case before us, to the extent of the damages paid on account of the collision, was liable to the creditors of the ship, and the libellants, as such creditors, were entitled to collect their claim, it being less in amount than the sum of such proceeds.

The remaining questions are free from difficulty. It was urged below and is pressed at bar that the amended libel disclosed no cause of action, because it was not specifically alleged that the master of the Johnson communicated with the cargo owners before consenting to the bond.

It was said in *The Julia Blake* [*Bank of St. Thomas* v. *The Julia Blake*], 107 U. S. 418, 425 [27: 595, 598], "it is now the settled law of the English courts that a master 'cannot bottomry a ship without communication with his owner, if communication be practicable, and *a fortiori*, cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner be practicable.'" A particular review of the doctrine laid down by the English courts was, however, rendered unnecessary in the case of The Julia Blake, as the circumstances in that case clearly established that the hypothecation of the cargo was unwarranted, irrespective of the failure to communicate with the owner of the cargo. In the case of *Glascott* v. *Lang*, 2 Phill. Ch. 321, decided in 1847, Lord Chancellor Cottenham declared that no authority existed to support the claim that a bottomry bond executed upon a vessel might be avoided because the captain, though having opportunity to do so, failed to communicate with the owners before giving the bond. In *The Karnak*, L. R. 2

Adm. & Eccl. 308, Sir Robert Phillimore thus referred to the subject:

"I think it will be found upon examination of the foreign maritime law that the bottomry bond, under the various titles of *contrat à la grosse aventure*, *hypotheca*, *bodmer*, or *cambio maritimo*, was always considered as binding the cargo, and that the necessity of a special communication, if possible, of the master with the owner of the cargo, according to the doc-
308]trine *of recent cases, however just in principle, is peculiar to the English law."

The rule declared to be settled in Great Britain by the cases of *The Bonaparte*, 8 Moore, P. C. C. 459; *The Hamburg*, Brown. & Lush. Adm. 253, 273; *S. C.* 2 Moore, P. C. C. N. S. 289, 320; *Australasian Steam Navigation Company* v. *Morse*, L. R. 4 P. C. 222, was, in 1877, thus stated by the Privy Council in *Kleinwort* v. *Cassa Marittima*, L. R. 2 App. Cas. 157:

"That it is an universal rule that the master, if in a state of distress or pressure, before hypothecating the cargo, must communicate or even endeavor to communicate with the owner of the cargo, has not been alleged, and is a position that could not be maintained; but it may safely, both on authority and on principle, be said, that in general it is his duty to do so, or it is his duty in general to attempt to do so. . . . If according to the circumstances in which he is placed it be reasonable that he should—if it be rational to expect that he may—obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt."

As in the case of *The Julia Blake* [*Bank of St. Thomas* v. *The Julia Blake*], however, we find it unnecessary to determine in the case now before us whether the rule laid down by the courts of Great Britain is the doctrine of this court. Under that rule, it is only where, *under all the circumstances of the case*, communication with the owners of the cargo was feasible, that a failure to attempt to communicate will avoid the bond. Now, in the case at bar, the pleadings do not aver, nor does the evidence establish, whether communication was had by the master with the owners of the cargo before the execution of the bond, nor that such communication was feasible or might reasonably have been had. While it may be inferred from the averment in the libel that the libellants assented to the bond, "believing that the said bond was properly and necessarily issued," that such assent was given subsequent to the execution of the bond, the language used does not imply that the master had not communicated with the cargo owners be-
309]fore making the hypothecation. *As the bond does not import to the contrary, the master must be presumed to have lawfully executed it. The necessity for the hypothecation and that the course pursued was for the best interests of the cargo owners is established by the evidence. Under such circumstances, we think the duty was upon the party who questioned the power of the master to have executed the instrument of hypothecation to plead it as a matter of defense. *The Virgin* [*The Virgin* v. *Vyfhius*], 33 U. S. 8 Pet. 550 [8: 1041].

Particularly is this the case when, as here, the recovery sought from the shipowner is for advances made for *his benefit*, which were charged upon the property of the cargo owners by the representative as well of the shipowner as the owners of the cargo. Whether, under the circumstances, an estoppel might not arise, need not be determined.

But one matter remains to be considered, and that is as to the action of the district judge in refusing on the hearing, and subsequently, to permit the respondent to amend his answer by setting up the plea of laches and of *res judicata* as respects the allegation, for the first time made in the third amended libel, of the receipt by the owner of the Andrew Johnson of partial compensation from the owners of the ship Thirlmere for the loss of the Andrew Johnson and her freight. The third amended libel was filed October 28, 1890, and the exceptions and answer thereto were filed June 22, 1891. The trial took place on November 22, 1893. It appears from the papers used in support of the motion filed after the trial of the case that the claim made in the admiralty proceedings in England, that the cargo owners should be credited from the ship's share of the moneys paid into court by the owners of the Thirlmere with the ship's proportion of the bottomry bond, was rejected, because of a supposed want of jurisdiction. Indeed, the proctor for the respondent, in an affidavit filed in support of the renewed application for leave to amend the answer, stated as a reason for not setting forth the defenses in question in the answer to the amended libel that he "was then of the opinion that his client was entitled to judgment on the defenses then set up," and that he "was then advised that the presentation and rejection by the English admiralty court of the libellants' *claim, founded on their payment of the[**310**] bottomry bond, did not, according to the law of England, amount to an adjudication thereon, for the reason that the said English court of admiralty was without jurisdiction thereof."

It is also clearly inferable from the statements in the affidavit we have referred to that when the answer to the third amended libel was filed the proctor for the respondent knew of the transaction with the insurance company. Even, therefore, if the fact was, as claimed, that the respondent would have been entitled to receive from his underwriters one half of whatever decree the libellants might be entitled to recover, had the same been secured with reasonable diligence, and that respondent had lost said recourse by reason of the bar of the statute of limitations, still there is no pretense that the respondent was misled into believing that the libellants had abandoned their claim against him, and the fact was that they promptly brought suit in this country to recover against the shipowner. Without considering the averment in the last amendment to the libel, by which the recovery by the owner of the Johnson from the Thirlmere was alleged, the first libel informed the respondent that the claim arising from the bond was pressed against him. If between the time of the filing of the first libel (July 20, 1887) and the time of the hearing (November 22, 1893) a claim against an insurance company in favor of the respondent was lost by

laches, such loss was the result of his own conduct.

Under all the circumstances, particularly as the rejection of the claim in the courts of Great Britain was not upon the merits, we are of opinion that the trial court did not abuse its discretion in refusing leave to amend the answer.

The decree of the Circuit Court of Appeals must be reversed, and that of the District Court affirmed. And it is so ordered.

GEORGE W. HARRISON, *Appt.*,
v.
PEDRO PEREA, Surviving Administrator of the Estate of José L. Perea, Second, Deceased, and Others.

PEDRO PEREA, Surviving Administrator, etc., *Appt.*,
v.
GEORGE W. HARRISON.

(See S. C. Reporter's ed. 311-328.]

Sufficiency of answer—appeal from territorial judgment—jurisdiction of this court—wrongful conversion of an estate—interest, when chargeable—commissions of administrator—allowance to solicitor—one not appealing cannot contest—rate of interest—costs, when chargeable on defendant.

1. In an action by an administrator to recover the assets of the estate from a defendant who has no right to them, but has converted them, it is not a sufficient answer to allege that the estate may be increased after an accounting with another estate, and to bring that other estate into the controversy with the innumerable questions in regard to it which have no connection with the issues in the case; and a cross bill setting up the same matters is demurrable.
2. Upon an appeal from the supreme court of a territory, the findings of facts by that court are conclusive upon this court.
3. The jurisdiction of this court on such appeal, apart from exceptions to the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment.
4. Where the defendant has wrongfully converted the whole estate of a minor, and his liability to pay it back is plain and clear, it is no objection to the decree that it makes him liable as an individual for the repayment of the same. It is not necessary to follow and identity the specific property.
5. It is not error for a court to charge defendant, who has converted the whole assets of an estate, with interest on the amount thereof at 6 per cent.
6. Statutory commissions on the whole amount due to an administrator from one who has converted the estate should be allowed without deduction from a part of the sum which is not paid over, but which the defendant by favor of the court is allowed to retain on account of his right to share in the fund as a distributee.
7. An allowance, out of a fund, of a fee for a solicitor by whose exertions the fund was recovered, is within the judicial discretion of the court; and in fixing that fee the court can proceed upon its own knowledge of the value of the solicitor's services.
8. One who does not appeal from a decree is not entitled, on appeal from a decree of affirmance, to contest a provision of the original which is merely affirmed by the latter.
9. An allowance of interest at a certain rate by the supreme court of a territory, which has discretion in the matter, will not be altered and increased by this court.
10. Costs of defending an action brought by an administrator against one who has wrongfully converted assets of the estate and persistently refused to pay them over on demand must be charged against the defendant personally, and cannot be allowed out of the fund.

[Nos. 113, 497.]

Argued November 10, 11, 1897. Decided November 29, 1897.

APPEALS from a decree of the Supreme Court of the Territory of New Mexico affirming the decree of the District Court of that Territory in favor of the complainant, Pedro Perea, administrator, etc., against George W. Harrison *et al.*, defendants, for an accounting for the property and assets of the estate of José L. Perea, Second. The decree found the amount due from defendant to complainant and decreed its payment. *Reversed*, and cause remanded, with instructions to enter judgment in conformity with the opinion, etc.

See same case below, 7 N. M. 666.

Statement by Mr. Justice **Peckham:**

The bill in the first above entitled suit was filed in a district court of the territory of New Mexico in chancery, by Pedro Perea, as sole surviving administrator of the estate of José L. Perea, Second, deceased, and as one of his heirs at law, against the defendant, George W. Harrison, individually and as administrator of the estate of his wife, Guadalupe Perea de Harrison, and also against the other heirs at law of José L. Perea, Second. It was brought to compel an accounting by the defendant George W. Harrison, individually and as administrator of the estate of his wife, for the property and assets of the estate of José L. Perea, Second, which had come into his hands.

The bill in substance alleged the following facts: José *Perea, Second, a resident of [312

NOTE.—*As to right of administrator, executor, or trustee to appeal as party aggrieved*, see note to Bryant v. Thompson (N. Y.) 13 L. R. A. 745.

As to review by United States court of territorial decisions; extent and manner of; distinction between an appeal and a writ of error,—see note to Miners' Bank v. Iowa District Prosecuting Atty. 13: 867.

As to jurisdiction of United States Supreme Court dependent on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy,—see note to Gordon v. Ogden, 7: 592.

As to what is "final decree" or judgment of state or other court from which appeal lies, see note to Gibbons v. Ogden, 5: 302.

As to personal liability of executors and administrators for costs, see note to Lynch v. Webster (R. I.) 14 L. R. A. 696.

New Mexico, died in that territory on the 27th of August, 1887, being about the age of eight years. He left him surviving his mother, Guadalupe Perea, who was then a widow, and his half brothers and sisters as his heirs at law. On the 23d of July, 1884, his mother had been appointed his guardian and had taken possession of his property. In September, 1885, she married the defendant, George W. Harrison. She continued guardian of her son up to his death, in August, 1887. In September, 1887, the complainant was appointed administrator and the mother was appointed administratrix of the estate of the minor. They both gave bonds and took the requisite oaths. On the 6th of March, 1888, the mother made what she termed a final report of her guardianship to the probate court, which showed a balance of over $17,000 in her hands belonging to the estate of the minor. Under the influence of her husband she claimed, from the time of her son's death down to her own decease, to hold the property as guardian, and not as administratrix, and while acting under that influence she refused to permit the complainant, after his appointment as administrator, to assist in the administration of the estate, or to have possession or control over any of its assets. Objections were made by the complainant to the report filed by the mother in March, 1888, called the guardian's final account, and these objections were sustained by the probate court. An appeal from that order was taken by the mother, but no further proceedings were had therein, and the same was practically abandoned. The mother died October 20, 1889. Her husband then unlawfully took possession of the property of the minor in her hands at the time of her death, and subsequently and on the 6th of January, 1890, he took out letters of administration on her estate, she dying intestate. He then claimed to hold the estate of the minor by reason of being administrator of his wife's estate. He took possession of the minor's estate individually, with full knowledge of its trust character, placed it to his own credit in bank, mingled it with his own funds and claimed the right to retain possession and control thereof, and refused the demand to pay over the estate to him, which the **313**] *complainant made in his capacity as sole surviving administrator of the estate of the minor. It was also alleged that the mother of the deceased minor, acting under the influence and by the direction of her husband, and the defendant Harrison himself, individually, did by their actions cause great damage to the estate of the minor, and relief was demanded against the defendant Harrison as administrator of his wife's estate, and individually for an accounting in relation to the estate of the minor, of which he was in possession, and for a recovery of the amount found to be in his possession.

The defendant Harrison demurred to the bill, his demurrer was overruled, and he then answered both individually and as administrator of the estate of his deceased wife. In that answer the defendant denied many of the material allegations contained in the bill. He alleged that he and the defendant Grover William Harrison, who was minor child of himself and his deceased wife, Guadalupe Perea de Harrison, had succeeded to all the interest and rights of his said wife in and to the property of the estate of José L. Perea, Second, and for that reason the complainant was not entitled to a decree for anything upon the accounting. The answer also alleged that the complainant was a son and also one of the three administrators of the estate of the late José L. Perea, Senior (two of the complainant's brothers being the other administrators), and that those administrators had failed to account for a large sum of money which was due from the estate of José L. Perea, the elder, to José L. Perea, Second, in his lifetime, and afterwards to his estate; and it was alleged that large amounts of property had come into the hands of such administrators of the estate of the deceased father, José L. Perea, Senior, of which no account had been made, and that the *pro rata* share of the minor, José L. Perea, Second, in these assets so unaccounted for would amount to $30,000.

The complainant excepted to so much of the answer as contained the above allegations relating to the estate of the elder Perea and the action of the administrators with regard thereto upon the ground of impertinence.

The defendant, by leave of court, also filed a cross bill, in *which in very great detail [**314** he set forth the condition of the estate of the elder Perea and the action of the administrators thereof. Among other things it was alleged that the elder Perea in 1842 married his first wife and they lived together until 1877, when she died; that he had by her six daughters and six sons, and that he brought into the marriage community a large amount of property, real and personal, amounting to $100,000, acquired by him by inheritance, bequest, and other means, and in addition personal property of the value of about $300,000, and that at the time of his marriage his wife owned in her right and brought into the marriage community real property situate in the territory of New Mexico of the value of $30,000 and personal property to the value of $30,000; that this property of the husband and wife became upon their marriage property of the marriage community, and so continued to remain the property of the parties, to which large accretions and additions were made by the industry and labor of the husband and wife, so that at the time of the death of the wife in 1877 the full value of the united property was $300,000 of realty and $500,000 of personalty, and that all of this property, except the amount brought into the marriage community, was gain and increase of that property and belonged in equal parts to the husband and wife.

It was further alleged that in 1883 the elder Perea died, and that his estate had not been properly administered; that property belonging to the estate had not been inventoried as such; that the conduct of the administrators had been wasteful, the estate had not been properly taken care of, and that the administrators had expended large amounts of the community property in the purchase of real property, so that such property had been unlawfully converted into worthless real property. It was also alleged that a pretended settlement had been made before the probate judge in New Mexico, and the administrators

had made an accounting before the court, and had obtained their discharge and the cancelation of their bonds by that court; that this set-
315] tlement before and discharge *by the probate court was a fraudulent one and fraudulently obtained, and that the decree should be set aside. It was also alleged that the defendant Harrison and his wife had before her death commenced a suit against the complainant and the other defendants who were administrators of the estate of the elder Perea, asking for an accounting in regard to the identical matters and things set up in this cross bill; and that such suit was still pending and undetermined at the time of the commencement of this suit by the complainant herein.

Various other matters in relation to the management of the estate of the elder Perea were set forth in the cross bill at very great length, and relief was demanded in accordance with what was alleged to be his rights by such complainant. This relief was of all varieties, including an investigation into accounts and matters relating to community property arising out of the marriage of the elder Perea in 1842, and an inquiry as to what was such property and its proper increase; also injunctions, accountings, decrees for conveyance, for distribution, for removal of the administrators; for the annulling of the pretended and fraudulent decree discharging the administrators and finally settling their accounts, and for the appointment of a receiver of the estate of the elder Perea.

To this cross bill the complainant herein demurred upon several grounds, the substance being that it was multifarious in that it was brought in regard to matters having no connection with the subject-matter of the original bill, and not proper to be investigated in this suit.

The exceptions to the answer and the demurrer to the cross bill were argued at the same time, and, after hearing counsel, the court allowed the exceptions and struck out the matter excepted to, and it also sustained complainant's demurrer to the cross bill.

The case then being at issue was duly referred to a master, before whom both parties appeared and introduced their proofs, after which the master made his report. Upon that report and the evidence taken before the master, the case was brought to a hearing, and the court found, in substance, that the allegations set forth in complainant's bill were true. The
316] *court also found that José L. Perea, Senior, died about the 21st day of April, 1883, and left his widow, Guadalupe Perea (who afterwards married the defendant George W. Harrison), and the other defendants in this suit, with the exception of George W. and Grover William Harrison, his heirs at law. José Perea, Second, was the son of the elder Perea by his second wife, Guadalupe Perea. After the death of the elder Perea, his widow married, as heretofore stated, the defendant George W. Harrison, and by him she had issue, Grover William Harrison, one of the defendants herein. With these exceptions all of the defendants were children of the elder Perea by a former wife. Pedro, Mariano, and Jesus M. Perea were appointed administrators of the estate of their deceased father.

The court also found that the defendant George W. Harrison, not only upon the death of his wife had control, but that immediately after their marriage he took control and charge, of the assets of the deceased minor, and at the time of the entry of the decree herein he still retained and had possession of all the moneys belonging to that estate, and that they were subject to his individual control.

At the time of the death of the minor he owed no debts and there were no charges against his estate except his funeral expenses and the expenses of his last illness and certain claims for his maintenance by his guardian. The defendant George W. Harrison, in the name of his wife and in her lifetime, made sundry reports to the probate court as to the condition of the estate, some of which contained false entries to her advantage, and together they obstructed the distribution of the estate among the heirs.

The court also found that George W. Harrison, the defendant, wilfully obstructed the distribution of the assets of the estate of the minor, and by his misconduct rendered it necessary that the complainant should obtain possession of the assets by the institution of this suit, and that the necessity for this suit arose entirely out of the wrongful conduct of the defendant Harrison.

The amount found due from the defendant to the complainant *was stated in the decree[317
to be, with interest up to the date of the entry of the decree, June 19, 1893, the sum of $31,545.32, of which the defendant Harrison was entitled as administrator of the estate of his late wife, Guadalupe Perea de Harrison, to thirteen twenty-sixths, and to three twenty-sixths in addition by reason of the purchase of the interests of some of the heirs of the estate of José L. Perea, Second, and to one twenty-sixth more, as guardian of Grover William Harrison, one of the defendants, being a total of seventeen twenty-sixths; and the other heirs were each decreed entitled to one twenty-sixth of such balance; and it was provided in the decree that the defendant Harrison might, instead of turning over to the complainant, the administrator of José Perea, Second, the full sum found due, retain the amount found due him from the estate, which was stated to be the sum of $16,227.19. The defendant George W. Harrison was also charged with the payment of the costs of the suit individually, including the sum of $1,000 allowed the special master.

From the final decree thus entered the defendant George W. Harrison appealed to the supreme court of the territory of New Mexico, which court, with some modifications, affirmed the judgment of the court below. Those modifications consisted in charging interest upon the full amount of the sum found due by the decree of the court below, from the time of the entry of that decree up to the 26th of August, 1895, which amounted to the sum of $4,324.45, and the defendant was charged in the decree of the last-named date with the full sum of $35,869.77. The fee for the solicitor of complainant was reduced from $5,000 to $3,586.97, being 10 per cent upon the amount found in the hands of the defendant Harrison. The complainant, as administrator was decreed to

be entitled to the statutory commission upon the last-named sum found by the court to be due from the defendant Harrison, which commission amounted to $1,943.48. The court also reduced the compensation of the special master from $1,000 to $500. The court also modified the decree against Harrison for the payment of costs individually, by directing 318] "that the *said solicitor's fee, the said commission for said administrator, the said special master's fee, and all of the costs of this case in this court and in the court below, should be paid out of said fund, and that of the remainder the said defendant George W. Harrison may retain in his possession seventeen twenty-sixth parts thereof, and that he shall pay over to said Pedro Perea, as administrator of José L. Perea, deceased, the remaining nine twenty-sixths, to be distributed to the heirs at law of said José Leandro Perea, Second," as directed by the court. From the judgment of affirmance as modified the defendant George W. Harrison has appealed to this court. The complainant also took a cross appeal from the judgment.

Mr. **William B. Childers** for Harrison.
Mr. **Neill B. Field** for Perea.

Mr. Justice **Peckham** delivered the opinion of the court:

The question first arising in this case is in regard to the correctness of the decisions of the courts below in allowing complainant's exceptions to portions of the answer of the defendant Harrison and in sustaining the demurrer to defendant's cross bill. The decision of the two matters rests in this case upon essentially the same foundation. If the allegations of the defendant's answer to the original bill are impertinent, it would follow that in this case the cross bill would be multifarious, and that the demurrer on that ground should be sustained. The allegations in the two pleadings are of the same nature, only in the cross bill they are very greatly extended and set forth in almost infinite detail.

Impertinence is described by Lord Chief Baron Gilbert to be "where the records of the court are stuffed with long recitals, or with long digressions of matter of fact, which are altogether unnecessary and totally immaterial to the matter in question." 1 Dan. Ch. Pl. & Pr. 5th Am. ed. marginal paging, 349. It is also said that impertinence is the introduction of any matters in a bill, answer, or other 319] pleading *in the suit which are not properly before the court for decision at any particular stage of the suit. *Wood* v. *Mann*, 1 Sumn. 578. The best test to ascertain whether matter be impertinent is to try whether the subject of the allegation be put in issue in the matter in dispute between the parties. All matter not material to the suit is regarded as impertinent. 1 Daniell, *supra*.

As to multifariousness, it was said in *Shields* v. *Thomas*, 59 U. S. 18 How. 253, at 259 [15: 368]: "There is perhaps no rule established for the conducting of equity pleadings, with reference to which (whilst as a rule it is universally admitted) there has existed less of certainty and uniformity in application than has attended this relating to multifariousness. This effect, flowing, perhaps inevitably, from the variety of modes and degrees of right and interest entering into the transactions of life, seems to have led to a conclusion rendering the rule almost as much an exception as a rule, and that conclusion is, that each case must be determined by its peculiar features. Thus Daniell in his work on Chancery Practice, vol. 1, p. 384, quoting from Lord Cottenham, says: "It is impossible, from the authorities, to lay down any rule or abstract proposition as to what constitutes multifariousness, which can be made universally applicable. The cases upon the subject are extremely various, and the court, in deciding upon them, seems to have considered what was convenient in particular cases, rather than to have attempted to lay down an absolute rule." Continuing his opinion, the learned justice in the above case said: "Justice Story, in his compilation upon equity pleading, defines multifariousness in a bill to mean 'the improperly joining in one bill distinct and independent matters, and thereby confounding them.' . . . Justice Story closes his review of the authorities upon this defect in a bill with the following remark: 'The conclusion to which a close survey of all the authorities will conduct us seems to be, that there is not any positive inflexible rule as to what, in the sense of a court of equity, constitutes multifariousness, which is fatal to a suit on demurrer.'"

Upon consideration of the various cases, we think that in *allowing the exceptions to [320 the answer and in sustaining the demurrer to the cross bill, the courts below committed no error. The facts which the defendant Harrison endeavored to set up in his answer and cross bill were not relevant to the matters properly in issue in this suit. Neither the convenience of the parties nor their rights in regard to the matters set forth in the original bill would be aided by entering upon an inquiry relating to the matters set up in the answer and cross bill. It is clear that an investigation and accounting, such as is asked for in the cross bill, would take a long time, probably many years, to finish, involving as it would an inquiry into the amount of the community property of the elder Perea and his wife in 1842, and what should be found to be the actual increase springing from the same; also an inquiry into the transactions of the administrators of the estate of the elder Perea and into their liability on account of the same, together with the taking of evidence upon the subject of the fraudulent character of the decree of the probate court discharging the administrators of that estate. It would in addition include an inquiry into the question whether the administrators, if the decree were set aside, had been guilty of such conduct in the care and management of the estate coming into their hands as would make them liable for any loss sustained by the estate in consequence of such action. In fine, it is seen that the character of the investigation demanded by the cross bill and of the relief sought thereby is extensive enough to call for an almost interminable amount of research and labor. These considerations are not of the slightest moment when weighed against the legal rights of the parties interested in the question; and

their right to have such investigation made and adequate and proper relief granted is not a matter of discretion or favor. If they have not slept upon their rights, and if they come into court at the proper time and in a proper action, the court will enter upon the necessary investigation and grant such relief as they may be entitled to. On the other hand, these considerations are most material and vital upon the question of the necessity or propriety of such an investigation in this suit, which was 321] *brought for a different purpose and which would be necessarily greatly delayed in its termination if such an inquiry should be now entered upon.

Let us look for a moment at the simple character of this suit. It is brought to recover as administrator the assets of the estate of the minor already mentioned, the possession of which the defendant Harrison does not deny. He shows no right to them as against the complainant, because the facts he sets up in his answer form no defense. Nor do the same facts when set forth in the cross bill constitute a cause of action against this complainant, proper to be proved and defended against in this suit, as against the demand of the complainant herein. It is plain that the complainant, as the surviving administrator of the estate of the deceased minor, was entitled to the immediate possession of all the assets of such estate. Upon the death of the minor the guardianship of the mother ceased, and as she was thereupon appointed administratrix her continuing to hold the assets of the estate from the time of such appointment was as administratrix, and not as guardian. The counsel for Harrison says in his brief that he is disposed to concede this proposition. It is plainly true. Her right or duty to account as guardian did not affect the title to the property upon the death of the ward. That title became vested in the administrator and administratrix upon their appointment. 1 Williams, Exrs. 6th Am. ed. 696. The plaintiff herein, as coadministrator, had the same legal title to the assets that she had. The advantage of possession was with her. But on the death of the administratrix the complainant remained the sole surviving administrator, and in him was vested the exclusive title and the right to the immediate possession of the assets of the estate of the deceased minor. Instead of obtaining that possession he finds all the assets in the hands of the defendant Harrison, who refuses to give them up. Their amount is not really in controversy. The defendant shows no right or title whatever to them. It is no answer to the demand that the defendant should pay over the sum which is in substance acknowledged to be in his possession 322] to say that the *minor's estate may be increased after an accounting shall be had and judgment obtained and the money paid over in the matter of the estate of the elder Perea. The claim upon that estate, so far as the defendant Harrison is concerned, either individually or as administrator of his deceased wife, is altogether too remote and too disconnected from the issues properly joined in the original suit herein to make it necessary, on his demand, to turn aside from their decision until that claim shall be hereafter and in this suit determined. It would be entering upon an investigation into matters connected with a different estate, an inquiry into which would involve innumerable questions which would have no bearing upon the decision as to the right of defendant to retain these particular funds now in his individual possession and treated by him as his own.

It must also be borne in mind that the defendant Harrison has an action pending against the complainant herein and the other and surviving administrator of the estate of the elder Perea, together with his other heirs at law, in regard to these very matters which are set up in his cross bill herein. Indeed, this cross bill contains nothing material beyond the allegations which are contained in the complaint in his first suit. The allegations in that suit are reintroduced in the cross bill word for word, and the relief prayed for in the cross bill is the same. From all the facts thus appearing in complainant's original bill, in the answer and the cross bill of the defendant Harrison, it is plain that the matters set up in the answer and in the cross bill in regard to which the defendant seeks investigation in this suit are not proper subjects of inquiry herein, because not connected with the issues sought to be decided in the original bill, and it would result in great and unnecessary delay in the decision of this suit to reverse this judgment and direct an investigation into matters which are foreign to its merits. We are of opinion the court below committed no error in allowing complainant's exceptions to the answer and in sustaining his demurrer to the cross bill.

The decision thus arrived at includes the main question in the case. There are some few other matters to be reviewed.

*Our further examination must proceed[323 upon the finding of facts as made by the court below, for this being an appeal from the supreme court of a territory those findings are conclusive upon this court. The jurisdiction of this court on such an appeal, apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment. *Stringfellow* v. *Cain*, 99 U. S. 610 [25: 421]; *Nesbit* v. *Wells*, 104 U. S. 428 [26: 802]; *Eilers* v. *Boatman*, 111 U. S. 356 [28: 454]; *Idaho & Oregon Land Improv. Company* v. *Bradbury*, 132 U. S. 509 [33: 433]; *Mammoth Mining Company* v. *Salt Lake Foundry & Machine Company*, 151 U. S. 447, 450 [38: 229, 230]; *Haws* v. *Victoria Copper Mining Company*, 160 U. S. 303 [40: 436]; *Gildersleeve* v. *New Mexico Mining Co* 161 U. S. 573 [40: 812]; *Bear Lake & River Water Works & Irrigation Company* v. *Garland*, 164 U. S. 1, at 18 [41: 327, 334].

Objection is made to that portion of the decree which holds the defendant Harrison liable as an individual for the repayment of the amount of the assets of the estate found in his possession. The findings of fact amply justify this action of the court. It is found that immediately upon the intermarriage of the defendant Harrison with the widowed mother of the minor he took entire charge and control of her affairs, including the assets of the minor's estate; that he reduced them to money mingled the same with his own funds, depos-

ited them in bank to his individual credit, and at the time of the final decree he retained the same subject to his individual control. The court also found that he made reports in the lifetime of his wife, and in her name, to the probate court, which contained false entries to the advantage of his wife, and that together they obstructed the distribution of the estate among the heirs; that upon the death of his wife on the 20th of October, 1889, he was in possession of these assets with full knowledge of their trust character, and after her death he refused to pay over on demand, to the complainant as the sole surviving administrator of the estate of the minor, the assets pertaining to that estate. These facts show a persistent, deliberate, and successful attempt to secure and retain the assets of this estate and to con-
324]vert them to his own use *individually. The facts found show that he was guilty of such conversion. Cases are cited by defendant's counsel where payments wrongfully made by an administrator to a third person could not be recovered directly from such third person at the suit of a creditor of the estate, the estate itself not being insolvent. Those cases and the one at bar have no resemblance to each other. This is a case where the whole assets of the estate have been wrongfully and knowingly taken and converted to the individual use of this defendant, and the action is brought to recover the same by the sole surviving administrator of the estate. Nor is it a question of following the specific property which was taken by the defendant. The finding is that he reduced the assets and property of the estate to money and mingled the same with his own funds, and has kept control of them ever since. The question of identification has nothing to do with the case. It is a bald case of the conversion of the whole estate of the minor, and his liability to pay it back is plain and clear.

Nor did the court below err to the prejudice of the defendant in the matter of charging him with interest at 6 per cent on the amount of the assets converted by him. The interest is charged by reason of his conversion of the whole assets of the estate. It is not a mere mingling of the funds with his own, while recognizing his liability to repay them and having them at the same time ready to respond when demanded. It is a wholesale conversion of the entire assets. The facts found make sion evidence perfectly clear that such conver- riage with the deed from the time of his mar- entries in the reports of the minor. [illegible] in that direction. [illegible] strong evidence

Neither is it a question of what profits (if any) have been made by an individual who has mingled trust funds with his own and used them for his personal benefit, although never denying his liability to account. In such cases it is sometimes proper to inquire what profits have been made in order to charge the trustee with their amount, if greater than the usual rate of interest. This is not such a question. The defendant has, without
325]the least right or title, taken moneys *belonging to the estate of a deceased minor, and converted them substantially to his own use, while denying the right of the administrator of such estate to the possession thereof. He is properly charged, at least, with the usual interest, without investigation into the question of what profits he may have made.

That portion of the decree which authorizes the complainant as administrator to retain his statutory commissions upon the full fund found due from the defendant is objected to, and the claim is made that he is not entitled to commission on any other sum than that which he actually receives and pays out. The decree determines the amount due from the defendant to the complainant as administrator. Strictly speaking, the complainant was entitled to a decree for the payment of that full sum by the defendant, after which he would be paid the distributive share legally coming to him. If that course had been followed and such a decree given, the complainant would have been entitled to his statutory fees, as administrator, upon the amount thus paid in; but by the favor of the court, the defendant Harrison was permitted, instead of making this formal payment, to retain in his possession the seventeen twenty-sixths of the estate which the court decided he would be entitled to receive from the administrator, upon his making distribution of such estate to the parties entitled to it. The court in pursuance of this course did not relieve the estate from the payment of the full amount of the commissions of complainant as administrator which he would have been entitled to had the amount which the defendant retained been actually and physically paid over into his hands. As to this, the defendant has no good grounds of complaint.

The defendant also objects to the allowance of the solicitor's fee which is charged against the fund. We think no error arises from this action of the court below. By the exertions of the solicitor the fund was recovered, and it was properly made to bear some portion of the expense of its administration. The amount was within the judicial discretion of the court, and in fixing that amount the trial court could proceed upon its own knowledge of the value of the solicitor's services. *Internal [**326**] *Improv. Fund Trustees* v. *Greenough*, 105 U. S. 527 [26: 1157]; *Fowler* v. *Equitable Trust Co.* 141 U. S. 411, 415 [35: 794, 796].

These are substantially all the questions which arise upon the appeal of the defendant Harrison.

Upon the cross appeal of the complainant he seeks to modify the judgment of the su- [illegible] in regard to the parties to the dis- distributed, one [illegible] the deceased mother of the fund should be other half among his twelve half brothers of sisters (children of the minor's father), to the exclusion of the minor's half brother, Grover William Harrison (the son of his mother by her husband Harrison), who by the judgment of the court is permitted to share in such distribution. As the trial court made that decree and the complainant did not appeal from it, and the supreme court has simply affirmed that provision, the complainant's appeal from the latter decree does not, in our opinion, bring up this question for review. All that the complainant could claim in the supreme court

was the affirmance of the judgment as given in the court below, because, as he had not appealed from it, he could not be heard to ask for its modification or reversal. When the supreme court affirmed that provision of the decree the complainant's appeal from that court would not bring the propriety of the provision for distribution before us.

Upon his cross appeal the complainant also asks for a modification of the decree with regard to the rate of interest charged against defendant, claiming it ought to be 12 instead of 6 per cent. We cannot interfere with the rate charged in the original decree, because the complainant has not appealed therefrom, and we do not thiuk we ought to interfere with the rate of 6 per cent charged by the supreme court upon the total amount of the original decree from the time it was entered. It was to a certain extent discretionary with the latter court, and we think we are not called upon to alter and increase the rate charged by that court.

Although the complainant herein did not appeal from the original decree entered by the trial court, yet upon defendant Harrison's appeal therefrom the supreme court modified the 327] *decree in some particulars, and specially in regard to costs, charging them upon the fund instead of against the defendant Harrison individually, as was the decree below. This was a modification of the judgment against the interest of and unfavorable to the complainant herein, as it reduced the amount of the fund for distribution. This question can be reviewed upon the complainant's cross appeal. We are of opinion that there was no proper ground for the modification of the decree as to costs made by the trial court.

The defendant Harrison, by the finding of the court, has wilfully obstructed the distribution of the assets of this estate, and by his misconduct has rendered it necessary that the complainant should obtain possession of them by the institution of this suit, and the necessity for commencing it arose entirely out of his wrongful conduct. This is the finding as approved by the supreme court of the territory. The other findings, showing the false accounts, the wrongful conversions of these moneys, and the wrongful and persistent refusal to pay them over on demand made by the administrator, altogether make out a gross case against the defendant, and leave no reasonable foundation for permitting him, as the supreme court does, to defend this action entirely at the expense of the fund and with no personal responsibility for costs. We see no plausible ground for this privilege.

A clerical error seems to have been made in the distribution by the supreme court. One twenty-sixth part of the estate is undisposed of by the judgment. It provides for the payment of seventeen twenty-sixths to defendant Harrison, and distributes the remaining nine twenty-sixths, one ninth to each of *eight* named distributees. One name has been accidentally omitted. This can be corrected on application by the court below.

The provision making all the costs payable out of the fund cannot stand, and the decree should charge defendant Harrison with costs personally, as in the original decree entered by the trial court, with the exception that the amount of the decree of the special master is retained at $500. All the costs in this court must be paid by the defendant *Harrison[328 personally. *The decree of the Supreme Court of New Mexico is therefore reversed* on the cross-appeal of Perea, and the cause remanded, with instructions to enter judgment in conformity with this opinion, with liberty to change the distribution upon application if it shall appear proper.

LEWIS C. KARRICK, *Appt.*,
v.
CHARLES L. HANNAMAN.

(See S. C. Reporter's ed. 328-339.)

Review of territorial judgment—dissolution of partnership—liability of continuing partner—decree on accounting.

1. Upon appeal from the supreme court of a territory this court cannot review conflicting evi-

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NOTE.—*As to partnership, what constitutes*, see note to Tyler v. Waddingham (Conn.) 8 L. R. A. 657.

For what business; how proved,—see note to Hallstead v. Curtis (Pa.) 13 L. R. A. 370.

As to commercial paper, see note to Lee v. First Nat. Bank (Kan.) 11 L. R. A. 238.

As to when partner liable on contracts in firm name after dissolution; what notice of dissolution is necessary to avoid liability,—see note to Lovejoy v. Spafford, 23: 851.

As to partnership realty, conveyance of; rights of partners to convey,—see note to Gibson v. Warden, 20: 797.

As to how far partners are liable for each other's acts, see note to Nelson v. Hill, 12: 81.

As to effect of admissions of partner, after dissolution, on his copartners, see note to Thompson v Bowman, 18: 736.

Wrongful dissolution of partnership; damages for; secret profits made by misuse of partnership funds by one partner; ground of dissolution; wrongful disposal, destruction, or use of partnership property; fiduciary relation of partner; continuance of business after dissolution, or after death of partner; interest, when allowed on accounting; surviving partner is trustee; business carried on by partner in competition with the firm; exclusion of one partner; embarking in new business; liability of receiver; bankruptcy of one partner; notice of dissolution.

One partner may maintain an action at law against another for a breach of the copartnership articles in dissolving before the period therein limited. Bagley v. Smith, 10 N. Y. 489, 61 Am. Dec. 756.

The damages in such an action are the profits which would have accrued to the plaintiff from the continuation of the partnership business and which are lost by the unauthorized dissolution. *Idem.*

Evidence of the actual gains of the partnership during its continuance is admissible as an element in determining the value of the prospective profits. *Idem.*

The rule is firmly established that a party to a contract may recover as damages the loss of the benefits and gains he would have realized from its performance. This measure of damages has been applicable to a great variety of agreements. Taylor

dence; its authority is limited to the question whether the facts found support the judgment.

2. A partner who assumes to dissolve the partnership before the end of the term agreed on in the partnership articles is liable, in an action at law against him by his copartner for the breach of the agreement, to respond in damages for the value of the profits which the plaintiff would otherwise have received.

3. In a court of equity, a partner who after a dissolution of the partnership carries on the business with the partnership property is liable, at the election of the other partner or his representative, to account for the profits thereof, subject to proper allowances.

4. A partner who ousts his copartner from the business before the expiration of a stipulated period of copartnership, during which each is entitled to an equal share of the profits and a monthly allowance for expenses, cannot complain of a decree which requires him to account for and pay over the ousted partner's share of the capital and one half of the wrongful disbursements, and also one half of the net profits of the business made after the ousting, while monthly allowances to the subsequent period are made to him only, and not to the ousted partner; and it is immaterial in this respect whether the ousting is deemed to effect a dissolution of the partnership or not.

[No. 12.]

Argued October 27, 28, 1896. Decided November 29, 1897.

APPEAL from a decree of the Supreme Court of the Territory of Utah modifying and as modified affirming the decree of the Third Judicial District Court of that Territory in an action brought by Charles L. Hannaman, plaintiff, against Lewis C. Karrick for the dissolution of a partnership, the appointment of a receiver, the application of the partnership property to the partnership debts, and a division of the remainder between the partners the said parties to the action. *Affirmed.*

See same case below, 9 Utah, 236.

Statement by Mr. Justice **Gray:**

This was a suit brought April 17, 1890, in the third judicial district court of the territory of Utah, by Hannaman against Karrick for the dissolution of a partnership, formed Feb-

v. Bradley, 39 N. Y. 129; Masterton v. Brooklyn, 7 Hill, 61, 42 Am. Dec. 38; Bagley v. Smith, 10 N. Y. 489, 61 Am. Dec. 756; Wakeman v. Wheeler & Wilson Mfg. Co. 101 N. Y. 205, 54 Am. Rep. 676; Savery v. Ingersoll, 46 Hun, 179.

The fact that the whole capital provided for by articles of copartnership has been lost is sufficient ground for a refusal by one of the partners to further continue the business, although the time limited by the articles for the continuation of the copartnership has not expired. Van Ness v. Fisher, 5 Lans. 236.

Although copartnership property be transferred to a third person by one of two partners, the other partner need not rely upon his action for damages; he has a right to compel a surrender of his share of the proceeds which have been received by his copartner upon the sale of the partnership property. Tannenbaum v. Armeny, 81 Hun, 582.

A partner who has unlawfully assumed to destroy a partnership contract and to make a new one for his own benefit should be deemed to hold it for the benefit of the firm. Spears v. Willis, 69 Hun, 409.

A partner occupies a fiduciary position with regard to his copartners and the funds of the firm, and will not be permitted to make a personal profit out of the use of such funds. 1 Lindley, Partn. 2d Am. ed. 303; Featherstonhaugh v. Fenwick, 17 Ves. Jr. 298; Anderson v. Lemon, 8 N. Y. 236; Mitchell v. Reed, 61 N. Y. 123, 19 Am. Rep. 252; Riddle v. Whiteroud, 35 U. S. 621 (34: 283); Baldwin v. Von Mich- 20 L. R. Alun. 43; Holmes v. Gilman, 138 N. Y. 377,

Although partners term occupy the position in the strict sense of the other and towards the firm funds, towards each is one of a fiduciary nature, calling for the maintenance and exercise of the greatest good faith between them. Such a relationship authorizes the same remedy on behalf of the wronged partner as would exist against a trustee, strictly so-called, on behalf of a *cestui que trust*. Re Hallett, L. R. 13 Ch. Div. 696, 712; Holmes v. Gilman, 138 N. Y. 377, 20 L. R. A. 566.

All the partnership property and partnership contracts should be managed for the equal benefit of all partners according to their respective shares and interests therein. If, therefore, any one partner should stipulate clandestinely for any private advantage or benefit to himself to the disadvantage or in fraud of his partners, he will in equity be compelled to divide such gains with them. 2 Story, Partn. § 174; 2 Kent, Com. 51; Spears v. Willis, 151 N. Y. 452.

The interests of one partner in a mining lease which is surrendered by the other partners several months before its expiration continues under a new lease taken by them. Continental Divide Min. Invest. Co. v. Bliley, 23 Colo. 160, 3 Gen. Dig. N. S. tit. *Partnership*, 65.

Where A and B carried on trade, as partners, with the funds of A, in the name of B, and without any dissolution of the partnership or rendering any account to A, B afterwards, without the consent of A, entered into a partnership with C, and carried into the new concern all the funds of the former partnership; and A, on the death of B, filed a bill against his administratrix and C, his surviving partner, for a discovery and account: and C demurred to so much of the bill as sought an account from him on the transactions and profits of the partnership between him and the intestate, and of the personal estate of the intestate in his hands,— the demurrer was overruled. Long v. Majestre, 1 Johns. Ch. 305.

There is an implied obligation among partners to use the property for the benefit of those to whom it belongs. Pomeroy v. Benton, 57 Mo. 544.

Where one partner withdraws funds from the copartnership, contrary to the articles of copartnership, and employs them in trade, he may be required to account, not only for the interest, but for the profits, of that trade. Dimond v. Henderson, 47 Wis. 176.

[illegible] funds in his [illegible] must account not only for moneys or uses the partnership moneys so withdrawn, but for [illegible] speculations, he trade. Stoughton v. Lynch, 1 Johns. Ch. 467.

This principle of this case is restricted to cases in which the partnership funds are clandestinely withdrawn, or fraudulently misappropriated, by one or more partners, without the consent and to the injury of the others. McAdams v. Hawes, 9 Bush, 22.

Where one or more partners of a firm continue the business after dissolution of a firm by death or otherwise, the retiring partner, or the legal representatives of the deceased partner, are entitled to his share of the profits after dissolution. Phillips v. Reeder, 18 N. J. Eq. 99.

Where a partner withdrew money from the concern for his expenses, which claim was rejected as

ruary 3, 1886, by an agreement in writing, by which they agreed to become partners in a mercantile and laundry business for the term of five years from that date, with a capital stock of $25,000, of which the plaintiff was to furnish $5,000, and the defendant $20,000; the defendant lent the plaintiff the sum of $5,000 for five years, for which the plaintiff gave a promissory note, payable at the end of that time, and secured by mortgage upon his interest in the partnership property; the plaintiff was to give his entire time and attention to the partnership business, and the defendant was to devote to it only such time as he should see fit; the plaintiff to have the control and management of the business generally and entirely, except as the defendant might designate, and such matters to be subject to mutual agree-
329] ment; one half of the *net profits of the business to go to the defendant in repayment of $15,000 of the capital stock furnished by him, and the other half to be allowed to remain in the business, except that each partner might draw out not exceeding $125 a month for personal expenses; the profits and losses to be shared equally, and neither party to have any other salary or compensation for services; and the title and interest of the partners in the partnership property to be proportionate to their respective contributions to the capital.

The complaint alleged the following facts: The parties carried on business in conformity with the agreement until February 1, 1888, when the defendant took exclusive possession of all the partnership business, stock, books, and accounts, and of the premises where the business was carried on, and ever afterwards prevented the plaintiff from participating in any manner in the business or deriving any benefits therefrom. The plaintiff until that date performed his part of the agreement, and was ever after ready and willing to perform it, and so informed the defendant. From that date, the defendant wrongfully, and in fraud of the plaintiff's rights, carried on and controlled the partnership business for his own exclusive benefit, and applied to his own use from the proceeds and profits of the same large sums of money, exceeding the proportion to which he was entitled. On January 1, 1890, the defendant, without the plaintiff's knowledge or assent, sold and delivered to the Bast-Marshall Mercantile Company all the assets and property of the partnership. The complaint prayed for a dissolution of the partnership, the appointment of a receiver, an injunction

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being against the covenant in the articles of copartnership, he was chargeable with interest on the excess drawn beyond the amount necessary for his expenses. Beacham v. Eckford, 2 Sandf. Ch. 126.

Interest is not allowed generally upon partnership accounts until after a balance is struck between the parties. Allen v. Woonsocket Co. 13 R. I. 148; Dexter v. Arnold, 3 Mason, 284; Gyger's Appeal, 62 Pa. 73. 1 Am. Rep. 382; Musselman's Appeal, 62 Pa. 81. 1 Am. Rep. 385; Adams v. Gale, 2 Atk. 106; Child v. Gibson, 2 Atk. 603; Wilkins v. Hunt, 2 Atk. 151; Littlehales v. Gascoyne, 3 Bro. Ch. 73; Franklin v. Frith, 3 Bro. Ch. 433; Newton v. Bennet, 1 Bro. Ch. 359; Perkins v. Baynton, 1 Bro. Ch. 375; Foster v. Foster, 2 Bro. Ch. 616; Ratcliffe v. Graves, 1 Vern. 196; Longmore v. Brown, 7 Ves. Jr. 125; Piety v. Stace, 4 Ves. Jr. 620; Hollister v. Barkley, 11 N. H. 501; Honore v. Colmesnil, 7 Dana, 201.

A partner who draws out money from copartnership funds is not chargeable with compound interest, but with simple interest only on the sums drawn out; unless it appears that he has traded or speculated with the money, and made a profit on it, and refused, on being called on for the purpose, to disclose the profits. Stoughton v. Lynch, 2 Johns. Ch. 209.

The period of dissolution is the proper time to make a rest and adjust the balance of the partnership account; and the partner against whom the balance is found is chargeable with interest. Andrews v. Andrews, 3 Bradf. 100; Johnson v. Hartshorne, 52 N. Y. 178.

A surviving partner though he has a legal right to the partnership effects, yet, in equity, is considered a trustee to pay the debts and dispose of the effects for the benefit of himself and the estate of his deceased partner. Skidmore v. Collier, 8 Hun, 50.

The capital of the deceased partner is to be treated as trust property; and when it has been employed in carrying on the business of the concern, so much of the subsequent profits as can be attributed to the employment of such capital must be accounted for by those who have used it. Skidmore v. Collier, 8 Hun, 50.

Any business carried on by a partner in competition with that of the firm renders him accountable to them for all the profits thereby made. 17 Am. & Eng. Enc. Law, 1232.

Where one partner procures insurance on partnership property and with partnership funds in his own name, and for his own benefit, he must account for it to the firm. Tebbetts v. Dearborn, 74 Me. 392.

In Murrell v. Murrell, 33 La. Ann. 1233, it was held that where one partner embarks firm assets in another firm, his copartner is not entitled to profits but to damages only.

If one partner stipulates clandestinely with third parties, for profits or advantages to himself, his copartner is entitled to share therein. Kilbourn v. Lutta, 5 Mackey, 304, 60 Am. Rep. 373.

Shipments made by one partner to another, who is at a distance, made in the ordinary course of business, will be deemed to be on their joint account, unless the contrary is conclusively shown. The Francis, 1 Gall. 618; The San José Indiano, 2 Gall. 268.

Where a number of the partners exclude another of their number, denying that he is a partner, subsequent purchases made by them inure to his benefit. Settembre v. Putnam, 30 Cal. 490.

In Fletcher v. Ingram, 46 Wis. 191, copartners were held liable for conversion of money used by one partner to make purchases.

A partner is not bound to account for his share of commissions paid to another firm of which he is a member, on an employment made with the consent of his copartners. Freck v. Blakiston, 83 Pa. 474.

Where two attorneys are partners and sales of railroad stock on commission are included in their business by custom, each partner is entitled to share in the commissions earned by the other. Sanderson v. Sanderson, 20 Fla. 292.

Where, pursuant to a written contract of partnership, one partner furnishes the other with money to go to California to dig gold, and when he arrives there he goes into a trading business from which profits are derived, it will be regarded as for their joint benefit, and he will be required to account for such profits. Brigham v. Dana, 29 Vt. 1.

A continuance of the business with partnership assets or an embarking in new ventures with the capital of his associates by one partner, after dissolution, in whatever manner it may have been effected, renders him accountable to his copartners. Long v. Majestre, 1 Johns. Ch. 305; Ogden v.

against interfering with the property, its application to the payment of the partnership debts and a division of the remainder between the partners, the setting aside and cancelation of any transfer or assignment to the Bast-Marshall Mercantile Company, and an account.

The defendant Karrick, in his answer, admitted the partnership, and his own taking possession on February 1, 1888; but denied the other allegations of the complaint; and alleged that the plaintiff mismanaged the business in various particulars specified, and that when the [330]defendant took possession *the partnership was insolvent and heavily in debt, and the plaintiff was owing to it a large sum of money and was insolvent, and the partnership was then dissolved by mutual consent.

The Bast-Marshall Mercantile Company was originally made a defendant, and filed a separate answer. But the plaintiff afterwards dismissed his suit as against that company; the case was referred, by consent of the remaining parties, to a referee to report his findings of fact and conclusions of law to the court; and at the hearing before the referee much evidence was introduced by either party in support of his allegations and denials.

On October 5, 1891, the referee made his report, in which he set forth all the evidence; and by which he found that the facts were as alleged in the complaint, and were not as alleged in the answer of Karrick; and stated an account, resulting as follows:

Unadjusted and undivided profits January 1, 1890, including $2,616.25 then uncollected by defendant		$22,858 18
Profits realized after January 1, 1890		99 90
Wrongfully disbursed by defendant after that date		379 50
		23,337 58
Unavoidable losses after January 1, 1890		2,005 12
Net profits		21,332 46
Of which, plaintiff is entitled to one half		10,666 23
Capital put by plaintiff into the business		5,208 89
		15,875 12
Due from plaintiff to defendant on note mentioned in partnership agreement, without interest		5,000 00
Principal sum due to plaintiff		10,875 12
Interest at 8 per cent yearly from January 1, 1890, to October 5, 1891, on $8,258.87, the difference between $10,875.12 and $2,616.25 uncollected January 1, 1890		1,165 41
Total amount due to plaintiff		$12,040 53

*From the findings of fact the referee[331 concluded, as matter of law, that the partnership

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Astor, 4 Sandf. Ch. 311; Skidmore v. Collier, 8 Hun, 50.

Where a partner holds exclusive possession and excludes the other he is responsible for the restoration of the excluded partner's interest and for its use, to be paid out of the property as a prior claim. Adams v. Kable, 6 B. Mon. 384, 44 Am. Dec. 772; Jones v. Morehead, 3 B. Mon. 377.

Property purchased on partnership account by one partner during the period of his exclusion of his copartner must be accounted for. Settembre v. Putnam, 30 Cal. 490.

A partner who is appointed a receiver of the firm, who speculates with the funds, is accountable for the profits, not to his copartners, but to the court whose officer he is. Whitesides v. Lafferty, 3 Humph. 150.

Where a partnership is continued by executors, and afterwards terminated by them, the firm is no longer accountable for profits. Colgate v. Colgate, 23 N. J. Eq. 372.

Where a partner, who took the assets to wind up the concern, appropriated to himself certain bonds, then worth 78 cents on a dollar, and which afterwards became worth more, he was held chargeable with the present value of those retained, and the value at the time of sale of those sold. Richards v. Burt, Iowa, 723.

A partner in firm's premises after dissolution, exclusive possession of the their rental value. Liquidation is chargeable with Stoughton v. Lynch, 2 Johns. Ch. 209, 109 Ill. 94; Peace, 4 Ired. Eq. 223, 45 Am. Dec. 514; Tennant v. Guy, 19 N. Y. S. R. 667.

Where P undertook, without any just cause, to exclude H, his partner, from an interest in a valuable contract, in which they were equally concerned, and to take in K in his stead, and K, knowing that P could not rightfully exclude H, conspired with P to accomplish that purpose and undertook to appropriate to himself the profits of the contract which of right belonged to H, these acts and doings of K and P had no effect on the rights of H, and he is entitled to one half of the profits of the contract. Pearce v. Ham, 113 U. S. 585 (28: 1067).

When a partnership is dissolved by death of a member, or otherwise, and the other members continue the business, or enter upon new enterprises with the firm property, they may be required to account to the outgoing partner or his representative for the resulting profits. And in some cases it may be optional on his part whether they be required to allow to him a due share of the profits or interest upon his share of the capital. Crawshay v. Collins, 15 Ves. Jr. 218, 1 Jac. & W. 267, 2 Russ. Ch. 325; Featherstonhaugh v. Fenwick, 17 Ves. Jr. 298; Wedderburn v. Wedderburn, 2 Keen, 722, 1 Myl. & C. 41.

And the same rule is applicable where a sale by one member of a firm to his partners is set aside for fraud or other cause. Cook v. Collingridge, Jac. 607; King v. Leighton, 100 N. Y. 386.

The bankruptcy of one member of a firm only works a dissolution of the partnership to the extent of disabling it from entering into new engagements or assuming new obligations, except such as are required to complete its unfinished business and to wind up its affairs. King v. Leighton, 100 N. Y. 386.

It is the duty of the solvent members to take possession of the firm assets, perform its contracts, extinguish its liabilities, and close up its business, and it is the right of the representatives of the bankrupt partner, unless there are peculiar circumstances exempting the particular case in ing, not ... rule, to have an account- ness of the firm, ... completed business unfinished at the dissolution completed afterwards, and, at their option, to ... may be realized from new business entered into and carried on with the assets of the firm. King v. Leighton, 100 N. Y. 386.

In dissolution of a partnership when not the result of mutual agreement there must be notice by the party desiring a dissolution, to his copartner, of his election to terminate the partnership, or his election must be manifested by unequivocal acts or circumstances brought to the knowledge of the other party which signify the exercise of the will of the former that the partnership be dissolved. 2 Lindley, Partn. bk. 4, p. 572, § 1, and cases cited; Spears v. Willis, 151 N. Y. 449.

was not dissolved; but that it expired February 3, 1891, according to the terms of the agreement; that the profits and losses of the partnership business should be divided equally between the parties, after crediting each with his advances to and investments in the partnership; and that the sum of $12,040.53 was therefore owing to the plaintiff. The court adopted the referee's findings of fact and conclusions of law, and entered a decree accordingly.

The defendant appealed to the supreme court of the territory, which held that, for the reasons stated in its opinion (the material part of which upon this point is copied in the margin†), the defendant could not dissolve the 332] partnership *without reasonable cause, and without the plaintiff's consent, before the expiration of the term stipulated in the partnership articles; and therefore that the partnership 333]had not *been dissolved by the acts of the defendant; but that, as each partner was permitted by those articles to draw out of the partnership $125 a month for personal expenses, the defendant should have been allowed the sum of $3,000 as personal expenses for the two years during which he conducted the business of the firm; and that the judgment should be modified by deducting one half of this sum, and, so modified, be affirmed, for the sum of $10,540.53. 9 Utah, 236. The defendant appealed to this court.

Messrs. **Jeremiah M. Wilson,** *J. G. Sutherland, A. Howat,* and *C. W. Bennett,* for appellant:

A partner can, at any time, if he believes his interest to be endangered by the manner in which the business is being conducted, or if his relations with his associates have become so unpleasant as to be productive of discord and strife, in good faith and without any fraudulent or evil motive, terminate the partnership by his own act, leaving the other member or members of the firm to his or their action for damages upon the contract for any injury he or they may have received thereby.

17 Am. & Eng. Enc. Law, 1097, 1098; *Skinner* v. *Dayton*, 19 Johns. 513, 10 Am. Dec. 286; *Solomon* v. *Kirkwood*, 55 Mich. 256; *Slemmer's Appeal*, 58 Pa. 155, 98 Am. Rep. 248; *Mason* v. *Connell*, 1 Whart 381; *Blake* v. *Dorgan*, 1 G. Greene, 537; *Cape Sable Company's Case*, 3 Bland, Ch. 606; *Marquand* v. *New York Mfg. Co.* 17 Johns. 525; *Monroe* v. *Hamilton*, 60 Ala. 226; *Miller* v. *Brigham*, 50 Cal. 615; *Fourth Nat. Bank* v. *New Orleans & C. R. Co.* 78 U. S. 11 Wall. 624 (20: 82); Bates, Partn. p. 605, § 577; Story, Partn. § 778.

†"Where the partnership is merely at will, the right of one partner to terminate it must be conceded; but where by agreement it is to continue for a time stipulated the party seeking a dissolution before the expiration of the time ought in justice at least to be required to act in good faith, and at a reasonable time, and in a reasonable manner. In the case of a partnership for a stipulated time of duration, where the business has been established, is becoming profitable, and has good future prospects, to allow one of the partners *sua sponte* to expel the other and dissolve the partnership with a view to appropriate the business to himself would be to adopt a doctrine at once inequitable and unsupported by either reason or justice. There seems to be no good reason why a person should be allowed to commit a breach of his contract in such case, while in all other cases of flagrant violation, not within the partnership, he would be compelled to specifically perform if it was within his power to do so. Why should a partner be thus allowed to ruin the business of the firm from mere caprice, or of his own volition, without cause, and in violation of his agreement, and sacrifice the entire object of the partnership? That such a violation may entitle the injured partner to damages is no answer, for damages, in many cases, must necessarily prove to be utterly inadequate to compensate for the destruction of a profitable and growing business; and besides, this mode of redress is usually slow and unsatisfactory, and is not a remedy that will or can do complete justice between the parties. Where there is such a breach between the partners as to render continuance in [illegible] its formation, or if for [illegible] the partnership ought to be dissolved before the expiration of the term, then a court of equity is competent to grant relief. But it would scarcely seem to come within the principles of justice to permit one partner to expel another from a profitable business for some real or fancied wrong or mismanagement, and then continue the business himself, and profit by his own wrong, responsible only in damages.

"Mr. Justice Story, in his Commentaries on the Law of Partnership, in § 275, speaking of the power of one partner to dissolve the partnership where the time of duration is stipulated, says: 'In cases where the partnership is by the agreement to endure for a limited period of time the question whether it may within the period be dissolved by the mere act or will of one of the partners, without the consent of all the others, does not seem to be absolutely and definitely settled in our jurisprudence, although it would not seem, upon principle, to admit of any real doubt or difficulty. Whenever a stipulation is positively made that the partnership shall endure for a fixed period, or for a particular adventure or voyage, it would seem to be at once inequitable and injurious to permit any partner at his mere pleasure to violate his engagement, and thereby to jeopard, if not sacrifice, the whole objects of the partnership; for the success of the whole undertaking may depend upon the due accomplishment of the adventure or voyage, or the entire time be required to put the partnership into beneficial operation.' In Gerard v. Gateau, 84 Ill. 121 [25 Am. Rep. 438], Mr. Justice Scott, delivering the opinion of the court, said: 'A party who is the author of the ill-feeling between himself and partners ought not to be permitted to make the relation he has induced the ground of a dissolution of the partnership. His conduct may have been taken with a view to that very result, and it would be inequitable to allow him advantage from his own wrongful acts. It would allow one partner, at his election, to put an end to his own deliberate contract, when the other had been guilty of no wrongful act or omission of duty. The results flowing from a premature dissolution of a partnership might be most disastrous to a partner who had embarked his capital in the enterprise.' So in Henn v. Walsh, 2 Edw. Ch. 129, the vice chancellor said: 'A partnership agreement, like any other, is b[illegible]ing upon the parties. They must adhere from terms. Neither partner is at liberty [illegible] a sufficient it against the will of the other; one partner will [illegible]. Mere dissatisfa[illegible] a bill for a dissolution, not justify him [illegible]ross agreement it is to continue where [illegible] term; and the court will not interfere to dissolve the contract upon such ground.'

"The views thus expressed have the apparent support of most elementary writers and seem to be in conformity with the doctrine prevailing in England. The contrary doctrine, if not indefensible, is founded on reasons exceedingly artificial. It is based on the ground that one partner has the rights to found his claim, real or otherwise, to immediate safety and indemnity on an obvious injury to the interests and rights of another, which is alike inequitable and unjust; and we think it is not supported by the weight of authority. Story, Partn. §§ 275, 276; Story, Eq. Jur. § 673; Lindley, Partn. [bk. 4, c. 1 (5th ed.)] p. 575, § 2; Ferrero v. Buhlmeyer, 34 How. Pr. 33; Pearpoint v. Graham, 4 Wash. C. C. 232; Peacock v. Peacock, 16 Ves. Jr. 49; Cash v. Earnshaw, 66 Ill. 402; Van Kuren v. Trenton Locomotive & Mach. Mfg. Co. 13 N. J. Eq. 302."

Messrs. **Joseph L. Rawlins** and *Parley P. Williams*, for appellee:

Where one partner wrongfully excludes his copartner, retains the partnership assets and property, continues the business, and makes profits, he is bound to account to such copartner either for his share of the profits or for interest on the capital, at the latter's option.

Holmes v. *Gilman*, 138 N. Y. 369, 20 L. R. A. 566; Collyer, Partn. § 324; 3 Kent, Com. 12th ed. 73, 74; 2 Bates, Partn. § 794; *Freeman* v. *Freeman*, 136 Mass. 263; *Hartman* v. *Woehr*, 18 N. J. Eq. 386.

A partnership formed for a definite, unexpired period cannot be terminated at any time by either party without cause.

23 Am. L. Reg. N. S. 689; Story, Partn. § 275; *Berry* v. *Folkes*, 60 Miss. 576; *Van Kuren* v. *The Trenton Locomotive & Mach. Mfg. Co.* 13 N. J. Eq. 302; *Hartman* v. *Woehr*, 18 N. J. Eq. 383; *Howell* v. *Harvey*, 5 Ark. 270, 39 Am. Dec. 376; Gow, Partn. chap. 5, §§ 1, 219, 225, 226, 288; 3 Collyer, Partn. 2d ed. bk. 1, chap. 2, p. 62, § 21; Kent, Com. 4th ed. p. 61. § 43; *Peacock* v. *Peacock*, 16 Ves. Jr. 56; *Crawshay* v. *Maule*, 1 Swanst. 495; *Pearpoint* v. *Graham*, 4 Wash. C. C. 234; *Johnston* v. *Dutton*, 27 Ala. 245.

A court of equity will refuse to dissolve a partnership or appoint a receiver at the instance of the wrongdoing partner.

Seighortner v. *Weissenborn*, 20 N. J. Eq. 178.

A partner who, by his own wilful misconduct, has caused such want of confidence, will not be allowed to take advantage of it to procure a dissolution.

Harrison v. *Tennant*, 21 Beav. 482; *Baxter* v. *West*, 1 Drew & S. 173; Lindley, Partn. 185, 186; Collyer, Partn. § 297.

As Karrick had no legal power to drive Hannaman out of the partnership, so he had no right to insist that Hannaman should accomplish the same thing by an immediate suit; these alleged rights are reciprocal, both could be done or neither; if Karrick could not drive Hannaman out, then it followed that Karrick could not insist on Hannaman bringing suit for dissolution.

2 Lindley, Partn. 2d Am. ed. 1263, 1264.

Mr. Justice **Gray** delivered the opinion of the court:

Much of the argument for the appellant was devoted to a discussion of conflicting evidence, which is not open to examination by this court, its authority upon appeal from the supreme court of a territory being limited to the question whether the facts found by that court support its judgment. *Haws* v. *Victoria Copper Min. Co.* 160 U. S. 303 [40: 436]; *Harrison* v. *Perea*, just decided [*ante*, 478].

The principal question of law discussed in the opinion of the supreme court of the territory, and at the argument in this court, was whether a partnership, which by the copartnership articles is to continue for a specified time, can be dissolved by one partner at his own will without the assent of the other before the expiration of that time.

It is universally conceded that a contract of partnership containing no stipulation as to the **334**]time during which it shall *continue in force does not endure for the life of the partners, or of either of them, nor for any longer time than their mutual consent, may be dissolved by either partner at his own will at any time. *Peacock* v. *Peacock*, 16 Ves. Jr. 49; *Crawshay* v. *Maule*, 1 Swanst. 495; *Neilson* v. *Mossend Iron Co.* L. R. 11 App. Cas. 298; 3 Kent, Com. 53; Story, Partn. § 269.

Upon the question how far the status or relation of a partnership, which by the partnership agreement is to continue for a certain number of years, can be determined by one partner without the consent of the other before the expiration of that time, there has been some difference of opinion.

The principal reasons and authorities in favor of the position that a contract of partnership for a definite time cannot be dissolved at the mere will of one partner are stated or referred to in the opinion of the supreme court of the territory in this case, reported in 9 Utah, 236.

Those which support the opposite view may be summed up as follows: A contract of partnership is one by which two or more persons agree to carry on a business for their common benefit, each contributing property or services, and having a community of interest in the profits. It is in effect a contract of mutual agency, each partner acting as a principal in his own behalf and as agent for his copartner. *Meehan* v. *Valentine*, 145 U. S. 611 [36: 835]. Every partnership creates a personal relation between the partners, rests upon their mutual consent, and exists between them only. Without their agreement or approval, no third person can become a member of the partnership, either by act of a single partner, or by operation of law; and the death or bankruptcy of a partner dissolves the partnership. 3 Kent, Com. 25, 55, 58; *Wilkins* v. *Davis*, 2 Low. Dec. 511. So, an absolute assignment by one partner of all his interest in the partnership to a stranger dissolves the partnership, although it does not make the assignee a tenant in common with the other partners in the partnership property. *Fourth Nat. Bank* v. *New Orleans & Carrolton Railroad Co.* 78 U. S. 11 Wall. 624, 628 [20: 82, 83]; *Marquand* v. *New York Mfg. Co.* 17 Johns. 525, 528, 535. No partnership can efficiently or beneficially *carry on [**335** its business without the mutual confidence and co-operation of all the partners. Even when, by the partnership articles, they have covenanted with each other that the partnership shall continue for a certain period, the partnership may be dissolved at any time, at the will of any partner, so far as to put an end to the partnership relation and to the authority of each partner to act for all; but rendering the partner who breaks his covenant liable to an action at law for damages, as in other cases of breaches of contract. *Skinner* v. *Dayton*, 19 Johns. 513, 538 [10 Am. Dec. 286]; 3 Kent, Com. 54, 55, 62; *Cape Sable Co.'s Case*, 3 Bland, Ch. 606, 674; *Monroe* v. *Conner*, 15 Me. 178, 180 [32 Am. Dec. 148]; *Mason* v. *Connell*, 1 Whart. 381, 388; *Slemmer's Appeal*, 58 Pa. 168, 176 [98 Am Dec. 255]; *Blake* v. *Dorgan*, 1 G. Greene, 537, 540; *Solomon* v. *Kirkwood*, 55 Mich. 256, 259, 260. According to the authorities just cited, the only difference, so far as concerns the right of dissolution by one partner, between a partnership for an indefinite period and one

for a specified term, is this: In the former case, the dissolution is no breach of the partnership agreement, and affords the other partner no ground of complaint. In the latter case, such a dissolution before the expiration of the time stipulated is a breach of the agreement, and as such to be compensated in damages. But in either case the action of one partner does actually dissolve the partnership.

A court of equity, doubtless, will not assist the partner breaking his contract to procure a dissolution of the partnership, because, upon familiar principles, a partner who has not fully and fairly performed the partnership agreement on his part has no standing in a court of equity to enforce any rights under the agreement. *Rutland Marble Co.* v. *Ripley*, 77 U. S. 10 Wall. 339, 358 [19: 955, 961]. But, generally speaking, neither will it interfere at the suit of the other partner to prevent the dissolution, because, while it may compel the execution of articles of partnership so as to put the parties in the same position as if the articles had been executed as agreed, it will seldom, if ever, specifically compel subsequent performance of the contract by either party, the contract of partnership being of an essen-
336] tially personal character. *Batten, Specific Performance, 165–167; 3 Lindley, Partn. chap. 10, § 4; Pom. Specific Performance, § 290; *Scott* v. *Rayment*, L. R. 7 Eq. 112; *Satterthwait* v. *Marshall*, 4 Del. Ch. 337, 354; *Reed* v. *Vidal*, 5 Rich. Eq. 289; *Somerby* v. *Buntin*, 118 Mass. 279, 287 [19 Am. Rep. 459]. Especially, where by the partnership agreement, as in the case at bar, the defendant is to supply all or most of the capital, and the plaintiff is to furnish his personal services, the agreement cannot be specifically enforced against the plaintiff, and will not be enforced against the defendant. *Stocker* v. *Wedderburn*, 3 Kay & J. 393, 404; *Buck* v. *Smith*, 29 Mich. 166 [18 Am. Rep. 84].

In the somewhat analogous case of a contract of hiring and service, it is well settled that a court of equity cannot compel the performance of the service, although it may in some cases enforce a negative stipulation not to serve any third person within the time agreed. *Dietrichsen* v. *Cabburn*, 2 Phill. Ch. 52, 59, and cases cited; *Lumley* v. *Wagner*, 1 De G. M. & G. 604; *Wolverhampton & Walsall Railway Co.* v. *London & Northwestern Railway Co.* L. R. 16 Eq 433, 440; *Whitwood Chemical Co* v. *Hardman* [1891] 2 Ch. 416; *Davis* v. *Foreman* [1894] 3 Ch. 654; 13 Law Quarterly Review, 306; *Tobey* v. *Bristol*, 3 Story, 800, 824.

We are not prepared, therefore, to assent to the opinion of the court below that a partnership for a definite time cannot be dissolved by one partner at his own will, and without the consent of his copartner, within that time; and consequently that the partnership between these parties was not dissolved on February 1, 1888, when the defendant assumed exclusive possession and control of the business and property of the partnership, and excluded the plaintiff from any participation therein. But it is unnecessary to express an opinion upon this point, because, however it might be decided, it would not affect the conclusion in favor of the plaintiff in the present case.

Even if the partnership should be considered as having been actually dissolved at that date, yet the dissolution did not put an end to the plaintiff's right to his share in the property and the profits of the partnership. In a case in which both parties, *in their pleadings, [**337** assumed the partnership to have been dissolved, this court, speaking by Mr. Justice Miller, held that drunkenness and dishonesty on the part of one partner and his consequent exclusion from the business did not authorize his copartner, "of his own motion, to treat the partnership as ended and to take himself all the benefits of their joint labors and joint property," or exempt him from responsibility to account to the excluded partner. *Ambler* v. *Whipple*, 87 U. S. 20 Wall. 546, 555, 557 [22: 403–405]. And in a later case, the court, speaking by Mr. Justice Woods, said: "However the question may be decided, whether one partner may by his own mere will dissolve a partnership formed for a definite purpose or period, it is clear that upon such a dissolution one partner cannot appropriate to himself all the partnership assets, or turn over the share of his partner to another with whom he proposes to form a new partnership." *Pearce* v. *Ham*, 113 U. S. 585, 593 [28: 1067, 1070].

A partner who assumes to dissolve the partnership, before the end of the term agreed on in the partnership articles, is liable, in an action at law against him by his copartner for the breach of the agreement, to respond in damages for the value of the profits which the plaintiff would otherwise have received. *Bagley* v. *Smith*, 10 N. Y. 489 [61 Am. Dec. 756]; *Dennis* v. *Maxfield*, 10 Allen, 138. In a court of equity, a partner who, after a dissolution of the partnership, carries on the business with the partnership property is liable, at the election of the other partner or his representative, to account for the profits thereof, subject to proper allowances. *Ambler* v. *Whipple*, and *Pearce* v. *Ham*, above cited; *Hartman* v. *Woehr*, 18 N. J. Eq. 383; *Freeman* v. *Freeman*, 136 Mass. 260; *Holmes* v. *Gilman*, 138 N. Y. 369 [20 L. R. A. 566]; 3 Kent, Com. 64.

In the case at bar, by the terms of the agreement in writing, dated February 3, 1886, under which the partnership was formed, it was to continue for five years, that is to say, until February 3, 1891; the plaintiff was to contribute $5,000, and the defendant $20,000, to the capital; the defendant lent the plaintiff the sum of $5,000, for which the plaintiff gave his promissory note, payable at the end of five years; the plaintiff was to have the general management of the business; each *part-[**338** ner might draw out not exceeding $125 a month for personal expenses; the profits and losses were to be shared equally, and neither partner was to have any other compensation for services; and their title in the partnership property was to be in proportion to their contributions to the capital.

By the facts found by the courts of the territory, it appears that the business was carried on, according to the agreement, for two years, or until February 1, 1888; that the defendant then took exclusive possession of the property and the business of the partnership, and thenceforth carried on the business profitably and for his own benefit, and excluded the

plaintiff from any participation in the business or the profits, although the plaintiff was, as he informed the defendant, ready and willing to perform his part of the partnership agreement; and the defendant on January 1, 1890, a year before the expiration of the term agreed on, and without the plaintiff's knowledge or assent, sold out and delivered to a stranger all the property of the partnership.

The judgment of the court of first instance charged the defendant with the amount of capital paid by the plaintiff into the partnership, deducting, however, the whole amount of the plaintiff's promissory note payable to the defendant at the end of the term of five years; and further charged the defendant with half of the net profits of the business during the two years that he carried it on after ousting the plaintiff and before selling out to a stranger, and with half of the wrongful disbursements of the defendant afterwards. The supreme court of the territory, affirming the judgment in other respects, held that, as by the agreement of partnership each partner was permitted to draw out a certain sum monthly for personal expenses, the defendant was entitled to such an allowance monthly for the two years during which he conducted the business, and the same should be deducted from the profits to be accounted for, and the judgment in favor of the plaintiff reduced accordingly. The court made no such allowance to the plaintiff. And, in accordance with the partnership articles, neither partner was allowed any compensation for his services other than his half of the profits.

339] *It does not appear to have been suggested by the defendant in either of the courts of the territory, and could not successfully be contended, that in estimating the damages or the profits which the plaintiff was entitled to recover, any deduction should be made by reason of his not having performed during those two years the services, as manager of the business, which he had agreed by the partnership articles to perform. No finding as to the value of such services was made or requested; and the defendant himself not only refused to let the plaintiff, as he offered to do, perform them during those two years, but in his answer and at the hearing before the referee insisted that the plaintiff's services as manager were of no benefit to the partnership.

The result is that, whether the partnership should or should not be considered to have been dissolved when the defendant ousted the plaintiff and assumed the exclusive possession and control of the property and business of the partnership, the defendant has shown no ground for reversing or modifying the final decree of the supreme court of the territory.

Decree affirmed.

JOHN W. WARNER, Administrator of the Estate of Joseph W. Collis, Deceased, *Plff. in Err.*,

v.

BALTIMORE & OHIO RAILROAD COMPANY.

(See S. C. Reporter's ed. 339-349.)

Care required of a passenger taking a train—implied invitation to cross the track—questions for jury—contributory negligence of passenger.

1. The care required of a passenger crossing a track from a station platform to reach his train is not to be determined by the rules of law as to travelers upon a highway at a railroad crossing, as the railroad company owes the former a higher degree of care than it owes the latter.
2. The implied invitation to cross a railroad track from a station platform to a standing train waiting for passengers justifies one in assuming that the carrier's business is not so arranged as to expose him to the hazard of danger to life and limb unless he exercises the very highest degree of care and caution.
3. Questions of negligence are for the jury when reasonable men may fairly differ upon them.
4. The negligence of a person in crossing a railroad track from a depot platform to a standing train which he is about to take, when another train is coming which he does not see, is a question for the jury.

[No. 82.]

Argued November 1, 2, 1897. Decided November 29, 1897.

NOTE.—*As to care and precaution necessary in crossing a railroad track*, see note to Continental Improv. Co. v. Stead, 24: 403.

As to injuries in getting on and off railroad trains; injuries received by persons assisting passengers on board the cars; rights of persons assisting passengers on board; parties compelled to alight; children jumping on and off trains in motion; boarding moving train; alighting from moving trains: (a) generally; (b) alighting after being warned; (c) getting off before train stops; (d) getting off where train makes preliminary stop; (e) where train does not stop; (f) where party is directed by conductor or employee to alight; (g) alighting from a train in motion where it had stopped sufficient time at station; (h) where time is not given passengers to alight,—see note to Carr v. Eel River & E. R. Co. (Cal.) 21 L. R. A. 354.

Duty of railroad company to protect from injury one who has purchased a ticket and is about to take a train; duty of carrier of passengers, stations and platforms; injuries in getting on trains; running a train past another train standing at station; cable cars; contributory negligence.

A carrier who permits passengers to wait in its depot for trains is liable to one who after purchasing a ticket and so waiting is indecently assaulted by its station agent. St. Louis S. W. R. Co. v. Griffith, 12 Tex. Civ. App. 631.

A common carrier of passengers is bound to use a high degree of care for their safety so far as it is dependent upon the means employed and upon those engaged in the business, and the discharge of such duty requires the exercise of all the care and vigilance that human foresight may suggest. Hurley v. New York & B. Brew. Co. 13 App. Div. 167.

The duty of a common carrier of passengers is to exercise the highest practicable care for their

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment of that court affirming the judgment of the Supreme Court entered upon the verdict of the jury in favor of the defendant, the Baltimore & Ohio Railroad Company, in an action brought by John W. Warner, administrator of Joseph W. Collis, for damages for the killing of said Joseph W. Collis at defendant's station in the city of Washington. *Reversed*, and case remanded with directions for a new trial.

See same case below, 7 App. D. C. 79.

The facts are stated in the opinion.

Mr. **Rodolphe Claughton,** for plaintiff in error:

The responsibility of the carrier begins when the passenger presents himself for transportation; and this he may be said to do when he approaches the place of reception, for the purpose.

Cooley, Torts, 770.

Neither the purchase of a ticket nor the entry into the car is essential to create the relation of carrier and passenger. The plaintiff asked to buy and pay for a ticket, and he was entitled to the protection due to a passenger from the moment he entered upon the premises of the defendant.

Norfolk & W. R. Co. v. *Galligher*, 89 Va. 843.

Plaintiff purchased a ticket on defendant's railway; and that fact created the relation of carrier and passenger.

Wabash, St. L. & P. R. Co. v. *Rector*, 104 Ill. 301.

If a passenger leaves a train for the purpose of obtaining refreshments, at a regular station, or transacting business during its stay there, but intending to return and continue his passage, he does not cease to be a passenger, or lose the right of being protected.

Parsons v. *New York C. & H. R. R. Co.* 113 N. Y. 362, 363, 3 L. R. A. 683; *Atchison, T. & S. F. R. Co.* v. *Shean*, 18 Colo. 368, 20 L. R. A. 729.

It was necessary for him to cross over the intervening track of the defendant from one train to another. In making this transit he continued to be a passenger of the defendant and entitled to the protection that the highest

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safety; and such duty continues in some measure or degree until such passenger has left the premises of the carrier. Illinois C. R. Co. v. Davidson, 46 U. S. App. 300, 76 Fed. Rep. 517, 22 C. C. A. 306.

A passenger upon a railroad train who has paid his fare is entitled to a seat, and is not, as matter of law, guilty of contributory negligence in attempting to pass from one car to another, with due care and caution to obtain it, which will prevent him from recovering where he is thrown from the train and injured. Chesapeake & O. R. Co. v. Clowes, 93 Va. 189.

A railroad company is liable for injuries to a passenger properly upon a platform constructed by it and run down without fault of his own, whether the negligence is in the situation and construction of the platform, or in the running and management of trains, or in both. Illinois C. R. Co. v. Davidson, 46 U. S. App. 300, 76 Fed. Rep. 517, 22 C. C. A. 306.

Passengers obliged to cross railroad tracks to board a train standing at a station have the right to suppose that the company will regulate the movement of its trains on the tracks to be crossed with due regard to their safety. Chicago, St. P. & K. C. R. Co. v. Ryan, 165 Ill. 88.

A passenger at a railway station, who is killed while attempting to cross the track from the platform on one side of the tracks to the one on the other side, when he knew that passengers were required to go from one platform to the other by an overhead bridge instead of by crossing the tracks, is guilty of such contributory negligence as will prevent a recovery for his death. Riester v. New York C. & H. R. R. Co. 16 App. Div. 216.

One is not, as matter of law, guilty of contributory negligence in using a slope of a platform covered with ice on taking a train instead of steps also provided, although she had been cautioned to be careful as the platform was slippery. Rathgebe v. Pennsylvania R. Co. 179 Pa. 31.

A man standing on a station platform waiting for a train after purchasing a ticket, when he is struck and injured by the body of a person killed by a passing train, has no greater right of action than if he had been injured at any other place where he had a right to be. Wood v. Pennsylvania R. Co. 177 Pa. 306, 35 L. R. A. 199.

A railroad company is liable for injuries to a passenger who, after boarding the train, is required by the conductor to get off and go to the rear of the train where there is no platform and the lowest step of the car is 30 inches from the ground, and who is injured by a sudden and unnecessary jerk by the brakeman, while attempting to get on the car. International & G. N. R. Co. v. Mulliken, 10 Tex. Civ. App. 663.

A street railroad company is liable for an injury to a passenger free from contributory negligence, caused by the conductor's suddenly starting the car after the passenger has stepped upon a footboard upon the side thereof, and before he has entered and taken a safe position or had reasonable time to do so. Anacostia & P. River R. Co. v Klein, 8 App. Dec. 75.

A person intending to become a passenger upon a train is subject to the same rule as other persons as to the care required in going upon a railroad track, and is guilty of negligence in crossing the track for the purpose of boarding a train and stopping at a platform on the opposite side and on another track, without looking to see whether a train is approaching upon the track nearest to him. Warner v. Baltimore & O. R. Co. 7 App. D. C. 79.

One is not, as matter of law, guilty of contributory negligence in attempting to board a moving train. Birmingham Electric R. Co. v. Clay, 108 Ala. 233.

One who attempts to board a train moving at a rate of 4 miles an hour, with both arms full of bundles, is guilty of such contributory negligence as will prevent a recovery for his death. Birmingham Electric R. Co. v. Clay, 108 Ala. 233.

An intending passenger who attempts to board a railroad train under increasing speed of 6 to 7 miles an hour is guilty of negligence which will prevent recovery for his injuries, although he is young, vigorous, and has been a constant traveler on railroads, and is told by the conductor to jump aboard, Heaton v. Kansas City, P. & G. R. Co. 65 Mo. App. 479.

A railroad company may without the imputation of negligence continue to use a platform not obviously dangerous, which has been in daily use for years, and uniformly proved adequate and convenient. Illinois C. R. Co. v. Hobbs, 58 Ill. App. 130.

A railroad company is liable for an injury to one free from negligence who was injured by falling over a mail bag thrown on the platform between the waiting-room door and the train which she intended to take, where the platform was insuffi-

degree of care on the part of the defendant could afford, under the circumstances.

Baltimore & O. R. Co. v. *State, Hauer*, 60 Md. 463.

Defendant was guilty of gross negligence. *Chicago, M. & St. P. R. Co.* v. *Lowell*, 151 U. S. 217 (38: 136); *Jewett* v. *Klein*, 27 N. J. Eq. 552.

The jury is made the tribunal to decide disputed questions of fact, and should decide such questions as these.

Jones v. *East Tennessee, V. & G. R. Co.* 128 U. S. 443 (32: 478).

Intestate, who was a passenger, was not obliged to look and listen for approaching trains.

Wheelock v. *Boston & A. R. Co.* 105 Mass. 208; *Pennsylvania R. Co.* v. *White*, 88 Pa. 333, 334; *Terry* v. *Jewett*, 78 N. Y. 343; *Brassell* v. *New York C. & H. R. R. Co.* 84 N. Y. 246; *Baltimore & O. R. Co.* v. *State, Hauer*, 60 Md. 463-465; *Philadelphia, W. & B. R. Co.* v. *Anderson*, 72 Md. 529, 530, 8 L. R. A. 673; *Jewett* v. *Klein*, 27 N. J. Eq. 550; *Atchison, T. & S. F. R. Co.* v. *Shean*, 18 Colo. 368, 20 L. R. A. 729.

Intestate did not have timely warning of his peril.

Continental Improv. Co. v. *Stead*, 95 U. S. 164 (24: 405); *Ernst* v. *Hudson River R. Co.* 35 N. Y. 35, 90 Am. Dec. 761; *Chicago, M. & St. P. R. Co.* v. *Lowell*, 151 U. S. 217 (38: 136).

It is only where the facts are such that all reasonable men must draw the same conclusions from them that the question of negligence is ever considered as one of law for the court.

Texas & P. R. Co. v. *Gentry*, 163 U. S. 353 (41: 186).

Messrs. **George E. Hamilton** and *M. J. Colbert*, for defendant in error:

There is no evidence of any negligence on the part of the defendant.

McKey v. *Hyde Park*, 134 U. S. 84 (33: 860); *Richmond & D. R. Co.* v. *Powers*, 149 U. S. 43 (37: 642).

Where the evidence is such that if a verdict rendered upon it would necessarily be set aside as against the evidence, or against the clear weight of the evidence, it is the duty of the court, in advance, when asked to do so, to direct a verdict for the defendant.

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ciently lighted and the company knew that the mail clerk was accustomed to throw mail bags on the platform at such station. Ayres v. Delaware, L. & W. R. Co. 4 App. Div. 511.

Running a train at 25 miles an hour between a station and a train waiting on a track at such station to receive passengers is negligence. Chicago, St. P. & K. C. R. Co. v. Ryan, 62 Ill. App. 264.

A railroad company is guilty of negligence toward passengers in running a fast train past another standing at the station over a crosswalk, on which passengers are going to or leaving the train. Chicago, B. & Q. R. Co. v. Czaja, 59 Ill. App. 21.

A railway company which switches a freight train from one track onto another, and backs it against a person on the latter track while she is crossing it to take a train which is waiting at a station for the reception of passengers, does not exercise the highest degree of diligence towards her which is required of it. Chicago & E. I. R. Co. v. Chancellor, 60 Ill. App. 525.

Negligence of a passenger in boarding a moving train does not relieve the company from responsibility for injuries from the negligent act of its employee in pushing him off the step of the car. Sharrer v. Paxson, 171 Pa. 26.

That a passenger diligent in attempting to get upon a cable car while it is stopped to receive passengers is lacking in dexterity will not preclude him from recovering for injuries sustained from the starting of the car while he is attempting to board it. Dudley v. Front Street Cable R. Co. 73 Fed. Rep. 128.

It is the duty of the conductor of a cable car before giving the signal to the gripman to start, after the car has stopped to take on passengers, to look around and see that all passengers to take passage at that place are safely on board; and failure so to do is not excused by the fact that he does not see an intending passenger. Dudley v. Front Street Cable R. Co. 73 Fed. Rep. 128.

To board or depart from an electric car while in motion is not negligence *per se*. Cicero & P. Street R. Co. v. Meixner, 160 Ill. 320, 31 L. R. A. 331.

It is the duty of a railroad company to keep that portion of its premises which is used by the passengers, with its consent, for boarding or alighting from trains, in a safe condition. Hulbert v. New York C. R. Co. 40 N. Y. 145.

A railroad company is bound to see that its platforms at stations are so far free from ice that passengers using the ordinary care of persons not apprised of danger will not slip. Weston v. New York Elev. R. Co. 73 N. Y. 595.

It is the duty of a railroad company to provide a convenient passage through snow from its depot to the highway. Hoffman v. New York C. & H. R. R. Co. 75 N. Y. 605.

When a street-car company removes snow from its tracks, it must not leave it in dangerous piles along the tracks. Dixon v. Brooklyn City & N. R. Co. 100 N. Y. 170.

A railroad company is not bound to make immediate and continuous removals of snow and ice gathering to slight extent on the platform of its cars while in transit. Palmer v. Pennsylvania Co. 111 N. Y. 488, 2 L. R. A. 252.

The omission of a railway company to clear the approaches to its station early in the morning from sleet gathered during the night is not negligence. Kelly v. Manhattan R. Co. 112 N. Y. 443, 3 L. R. A. 74.

A railroad company must not construct its cars and station platforms so that the car projects over the platform. Dobiecki v. Sharp, 88 N. Y. 203.

A railroad company must not allow mail bags to be thrown from its cars on to station platforms where passengers are standing. Carpenter v. Boston & A. R. Co. 97 N. Y. 494, 49 Am. Rep. 540.

In constructing a platform for passengers to alight upon from its cars, a railroad company is only bound to exercise ordinary care to make it reasonably adequate and safe for the purpose to which it is devoted, keeping in view the dangers attending its use. Laffiin v. Buffalo & S. W. R. Co. 106 N. Y. 136, 60 Am. Rep. 433.

A railroad company is not bound to so construct its tracks that it will be impossible for a passenger, while standing on the step at the side of an open car, to be struck by another car. Craighead v. Brooklyn City R. Co. 123 N. Y. 391.

Failure of a railroad company to light its station platform, in consequence of which a passenger stumbles over a box resting thereon, will render it liable for the injuries sustained, although the box was not placed there by it or its servants. Waller v. Missouri, K. & T. R. Co. 59 Mo. App. 410.

It is gross negligence for a baggageman to pull a heavy truck loaded with baggage over a railroad platform upon which there are many persons in the way, without warning or looking out for the

Phœnix Mut. L. Ins. Co. v. *Doster*, 106 U. S. 30 (27: 65); *Kane* v. *Northern C. R. Co.* 128 U. S. 91 (32: 339)

The plaintiff's intestate was guilty of such negligence contributing to his injury as prevents a recovery.

Chicago, R. I. & P. R. Co. v. *Houston*, 95 U. S. 697 (24: 542); *Schofield* v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615 (29: 224); 4 Am. & Eng. Enc. Law, 70, and cases there collected; *Baltimore & O. R. Co.* v. *State, Hauer*, 60 Md. 468; *Philadelphia, W. & B. R. Co.* v. *Anderson*, 72 Md. 530, 8 L. R. A. 673; *Tuttle* v. *Traveler's Ins. Co.* 134 Mass. 175, 45 Am. Rep. 316; *Wheelwright* v. *Boston & A. R. Co.* 135 Mass. 225.

Mr. Justice **White** delivered the opinion of the court:

This action was begun in the supreme court of the District of Columbia to recover damages for the killing of the plaintiff's intestate on June 22, 1893, at a suburban station of the city of Washington, located on the line of the defendant's road, known as University station.

It appeared from the evidence that at the station referred to the company operated a double-track road, the tracks running substantially from north to south, the southerly direction leading to Washington and the northerly direction leading away from that city. The two tracks being side by side, one consequently laid to the west and the other to the east. The distance between the rails of each track was 4 feet 8½ inches, *while the [341 distance between the east and west tracks, respectively, was 7 feet 5 inches.

At the place in question the station building was on the outer side of the west track, and contained a waiting room, a ticket office, and the other conveniences of a passenger station. Fronting the station building and beside the track was the necessary platform to enable passengers to enter or descend from any train which might there stop. In the space between the east and west track there was no platform

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safety of such persons. Illinois C. R. Co. v. Wall, 58 Ill. App. 588.

A railroad company which furnishes a safe and convenient platform in front of its depot is not liable for an injury to a passenger who, while waiting for a train, falls into a pit while walking in the darkness on a platform at the back of the depot which was not intended for passengers,—especially where the exercise of ordinary care would have shown the danger of walking there. Gunderman v. Missouri, K. & T. R. Co. 58 Mo. App. 370.

A passenger on a railway train who is injured while leaving a depot belonging to another company, used as a union depot by both companies, because of a defective approach thereto, may recover against both companies for the injuries. Gulf, C. & S. F. R. Co. v. Glenk, 9 Tex. Civ. App. 599.

A railroad company is liable for the negligence of a mail agent in throwing a mail sack upon a station platform, causing the injury of a person thereon, although the company has no right to interfere with the discharge of his duties, if it had notice of his practice to throw sacks in this way. Galloway v. Chicago, M. & St. P. R. Co. 56 Minn. 346, 23 L. R. A. 442.

The duty of a railway company to keep its station platform properly lighted and free from dangerous obstructions is not confined to passengers alone, but extends to persons coming to the station to meet their friends or see them safely off. New York, C. & St. L. R. Co. v. Mushrush, 11 Ind. App. 192.

A passenger who, through heedlessness or forgetfulness, does not recollect having seen, the preceding evening, an obstruction on a platform on the route from the station-house to the train, and stumbles over it, is guilty of such contributory negligence as will prevent a recovery for the injury, although the company was negligent in not having the way clear, or in not having sufficient light to enable passengers to see the obstruction. Wood v. Richmond & D. R. Co. 100 Ala. 660.

The surroundings at a railroad station must be such as not to retard, mislead, or hazard the safety of passengers in their departure from the train. McSloop v. Richmond & D. R. Co. 59 Fed. Rep. 431.

A railway passenger has the right to assume that the approaches, tracks, platforms, and places for entering and leaving cars at stations are in a reasonably safe condition for such purposes. Kentucky & I. Bridge Co. v. McKinney, 9 Ind. App. 213.

A railroad company is not liable to one injured while attempting to board a freight train having a cab attached for the accommodation of passengers, at a place where the train does not usually stop to receive passengers, without the knowledge of the conductor or other person in control of the train, from the starting of the train before such person passes from the platform to the inside of the cab, where the conductor has distinctly announced in the hearing of persons assembled at such place that they should not get aboard there, and that the train would move on and stop for them elsewhere near by, although such person does not hear the announcement. Curry v. Georgia Midland & G. R. Co. 92 Ga. 293.

A railway company is not liable for personal injuries sustained by a passenger by violent contact with the edge of a platform in dangerously close proximity to the train, where he knew of its situation and had ample time to board the train while it was standing still, but neglected to do so for his own convenience, and momentarily forgot the dangerous proximity of the platform. McLaren v. Alabama M. R. Co. 100 Ala. 506.

A railroad company which leaves a car in its accustomed position at the platform, open and apparently ready to receive passengers, is guilty of negligence in suddenly jerking the car forward in such a manner that a child rightfully about to enter as a passenger is thrown off the platform, sustaining injuries from which it dies. Daley v. Port Jervis, M. & N. Y. R. Co. 61 N. Y. S. R. 632.

A railway company is liable for an injury to a passenger who was thrown off a narrow passageway 3 or 4 inches wide provided for passengers, while she was attempting to get upon a train, by reason of the unintentional turning of another passenger, although the station is common to several roads. Redner v. Lehigh & H. River R. Co. 73 Hun, 562.

A person who attempts to board a moving train at a place at which it is not scheduled to stop is guilty of contributory negligence which will prevent recovery for injuries sustained, in the absence of any circumstances preventing the free and untrammeled exercise of his faculties and judgment. Distler v. Long Island R. Co. 78 Hun, 252.

A passenger who unnecessarily and without invitation goes upon a railroad track to take a train, and is injured by being struck by a train, is guilty of contributory negligence, although a few days previously at the request of a conductor he took a train by going upon the track in the same manner. Foreman v. Pennsylvania R. Co. 159 Pa. 541.

or other facility for passengers either to enter or leave the train, hut on the other side of the east track there was a platform which was uncovered, hut which was manifestly constructed for the purpose of facilitating the entry into or departure from any train which might stop at that point on the east track. These east and west platforms were connected by a plank crossing, which came opposite the center of the station huilding.

There was a road crossing adjoining the station, and the travel was such as seems to have necessitated the use of crossing gates and the employment hy the railroad company of a gate watchman. On the east side of the track there was also a settlement known as Brookland, and several of the witnesses who testified at the trial lived in the immediate vicinity of the station in question.

Whilst, as we have said, the substantial direction of the two tracks was north and south, nevertheless the proof showed that in the southward direction of the tracks, that is, towards Washington, the tracks were not perfectly straight, but were somewhat curved. As to the foregoing facts, there seems from the hill of exceptions to have been no conflict of proof.

There was proof tending to show that on the morning of the accident, at about twenty minutes past seven o'clock, the deceased alighted at University station from a local train hound to Washington. One of the stopping points of such train on the way to University station was a small station known as Forest Glen. After attending to some business in the neighborhood of University station, Collis returned to that station at ahout half past eight o'clock on the same morning. He was then seen engaged in conversation with several persons in 342]*or ahout the station building, which we have already described. There was a local train hound out from Washington, that is, going north, which was scheduled to stop at Forest Glen, and which was due to arrive at University station at *nine* minutes past nine o'clock, whilst there was an express train bound to Washington scheduled to pass the same station at *eleven* minutes past nine. The proof tended to show that the local train arrived at University station a few minutes late, and that either as it was stopping at the east platform or after it had actually stopped there Collis, who had in his possession a return-trip ticket from University station to Forest Glen, hurriedly went from under the arch of the station building in the direction of the local train. There was conflict in the proof as to whether when Collis started the local train had actually stopped on the east track or was slowing down. There was also conflict in the evidence as to where Collis was when he started to the local train. The engineer of the express train testified "that after he got hy the whistling post he saw Mr. Collis standing on the platform, hut did not think that Collis would go over," and that it was not until Collis started across that he gave the danger signals; whereas another witness for the defense testified that Collis was sitting behind the arch of the station building when the local train arrived, and as it did so he went around the station building "to cross the track and get on his train," and "started straight across, did not stop at all, and did not look in either direction." There was conflict also in the proof as to whether, in crossing towards the train, Collis went on the crosswalk connecting the two platforms, or diagonally upon the track away from the hoard walk and bearing towards the local train. Some of the witnesses testified that as he started toward the local train, not being opposite a platform, hy which to enter a coach, he obliquely directed his course towards the south as though to reach the platform and steps of a car on the local train, whilst other testimony tended to show that as he came out from under the arch and around the huilding he pursued a course directly across the track towards the local train.

*The testimony moreover established [343 that whilst Collis was making the movement towards the local train, in one or the other of the modes above described, the express came down the west track, passed the station, running by the standing or stopping local train at the rate of between 40 and 45 miles an hour, and that by the train so moving Collis was struck and killed. The proof further tended to show that there was a clear view of the track going north from the station for a considerable distance, and that there was a whistling post for the station located 1,500 or 1,600 feet beyond the station. There was no proof, however, showing that a view of the rapidly moving express train was possible from under the archway of the station from which some of the proof tended to show Collis came on his way towards the local train.

There was conflict in the testimony as to whether the express train whistled at the whistling post. Some of the witnesses testified that the only signal given as the train approached the station was the danger signal which was sounded when the engine was only 50 or 60 feet from the point where Collis was killed; while others testified that a long blast for the station was sounded at the whistling post. There was no proof tending to show that any notice or warning, by sign or otherwise, was given, of the danger which might be incurred if a passenger attempted to cross the west track in order to board a train on the east track, nor was there any proof offered tending to show that any warning or notice was given, either by the ticket agent, gate watchman, or the employees of the local train, to passengers actually in waiting at the station, of the fact that the express train was due under its schedule, and, if on time, would pass the station without stopping, and almost simultaneously with the arrival of the local train.

It was proved that a book of rules issued by the company to its employees contained the following:

"No. 441. When one passenger train is standing at a station receiving or discharging passengers on double track no other train, either passenger or freight, will attempt to run past *until the passenger train at the station [344 has moved on or signal is given by the conductor of the standing train for them to come ahead, and the whistle must not be sounded while passing a passenger train on double track or sidings unless it is absolutely necessary."

While the engineer of the express train testified that coming down towards University station he saw the local train and did not know whether it was moving or had stopped entirely, or was going to stop or not, he also admitted that he knew of the existence of rule 441, but that "it was impossible to carry out the rule and make schedule time, and that the rule never was carried out."

At the close of the evidence for both parties the defendant requested a peremptory instruction in his favor, which the court gave, and by reason thereof the jury returned a verdict in favor of the defendant. From the judgment thereupon entered an appeal was taken to the court of appeals of the District of Columbia, where the judgment was affirmed. The case was then brought into this court by writ of error.

The peremptory instruction by the trial court and the affirmance of its action by the appellate court manifestly proceeded, not on the theory that, as a matter of law, there was no negligence on the part of the defendant, but that the proof of contributory negligence on the part of the plaintiff was so conclusive as to leave no question for the consideration of the jury. Indeed, apart from any question which may have arisen from the proof as an entirety, and apart from the conflicting evidence as to the failure to give warning or proper signals, in the light of the ruling in *Chicago, M. & St. P. Railway Co.* v. *Lowell*, 151 U. S. **345**]209 [38:131], *it is obvious there was not room reasonably to claim that it should have been determined, as matter of law, that the railroad company had not been negligent. In the *Lowell Case*, as in this, it was shown that a rule of the company, applicable where double tracks were operated, prohibited any train, either passenger or freight, from attempting to run past a passenger train standing at a station for the purpose of receiving or discharging passengers, until the passenger train at the station had moved on, or signal was given by the conductor of the standing train for the other train to come ahead. Speaking of such a rule, and after declaring that it could not be seriously contended that the defendant was free from fault in failing to stop its train, in compliance with its own rule, the court said (page 217 [38: 136]): "In view of the frequency of accidents occurring to passengers crossing one track at a station, after alighting from a train standing upon another track, the rule is doubtless a proper one, and if it had been observed on that evening, this accident would probably not have occurred."

The cogency of this language applies with equal force to the state of facts disclosed in this record, where the station in which was the waiting room was so situated, and the trains of the company so operated, that passengers obliged to board a train which was to arrive and depart on the east track could not do so without crossing the west track, over which a train bound in an opposite direction was momentarily to arrive. If the stopping of a train at a station to put off a passenger, as held in the *Lowell Case*, may, under certain circumstances, justify the passenger in presuming that it is safe for him to alight from the train away from a platform, and does not impose upon him in so doing the same degree of care and caution as would be imposed on him if he were not a passenger, it follows, necessarily, that the same rule would apply to one waiting at a station to take a train and who approaches the train he is to take when it arrives at the station.

The learned court below, in affirming the judgment of the trial court, principally rested its conclusion on the ruling in *Elliott* v. *Chicago, Milwaukee, & St. Paul R. R. Co.* 150 U. S. 245 [37: 1068], and *the authorities in [**346** that case referred to. But there the question for determination was the negligence of one not a passenger.

The duty owing by a railroad company to a passenger, actually or constructively in its care, is of such a character that the rules of law regulating the conduct of a traveler upon the highway when about to cross and the trespasser who ventures upon the tracks of a railroad company are not a proper criterion by which to determine whether or not a passenger who sustains injury in going upon the tracks of the railroad was guilty of contributory negligence. A railroad company owes to one standing towards it in the relation of a passenger a different and higher degree of care from that which is due to mere trespassers or strangers, and it is conversely equally true that the passenger, under given conditions, has a right to rely upon the exercise by the road of care, and the question of whether or not he is negligent, under all circumstances, must be determined on due consideration of the obligations of both the company and the passenger. As said by the court of appeals of New York in *Terry* v. *Jewett*, 78 N. Y. 344:

"There is a difference between the care and caution demanded in crossing a railroad track on a highway and in crossing while at a depot of a railroad company to reach the cars. No absolute rule can be laid down to govern the passenger in the latter case under all circumstances. While a passenger has a right to pass from the depot to the train on which such passenger intends to travel, and the company should furnish reasonable and adequate protection against accident in the enjoyment of this privilege, the passenger is bound to exercise proper care, prudence, and caution in avoiding danger. The degree of care and caution must be governed in all cases by the extent of the peril to be encountered and the circumstances attending the exposure."

And in the case before the court it was held to be a question for the jury, under all the circumstances, whether the plaintiff was chargeable with contributory negligence.

The doctrine of the *Terry Case* was approved in *Brassell* v. *New York C. & H. R. R. Co.* 84 N. Y. 246, and is supported *by the fol-[**347** lowing authorities: *Atchison, T. & S. F. R. R. Co.* v. *Shean*, 18 Colo. 368 [20 L. R. A. 729]; *Philadelphia, W. & B. R. R. Co.* v. *Anderson*, 72 Md. 529, 530 [8 L. R. A. 673]; *Baltimore & Ohio R. R. Co.* v. *State, Use of Hauer*, 60 Md. 463, 465; *Pennsylvania Railroad Co.* v. *White*, 88 Pa. 333, 334; *Jewett* v. *Klein*, 27 N J. Eq. 550; *Wheelock* v. *Boston & A. R. R. Co.* 105 Mass. 203.

To concede the rule and, in a given case, to take a passenger beyond its protection by hold

ing that one who goes in proper time to a station for the purpose of taking a train over the road and has a ticket for travel thereon is not to be considered as a passenger until he has manifested by some outward act his intention to board a train and become a passenger, is to admit the rule on the one hand and on the other to deny it. It is also clear that to say that one who goes to a station to take a train must exercise the same circumspection and care as a traveler on the highway or a trespasser, unless by some implication the corporation has invited the person to deport himself as a passenger, and that such implication must be determined as a matter of law by the court and not of fact by the jury, is, in effect, under the form of a qualification to destroy the rule.

The situation of the tracks, the location of the station building and the waiting room, the coming of the local train and its stopping to receive passengers in a position which required the latter to cross a track in order to reach the train, involved necessarily a condition of things which, under one view of the testimony, constituted an implied invitation to the passenger to follow the only course which he could have followed in order to take the train, that is to cross the track to the waiting train. Whilst it is true, as was said in *Terry* v. *Jewett*, *supra*, that such implied invitation would not absolve a passenger from the duty to exercise care and caution in avoiding danger, nevertheless it certainly would justify him in assuming that, in holding out the invitation to board the train, the corporation had not so arranged its business as to expose him to the hazard of danger to life and limb unless he exercised the very highest degree of care and cau-
348] tion. *The railroad under such circumstances, in giving the invitation, must necessarily be presumed to have taken into view the state of mind and of conduct which would be engendered by the invitation, and the passenger, on the other hand, would have a right to presume that in giving the invitation the railroad itself had arranged for the operation of its trains with proper care. The doctrine finds a very clear expression in a passage in the opinion in the *Terry Case*, already referred to, where it was said (p. 342):

"It may be assumed that a railroad corporation, in the exercise of ordinary care, so regulates the running of its trains that the road is free from interruption or obstruction where passenger trains stop at a station to receive and deliver passengers. Any other system would be dangerous to human life, and impose great risks upon those who might have occasion to travel on the railroad."

When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. *Grand Trunk Railway Co.* v. *Ives*, 144 U. S. 408, 417 [36:485, 489]; *Baltimore & Ohio Railway Co.* v. *Griffith*, 159 U. S. 603, 611 [40:274, 278]; *Texas & Pacific Railroad Co.* v. *Gentry*, 163 U. S. 353, 368 [41:186, 193]. A like doctrine was thus expressed by the supreme court of Pennsylvania in *Pennsylvania Railroad Co.* v. *White*, 88 Pa. 327, 333, a case in many respects analogous to the present one:

"Negligence has been defined to be 'the absence of care according to the circumstances,' and is always a question for the jury when there is reasonable doubt as to the facts, or as to the inferences to be drawn from them. When the measure of duty is ordinary and reasonable care, and the degree of care varies according to circumstances, the question of negligence is necessarily for the jury."

We think the case presented by the record is not one where the facts inferable from the evidence were such that all reasonable men would, of necessity, draw the same conclusion from them, and the question of negligence was not, therefore, one of law for the court.

*It is therefore ordered that the judg- [**349**
ment be reversed, and the case remanded, with directions to grant a new trial, and for further proceedings in conformity to law.

Mr. Justice **Brewer** is of the opinion that the deceased was guilty of contributory negligence.

ST. ANTHONY FALLS WATER POWER COMPANY, *Plff. in Err.*,
v.
BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL.

MINNEAPOLIS MILL COMPANY, *Plff. in Err.*,
v.
BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL.

(See S. C. Reporter's ed. 349-374.)

Rights of riparian owners governed by state decisions—jurisdiction of a state over the waters of the Mississippi river—navigable stream—appropriation of waters of a lake for city water supply—rights of a state to divert water for public use.

1 Property rights of riparian owners are to be measured by the rules and decisions of the state courts.

2. The act of Congress making the Mississippi river a common highway for all citizens of the United States does not impair the title and jurisdiction of a state over the navigable waters within her boundaries any more than such rights are limited with regard to the original states.

3. A stream may be navigable although it is not deep enough to admit the passage of boats over all portions of it.

4. The appropriation of the waters of a lake for a

NOTE.—*As to navigable waters, what are, in United States; streams and inland waters as highways*,—see note to United States v. The Montello, 22: 391.

As to alluvion or accretion and reliction; right to, and ownership of; by what law title to is determined; rule of division among riparian owners,—see notes to Kennedy v. Hunt, 12: 829; and St. Clair County v. Lovingston, 23: 59.

As to rights of the United States and the states to shore lands and accretions against piers, see note to Doe, Hallett, v. Beebe, 14: 35.

As to what is seashore; how far lands bounded on extend,—see note to United States v. Pacheco, 17: 865.

city water supply, thereby preventing their flowing past a water power in a river, without any compensation for the resulting injury to riparian owners, is a matter of local law on which the Federal court must follow state decisions.

5. Grants of power to build dams and improve the water power of a river in such manner or to such extent as shall be authorized by the directors of a corporation are subject, in legal effect, to the paramount rights of the state, as trustee for the public, to divert a portion of the waters for public use, and also to the rights of the general government in regard to navigation and commerce.

[Nos. 23, 24.]

Argued October 13, 14, 1897. Decided November 29, 1897.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment of that court in each of the above-entitled actions, affirming the judgment of the District Court of said State in favor of the defendants, dismissing the two actions which were tried together, one brought by the St. Anthony Falls Water Power Company, plaintiff, and the other by the Minneapolis Mill Company, plaintiff, against the Board of Water Commissioners of the City of St. Paul, for damages for injury from diverting water from the water power of each of the plaintiffs. *Affirmed.*

Statement by Mr. Justice **Peckham:**

These actions were brought in a district court of the state of Minnesota, by the respective plaintiffs in error against the defendant in error for the purpose of recovering damages for injury to their alleged rights as riparian owners and otherwise, at St. Anthony Falls on the Mississippi river, and also for a perpetual injunction enjoining the defendant in error from diverting the waters above so as to prevent them [**350** from flowing *in their natural course in the Mississippi river and down to the water power of the plaintiffs in error respectively.

The plaintiff in error, the St. Anthony Falls Water Power Company, was incorporated by an act of the territory of Minnesota, approved on the 26th day of February, 1856. The first eight sections of the act relate to the incorporation of the company and to its internal affairs. The 9th section reads as follows:

"Sec. 9. The said corporators are hereby authorized for the purpose of the improvement of the water power above and below the Falls of St. Anthony, in the Mississippi river, to maintain the present dams and sluices, and construct and maintain dams, canals, and water sluices, erect mills, buildings, or other structures for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said company, in such manner or to such extent as shall be authorized by the directors of said company, and may construct dams on the rapids above or below the Falls of St. Anthony, with side dams, sluices, and all other improvements in the Mississippi river, upon the property owned or to be owned by said corporators, which may be necessary for the full enjoyment of the powers herein granted: *Provided, however*, That said corporation shall give a free passage for all loose logs that are to be manufactured on Hennepin or Cataract islands, or between them on the falls through any dam or dams they may erect, on the west side of Nicollet or Hennepin islands, and the passage through the pond, above said dam shall, when needed, be 20 feet wide; *Provided*, That nothing herein contained shall be so construed as to authorize said corporation to interfere with the rights of property of any other person or persons whatever."

The Minneapolis Mill Company was also incorporated by an act of the legislature of the territory of Minnesota, approved February 27, 1856, chap. 145, p. 236, the 9th, 11th, and 12th sections of which read as follows:

"Sec. 9. The said corporators are hereby authorized, for the purpose of the improvement of the water power above and *below the [**351** Falls of St. Anthony in the Mississippi river, to maintain the present dams and sluices, and to construct dams, canals, and water sluices, erect mills, buildings, or other structures, for the purpose of manufacturing in any of its branches, or improving any water power owned or possessed by said company, in such manner and to such extent as shall be authorized by the directors of said company, and may construct dams on the rapids above or below the Falls of St. Anthony, with side dams, sluices, and all other improvements in the Mississippi river which may be necessary for the full employment of the powers therein granted."

"Sec. 11. This act shall take effect and be in force from and after its passage, and may be amended by any subsequent legislative assembly, in any manner not destroying or impairing the vested rights of said corporators: *Provided*, That nothing herein contained shall be so construed as to authorize said corporation to interfere with the rights or property of any other person or persons whatever."

"Sec. 12. *Provided further*, That nothing contained in the act entitled 'An Act to Incorporate the St. Anthony Falls Water Power Company' shall be so construed as to allow the said St. Anthony Falls Water Power Company to maintain or construct dams or sluices extending beyond the center of the channel of the Mississippi river from the western bank of Hennepin island, and said St. Anthony Falls Water Power Company are hereby restricted in the exercise of powers and privileges granted by the 9th section of said act to the space between the western bank of said island and the center of said river: *Provided*, The said dam shall always be provided with suitable slides and sluices, so as to admit the passage of logs and timber down the Mississippi river, and that any future legislature may amend or modify this act, or the act to which this section is amendatory: *And provided further*, That the Minneapolis Mill Company shall be restricted in its operations to the center of the main channel of the Mississippi river and to the property belonging to said company."

By the 2d section of the act of Congress, approved February 26, 1857 (11 Stat. at L. 166, chap. 60), authorizing the people *of the terri- [**352** tory of Minnesota to form a state Constitution, etc., it was enacted: "That the said state of Minnesota shall have concurrent jurisdiction on the Mississippi and all other rivers and

waters bordering on the said state of Minnesota, so far as the same shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same; and said river and waters, and the navigable waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor."

Section 2, article 2, of the Constitution of Minnesota has the same provision for the jurisdiction of the state over the Mississippi and other rivers and waters bordering on the state as is provided for in § 2 of the above act of Congress.

The complaints in the two cases are substantially similar, the two companies owning on different sides of the Mississippi river at about the same point, and the complaint in the case of the Minneapolis Mill Company contained the following among other allegations: It alleged the incorporation of the plaintiff in error, under the acts above mentioned, and also the incorporation of the defendant pursuant to an act of the legislature of the state of Minnesota, approved February 10, 1881, which has been amended by various acts supplemental thereto.

Plaintiff further alleged that pursuant to the provisions of its charter it acquired large tracts of land bordering upon the Mississippi river, and on the southwesterly bank thereof, lying within the present limits of the city of Minneapolis and county of Hennepin, and that by reason of the fall in said river at that point, which amounts to some 70 feet in the course of 1,000 feet, there was created a natural water power of great extent and value; that the plaintiff, pursuant to the provisions of its charter and in accordance with the natural right inherent in the ownership of lands abutting upon the waters of said river, constructed dams and water sluices at great expense, for the purpose of making the water power available [353] *for manufacturing and other purposes to which the same was adapted, and by meeting those erected by the other company, and that by the erection of these dams on the opposite side of the river the plaintiff had made available the water power of the river to the extent of about 50 feet fall, leaving still unoccupied a further fall of about 20 feet; that in pursuance of its charter and in accordance with its rights as riparian owner, plaintiff in error had made contracts with different parties for the construction of mills and manufacturing establishments in convenient proximity to its water power, and for a valuable consideration had furnished and was furnishing water power to these different establishments which have use for the power, and that the same is of great value to the plaintiff; that it has reserved to itself large rents and income by leasing to other parties the right to use certain portions of the water.

And the plaintiff alleged that by reason of its ownership of the land bordering upon the river it had acquired and still owned all the riparian rights incident to the ownership of lands bordering upon the Mississippi river, which was stated to be a natural watercourse, in which there naturally flowed a large quantity of water derived from the river and also from numerous tributaries above, and that by reason of its riparian rights the plaintiff was entitled to have and require the natural flow of the waters of the river in the channels, both east and west in said river, adjacent to the lands at said falls without diminution or diversion of such natural flow by any person whatever.

It was further averred that one of the tributaries of the Mississippi river is a natural watercourse and stream known as Rice creek, which drains waters from a large extent of territory within the state, and which are gathered together and have a natural flow or outlet through said creek into the Mississippi river, 8 or 10 miles above the water power of the plaintiff; that Rice creek, in its natural course, flows through a small lake in the county of Anoka, designated as Baldwin lake, and from thence to its connection with the Mississippi river; that the amount of water flowing in that *creek and lake varies [354] with the different seasons of the year, the ordinary amount being about 30 million gallons per day.

It is then further alleged that the defendant acting under the provisions of the act of the legislature above mentioned, approved February 10, 1881, authorizing the city of St. Paul to purchase the franchises and property of the St. Paul Water Company and creating a board of water commissioners, had acquired title to a portion of the land bordering upon Baldwin lake, and had erected thereon pumping works and machinery for the diversion of the waters of the lake into a certain other lake situated in the county of Ramsey, which other lake had a natural outlet through streams flowing into the Mississippi river below the water power of plaintiff, and that the defendant had for the greater part of the time during the two years before the commencement of this action, by means of its works on Baldwin lake, withdrawn from that lake a quantity of water to the amount of 10,000,000 gallons per day, and that the quantity thus pumped from that lake was diverted by the defendant into a lake known as Pleasant lake, and from thence it had been drawn by the waterworks of the defendant into the city of St. Paul, and distributed over that city and used for domestic purposes and for furnishing water for steam engines and other manufacturing purposes, and for the propulsion of elevators and other machinery, and that the waters thus used had been entirely diverted from Rice creek and from that part of the Mississippi river above the water power of plaintiff, and no part thereof had been returned to the Mississippi river above the water power of plaintiff so as in any way or manner to be made useful to plaintiff.

The plaintiff further alleged that the defendant, although assuming to act in accordance with its charter, had not acquired the right to divert the waters naturally flowing in Rice creek, and through Baldwin lake from their natural course, nor had defendant made compensation to plaintiff and other parties beneficially interested in the use of said water, nor had defendant made any provision for

computing the amount of compensation due
355]plaintiff *for damages caused by diverting and withdrawing the waters of the river from their natural course; that by reason of this diversion of water the income and profits arising from the maintenance of the water power were diminishing (to an amount stated in the complaint), and that the damages sustained by the plaintiff by reason of the diversion amounted to the sum of $1,500.

Judgment was demanded that the plaintiff should recover its damages already sustained in the sum of $1,500, and that the defendant should be perpetually enjoined from interfering with or diverting the waters which would otherwise naturally flow into lake Baldwin, so as to prevent them from flowing in the natural course to said Rice creek and Mississippi river to the water power of said plaintiff.

The answer of the defendant averred that the defendant existed as a corporation and executive department of the city of St. Paul, of the state of Minnesota, under and by virtue of the acts referred to in the complaint, as approved February 10, 1881, and amended January 25, 1883, and March 4, 1885, and that the defendant, under these acts and under the charter of the city of St. Paul, exercised all of the authority of the city of St. Paul with respect to acquiring lands and franchises for and the construction of water works for the purpose of supplying the city of St. Paul and its inhabitants with pure water for all public purposes.

The defendant also averred that by virtue of the authority granted by the acts of the legislature, above referred to, and by the charter granted to the city of St. Paul, the defendant had secured the right of way from the city of St. Paul to said Baldwin lake, and by the use of mains, ditches, and pumps it had drawn and was drawing from that lake and was bringing to the city of St. Paul water for the use of the city and its inhabitants, and that the defendant and the city of St. Paul are the owners in fee simple of a large tract of real estate bordering on Lake Baldwin, upon which lands it had erected buildings and placed therein pumps, etc., for the purpose of drawing water from that lake for the purpose of supplying the city of St. Paul with water.

356] *Other averments were made not material to be here mentioned.

The defendant claimed a right to take the water from Baldwin lake and conduct the same to the city of St. Paul for the use of said city and its inhabitants (without making any compensation or payment therefor to the plaintiff), by reason of the legislative authority above mentioned.

A similar answer was put in by the defendant in the case of the St. Anthony Falls Water Power Company.

Replies to these answers were put in by the plaintiffs in error taking issue on the matters of fact therein alleged.

Upon these pleadings the two actions came on for trial in the state court and were tried together. Evidence was given upon the part of the plaintiffs tending to support the allegations of the complaints, and after the plaintiffs had rested, the defendant moved that the actions should be dismissed on the ground that there was no liability on the part of the defendant to either of the plaintiffs, because the Mississippi river was a navigable river, its beds and its waters being owned by the state of Minnesota, and that the board of water commissioners, defendant herein, was a part of the city government of the city of St. Paul authorized by the legislature to draw water from any of the lakes of the state for the purpose of supplying water to the city of St. Paul; that the defendant acted as agent of the state and in the name of the state, supplying the citizens of the state with water owned by the state, which the state had a right to use for that purpose, and that such right was paramount to the rights of any riparian owners; also on the ground that nothing but a reasonable use had been shown by the defendant as riparian owner of land on lake Baldwin; also that plaintiff's dams are a purprestre, and that plaintiffs can have no right to the use of water obtained in that way; also that their riparian rights do not extend to the use of water on land not owned by them, or, as against the defendant, to power obtained which requires the flowage of land other than their own.

The motion to dismiss was granted in each case, to which the plaintiff in each case duly excepted.

*A motion for a new trial was made be-[357
fore the trial court upon a case and exceptions, and the motion, after hearing counsel, was denied. The plaintiffs then appealed to the supreme court of the state from the order of the district court denying plaintiff's motion for a new trial and from the whole thereof. The supreme court affirmed the order and directed that the defendant should have judgment accordingly. Upon the affirmance of the judgments by the supreme court the plaintiffs obtained a writ of error in each case from this court, and the records are now before us for review.

Messrs. **Rome G. Brown** and *Charles S. Albert* for plaintiffs in error.

Messrs. **James E. Markham** and **Herman W. Phillips** for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

It is claimed upon the part of the plaintiffs in error that by the decision of the court below they have been deprived of their property without due process of law. They urge that they have certain rights as riparian owners of land near St. Anthony Falls, bordering upon the Mississippi river, to the use of all the water as it would naturally flow past their land, and that this right is property; that its existence and extent are to be determined by the general law applicable to riparian owners in like situation, which right is not determined conclusively by a state court, and that being property it cannot be taken away or impaired either by other private owners or by the state, except that if the latter should require the use of any portion of the water for any public purpose it may only be taken or diverted upon due compensation being made. These rights,

it is claimed, are protected by the Federal Constitution, and that as such claim was duly presented before the state tribunal, the question is now open for review by this court.

358] *If wrong in their above claim the plaintiffs in error then urge that if it be assumed that the state originally had the power to make a diversion of some portion of the water in the Mississippi river for the purpose of supplying the city of St. Paul with water, yet that through the action of the territorial legislature in 1856, in granting these plaintiffs in error their charters, with the powers and rights therein named, the territory gave and released to plaintiffs in error the right to use all of the water naturally flowing in the river past their lands for the purpose of power free from the right of any subsequent territorial or state legislature to divert the waters in the manner complained of herein without making compensation.

These charters are claimed by the plaintiffs in error to be contracts, the obligations of which no subsequent legislature could impair, and it is argued that the act of 1881 and the subsequent acts amendatory thereof, granting to the defendant in error a right to use water for the purposes therein named, do impair the obligations of these contracts, and therefore are absolutely void.

They also urge that, even if their riparian rights are to be governed by the general rules of law laid down by the highest court of Minnesota, it will be found that the former decisions of that court upon that subject have fixed in plaintiffs the property rights which they here claim, and that this court should not be bound by the last decision of the state court upon the question, as evidenced by the judgment under review, because it is wholly inconsistent and at war with all the prior decisions of the state court, and ought not to be followed.

These contentions on the part of the plaintiffs in error are now to be examined.

(1) In regard to the first proposition, we are of opinion that the property rights of the plaintiffs in error, as riparian owners, are to be measured by the rules and decisions of the state courts of Minnesota. This principle, we think, has been announced and adhered to by this court from its very early days, and no distinction has been made between the rights of the original states and those which were sub-

359] sequently admitted *to the Union under the provisions of the Federal Constitution. The provisions of the act of Congress already cited (act of February 26, 1857, 11 Stat. at L. 166, chap. 60, § 2), making the Mississippi river a common highway for the inhabitants of the state and all other citizens of the United States, do not impair the title and jurisdiction of the state over the navigable waters within her boundaries more than rights of that nature are limited with regard to the original states. This has been uniformly held, and is so stated in many of the cases hereinafter cited where similar language has been used in the acts admitting states into the Union.

Preliminarily, it may be said that the Mississippi river at the point in question is a navigable stream. In order to be navigable it is not necessary that it should be deep enough to admit the passage of boats at all portions of the stream. One witness for the plaintiffs in error said that in its natural state the river at this point was not navigable at ordinary stages of the water for ¼ mile below St. Anthony Falls, and in its natural state it was not navigable immediately above the falls, but that it was navigable in its natural state above Nicollet island. He also stated that when he said the Mississippi river was not navigable at these falls, he meant that it was not navigable for boats; that boats could not go up and down in its natural condition; that it was always used for logs with chutes that are artificially prepared. It was navigable below the rapids and navigable above the rapids, and that the dam made it so. It was navigable above the rapids for the purpose of running shallow boats and for floating logs. What is said hereafter in regard to the river is based upon the really unquestionable fact that it is a navigable river at all points referred to in these records.

In *Martin* v. *Waddell*, 41 U. S. 16 Pet. 367 [10: 997], it was held that, when the American Revolution was concluded, the people of each state became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government. The action was ejectment for 100 acres of land *covered [**360** with water in Raritan bay in the township of Perth Amboy, in the state of New Jersey. The claim of the plaintiff was founded upon the charters of Charles II. to his brother, the Duke of York, in 1664 and 1674, for the purpose of enabling him to plant a colony on the continent of America, the land in controversy being within the boundaries of the charters and in the territory which now forms the state of New Jersey. Those letters patent, as construed by this court, conveyed to the Duke of York all the prerogatives and powers of government residing at the time of their execution in the King of Great Britain, and passed from the jurisdiction of Great Britain to the people of each state after the Revolution. Although the question in that case arose in regard to lands covered with water in Raritan bay, yet the principles upon which the case was decided have been stated to apply to the rights of the states in regard to all navigable waters within their jurisdiction.

In *Pollard* v. *Hagan*, 44 U. S. 3 How. 212 [11: 565], the question arose in regard to the rights of the state of Alabama in the shores of navigable waters and the soils under them within her limits. The 6th section of the act of Congress, passed on the 2d of March, 1819 (3 Stat. at L. 489, chap. 47), for the admission of the state of Alabama into the Union, provided: "That all navigable waters within the said state shall forever remain public highways, free to the citizens of said state and of the United States, without any tax, duty, impost, or toll therefor imposed by the said state." It was held that the government of the United States did not by reason of that enactment possess any more power over the navigable waters of Alabama than it possessed over the navigable waters of other states under the provisions of the Constitution, and that

Alabama had as much power over those navigable waters as the original states possessed over the navigable waters within their respective limits. It was also held that the shores of navigable waters and the soils under them were not granted by the Constitution of the United States, but were reserved to the states respectively, and the new states had the same rights, sovereignty, and jurisdiction over the subject as the original states.

361 *In *Goodtitle* [*Pollard*] v. *Kibbe*, 50 U. S. 9 How. 471 [13: 220], the decision of this court in *Pollard* v. *Hagan*, *supra*, was referred to and affirmed, and it was said that, by the admission of the state of Alabama into the Union that state became invested with the sovereignty and dominion over the shores of the navigable rivers between high and low water mark, and that after such admission Congress could make no grant of land thus situated.

In *Barney* v. *Keokuk*, 94 U. S. 324 [24: 224], it was recognized as the law that the title and rights of riparian proprietors upon the banks of the Mississippi were to be settled by the states within which the lands were included. Mr. Justice Bradley, in stating the opinion of the court in that case, said (at page 338 [24: 228]): "And since this court, in the case of *The Genesee Chief* [*The Genesee Chief* v. *Fitzhugh*], 53 U. S. 12 How. 443 [13: 1058], has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view *depended, as most cases must depend, on the local laws of the states in which the lands were situated.* In Iowa, as before stated, the more correct rule seems to have been adopted after a most elaborate investigation of the subject."

It was also said by the same learned justice in speaking of the English idea of navigable waters being necessarily tide waters: "It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many states of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the sev **362** eral states themselves *to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in *Martin* v. *Waddell*, 41 U. S. 16 Pet. 367 [10: 997]; *Pollard's Lessee* v. *Hagan*, 44 U. S. 3 How. 212 [11: 565], and *Goodtitle* [*Pollard*] v. *Kibbe*, 50 U. S. 9 How. 471 [13: 220]. These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable waters."

In *St. Louis* v. *Myers*, 113 U. S. 566 [23: 1131], this court held that the act of March 6, 1820 (3 Stat. at L. 545, chap. 22), admitting the state of Missouri into the Union, left the rights of riparian owners on the Mississippi river to be settled according to the principles of state law. Mr. Chief Justice Waite, in delivering the opinion of the court, said: "The act of Congress providing for the admission of Missouri into the Union (act of March 6, 1820, 3 Stat. at L. 545, chap. 22), and which declares that the Mississippi river shall be 'a common highway and forever free,' has been referred to in the argument here, but the rights of riparian owners are nowhere mentioned in that act. They are left to be settled according to the principles of state law."

In *Packer* v. *Bird*, 137 U. S. 661 [34: 819], it was held, that as the highest court of California had decided that the Sacramento river being navigable in fact, a title upon it extends no farther than to the edge of the stream, this court would accept that decision as expressing the law of the state. That case asserted the right of each state to determine the extent of the title and of the rights of the riparian owners in waters within the territory of the state. It was also stated that the Federal courts must construe grants of the general government without reference to the rules of construction adopted by the states for grants by them, but that whatever incidents or rights attach to the ownership of property conveyed by the United States bordering on navigable streams would be determined by the states in which it is situated, subject to the limitation that their rules do not impair the efficacy of the grant, or the use and enjoyment of the property by the grantee. It was further said that, "as an incident of such ownership the right of the riparian owner, where the waters are above the influence of *the tide, will be limited **[363** according to the law of the state, either to low or high water mark, or will extend to the middle of the stream."

It does not impair the efficacy of the grant or the use and enjoyment of the property by the grantee to hold that riparian rights are to be decided by the state courts, inasmuch as the grant, if by the Federal government, has been held in the cases already cited not to include title over navigable waters within or bounded by the states.

In *Hardin* v. *Jordan*, 140 U. S. 371 [35: 428], it was held that grants by the United States of its public lands bounded on streams and other waters, made without reservation or restriction, are to be construed, as to their effect, according to the law of the state in which the lands lie, and that it depends upon the law of each state to what extent the prerogative of the state to lands under water shall extend. In the opinion, after stating that the title to the shore and lands under water is in the state and is regarded as incidental to its sovereignty, it is said: "Such title being in the state, the lands are subject to state regulation and control under the condition, however, of not interfering with the regulations which may be made by Congress with regard to public navigation and commerce. . . . Sometimes large areas

[of land] so reclaimed are occupied by cities, and are put to other public or private uses, state control and ownership therein being supreme, subject only to the paramount authority of Congress in making regulations of commerce, and in subjecting the lands to the necessities and uses of comm[illegible]." (Citing cases.) Continuing, the court said: "This right of the states to regulate and control the shores of tide waters and the land under them is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes which are treated as inland seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the state; but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised."

364] *Mr. Justice Brewer, in his dissenting opinion in the above-cited case, which was concurred in by Mr. Justice Gray and Mr. Justice Brown, agreed "that the question how far the title of a riparian owner extends is one of local law. For a determination of that question the statutes of the state and the decisions of its highest court furnished the best and the final authority." And the dissent was based upon the theory that although the right of the state to determine this matter was not questioned in the prevailing opinion, there was, nevertheless, error committed by the majority of the court in refusing to follow a decision of the state court on the very question then under review, and in following instead thereof previous decisions of the state court inconsistent therewith.

In *St. Louis* v. *Rutz*, 138 U. S. 226 [34: 941], cited in the dissenting opinion above referred to, it was said by Mr. Justice Blatchford, in delivering the opinion of the court: "The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi river, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property which is governed by the local law of Illinois."

In *Kaukauna Water Power Company* v. *Green Bay & M. Canal Company*, 142 U. S. 254 [35: 1004], Mr. Justice Brown, in delivering the opinion of the court, said at page 271 [35: 1010]: "It is the settled law of Wisconsin, announced in repeated decisions of its supreme court, that the ownership of riparian proprietors extends to the center or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels. (Citing cases.) In *City of Janesville* v. *Carpenter*, 77 Wis. 288, 300 [8 L. R. A. 808], it is said of the riparian owner: 'He may construct docks, landing places, piers, and wharves out to navigable waters if the river is navigable in fact, but if it is not so navigable he may construct anything he pleases to the thread of the stream, unless it injures some other riparian proprietor or those having the superior right to use the waters for hydraulic purposes. . . . Subject to these restrictions, he has the right to use his land under water the same as above wa-

365] ter. *It is his private property under the protection of the Constitution, and it cannot be taken, or its value lessened or impaired, even for public use, "without compensation," or "without due process of law," and it cannot be taken at all for anyone's private use.' With respect to such rights we have held that the law of the state as declared by its supreme court is controlling as a rule of property."

In *Shively* v. *Bowlby*, 152 U. S. 1 [38: 331], it was again said that the new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tidewaters and in the lands under them within their respective jurisdictions. It was also remarked that, upon the question how far the title of the owner of land extends, bounding upon a river actually navigable, but above the ebb and flow of the tide, there is a diversity in the laws of the different states; and that the title and rights of riparian or littoral proprietors in the soil below high-water mark are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution.

The suit was in the nature of a bill in equity brought to quiet title to lands below high water mark in the city of Astoria, the question involving the rights in navigable waters as between the state and others. The opinion at page 57 [38: 352] states as follows: "By the law of the state of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court, above referred to, the law of Oregon governs the case." The opinion refers to all the cases which we have above cited and many others, upon the various questions which are discussed in the case, and recognizes the rule that it belongs to the states to decide as to the character and extent of the riparian rights of owners upon navigable waters within such states.

It is true that in these various cases the exact point in controversy in this case in regard to the rights of the state as against riparian owners has not arisen. The dispute has generally been as to the extent and character of the title as between *the United States or the [**366** state and the riparian owner to lands under water, and as to the right of the riparian owner to build out from the shore piers or wharves so as to reach the navigable portion of the stream; but the principles laid down in all of these cases necessarily include the right of the state courts to decide, as a matter of local law, the point now under discussion, subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers. The jurisdiction of the state over this question of riparian ownership has been always, and from the foundation of the government, recognized and admitted by this court. The extent of the plaintiff's riparian right of property was therefore the subject of adjudication by the state court, and the rule has been definitely stated by that court in its judgment which is now under review.

(2) It is claimed, however, by the plaintiffs in error that this judgment is the only case in the state where the ruling made therein has

been adopted, and that this particular judgment is at war with and opposed to every other ruling upon the subject heretofore made by the supreme court of that state; and they contend that upon the authority of *Hardin* v. *Jordan*, *supra*, this court should disregard the judgment of the state court in this case and follow the previous decisions of that court on this subject. As to the case of *Hardin* v. *Jordan*, it may be said that it went as far as this court ought to go in refusing to follow the latest decision of the highest court of a state in regard to a matter upon which the judgment of that court is regarded as conclusive. It will be observed, however, that the decision in *Hardin* v. *Jordan*, in refusing to follow the ruling of the supreme court of Illinois, in *Trustees of Schools* v. *Schroll*, 120 Ill. 509 [60 Am. Rep. 575], was placed upon the asserted fact that such ruling of the supreme court of Illinois was not necessary to the decision of the case, and that, being opposed to the entire course of the previous decisions of that state, it should be disregarded. It is not so here. The ruling of the state court was necessary to the decision of this case and stands as the latest, 367] if not the only, exposition *of the views of that court upon the question involved. We ought, therefore, to follow that case.

However, with regard to the decisions of the state court upon this subject, cited by counsel for the plaintiffs in error, we think there is not one of them which is inconsistent with the decision of that court in the cases now under review. The question did not arise in any of them upon the right of the state as against plaintiffs in error, or anyone in like situation, to divert a portion of the flow of the water in the Mississippi river to any public purpose so long as it did not interfere with the navigation of the river.

The cases of *Schurmeier* v. *St. Paul & P. Railway Company*, 10 Minn. 82 [88 Am. Dec. 59]; *Brisbine* v. *St. Paul & S. C. Railroad Company*, 23 Minn. 114; *Morrill* v. *St. Anthony Falls Water Power Company*, 26 Minn. 223 [37 Am. Rep. 399]; *State of Minnesota* v. *Minneapolis Mill Company*, 26 Minn. 229; *Union Depot, Street R. & Transfer Co.* v. *Brunswick*, 31 Minn. 297 [47 Am. Rep. 789]; *Hanford* v. *St. Paul & D. R. Company*, 43 Minn. 104; and *St. Anthony Falls Water Power Company* v. *City of Minneapolis*, 41 Minn. 270, are cited to sustain the contention of the plaintiffs in error.

An examination of these cases shows that the question did not arise and was not decided in any of them. Some of the cases relate to the question as to what was the proper boundary, high or low water mark, of lands mentioned therein, and in others the question arose as to the riparian right of owners of lands adjoining the Mississippi river to build piers or docks out to the navigable portion of the stream, or to fill up and build upon a portion of the river out to its navigable part; or it was a question of the right of a riparian proprietor to compensation from a railway company seeking to condemn for the purposes of its railway a certain portion of land owned by him between the center of a street and the center of the channel of the river. In none of the cases was there involved the right of the state to divert for public purposes a portion of the flow of a river, while not in the slightest degree or in any way affecting the navigability of the stream.

In *Union Depot, Street R. & Transfer Co.* v. *Brunswick* and in *Brisbine* v. *St. Paul & S. C. R. Company*, *supra*, substantially the same questions arose, and in the latter case, in [368 speaking of some of the riparian rights of an owner upon the banks of a navigable stream, the court said:

"What these rights are, especially in regard to land acquired originally from the United States, and bordering, as this does, upon the Mississippi river, we regard as fully and correctly settled by the Federal Supreme Court. *Dutton* v. *Strong*, 66 U. S. 1 Black, 23 [17: 29]; *St. Paul & P. Railroad Company* v. *Schurmeier*, 74 U. S. 7 Wall. 272 [19: 74]; *Yates* v. *Milwaukee*, 77 U. S. 10 Wall. 497 [19: 984]. According to the doctrine of these decisions, the plaintiff possessed the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain, for his own and the public use, suitable landing places, wharves, and piers, on and in front of his land, and to extend the same therefrom into the river to the point of navigability, even though beyond low-water mark, and to this extent exclusively to occupy, for such and like purposes, the bed of the stream, subordinate and subject only to the navigable rights of the public, and such needful rules and regulations for their protection as may be prescribed by competent legislative authority. The rights which thus belonged to him, as riparian owner of the abutting premises, were valuable property rights, of which he could not be devested without consent, except by due process of law, and, if for public purposes, upon just compensation. *Yates* v. *Milwaukee*, 77 U. S. 10 Wall. 497 [19: 984].

In *Union Depot, Street R. & Transfer Company* v. *Brunswick and others*, 31 Minn. 297 [47 Am. Rep. 789], it was held to be the settled law of Minnesota that a riparian owner upon a navigable stream has the fee to low-water mark; and that in addition he owns as an incident to his ownership certain riparian rights, among which are the right to enjoy free communication between his abutting premises and the navigable channel of the stream, to build and maintain suitable piers, landings, or wharves on and in front of his land, and to extend the same therefrom into the stream to the point of navigability even beyond low-water mark, and to this extent exclusively to occupy for such and like purposes the bed of the stream, subordinate only to the paramount public right of navigation. *These riparian [369 rights the court held to be property, and that they were not to be taken by the state without paying just compensation therefor. The rights which were held subordinate only to the paramount public right of navigation were those mentioned by the court, and not a word was said as to the right of flowage, which was not involved and was not alluded to.

In *Morrill* v. *St. Anthony Falls Water Power Company*, *supra*, the supreme court of Minnesota held that the riparian owner of lands upon a navigable stream may use the water flowing past his land for any purpose, so long

as he does not impede navigation, in the absence of any counterclaim by the state or the United States. It will be seen that this case does not refer to the right to receive the full amount of the natural flowage from above, but only to the right to use that which does flow, in the absence of any counterclaim by the state or the United States.

The same general statement of the rights of riparian owners is made in *Hanford* v. *St. Paul & D. R. Company*, *supra*. That case treats of the right of a riparian owner in the bed of the stream above low water mark as subject to the right of the public to use the same for the purposes of navigation, and adds that "restricted only by that paramount public right, the riparian owner enjoys valuable proprietary privileges, among which we shall consider particularly the right to the use of the land itself for private purposes. . . . Subject only to the limitation that he shall not interfere with the public right of navigation he has the unquestionable and *exclusive* right to construct and maintain suitable landings, piers, and wharves into the water and up to the point of navigability, for his own private use and benefit. (Citing cases.) And it is obviously immaterial if the public interests be not prejudiced, whether the submerged land be covered with wharves of timber or stone, or be reclaimed from the water by filling in with earth so that it becomes dry land. The land may be so reclaimed." It is also said in the course of the opinion: "The limit to the private right is imposed by the public right, and the private right exists up to the point beyond which it would be inconsistent with the public right."

370] *All this was said in regard to the case then under discussion, which related to the right of a riparian proprietor to reclaim the submerged land to the point of navigability, and to alienate the same so that the alienee might have the rights of the riparian owner, although having no interest in the original riparian estate. The question here involved was neither decided nor considered.

In *Schurmeier* v. *St. Paul & Pacific Railroad Company*, 10 Minn. 82 [88 Am. Dec. 59], which was affirmed in 74 U. S. 7 Wall. 27 [19: 74], it was held that the grantee from the United States had his land bounded by the river, at least to low-water mark, and when after the grant was made to him he platted it into blocks as part of the town of St. Paul that he still retained in the land over which the streets and landing were laid the fee, subject only to the use of the public for the purposes designated, and that the railroad company, having no legal authority to use the streets or landing for railroad tracks, and such use being a special injury to the plaintiff, he was entitled to an injunction. In that case Mr. Chief Justice Wilson, in the state court, was of the opinion that the riparian proprietor went to the middle of the river; that that was the rule at common law, and, in his opinion, there was no reason to doubt that the common law prevailed in Minnesota as to that question; but while so holding, as his individual opinion, he said that other authorities regarded the boundary line of the riparian proprietor to be low-water mark, and even on that assumption the place in dispute was within the title of the riparian proprietor.

The state court subsequently decided that the title of a riparian owner on a navigable stream went only to low-water mark.

St. Anthony Falls Water Power Company v. *City of Minneapolis*, *supra*, does not decide the point contended for by the plaintiffs in error. It was a contest between private parties as to the effect of a certain deed in reserving rights to the grantor and as to the extent of the right of flowage contained in the deed. The question here under discussion was not even remotely affected.

*We have looked in vain among all the **[371** cases in the state court, cited by counsel for the plaintiffs in error, for any decision upon this question. Whatever may be the rights of the plaintiffs in error under their charters, or as the riparian owners of land, to build and maintain their dams to the center of the stream, there is no decision cited which holds that they are entitled to the use of all the water which would naturally flow past their lands and over their dams so constructed, nor has the state court decided that the only right of the state, to which this alleged right of the plaintiffs in error is subject or subordinate in any way, is limited to the right of the state to control or use the bed of the stream and the waters therein for purposes of navigation only. That limitation has never been placed upon the state with reference to the point here in question. The state supreme court in deciding this particular case was not therefore announcing a rule which was at all inconsistent with or opposed to any of its former decisions; and as the extent of the riparian rights in this case was a subject committed to the jurisdiction of the state of Minnesota, we are bound, so far as this question is concerned, to follow the decision of the highest court of that state, as announced in this case.

(3) If wrong in their above contentions, the plaintiffs in error then assert that their charters, granted in 1856, and set forth so far as material in the foregoing statement of facts, gave and guaranteed to them the right to use and develop the water power of St. Anthony Falls, and authorized them to build such structures in and upon the river as were necessary to develop that power, and that when these provisions of their charters were accepted and acted upon, they became contract obligations between the state of Minnesota and the plaintiffs, and that the statute above mentioned, authorizing the defendant to divert some portion of the natural flow of the water without compensation to the plaintiffs, was in violation of the Federal Constitution as impairing the obligation of the contracts contained in the charters referred to.

We think this contention cannot be maintained. We are of opinion that the true construction of these territorial *charters does not **[372** give such contract rights as are claimed by the plaintiffs in error. They were grants of power to the respective companies under which they were licensed to build their dams out into the river for the purpose of utilizing the power and of using the water that flowed down the river. These grants were in legal effect subject at all times to the paramount right of the

state as trustee for the public to divert a portion of the waters for public uses, and they were also subject to the rights in regard to navigation and commerce existing in the general government under the Constitution of the United States. See also, upon this subject, *Watuppa Reservoir Co.* v. *Fall River*, 147 Mass. 548 [1 L. R. A. 466]; *City of Auburn* v. *Union Waterpower Co.* [90 Me. 576, 38 L. R. A. 188], 38 Atl. 561. There was no contract by virtue of these charters that the companies should always and for all time be entitled to all the natural flow of the water in the river without regard to the right of the state as above mentioned. The claims made by the companies seem to us most extravagant. The state or any particular subdivision thereof acting under its authority would, if these claims were valid, be forever thereafter prevented from using any portion of the waters of the river for any public purpose unless compensation for such use were first made these plaintiffs. This construction of the meaning of the charters assumes the power of a territorial or state legislature to bind future legislatures in dealing with these public rights, and it prevents the latter from providing for the use of any portion of the waters for public purposes of the most important character without first making compensation to the plaintiffs for that use. If we should assume the validity of an act of the legislature of such a character (which, under the decision of this court in *Illinois C. Railroad Co.* v. *State of Illinois*, 146 U. S. 387 [36: 1018], is at least doubtful), it is clear that we ought not to adopt a construction leading to that result unless the legislative act be plain and beyond all doubt. We are of opinion that these particular charters of the plaintiffs are not to be thus construed. The sections of the acts which are material upon this point simply authorize the companies to [373] maintain their dams and sluices, *and permit them to construct and maintain other dams, etc., for the purpose of manufacturing, or for improving any water power owned or possessed by the companies, in such manner or to such extent as shall be authorized by the directors. But there is no language in the acts providing that the companies shall thereafter and always have the right to the use of all the natural flow of the water down the river. Nor is such right a necessary and legal consequence of the language used. They may have acquired by these acts the right to build dams, etc., and the right to use such water as in fact and from time to time should flow down to their dam, but there is nothing in the language of the charters showing or implying that it was the intention of the state to grant to these parties the rights now claimed by them. It is difficult to believe that a legislature would ever grant to individuals or companies rights of that nature, even if it be assumed it had the power. It was proper and in accordance with a wise public policy to grant a privilege to these companies to build dams, etc., as stated in the charters, and to permit them, by virtue of the dams and sluices, to use the water that in fact and from time to time might come down the river, but it cannot be supposed that the legislature meant by any grant of this kind to warrant that for all future time no part of the water that might otherwise naturally flow down the river should ever be used under the authority of the state for any public purpose, without compensating the plaintiffs for that diversion.

In *Rundle and Others, Trustees, etc.*, v. *Delaware & Raritan Canal Company*, 55 U.S. 14 How. 80 [14: 335], this court held that by the law of Pennsylvania the Delaware river was a public navigable river held by its joint sovereigns (the states bordering thereon) in trust for the public; that riparian owners in that state had no title to the river, or any right to divert its waters, unless by license from the states; that such license was revocable and in subjection to the superior right of the state to divert the water for public improvements, either by the state directly, or by a corporation created for that purpose; and that the proviso to the provincial acts of Pennsylvania and New Jersey of 1771 did not operate as a grant of the usufruct of the waters of the river to Adam *Hoops and his assigns, but only as a li- [374] cense or toleration of his dam. It appeared in this case that the plaintiffs in error, being plaintiffs below, were the owners of certain mills in Pennsylvania opposite the city of Trenton in New Jersey; that the mills were supplied with water from the Delaware river by means of a dam extending from the Pennsylvania shore to an island lying near and parallel to it, and extending along the rapids to the head of tidewater. The plaintiffs claimed that by virtue of a proviso in the acts of the provincial legislatures of Pennsylvania and New Jersey their predecessors had become entitled to the free and uninterrupted enjoyment of the river Delaware for the use of their mills, and that, notwithstanding, the defendants had erected a dam in the river above plaintiff's mills, and had dug a canal and diverted the water to their great injury. A demurrer was interposed, upon which the court below gave judgment for the defendants, and this court was asked to review and reverse that judgment. It was held that the proviso was nothing more than a license to keep the dam up, which could at any time be revoked.

A careful consideration of the acts in question persuades us that they are not to be construed as plaintiffs claim, and that under them the plaintiffs took no contract rights which have been impaired in any degree by the subsequent acts under which defendants claim the rights set up in their respective answers.

These views lead us to the opinion that *the judgments of the Supreme Court of Minnesota in these cases are right, and they are therefore affirmed.*

375] UNITED STATES, *Appt.*,
v.
FRANK B. CROSTHWAITE.

(See S. C. Reporter's ed. 375–381.)

Compensation of special attorneys and counselors—certificate of attorney general.

1. Attorneys and counselors specially employed to render legal services for the United States cannot be compensated for such services, in the absence of the certificate of the Attorney General required by U. S. Rev. Stat. § 365.

2. One who receives a commission as special assistant to the district attorney for particular cases, or for a single term of the court, or for a limited time, is not an assistant district attorney within the meaning of U. S. Rev. Stat. § 365, and cannot recover compensation without a certificate of the attorney general.

[No. 77.]

Submitted November 1, 1897. Decided November 29, 1897.

APPEAL from a judgment of the Court of Claims in favor of Frank B. Crosthwaite against the United States for the value of services rendered by him as a special assistant to the attorney of the United States for the District of Idaho. *Reversed*, with directions to dismiss the action.

See same case below, 30 Ct. Cl. 300.

The facts are stated in the opinion.

Mr. **Louis A. Pradt,** Assistant Attorney General, for appellant.

Messrs. **John C. Chaney** and **John R. Garrison** for appellee.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an appeal from a judgment against the government in the court of claims for the sum of $300, which was found to be the value of certain services rendered by the appellee, as a special assistant to the attorney of the United States for the district of Idaho, at a called term of the circuit court.

The facts found by the court of claims, and upon which the appellee's claim for compensation depends, may be thus summarized:

On the 22d of June, 1892, the appellee, an examiner in the Department of Justice, received from the Attorney General an order directing him to discontinue the investigations then being made by him in Utah, and proceed at once 376] to Idaho for *the purpose of conferring with the author of a certain confidential communication which had been received by the Department of Justice. The order also directed him to examine the offices and accounts of the United States attorney, the United States marshal, the clerk of the United States court, and the United States commissioners, investigate the manner in which business was conducted by those officers, inform himself as to the character and qualifications of the various officials, and report to the department the results of his examination.

While thus engaged in Idaho the plaintiff received by telegraph, August 9, 1892, an order from the acting Attorney General of the United States, directing him to "report to and assist the United States attorney at a special term to be called by Judge Beatty at Coeur d'Alene City, Idaho."

On the 13th of August, 1892, he was appointed by the acting Attorney General "a special assistant to the attorney of the United States for the district of Idaho, to aid him in the preparation and prosecution of all criminal business properly coming before the court during its special term, ordered at Coeur d'Alene for August 8, 1892." The order of appointment stated: "Your compensation will be determined by the Attorney General upon completion of your service. Execute the customary oath of office and forward the same to this department without delay."

It should be stated that on the 14th day of August, 1892, while at Boisé City, and after his above appointment had been made, but before receiving notice thereof, the appellee mailed to the Attorney General an official communication in relation to the criminal proceedings then being instituted in Idaho against rioters and conspirators, in which he said: "I will proceed to Wallace to morrow for the purpose of preparing the cases for trial, and to select the necessary witnesses, in order that none may be subpœnaed unnecessarily. The marshal has been instructed to provide a sufficient guard for the term to be held, and everything appears to be moving along smoothly. In order that no question may be raised by the defense as to my status, and that I may be able to appear before the grand jury, I beg to suggest the advisability of my appointment as *a special assistant to the United [377 States attorney, without compensation, for these cases."

The plaintiff took the required oath of office and performed the duties assigned to him. He appeared on behalf of the United States before the United States Commissioner at Wallace, Idaho, for the purpose of having him "discharge" a large number of rioters who had been held to appear before that officer, examined witnesses before the grand jury, rendered daily service at the trial of the cases, "and generally rendered the professional assistance of an assistant district attorney from the 23d of August, 1892, to the 28th of September, 1892." He performed also his duties as examiner of the Department of Justice.

At the time of rendering service as special assistant to the district attorney he was receiving in his capacity as an examiner in the Department of Justice a salary of $2,500 per annum. He was also reimbursed for his traveling expenses during the time he acted as special assistant to the district attorney.

Upon the conclusion of his services as above stated, the appellee, although he had suggested that his appointment should be without compensation, sent to the Attorney General a statement of his services as special assistant to the district attorney, saying: "I send this statement to you, considering that it is necessary, if it shall be determined that I shall be compensated for the services performed as ass't U. S. att'y. I have left the amount to be inserted at the de-

NOTE.—*As to district attorney; fees of; contract for additional compensation,*—see note to Lancaster County v. Fulton (Pa.) 5 L. R. A. 437.

partment in accordance with your action thereon." But the Attorney General expressed his surprise that the appellee should claim special compensation and refused to fix any compensation for his services, saying, in a communication to the plaintiff: "As an examiner of this department you receive $2,500 a year and expenses, and what you have been doing is clearly within the line of your duty in the premises."

The question as to the employment of special counsel on behalf of the United States has frequently been the subject of legislation by Congress.

By the 2d section of the act of August 2, 1861, 378]*entitled "An Act Concerning the Attorney General and the Attorneys and Marshals of the Several Districts" (12 Stat. at L. 285, chap. 37), it was provided "that the Attorney General be, and he is hereby empowered, whenever in his opinion the public interest may require it, to employ and retain (in the name of the United States) such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant counsel the amount of compensation."

This section was repealed by the act of March 3, 1869, making appropriations for the legislative, executive, and judicial expenses of the government for the fiscal year ending June 30, 1870. 15 Stat at. L. 282, 294, chap. 121. But by the act of April 10, 1869, entitled "An Act Concerning the Attorney General," the above act of March 3, 1869, was itself repealed, so far as it repealed the 2d section of the act of August 2, 1861, and that section was declared to be in full force; and it was made the duty of the Attorney General to report "at the commencement of the next session of Congress, and to each succeeding session, the names of all the persons employed for the purposes aforesaid, and where and upon what business employed, with the compensation paid to each." 16 Stat. at L. 46, chap. 25.

Next came the act of June 22, 1870, establishing the Department of Justice (16 Stat. at L. 162, 164, chap. 150), the 16th and 17th sections of which were preserved and reproduced in the following sections of the Revised Statutes:

"Sec. 363. The Attorney General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings.

"Sec. 364. Whenever the head of a department or bureau gives the Attorney General due notice that the interests of the United States require the service of counsel upon the examina-379]tion *of witnesses touching any claim, or upon the legal investigation of any claim, pending in such department or bureau, the Attorney General shall provide for such service.

"Sec. 365. No compensation shall hereafter be allowed to any person, besides the respective district attorneys and assistant district attorneys, for services as an attorney or counselor to the United States, or to any branch or department of the government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney General that such services were actually rendered, and that the same could not be performed by the Attorney General, or Solicitor General, or the officers of the Department of Justice, or by the district attorneys.

"Sec. 366. Every attorney or counselor who is specially retained under the authority of the Department of Justice to assist in the trial of any case in which the government is interested shall receive a commission from the head of such department, as a special assistant to the Attorney General, or to some one of the district attorneys, as the nature of the appointment may require; and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law."

The object of these statutory provisions is manifest. While giving the Attorney General full power to employ counsel for the United States to assist those upon whom regularly devolved the duty of representing the government in the courts without special compensation, Congress intended to restrict the exercise of that power to the extent indicated in § 365. It was left to that officer to determine whether the public interests required the employment of special counsel. But that the discretion given to him might not be abused, and that unnecessary expense might be avoided, it was declared (§ 365) that except in the cases of the respective district attorneys and assistant district attorneys no compensation should be allowed to any person as an attorney or counselor for the United States unless specially authorized by law, and then only on the certificate of the Attorney General that such services were actually rendered, and that the same could *not have been performed by the Attor- [380
ney General, or by the Solicitor General, or by the officers of the Department of Justice, or by the district attorneys. The giving of such a certificate was thus made a condition of the right of the court to give judgment, as upon contract, against the government for any amount whatever as compensation for legal services rendered in its behalf by counsel specially employed or retained by the Attorney General to assist those whose duty it is to represent the United States in its legal business. Attorneys and counselors specially employed to render legal services for the United States cannot, therefore, under existing legislation, be compensated for such services in the absence of the certificate of the Attorney General required by § 365 of the Revised Statutes. In accepting such employment they take the risk of that officer giving such a certificate as ought to be given. If he fails or refuses to give the required certificate, Congress alone can provide for compensation. The courts cannot disregard the express command of the statute forbidding compensation to be allowed for legal services rendered by special counsel when the claim therefor is not accompanied by the prescribed certificate of the Attorney General.

This construction of the statute necessarily requires a reversal, with direction to render

judgment for the United States, unless it be held that the plaintiff, while acting under his commission as "a special assistant to the attorney of the United States" during a single term of the circuit court of the United States for the district of Idaho, and mainly for a particular class of cases, was an assistant district attorney within the meaning of the words in § 365, "besides the respective district attorneys and assistant district attorneys;" for, in the cases of the officers last named, no formal certificate is required from the Attorney General. But we cannot so interpret the statute. The assistant district attorneys referred to in that section are those who are regular assistant district attorneys, serving the government at fixed salaries, and employed, not for special cases or particular legal business, nor for a specified term of court, but generally and regularly for all the business of the government that may arise in

381]the courts *of the district in which they serve. This interpretation finds support in many appropriation acts. In the sundry civil appropriation act of October 2, 1888 (25 Stat. at L. 505, 545, chap. 1069), the distinction is made between "regular assistants to the United States district attorneys, who are appointed by the Attorney General at a fixed annual compensation," and "assistants to United States district attorneys in special cases." The distinction has been made in subsequent appropriation and deficiency acts. 25 Stat. at L. 565, 585, chap. 1210; 26 Stat. at L. 939, 977, chap. 411; 26 Stat. at L. 371, 409, chap. 837; *Id.* 504, 528, 548, chap. 1126; *Id.* 862, 892, chap. 510; *Id.* 948, 986, chap. 542; 27 Stat. at L. 282, 310, chap. 311; *Id.* 349, 386, chap. 380; *Id.* 572, 609, chap. 208; *Id.* 646, 661, 668, chap. 210; 28 Stat. at L. 58, 61, chap. 61; *Id.* 372, 416, chap. 301; *Id.* 910, 957, chap. 189; 29 Stat. at L. 17, 26, chap. 33; *Id.* 267, 297, 310, 313, chap. 373; *Id.* 412, 450, chap. 420.

We are of the opinion that the better construction of § 365 is that one who receives a commission as special assistant to the district attorney for particular cases, or for a single term of the court, or for a limited time, is not an assistant district attorney within the meaning of that section; and therefore the certificate of the Attorney General prescribed therein, which even that officer cannot dispense with, is a prerequisite to the allowance of compensation. Any other construction of the statute would defeat the object of its passage, which was to protect the treasury from the expense incident to the employment of special counsel, where the government did not have the assurance of the head of the Department of Justice in the form of a certificate, that the services to be rendered were actually rendered and could not be performed, either by himself or by the Solicitor General, or by some officer of that department, or by the proper district attorney. In this view it was error to have rendered judgment against the government.

The judgment is reversed, with directions to dismiss the action

RICHARD S. WILLIAMS, *Plff. in Err.*, [382

v.

UNITED STATES.

SAME

v.

SAME.

(See S. C. Reporter's ed. 382-398.)

Extortion by Chinese inspector—U. S. Rev. Stat. § 5481—indorsements on indictment—arrest of judgment on one count—joint trial—evidence—testimony of reputation—statement by prosecutor in the presence of jury.

1. Extortion by a Chinese inspector is not committed under the authority "of any revenue law," within the meaning of U. S. Rev. Stat. § 3169, or "of any internal revenue or custom law, or any revenue provision of any law of the United States," within the meaning of the act of February 8, 1875.
2. The offense of extortion under color of office, defined by U. S. Rev. Stat. § 5481, includes extortion by a Chinese inspector under color of his office.
3. Indorsements on the margin of an indictment, referring to certain statutes which do not support it, although they may have been erroneously supposed to do so by the district attorney who drew it, do not make the indictment invalid if it properly charges an offense under another statute.
4. The arrest of judgment on one count of an indictment is not subject to review on writ of error taken by the defendant.
5. Two indictments against the same person, in which the offenses charged are of the same kind and are provable by the same kind of evidence, may be consolidated and tried together, where it can be done without embarrassing the accused in making his defense, or working any prejudice to him.
6. Evidence which merely tends to show the possession at different times of money which was deposited in a bank to the credit of the accused or his wife is inadmissible on a trial for extortion in taking specified sums of money where the amounts do not correspond with the amounts shown to have been in his possession and there is no evidence of any connection between them.
7. Testimony that the reputation "in the custom-house" of a Chinese inspector was bad, when the witness states that he does not know his general reputation outside the custom house, is inadmissible.
8. On the trial of a Chinese inspector for extortion, in which it is claimed for him that his record for sending back Chinese women is unusually good, a statement by the prosecutor in the presence of the jury that no doubt he sent back every woman who did not pay him, if not withdrawn and an objection thereto is overruled, tends to

NOTE.—*As to extortion; in office*, see note to Brackenridge v. State (Tex.) 4 L. R. A. 360.

By threats; by false accusations in writing; by threatening letters; verbal threats; indictment for,—see note to Mann v. State (Ohio) 11 L. R. A. 656, 658.

That offenses of same general character may be joined; felonies and misdemeanors may be joined; separate offenses of same class; separate misdemeanors; several counts; counts at common law and under statute; charging acts in single count,—see note to Herman v. People (Ill.) 9 L. R. A. 182.

prejudice his rights to a fair and impartial trial, and is error sufficient for reversal.

[Nos. 266, 267.]

Argued October 27, 1897. Decided November 29, 1897.

IN ERROR to the District Court of the United States for the Northern District of California to review a judgment convicting Richard S. Williams, an officer of the Department of the Treasury, of extortion in exacting moneys from Chinese immigrants for permission to land and remain within the United States and sentencing him to fine and imprisonment. *Reversed in each case*, with directions for a new trial.

The facts are stated in the opinion.

Mr. **George D. Collins** for plaintiff in error.

Mr. **Jas. E. Boyd,** Assistant Attorney General, for defendant in error.

383] *Mr. Justice **Harlan** delivered the opinion of the court:

By an indictment returned in the district court of the United States for the northern district of California, it was charged that the plaintiff, an officer of the Department of the Treasury, duly appointed and acting under the authority of the laws of the United States, and designated as Chinese inspector at the port of San Francisco, and by virtue of his office being authorized, directed, and required to aid and assist the collector of customs of that port in the enforcement of the various laws and regulations relating to the coming of Chinese persons and persons of Chinese descent from foreign ports to the United States, "did then and there, as such officer, wilfully, knowingly, corruptly, and feloniously, for the sake of gain and contrary to the duty of his said office and by color thereof, ask, demand, receive, extort, and take of one Wong Sam, a Chinese person, a certain sum of money, to wit, one hundred dollars, which said sum of money was not due to him, the said Richard S. Williams," and which he was not, "by virtue of his said office, entitled to ask, demand, receive, or take"—that is to say, that "on the thirty-first day of August, in the year of our Lord one thousand, eight hundred and ninety-five, there arrived at the port of San Francisco aforesaid from a foreign port or place, to wit, the port of Hong Kong, in the Empire of China, a male person of Chinese descent, to wit, one Wong Lin Choy who claimed to the collector of customs that he was entitled to land, be, and remain within the United States on the ground that he was a native born of said United States; that thereafter such proceedings were had and taken before said collector of customs in accordance with law that the said Wong Lin Choy was by said collector of customs adjudged to be entitled to and permitted to land at said port as a native born of said United States of Chinese descent, and to be and remain in the said United States; that thereafter, . . . on the eighteenth day of September, 1895, . . . the said Richard S. Williams corruptly and extorsively, for the sake of gain and contrary to the duty of his said office and under color there-**384]**of, *did extort, receive, and take of said Wong Sam, who was then and there interested in the application or claim of said Wong Lin Choy as aforesaid, a sum of money, to wit, the sum of one hundred dollars as aforesaid, the said Richard S. Williams, under color of his said office, having previously, to wit, on the thirty-first day of August, 1895, at said city and county, state and district, aforesaid, feloniously and corruptly obtained and exacted a promise from said Wong Sam for the payment thereof by him to the said Richard S. Williams, by then and there falsely and corruptly representing to the said Wong Sam that without the payment thereof to him, the said Richard S. Williams, the said Wong Lin Choy would not be permitted to land at said port, be, or remain within the United States, but would be returned to said foreign port from whence he came, against the peace and dignity of the United States of America," etc.

A second count—describing the official character and duties of Williams as in the first count—charged that he wilfully and corruptly and under color of his office did "take and receive of one Wong Sam, who was then and there interested in the claim of one Wong Lin Choy to be permitted to land at the port of San Francisco aforesaid, a sum of money, to wit, one hundred dollars as and for a fee, compensation, and reward to him, the said Richard S. Williams, for the services of him, the said Richard S. Williams, under color of his said office, in the matter of the application of said Wong Lin Choy, who then and there claimed to the collector of customs of said port to be entitled to land at said port of San Francisco from a foreign port, to wit, the port of Hong Kong, in the Empire of China, and to be and remain in the United States under the claim that he was a native born of the said United States, which said application was then and there pending and under investigation before said collector of customs as aforesaid, whereas in truth and in fact no fee, compensation, or reward was then or at any other time due or owing from the said Wong Sam or any other person to the said Richard S. Williams for such service or any services of him, the said Richard S. Williams, in connection with said matter or at all, nor was he, the *said **[385** Richard S. Williams, entitled to the same by law, against the peace and dignity of the United States of America," etc.

A second indictment containing two counts was returned in the same court against the plaintiff in error, describing his official character and duties, and charging him in one count with having wilfully, knowingly, corruptly and feloniously, and in the second, with having wilfully and corruptly, under color of his office, taken from one Chan Ying, a Chinese person, the sum of $85, in consideration of his being permitted to come into and remain within the United States.

The record states that on the margin of each indictment was an indorsement in these words: "Sec. 3169, Rev. Stat. subs. 1 & 2, and sec. 23, act of Feb'y 8, 1875, vol. 1, 2d ed. Supp. Rev. Stat." This indorsement, it is contended, indicates the statutes under which the prosecutions were intended to be instituted.

A demurrer to each indictment having been overruled, the accused was duly arraigned in

each case, and pleaded not guilty. The two cases were then, on motion of the government, consolidated and tried together. The result was a verdict of guilty in each case. Judgment on the verdicts having been asked, the accused interposed a motion in arrest of judgment on the second count of each indictment, and also a motion for a new trial in each case. The first motion was sustained, and the second one having been overruled, the defendant was sentenced in each case to pay a fine of $5,000, to be imprisoned for three years to date from September 22, 1896, and to be further imprisoned until the fine imposed on him was paid or until he should be otherwise discharged by due process of law.

The first question to be examined is whether these prosecutions are authorized by any existing statute of the United States. It was presumed by the learned judge who presided at the trial that the indictments were founded upon § 3169 of the Revised Statutes and § 23 of the act of February 8, 1875, entitled "An Act to Amend Existing Customs and Internal Revenue Laws, and for Other Purposes." 18 Stat. at L. 307, 312, chap. 36.

386] *Section 3169 of the Revised Statutes is part of chapter I of title 35, *Internal Revenue*, and was brought forward from the act of July 20, 1868, entitled "An Act Imposing Taxes on Distilled Spirits and Tobacco, and for Other Purposes." 15 Stat. at L. 125, 165, chap. 186, § 98. By that section, which is given in full in the margin,† it is declared that "every officer **387**] or *agent appointed and acting under the authority of any revenue law of the United States, first, who is guilty of any extortion or wilful oppression under color of law; or, second, who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty. . . . shall be fined not less than $1,000 nor more than $5,000, and be imprisoned not less than six months nor more than three years. The court shall also render judgment against the said officer or agent for the amount of damages sustained in favor of the party injured, to be collected by execution. One half of the fine so imposed shall be for the use of the United States, and the other half for the use of the informer, who shall be ascertained by the judgment of the court."

Section 23 of the above act of February 8, 1875, provides: "All acts and parts of acts imposing fines, penalties, or other punishment for offenses committed by an internal revenue officer or other officer of the Department of the Treasury of the United States, or under any bureau thereof, shall be, and are hereby, applied to all persons whomsoever, employed, appointed, or acting under the authority of any internal revenue or customs law, or any revenue provision of any law of the United States, when such persons are designated or acting as officers or deputies, or persons having the custody or disposition of any public money."

We are of opinion that these prosecutions cannot be sustained under the above statutes. The words "extortion or wilful oppression under color of law," and the knowingly demanding "other or greater sums than are authorized by law," or the receiving "any fee, compensation, or reward, except as by law prescribed, for the performance of any duty"—illegal acts described in subdivisions one and two of § 3169 of the Revised Statutes—refer to offenses committed by officers or agents "appointed and acting under the authority of any *revenue* law of the United States." The accused, in his capacity of Chinese inspector, did not act under any law that could properly be regarded as a revenue law. He was appointed *pursuant to acts of Congress appropri- **[388** ating money to be used by the Treasury Department "to prevent unlawful entry of Chinese into the United States, by the appointment of suitable officers to enforce the laws in relation thereto, and for expenses of returning to China all Chinese persons found to be unlawfully within the United States." 26 Stat. at L. 371, 387, chap. 837; *Id.* 948, 968, chap. 542; 27 Stat. at L. 572, 589, chap. 208; 28 Stat. at L. 41, chap. 37; *Id.* 372, 390, chap. 301; *Id.* 636, 637, chap. 43; *Id.* 843, 846, chap. 187; *Id.* 910, 932, chap. 189; 29 Stat. at L. 413, 431, chap. 420. The Chinese exclusion acts have no reference to the subject of revenue, but are designed to exclude persons of a particular race from the territory of the United States. Clearly, Chinese inspect-

† Sec. 3169. Every officer or agent appointed and acting under the authority of any revenue law of the United States—

First. Who is guilty of any extortion or wilful oppression under color of law; or,

Second. Who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty; or,

Third. Who wilfully neglects to perform any of the duties enjoined on him by law; or,

Fourth. Who conspires or colludes with any other person to defraud the United States; or,

Fifth. Who makes opportunity for any person to defraud the United States; or,

Sixth. Who does or omits to do any act with intent to enable any other person to defraud the United States; or,

Seventh. Who negligently or designedly permits any violation of the law by any other person; or,

Eighth. Who makes or signs any false entry in any book or makes or signs any false certificate or return, in any case where he is by law or regulation required to make any entry, certificate, or return; or,

Ninth. Who, having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against the United States under any revenue law, fails to report, in writing, such knowledge or information to his next superior officer and to the Commissioner of Internal Revenue; or,

Tenth. Who demands, or accepts, or attempts to collect, directly or indirectly, as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do, shall be dismissed from office, and shall be held to be guilty of a misdemeanor, and shall be fined not less than $1,000, nor more than $5,000, and be imprisoned not less than six months nor more than three years. The court shall also render judgment against the said officer or agent for the amount of damages sustained in favor of the party injured, to be collected by execution. One half of the fine so imposed shall be for the use of the United States, and the other half for the use of the informer, who shall be ascertained by the judgment of the court.

ors, proceeding under the acts providing for their appointment, have no connection with the revenue system of the government, although the execution of the acts referred to is committed to the Treasury Department.

Nor can the prosecutions be sustained under the 23d section of the act of February 8, 1875. That section does nothing more than subject persons employed, appointed, or acting under the authority "of any internal revenue or customs law, or any revenue provision of any law of the United States," to the same fines, penalties, or other punishment for offenses committed by an internal revenue officer or other officer of the Treasury, or under any bureau thereof. The words, "internal revenue or customs law," do not include the statutes providing for the exclusion of Chinese persons from this country.

But there is a statute under which, in our judgment, a Chinese inspector guilty of extortion under color of his office can be prosecuted and subjected to fine and imprisonment. It is § 5481 of the Revised Statutes, providing that "every officer of the United States who is guilty of extortion under color of his office shall be punished by a fine of not more than $500, or by imprisonment not more than one year, except those officers or agents of the [389] United States otherwise *differently and specially provided for in subsequent sections of this chapter."

It is said that these indictments were not returned under that statute, and that the above indorsement on the margin of each indictment shows that the district attorney of the United States proceeded under other statutes that did not cover the case of extortion committed by a Chinese inspector under color of his office. It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment, if the charges made are embraced by some statute in force. The indorsement on the margin of the indictment constitutes no part of the indictment and does not add to or weaken the legal force of its averments. We must look to the indictment itself, and if it properly charges an offense under the laws of the United States that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute.

That the first count of each indictment makes a case of extortion under color of office, within the meaning of § 5481, is too clear to admit of dispute. The court below, therefore, while erroneously adjudging that the prosecutions were embraced by § 3169 of the Revised Statutes and the above act of February 8, 1875, did not err in overruling the demurrer to the first count of the respective indictments. We say nothing as to the second count in either indictment, because judgment on that count was arrested, and that action of the court is not subject to review on this writ of error. *United States* v. *Sanges*, 144 U. S. 310 [36: 445].

It is proper also to observe that there was error in the judgment as to the fine and imprisonment imposed upon the accused. Section 5481 of the Revised Statutes provides that the fine should not exceed $500, nor the imprisonment more than one year. If this were the only error complained of, the result would not be an entire failure of the prosecutions for it would only be necessary for the court below to enter a new judgment, imposing such fine or imprisonment, or both, as the statute permitted.

*But other errors are assigned relating [390 to the conduct of the trial. They must be examined, because if any of them affect the substantial rights of the accused, a new trial must be the result in each case.

It is assigned for error that the district court consolidated the two cases, and tried them at the same time and by the same jury. This objection is without merit. By § 1024 of the Revised Statutes it is provided: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated." The accused having been charged with different acts or transactions "of the same class of crimes or offenses," it is scarcely necessary to say that the transactions referred to in the indictments, being of the same class of crimes, could properly, that is, consistently with the essential principles of criminal law, be joined in one indictment against a single defendant without embarrassing him or confounding him in his defense. *Pointer* v. *United States*, 151 U. S. 396, 400 [38: 208, 211]. The plaintiff in error cites *McElroy* v. *United States*, 164 U. S. 76 [41: 355], as sustaining his objection to the consolidation. This is a misapprehension. The inquiry in that case was "whether counts against five defendants can be coupled with a count against part of them or offenses charged to have been committed by all at one time can be joined with another and distinct offense committed by part of them at a different time." It was held that the statute did not authorize that to be done. The Chief Justice, speaking for the court, said: "It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried." Here, the indictments were against the same person, the offenses charged were of the same kind, were *provable by the same kind of evidence, [391 and could be tried together without embarrassing the accused in making his defense.

If the offenses could be joined in one indictment, it would follow, under the statute, that separate indictments could, in the discretion of the court, be consolidated and tried at the same time and before the same jury. Nothing in the record shows that the consolidation of these cases worked or could have worked any prejudice to the defendant.

At the trial below the government read in evidence, over the objections of the accused, his affidavit filed in a divorce suit brought against him by Isabella M. Williams in the supreme court of San Francisco. That affidavit, made June 1, 1896, was as follows: "I

have read the affidavit of plaintiff in reply on her motion for alimony, etc., and in reply thereto I desire to say it is untrue that prior to the time I entered the employment of the United States government I was without means and had had no money for quite a time before, or that I had to borrow money to pay my living expenses. On the contrary, when I entered the employment of the United States government, on or about the 28th day of September, 1893, I was worth more money then than I am at the present time, being worth about $5,000, and since then having inherited some property; that the $3,000 referred to in said affidavit was not acquired by me during the time I was in the employment of the United States government, as set forth in said affidavit, but is a portion of the $5,000 heretofore referred to. The statement in said affidavit that I have in my possession or had in my possession, in addition to the said sum of $3,000 aforesaid, the sum of $5,000, instead of $4,000, is false and untrue; that, to my knowledge, plaintiff was not in the habit of carrying said sum of $5,000 in the bosom of her dress. On the contrary, there was on deposit in the Hibernia Savings & Loan Society in her name, belonging to me, the sum of about $4,000, which was a part of the $5,000 possessed by me at the time I entered the employment of the United States government. The $3,000 in bank referred to is a portion of said sum so deposited in the name of plaintiff [392] in the Hibernia *Savings & Loan Society. In answer to the statement contained on page 2 of said affidavit, to the effect that plaintiff paid for the piano therein referred to and the bill therefor was made out in her name, I simply desire to annex the bill for said piano to this affidavit, showing the bill to be made out in the name of P. S. Williams. The property at Nos. 420 and 422 Scott street, mentioned on page 2 of said affidavit, was acquired by my stepfather, Henry Monsferran, now deceased. He was a foreigner, unaccustomed to speaking the English language, and the details of the purchase were made by me, but the money that paid for said property was solely and exclusively the money of the said Henry Monsferran. The deed to the property was taken in his name. It is untrue that at the time plaintiff left our residence on the 29th day of April, 1896, she left said sum of $5,000 in greenbacks. On the contrary, as above stated, there was no such sum, and the money referred to by her as having been drawn from the Hibernia Savings & Loan Society is $3,000, so deposited in the savings bank. It is untrue, as stated in said affidavit, that I avoided the service of the summons and complaint in this action, or that by reason thereof plaintiff incurred an expenditure of $11.25."

It is stated in the bill of exceptions that, independently of that affidavit, there was no evidence whatever before the court relative to the matters therein referred to, except certain bank books offered and read in evidence over the objections of the accused.

The bill of exceptions states that at the trial the prosecution offered in evidence a book of the deposit of moneys in the San Francisco Savings Union, a banking corporation of the state of California, which book and deposits were in the name of the defendant; also a book of the deposit of moneys in the Hibernia Savings & Loan Society, a banking corporation of the state of California, which latter book and deposits were in the name of Isabella M. Williams. The deposits in the San Francisco Savings Union, as evidenced hy the hook first mentioned, were as follows: October 29, 1893, $350; November 18, 1895, $400; December 17, 1895, $550, making a total *of $1,300. [393] The deposits in the Hibernia Savings & Loan Society, as evidenced hy the bank book in the name of Mrs. Williams, were as follows: Septemher 10, 1895, $300; September 24, 1895, $150; October 8, 1895, $800; October 23, 1895, $700; Decemher 2, 1895, $1,000, making a total of $3,450.

It is stated in the bill of exceptions that these bank books and affidavit were the only evidence hefore the court relative to such deposits, and that there was no evidence indicating the existence of any privity or relation between the defendant and Mrs. Williams at the time the above deposits were made by her or at any other time, except as indicated in the above affidavit.

It may he also observed that when the affidavit and bank accounts were offered in evidence, no suggestion was made that the prosecution would at some stage of the trial show that the sums alleged to have heen received by the accused under color of his office were part of any sum referred to in the affidavit and bank books.

The defendant duly excepted to the action of the court in allowing the affidavit and bank books to be read in evidence.

The manner in which the trial court dealt with this evidence appears from the following extracts from its instructions to the jury:

"There has been some testimony in support of the allegations of these indictments respecting the pecuniary condition of the defendant, and also testimony as to the extent of his compensation by the government for services. This evidence was admitted in compliance with a well-known rule which establishes the relevance of evidence of this character where the charge is such as that alleged in these indictments. If the salary of the defendant, during the time alleged in the indictments and before then, was $4 or $5 per day, and if the testimony shows to your satisfaction that he has deposited in bank or there was deposited to his credit in hank in the neighborhood of $4,750 from September 10, to December 17, 1895, alleged in the indictments, then such testimony may be considered by you with a view of ascertaining how or by what means the defendant obtained that amount of *money [394] at a time when his compensation by the government, as is claimed by the prosecution, was not to exceed about $150 per month. Where did he get such large sums of money? From what source other than the source named in the indictments did he acquire this money? Has he furnished evidence explaining to your satisfaction the possession of these sums of money? These are all questions which you will consider, and if any explanation made by the defendant as to how he came hy this money seems incredible, irrational, and unsatisfactory you are at liberty to reject it and to act upon

the other testimony in the case. If, after doing all this, you feel to a moral certainty and beyond a reasonable doubt that he took the money, as alleged in the indictments, then your verdict should be guilty. In reference to the testimony which has been introduced in the case showing the pecuniary condition of the defendant, that if testimony explaining how, when, and by what means the defendant acquired possession of the sums of money shown to have been deposited in the San Francisco Savings Union and Hibernia bank could have been offered by defendant, and he failed to produce such testimony, then such failure may very properly be taken into consideration by the jury in determining the defendant's guilt or innocence. Where probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion may be considered, although this attitude of the case alone would not be entitled to much weight, because the burden of proof lies on the prosecution to make out the whole case by sufficient evidence; but when proof of inculpating circumstances had been produced tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and to show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charges. Therefore, if in this case the defendant could have produced testimony explaining his several deposits in the San Francisco Savings Union **395]** and the *Hibernia bank during the months of September, October, November, and December, 1895, and has failed to produce such testimony, then you are at liberty to infer that any explanation in his power to make would have been, if made, adverse and prejudicial to the defense."

After referring to some authorities announcing the general rule that a party in omitting to produce evidence in elucidation of the subject-matter in dispute which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for the presumption that such evidence, if adduced, would operate to his prejudice, and after referring to the affidavit made by Williams in the divorce suit, the court proceeded in its instructions: "It is the duty of the jury to ascertain from said affidavit and from the other testimony in the case what portions of the same are true. The jury is then at liberty to believe one part of it and to disbelieve the other part. Such affidavit was introduced upon the theory that it constituted an admission on the part of the defendant as to his ownership of certain funds referred to therein. The defense then insisted, as they had a right to, that the entire affidavit should be read. The whole of it is now before you, and it is for you to determine, from all of the circumstances of this case, the situation of the defendant, and all of the evidence that has been introduced, as to what portion of said affidavit, if any, is true. You are at liberty to believe or reject such portions of it as you think may be worthy of belief or disbelief. In this respect I call your attention to the deposits as they were made. . . . These deposits were made, as you will observe, at different times. In September he appears to have deposited the sum of $450; in October he deposited $1,650; in November he deposited $1,100, and in December, up to the 17th, he deposited $1,550, making a total, as I said, of $4,750; nine deposits in three months and seventeen days. Does the defendant's affidavit satisfactorily explain or account for the receipt of these sums of money?"

We are of opinion that the affidavit and the bank books were not admissible in evidence against the accused. There *was nothing **[396** before the jury in respect of the matters referred to in the affidavit except the affidavit itself, and nothing relating to the deposits except that disclosed by the affidavit and the bank books. Taking the case to be as presented by the bill of exceptions, the utmost the evidence tended to show was that the accused had in his possession at different times certain sums that were deposited by him in bank to his credit or to the credit of his wife. It is to be observed that no sum so deposited corresponded in amount with the sums which he was charged with having extorted under color of his office as Chinese inspector. Upon the face of the transactions referred to there was no necessary connection between the deposits and the specific charges against the defendant. And yet the jury were in effect told that the failure of the accused to explain how he came by those sums, aggregating nearly $5,000, was a circumstance tending to show that if he had given that explanation it would have operated to his prejudice in meeting the particular charges against him, of extorting at one time $100, and at another $85, under color of his office. There was no such connection shown between the possession by the defendant of the sums specified in the affidavit and bank books, and the alleged extortion by him of two named sums from certain persons, under color of his office, as required him to explain how he acquired the moneys referred to in the affidavit and bank books. The manifest object and the necessary effect of this evidence were merely to give color to the present charges, and to cause the jury to believe that the accused had in his possession more money than a man in his condition could have obtained by honest methods, and, *therefore*, he must be guilty of extorting the two sums in question. The present case does not come within the rule of evidence referred to by the learned court. The jury may have been unable to say from the evidence where the defendant obtained the moneys deposited in bank and specified in the bank book, aggregating $4,750 between certain dates. But that did not justify the conclusion that he had, under color of his office as Chinese inspector, extorted $100 upon one occasion and $85 *upon another occasion. **[397** The accused was entitled to stand upon the presumption of his innocence, and it cannot be said from anything in the present record that he was under any obligation arising from the rules of evidence to explain that which did not appear to have any necessary or natural

connection with the offense imputed to him. In our judgment the court, under the circumstances disclosed, erred in not excluding the affidavit and bank books as evidence, as well as in what it said to the jury on that subject.

Another assignment of error relates to the admission, against the objection of the defendant, of certain evidence as to character. A witness called by the prosecution was permitted to testify that the defendant's reputation "in the custom house" was bad, although he had distinctly stated, upon preliminary examination, that he did not know the general reputation of the accused "outside of the custom house." This was error. Assuming (although the record is silent on the subject) that the accused introduced evidence of his general reputation for integrity, it is clear that evidence, on behalf of the prosecution, that among the limited number of people employed in a particular public building his character was bad, was inadmissible. The prosecution should have been restricted to such proof touching the character of the accused as indicated his general reputation in the community in which he resided, as distinguished from his reputation among a few persons in a particular building. The estimate placed upon his character by the community generally could not be shown by proof only as to the estimate placed upon him by persons in the custom-house.

Another assignment of error deserves to be noticed. One of the witnesses for the defense was the collector of customs for the port of San Francisco. He was asked to whom, upon his return from Washington, was assigned the investigation of female cases. The court having inquired as to the purpose of this testimony, the attorney for the accused said: "It has been sworn to by Mr. Tobin that Mr. Williams asked for certain cases to be assigned to him and show the result. We propose to show by Mr. Wise that on his re-
398] turn from Washington *he assigned to Williams the investigation of Chinese female cases, and while Mr. Williams was acting in that behalf there were more females sent back to China than ever were sent back before or after." The representative of the government objected to this evidence as irrelevant, saying in open court, and presumably in the hearing of the jury, "No doubt, every Chinese woman who did not pay Williams was sent back." The attorney for the accused objected to the prosecutor making any such statement before the jury. The court overruled the objection, and the defendant excepted. The objection should have been sustained. The observation made by the prosecuting attorney was, under the circumstances, highly improper, and not having been withdrawn, and the objection to it being overruled by the court, it tended to prejudice the rights of the accused to a fair and impartial trial for the particular offenses charged.

For the several errors committed at the trial, to which we have referred, *the judgment is reversed in each case*, with directions to grant a new trial.

Mr. Justice **Brewer** did not hear the argument in this case, and did not participate in the decision.

Mr. Justice **Brown** concurred in the result.

ELIZABETH NOBLES, by Her Next Friend, W. W. Baughn, *Plff. in Err.*,

v.

STATE OF GEORGIA.

(See S. C. Reporter's ed. 398-409.)

Question of insanity of criminal—state construction of state statutes—finding of fact in opinion—trial of question of insanity of a convict—due process of law.

1. The words "after conviction," in § 4666a of Ga. Code 1882, providing for determination of the question of insanity, are not to be construed as limited to persons who have also been sentenced, by force of the preceding § 4666, on the subject, which prescribes an investigation after a convict has been sentenced.

2. A construction of state statutes by the court of last resort of the state will be followed by this court.

3. This court takes notice of a finding of fact in an opinion of the supreme court of Georgia on writ of error to that court.

4. A trial of the question of the insanity of a convict, suggested after verdict and sentence, is at common law in the discretion of the judge, without an absolute right on his part to have the issue tried before a court and jury.

5. The determination of the insanity of a person after his conviction and sentence, which by Ga. Code [1882], 4666, and Ga. Code [1895], 1047, 1049, is to be done by a jury summoned by the sheriff with the concurrence and assistance of the ordinary, is not insufficient to constitute due process of law on the ground that the investigation is not judicial in character, but the manner in which the questions shall be determined is purely a matter of legislative regulation.

[No. 376.]

Argued November 9, 10, 1897. Decided November 29, 1897.

IN ERROR to the Supreme Court of the State of Georgia to review a judgment of that court affirming the judgment of the Superior Court of Twiggs County, Georgia, convicting Elizabeth Nobles of murder and sentencing her to death. *Affirmed.*

See same case below, 98 Ga. 73.

The facts are stated in the opinion.

Messrs. **Marion W. Harris**, *W. C. Glenn*, and *D. W. Rountree* for plaintiff in error.

Mr. **J. M. Terrell** for defendant in error.

NOTE.—*Jurisdiction of United States Supreme Court; it is for state courts to construe their own statutes; supreme court will not review their decision except when specially authorized by statute*, —see note to Commercial Bank v. Buckingham, 12: 169.

As to what is due process of law, see note to Pearson v. Yewdall, 24: 436.

As to examination and confinement of insane persons, see note to Chavannes v. Priestly (Iowa) 9 L. R. A. 193.

As to constitutional right to notice of lunacy proceedings, see note to Evans v. Johnson (W. Va.) 23 L. R. A. 737.

Mr. Justice **White** delivered the opinion of the court:

In July, 1895, Elizabeth Nobles was tried in the superior court of Twiggs county, Georgia, upon an indictment for murder, and and was found guilty and sentenced to death. The bill of exceptions in the record now before us recites that "the said sentence of death, having been regularly and legally suspended and superseded by the order of the court the case came on again to be heard before the court on the 23d day of June," the object of the hearing being, as stated, "for the purpose of passing sentence of death by the court upon the said Elizabeth Nobles in said stated case;" that is to say, in consequence of the order which had suspended the sentence of death previously imposed in July, 1895. On the date of the appearance for resentence, June 23, 1896, W. W. Baughn, the present plaintiff in error, appeared on behalf of the convict and presented a motion or petition. The paper recited that the said Elizabeth Nobles should not be sentenced—

"First, because, as petitioner avers, the said Elizabeth Nobles is now insane.

"Second, because, the said Elizabeth Nobles being now insane, it is contrary to the policy of the law and is illegal that the sentence of death should be imposed upon her by the court.

"And petitioner further says that under article 14 of the Amendments to the Constitution of the United States, it is provided as follows: 'Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'

"Petitioner says that due process of law means law in its regular course of administration through courts of justice, and that by the 14th Amendment above quoted, whilst the states have power to deal with crime within their borders, no state can deprive any person [400] of equal and impartial justice *under the law, and that law in its regular course of administration through courts of justice is due process, and, unless the same take place through courts of justice, the constitutional requirement above quoted is nullified.

"Petitioner therefore specially sets up and claims the right of due process of law through its regular administration through courts of justice, under and by virtue of the constitutional guaranty under the 14th Amendment to the Constitution of the United States above quoted.

"Petitioner says that it is essential to due process of law within the meaning of the above requirement that a jury be impaneled on the issue now tendered by this petition, and that trial take place before a judge of the superior court of the state of Georgia, according to the due and regular form of proceedings in our courts. Whenever an issue of fact is made in a superior court in the state of Georgia the trial of the questions thereby raised is a function of the superior court of the county having jurisdiction; and that the trial of the question raised by this petition is a function of the superior court of Twiggs county, in which said court the said Mrs. Nobles was convicted of murder.

"Petitioner further says that the proceedings contemplated under § 4666 of the Code of Georgia are not due process of law for these reasons, to wit."

The grounds alleged were eight in number, and in substance charged that the method of inquiry provided by the Georgia statutes for ascertaining whether one who had been convicted of crime was insane at the time of the inquiry was not due process of law under the Constitution of the United States, because the investigation which the law authorized was not judicial in character. The detailed enumeration of why the remedy provided by the statute was asserted in the petition not to be judicial, as well as the prayer of the petition, are set out in the margin.†

*The court refused to grant the petition, [401] and resentenced the prisoner to the death penalty. Thereupon the petition was again presented, and, upon its being again refused, exceptions were noted. The case, on the exceptions reserved, as just stated, was taken to the supreme court of the state of Georgia, where the action of the lower court was affirmed, and to this judgment of the supreme court of the state of Georgia this writ of error is prosecuted. There is no question *raised that the statutes of [402] Georgia do not afford adequate means for trying by court and jury any question made as to the insanity of the accused at the time of the commission of a crime.

The statute law of Georgia directly applicable to and involved in this controversy is as follows:

Georgia Code (1882), 4666; Code (1895), 1047, 1049. *Become insane after conviction.* "If, after any convict shall have been sentenced to the punishment of death, he shall become insane, the sheriff of the county, with concurrence and assistance of the ordinary thereof, shall summon a jury of twelve men to inquire into such insanity; and if it be found, by the inquisition of such jury, that such convict is insane, the sheriff shall suspend the execution of the sentence directing the death of such convict, and make report of the said inquisition and suspension of execution to the presiding

†"1st. Because the same does not take place in any court of this state.

"2d. Because no rules of evidence or method of procedure are prescribed in such inquisition, and no proper method for the drawing, summoning, and impaneling a jury, and for the subpœnaing and examination of witnesses is provided.

"3d. Because no judge or presiding officer is charged with the function of ruling in or out evidence which may be tendered on said issue.

"4th. Because no judge or presiding officer is provided in said proceeding whose duty it is to instruct the jury on the law involved in the questions raised, and to make rulings on evidence which may be tendered for or against the person said to be insane.

"5th. Because there is no method of moving for a new trial or of correcting any errors which may take place in said proceeding.

"6th. Because said proceeding is one not known to the common law in ascertaining the facts involved according to the settled principles of the law of the land.

"7th. Because the supreme court of the state of Georgia has held that the said proceeding is in no sense a judicial proceeding, but is a mere inquisition from which there is no appeal.

judge of the district, who shall cause the same to be entered on the minutes of the superior court of the county where the conviction was had. And, at any time thereafter, when it shall appear to the said presiding judge, either by inquisition or otherwise, that the said convict is of sound mind, the said judge shall issue a new warrant, directing the sheriff to do
403] execution *of the said sentence on said convict at such time and place as the said judge may appoint and direct in the said warrant, which the sheriff shall be bound to do accordingly. And the said judge shall cause the said new warrant, and other proceedings in the case, to be entered on the minutes of the said superior court."

The provisions of this section are a reproduction in the Code of prior legislation (Georgia Acts of 1855–56, p. 36; 1859, p. 50):

Georgia Code 1882, 4666(*a*); Code 1895, 1048. *Lunatics, how disposed of.* "When any person shall, after conviction of a capital crime, become insane, and shall be so declared in accordance with the provisions of § 4666 of the Code, it shall be the duty of the judge to certify the fact, and the said convict shall be received into the lunatic asylum, there to be safely and securely kept and treated as other adjudged insane persons."

The provisions of this section are a reproduction in the Code of an act passed in 1874, Georgia Acts of 1874, p. 30.

The above sections, as existing in the Georgia Code of 1882, were cited by the supreme court of Georgia as controlling, and the brief for the plaintiff in error also states this to be the case. We have given the corresponding sections in the Code of 1895, although such sections as reproduced in the latter Code are in three sections and are somewhat altered in phraseology, but not so as to be material to the issue before us.

In the argument at bar the contention was that these sections of the Georgia law afforded an opportunity to investigate the question of the insanity of a person convicted of crime only when the suggestion of insanity was made after conviction and sentence, and, therefore, that the statutes furnished no means of testing the question of insanity arising after conviction and before sentence, and this fact, it was asserted, amounted to a denial of due process of law under the 14th Amendment of the Constitution of the United States. The construction of the statutes upon which this proposition was predicated is as follows: Although the text of § 4666 (*a*), which provides for an investigation into the question *of insanity, when[404 "any person shall, after conviction of a capital crime, become insane," is conceded to be broad enough to cover all cases arising between conviction and sentence, yet, the words "after conviction" it is urged should be construed as applying only to insanity arising after conviction and sentence, because § 4666 provides only for an investigation "after the convict shall have been sentenced." That is to say, the construction contended for, instead of treating the two sections of the Code as *in pari materia*, and construing them together so as to give effect to both, restricts and limits the natural and obvious meaning of the later statute by incorporating into it the provisions of the earlier one. If the contention that the words "after sentence" in the earlier statute only apply to cases where insanity is suggested after sentence, and not to those where it is claimed to have arisen between conviction and sentence, then the provision in the subsequent section, extending the remedy to cases arising "after conviction," cured the omission, if any there was, in the first statute. Instead, then, of construing the earlier as controlling the later statute, the elementary rule of interpretation would require that the later be considered as amplifying and providing for the thing omitted in the prior statute. While these conclusions are obvious, we are nevertheless relieved from the necessity of so deciding, since the opinion of the supreme court of the state in the case before us expressly holds that "the provisions of the Code relating to inquisitions in such matters are sufficiently comprehensive to cover all cases where the alleged insanity begins at any time after the rendition of the verdict of guilty." We follow the interpretation given by the supreme court of the state of Georgia to the statutes of that state.

Indeed, the question which arises on the record does not require a consideration of what would be due process of law under the 14th Amendment where insanity was suggested between verdict and sentence, or even at the time of sentence. This results from the fact

"8th. Because no manner of review whatever is permissible from the findings of said inquisition.

"9th. Because the proceedings before said inquisition do not take place before a court in the due course of the administration of justice. And petitioner says that the inquisition provided for a denial by the state of such due process of law as is guaranteed by the Constitution of the United States, and petitioner especially claims the privilege and right, under the United States Constitution, to have due process of law for the ascertainment of the truth of the issue now here tendered to the court.

"Petitioner further says that by the settled principles of the common law the ascertainment of the fact of sanity or insanity at any stage of the proceedings in the course of a legal investigation was a function of the trial court; that is, of the court having jurisdiction of the crime itself and of the criminal, whether before or after arraignment, before or after conviction, or after conviction and before execution, or before or after judgment, and that the settled and orderly course of procedure was the summoning of a jury and a trial of this issue under the forms of law, by introduction of evidence under the rulings of the judge of the said court, and whose duty it was to instruct the jury upon the law of the issues involved and to aid them in making a verdict. And petitioner says that each and all and every one of these proceedings named, and also the right to the court's process for the compelling the attendance of the witnesses to testify upon said issue, as well as such other proceedings and process and rights as are usually incident to trials before the superior courts of state, are essential to due process of law within the meaning of the Constitution of the United States, and petitioner now here claims the right to such proceedings under and by virtue of the 14th Amendment to the Constitution of the United States.

"Wherefore, petitioner, now in behalf of the said Elizabeth Nobles, whom petitioner avers is mentally incapacitated because of her present insanity to take any legal steps in her own behalf, the premises considered, prays the court for a trial by jury of the said question of insanity; that the court cause jurors to be regularly summoned and impaneled to try said issue, and that such other proceedings be had in that regard as are usually incident to trials in said court; and that petitioner have the right to the court's process to compel the attendance of witnesses and to such other processes as may be right and necessary, and that said sentence be postponed and suspended till the final adjudication of the question raised by this petition."

that the suggestion of insanity relied on was made, not at the time of sentence, but long after the sentence had been imposed. As stated, **405**] the bill *of exceptions recites that the accused had been sentenced to death at the term of court where the verdict of guilty was found, that is, in July, 1895, and that when called into court again, in June, 1896, it was for a resentence upon the verdict, because of the previous sentence "having been regularly and legally superseded by the order of court." In the opinion of the supreme court of Georgia in this case it finds this fact and holds that under the Georgia statutes the proceeding had in June, 1896, although called a resentence, was in legal effect but a fixing of a new date for the execution of the previous sentence, the date fixed in the prior sentence having expired. In other words, the supreme court of Georgia holds that the prior sentence remained in force, and that the subsequent action of the court was but a mere fixing of the date for its execution We take notice of the finding of fact (*Egan* v. *Hart*, 165 U. S. 188 [41: 680]) and follow the legal conclusions of the court, and are bound by them, since they involve but a construction by the court of last resort of the state of Georgia of the statutes of that state regulating the effect of a resentence in case the date fixed in a former sentence has lapsed.

From these considerations it follows that the only question which we are called upon to determine is whether, after a regular conviction and sentence a suggestion of a then existing insanity is made, it is necessary, in order to constitute due process of law, that the question so presented should be tried by a jury in a judicial proceeding surrounded by all the safeguards and requirements of a common-law jury trial, and even although by the state law full and adequate administrative and quasi-judicial process is created for the purpose of investigating the suggestion. Without analysis of the contention, it might well suffice to demonstrate its obvious unsoundness by pointing to the absurd conclusion which would result from its establishment. If it were true that at common law a suggestion of insanity after sentence created on the part of a convict an absolute right to a trial of this issue by a judge and jury, then (as a finding that insanity did not exist at one time would not be the thing adjudged as to its nonexistence at another) **406**] it would be wholly at the *will of a convict to suffer any punishment whatever, for the necessity of his doing so would depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial. Nor is this so extreme a possibility that it should not be supposed, since in the argument at bar it was admitted that the sentence first imposed was suspended because the record was taken to the supreme court of Georgia, where the question of the existence of insanity was either directly or indirectly adversely decided.

Blackstone, it is urged, supports the proposition that at common law there was an imperative duty, on the suggestion of the insanity of a convict, to try the issue by judge and jury. The text to which reference is made is as follows (4 Bl. Com. 24, 25):

"Also, if a man in his sound memory commits a capital offense, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for, peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution."

And 1 Hale, P. C. 34, 35, is referred to as being to the same effect. But nothing in these citations is pertinent to the issue under consideration. It is agreed that at common law an insane person was not to suffer punishment. The question here is, What, after conviction and sentence, was the method by which the existence of insanity in the convict was to be ascertained when a suggestion of such insanity was made? In speaking on this subject, Blackstone says (book 4, p. 396):

"Another cause of regular reprieve is, if the defendant becomes *non compos*, between the judgment and the award of execution: for regularly, as was formally observed, though a man be *compos* when he commits a capital crime, yet if he *becomes *non compos* [**407** after, he shall not be indicted; if after indictment he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution; for '*furiosus solo furore punitur*,' and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is therefore an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege why execution should not be awarded against him; and if he appears to be insane, the judge in his discretion may and ought to reprieve him."

In other words, by the common law, if, after conviction and sentence, a suggestion of insanity was made, not that the judge to whom it was made should, as a matter of right, proceed to summon a jury and have another trial, but that he should take such action as, in his discretion, he deemed best. In *Laros* v. *Commonwealth*, 84 Pa. 200, where a suggestion of insanity was made after verdict, the court said (p. 210):

"The last three assignments of error raise a single question upon the power of the court to inquire by inspection and *per testes* into the insanity of the prisoner since verdict. We have no precedents in this state, known to us, how the inquiry shall be conducted when such a plea in bar of sentence is put in. It seems to us, however, that no right of trial by jury is involved in the question. A jury having found a verdict against the plea of insanity when set up as a defense to conviction, subsequent insanity cannot be set up in disproof of the conviction. The plea at this stage is only an appeal to the humanity of the court to postpone the punishment until a recovery takes place,

or as a merciful dispensation. The rights of the prisoner as an offender on trial for an offense are not involved. He has had the benefit of a jury trial, and it is not the court only which must be satisfied on the score of humanity. If the right of trial by jury exist at all it must exist at all times, no matter how often the plea is repeated alleging insanity occurring since the last verdict. Such a right is inconsistent with the due administration of
408]* justice. There must be a sound discretion to be exercised by the court. If a case of real doubt arise, a just judge will not fail to relieve his own conscience by submitting the fact to a jury."

In *Bonds* v. *State* (1827) Mart. & Y. 143, the accused was convicted of the crime of murder, and, upon being led to the bar and asked by the court if he had anything to say why sentence of death should not be pronounced against him, through his counsel, alleged that he was at the time a lunatic, and that sentence could not be passed upon him, and offered to plead his lunacy in bar of the sentence, and further demanded of the court that a jury be called to try the issue of fact arising upon the plea. But the court, upon the inspection of the prisoner and upon consideration of the case—because nothing was shown to render it probable that the defendant was a lunatic, or to make that matter doubtful—refused to allow the prisoner his plea aforesaid, and denied him the privilege of a jury to try the question of his sanity or insanity, and passed upon the accused the sentence of death. In support of his claim that the right to have a jury try the plea of insanity was absolute, and that it was not a matter of choice or discretion with the court to deny the application, counsel for the accused relied upon a statement made in 1 Chitty, Crim. Law, 761, to wit, that "the judge may, if he pleases, swear a jury to inquire, *ex officio*, whether the prisoner is really insane, or merely counterfeits; and, if they find the former, he is bound to reprieve him till the ensuing session." But the reviewing court said, "The meaning of this passage, giving it a reasonable construction, must be that if, upon the question made, the judge is not satisfied, or has doubts, he may call in to his assistance the aid of a jury, and submit the matter to them. The law on this point is more fully stated in 1 Hawk. P. C. p. 3, in the notes, where it is said: 'Every person of the age of discretion is presumed of sane memory until the contrary appears, which may be either by the inspection of the court (1 Hale, 33; Tr. per pais 14; O. B. 1783, No. 4); by evidence given to the jury, who are charged to try the indictment (3 Bac. Abr. 81; 1 Hale, 33, 35, 36; O. B. 1784, No. 288).
409] Or, being a collateral *issue, the fact may be pleaded and replied to *ore tenus*, and a venire awarded, returnable *instanter*, in the nature of an inquest of office. Fost. 46; Kel. 13; 1 Lev. 61; 1 Sid. 72; 4 Comm. Appen. § 3. And this method, in cases of importance, doubt, or difficulty, the court will, in prudence and discretion, adopt. 1 Hale, 35; Sav. 50, 56; 1 And. 154. From this it appears that inspection by the court is one of the legal modes of trying the fact of insanity; and nothing appears in the record of this case to show that the discretion of the court, in adopting the mode pursued, was erroneously exercised. This court therefore is of opinion that there is no error in the matter of the first bill of exceptions." (In making the foregoing quotation we have corrected what seem to be typographical errors in the extract from the marginal note to section 4, chapter 1, book first of Hawkins' Treatise, conforming it to the note as found in the 6th edition, by Leach.)

It being demonstrated by reason and authority that at common law a suggestion made after verdict and sentence of insanity did not give rise to an absolute right on the part of a convict to have such issue tried before the court and to a jury, but addressed itself to the discretion of the judge, it follows that the manner in which such question should be determined was purely a matter of legislative regulation. It was therefore a subject within the control of the state of Georgia. Because we have confined our opinion exclusively to the question before us, that is, the right arising on a suggestion of insanity after sentence, we must not be understood as implying that a different rule would prevail after verdict and up to and including sentence, or as passing upon the question whether, under the 14th Amendment, a state is without power to relegate the decision of a question of insanity, when raised before conviction, to such apt and special tribunal as the law might deem best.

Affirmed.

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*THE VICTORY. [410

THE PLYMOTHIAN.

(See S. C. Reporter's ed. 410–430.)

Rule of navigation—vessels approaching each other in narrow channels—speed, when a fault—apportionment of damages—burden of proof—amount recoverable—presumption—giving a signal—failure to have a look out.

1. The rule applicable when two vessels "are crossing so as to involve risk of collision," that "the vessel which has the other on her own starboard side shall keep out of the way," is ordinarily inapplicable to vessels coming around bends in channels, which may at times bring one vessel on the starboard of the other.
2. Vessels approaching each other in narrow channels or where their courses diverge as much as 1½ or 2 points are bound to keep to port and pass

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*The Journal titles of these cases are, *Canton Insurance Company, Limited, et al., Appts.*, v. *John MacIntyre, Jr., et al.*, and *John MacIntyre, Jr., et al., Claimants, etc., Appts.*, v. *Canton Insurance Company, Limited, et al.*

NOTE.—*As to collision, measure of damages for*, see notes to Smith v. Condry, 11: 35; and Williamson v. Barrett, 14: 68.

As to collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting; instances,—see note to St. John v. Paine, 13: 537.

As to collision; vessel overtaking another,—see note to The Abbotsford v. Johnson (The Abbotsford) 25: 168.

to the right, whatever the occasional effect of the sinuosities of the channel.

3. A speed of 5½ knots through the water, aided by a tide force of 2 knots, is a fault contributing to a collision in a river when the vessel is approaching another vessel so as to involve the risk of collision, and does not slacken her speed or stop and reverse, and therefore is unable to stop before collision after that becomes imminent and she finds that her effort to crowd the other vessel off her rightful course must be unsuccessful.

4. Where a vessel is clearly in fault for a collision the evidence to establish the fault of the other vessel must be clear and convincing, in order to make a case for apportionment of damages.

5. The burden of proof is upon each vessel, in case of collision, to establish fault on the part of the other.

6. Only a *pro rata* share of the value of a vessel which was in fault for a collision and for the value of which a bond has been given in limited liability proceedings can be recovered by the underwriters of the cargo of the other vessel when the latter as well as its cargo was injured and was not itself in fault, while the amount of the bond is insufficient to pay the entire loss.

7. Each of two vessels approaching each other is entitled to presume that the other will act lawfully and pursue the customary course, regulating her actions so as to avoid danger.

8. A vessel which gives a signal to correct the error of another is entitled to rely upon it until it is made apparent, by a further cross signal, or from a change of heading, that the other is persisting in her wrongful course.

9. Failure of a vessel to station a lookout on the bows will not constitute a fault with respect to a collision, if the absence of the lookout did not contribute thereto.

[Nos. 66, 67.]

Argued October 28, 29, 1897. Decided November 29, 1897.

ON A WRIT of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree of that court modifying the decree of the District Court for the Eastern District of Virginia and as modified confirming the same in a libel filed by the master of the steamer Victory against the steamer Plymothian, and in a libel filed by the underwriters of the Plymothian's cargo against the Victory and the Plymothian, seeking to hold them both liable for damages thereto. The District Court held the Victory solely in fault for the collision, and decreed a recovery by the owner of the Plymothian and the underwriters of her cargo *pro rata*, to the extent of the bond filed by the owners of the Victory in a limitation proceeding. The said Circuit Court of Appeals concurred with the District Court as to the fault found against the Victory, but held that the Plymothian was also at fault to a slight degree, and modified the decree of the District Court by awarding the whole of the Victory's bond to the cargo and that any amount remaining unsatisfied should be paid by the owner of the Plymothian. *Decree of the Circuit Court of Appeals reversed, and decree of the District Court affirmed, with certain provisions as to costs.*

See same case below, 63 Fed. Rep. 631, 25 U. S. App. 271.

Statement by Mr. Chief Justice **Fuller:**

On the 12th day of November, 1891, the steamers Victory and Plymothian came into collision in the Elizabeth river between Lambert's Point and Craney Island light. The Plymothian, laden with a cargo of cotton, was outward bound. The Victory was inward bound in ballast. The Plymothian and her cargo were seriously damaged. The Victory was also damaged about the bows.

On the 14th of November, the master of the Victory filed a libel against the Plymothian in the district court for the eastern district of Virginia; and on November 27 a libel*was[411 filed in that court by the underwriters for the Plymothian's cargo against the Victory and the Plymothian, seeking to hold them both liable for damage thereto. The Port of Plymouth Steamship Company, owner of the Plymothian, filed a petition in said district court on the 3d of December, praying for a limitation of its liability for damages growing out of the collision, and giving notice of its intention to contest its liability for any part thereof. A similar petition was filed the same day by MacIntyre and others, owners of the Victory. The value of the owners' interest in the Plymothian and her pending freight was fixed at $45,221, less $5,000 salvage, or $40,221; the value of the interest of the owners of the Victory at the sum of $67,500; each gave bond. The damages to the Victory were proved at $14,363.80; to the Plymothian, at $41,684.12; and to the cargo, at $71,427.97.

The cause was heard upon pleadings and evidence, and the district court held the Victory solely in fault for the collision, and decreed a recovery by the owners of the Plymothian and the underwriters of her cargo, *pro rata*, to the extent of the bond filed by the owners of the Victory in their limitation proceeding. 63 Fed. Rep. 631. The underwriters of the cargo and the owners of the Victory severally appealed from the decree of the district court to the circuit court of appeals for the fourth circuit. That court concurred with the district court so far as concerned the faults found against the Victory, but held that the Plymothian was also in fault to a slight degree, and modified the decree of the district court by awarding the whole of the Victory's bond to the cargo, and that any amount re-

As to collision; rules for avoiding; steamer meeting steamer; instances,—see note to Williamson v. Barret, 14: 68.

As to collision; damages where two vessels are at fault for injury to a third,—see note to The City of Hartford v. Rideout (The City of Hartford and The Unit, 24: 930.

As to limited liability acts; as to loss by fire and collision; for personal injuries; surrender of transfer of ship and freight; apportionment of fund paid into court; what owners entitled to benefit of act; proceedings; jurisdiction; injunction to restrain prosecution in state courts,—see note to Lawton v. Comer (D. C. S. D. Ga.) 7 L. R. A. 55.

As to regulation of steam vessels; inspection; license; penalties; remedies,—see note to the City of Salem (D. C. D. Or.) 2 L. R. A. 380.

As to collision; liability of tug and tow; obstruction to navigation,—see note to The Imperial (D. C. D. Or.) 3 L. R. A. 234.

maining unsatisfied should be paid by the owner of the Plymothian. 25 U. S. App. 271.

The owners of the Victory and the owner of the Plymothian thereupon severally petitioned for the writ of certiorari from this court under § 6 of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517); and the writ was accordingly issued.

The facts as stated in substance by the district court and the circuit court of appeals were as follows:

The Victory was a British steamer of 1,774 tons net tonnage, 338 feet in length, 38½ feet [412] in breadth, inward bound in *ballast, drawing 17 feet aft and 13 feet forward. Her officers and crew numbered thirty-one all told.

The Plymothian was a British steamer of 1,016 tons net register, 260 feet long, laden with a cargo consisting of 3,682 compressed bales of cotton. Her officers and crew numbered twenty-one all told. She was outward bound from Galveston to Liverpool, having come in through Hampton Roads to take in coal at Lambert's Point. Her draft was 14 or 16 feet. Both vessels were in charge of pilots, and their masters were on their bridges respectively, each acting as lookout, and seeing that the orders of the pilots were executed. Neither ship had a special lookout forward of the bridge on her bows. The collision occurred in a straight stretch of the channel of the Elizabeth river between Craney Island lighthouse and the turn in the channel at the buoys opposite Lambert's Point. There were two of these buoys, a red one, No. 22, known as the Merrimac buoy, on the west side, and a black one, No. 9, on the east side. The distance from buoy No. 9 to Craney Island lighthouse was 1,967 yards on the chart, or about 1¼ miles.

The place of collision was at black buoy No. 7 at the easterly edge of the eighteen-foot curve of the channel, 1,200 yards south of the Craney Island lighthouse and 767 yards north of the black buoy No. 9. The channel is 250 yards wide at Craney Island and 450 yards wide at buoy No. 9.

The diagram of the channel on the opposite† page sufficiently indicates the situation.

The Plymothian had been taking coal at Lambert's Point pier, a short distance from buoy No. 9. She left the pier at 4 P. M., heading out off the buoy, the course from the pier to the turning point down the channel being northwesterly at an angle of 45 degrees. The usual departing signal was given as she moved from the pier. Proceeding outward to round buoy No. 9, with the helm slightly aport, the engines were at half speed until the buoy was close aboard on the starboard bow. The engines were then put at full speed and the helm hard aport, and, rounding the buoy, she set her course down the easterly side of the channel. [414] *At this time, the Victory was seen both by the captain and the pilot of the Plymothian to be coming up the channel, southward, below Craney Island light, to the westerly side of the mid-channel and on their port bow. The Plymothian thereupon blew a passing signal of one whistle, just as she passed buoy No. 9, and a minute later repeated it, without hearing any reply from the Victory. The vessels were over 1 mile apart at this time with a bend of the channel between them. The wind was southwesterly, with force enough to enable sailing vessels to make 2 or 3 knots against the tide. The Victory had in the meantime been maintaining her general course so as to pass well clear port to port. She had ported her helm, so as to show her port quarter to those on the Plymothian, straightening up to the channel course of S. ¼ W. from Craney Island light. She had been moving at the rate of 10 miles an hour, but at Craney Island she slackened her speed and proceeded at the rate of 6 or 7 miles an hour, assisted by a flood tide running southward with a force of 2 knots. The Plymothian in straightening out at buoy 9 had begun to move against the tide at the rate of about 4 knots an hour, keeping well to the eastern side of the channel.

As the vessels were thus proceeding, the Victory, shortly after passing Craney Island light, apparently directed her course towards the easterly side of the channel, as if under a starboard helm. The pilot of the Plymothian blew a single blast on his whistle, and, receiving two in reply, immediately reversed his engines, sending them full speed astern; blew a danger signal of three blasts, and put the helm hard aport. The Victory somewhat later also blew a danger signal, and then, or shortly afterwards, reversed her engines three lengths away from buoy No. 7, but not in time to stop her headway, due to high speed and the force of the flood tide. The Victory claimed that she gave two two-blast signals, and there is a conflict of evidence as to her position when the first of them was sounded. The Plymothian heard but one such signal, just preceding the danger blasts.

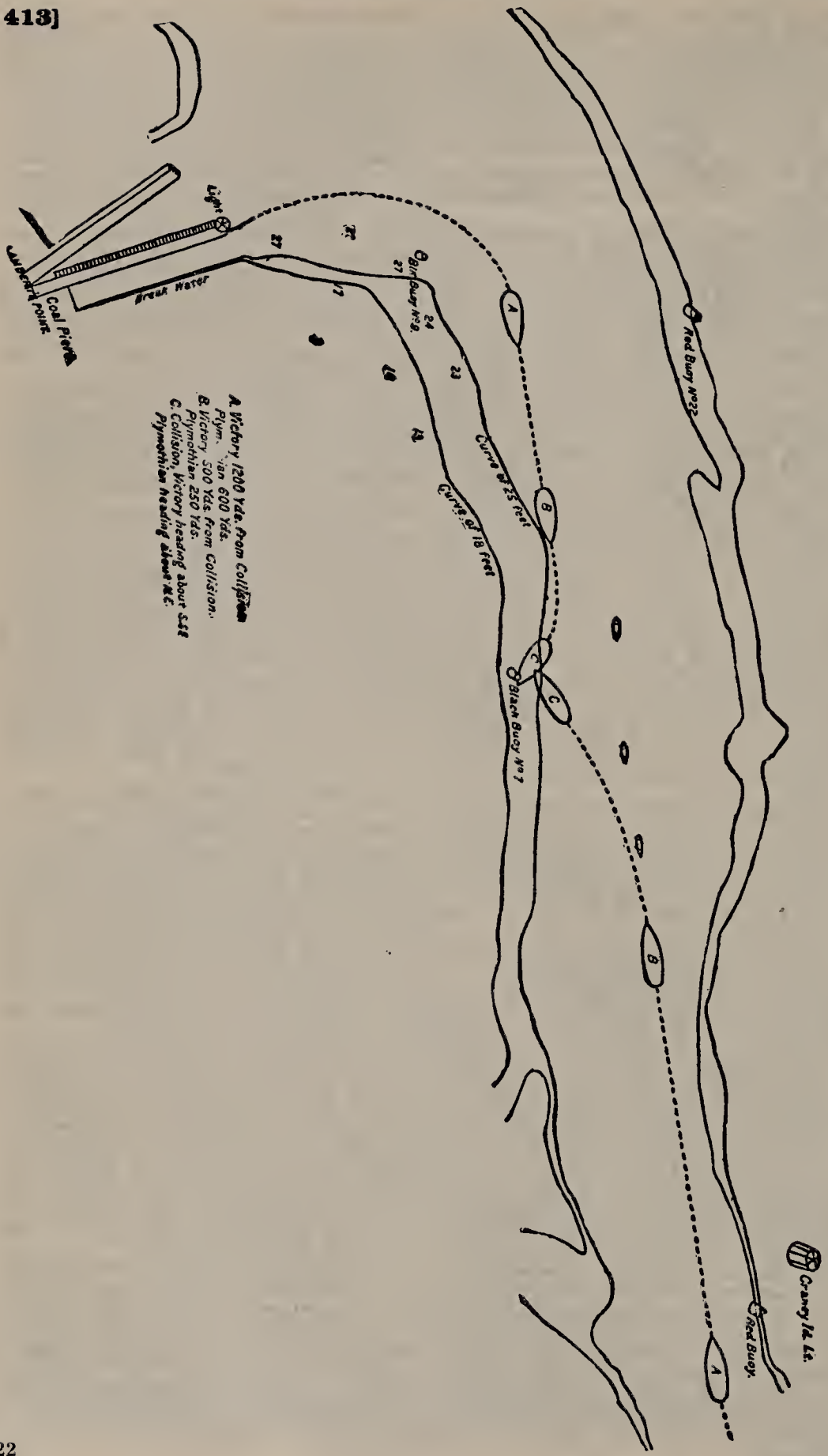
The Plymothian came practically to a standstill before the collision, with buoy *No. [415] 7 close under her starboard bow, but the Victory came on and struck the Plymothian's port side at the bridge, at an angle variously estimated at from 45 to 60 degrees, penetrating about 15 inches into the ship, through her three steel decks, stringer plates, and beams. The force of the blow threw the Plymothian's head around to the starboard, so that buoy No. 7, which prior to the collision had been under her starboard bow, was seen to come around in front of her stem to her port bow.

The Plymothian rapidly filled with water, and to prevent her sinking in the channel her engines were put at full speed ahead until she grounded on the mud flats to the eastward of the channel, where she sank in shallow water. She was subsequently raised, repaired temporarily at Newport News, and finally in England, on the completion of the voyage. The Victory was able to proceed to Norfolk. She was also temporarily repaired at Newport News and finally in England.

Of the cargo of 3,682 bales of cotton shipped on the Plymothian at Galveston, 1,671 bales were shipped under bills of lading, containing the provisions, among others, that the vessel should not be liable for loss or damage occasioned by collisions or other accidents of navigation, even though occasioned by negligence, and that the contract should be governed "by the law of the flag of the vessel carrying the goods."

†See over

413]


Light
Coal Piers
Coal Berth Point
Break Water
Black Buoy No. 9.
Red Buoy No. 22
Curve of 25 feet
Curve of 18 feet
Black Buoy No. 7
Red Buoy
Craney Id. Lt.
A. Victory 1200 Yds. from Collision
Plym... ian 600 Yds.
B. Victory 500 Yds. from Collision.
Plymothian 250 Yds.
C. Collision, Victory heading about S.S.E
Plymothian heading about N.E.

The other 2011 bales were shipped from interior points under bills of lading given by the inland carrier to the shipper. On reaching Galveston this cotton was delivered to the Plymothian, which issued bills of lading or receipts to the inland carrier, containing the negligence and flag clauses. The bills of lading given by the inland carriers had the negligence but not the flag clause.

Messrs. **J. Parker Kirlin** and **Floyd Hughes**, for the Plymothian:

The Victory's navigation was reckless in the extreme.

The starboard hand rule does not apply to cases of vessels approaching around bends in channels.

The Velocity, L. R. 3 P. C. 44; *The Ranger*, L. R. 4 P. C. 519; Marsden, Martime Collisions, 3d ed. 344, 427, 466, 468, 513.

Each pilot is bound, with peculiar exceptions not applicable here, to keep well over to the side on his starboard hand, and the fact that the bends in the channel might at times bring one on the starboard of the other, does not affect this rule.

Lyman v. *The John S. Hasbrouck* (*The John S. Hasbrouck*) 93 U. S. 405, 407 (23: 962); *Union S. S. Co.* v. *New York & V. S. S. Co.* 65 U. S. 24 How. 307 (16: 699); *New York & B. Transp. Co.* v. *Philadelphia Steam Nav. Co* 63 U. S. 22 How. 461 (16: 397); *The Vanderbilt* v. *McKibbon* (*The Vanderbilt*), 73 U. S. 6 Wall. 225, 229, 230 (18: 823, 824); *The Joseph Johnson* v. *McCord* (*The Johnson*), 76 U. S. 9 Wall. 146, 149 (19: 610); *The Empire*, 26 U. S. App. 152, 63 Fed. Rep. 476, 11 C. C. A. 519; *Towboat No. 1*, 33 U. S. App. 531, 74 Fed. Rep. 906; 21 C. C. A. 169; *The Edgar F. Luckenbach*, 8 U. S. App. 9, 50 Fed. Rep. 129, 1 C. C. A. 498; 1 Parsons, Ship. & Adm. 569; *The Velocity*, L. R. 3 P. C. 44; *The Ranger*, L. R. 4 P. C. 519; Marsden, Maritime Collisions, 3d ed. 344, 427, 466, 468, 513.

The Victory was to blame for attempting to cross the Plymothian's course from the right to the left hand side of the channel without obtaining a previous agreement by whistle signals.

She was in fault for too great speed in a channel way and for failure to slacken speed or stop and reverse earlier.

The excuses the Victory immediately set up for being on the wrong side of the channel at the time of the collision are an acknowledgment of guilt.

The Plymothian had a right to assume that when the Victory reached Craney Island she would make the change called for by the bend at that point.

The Velocity, L. R. 3 P. C. 44; *The Ranger*, L. R. 4 P. C. 519.

The faults of the Victory being clear and gross, the burden rests upon her, in order to make a case for apportionment, to establish fault on the part of the Plymothian by clear and convincing proof. In such case the contributing fault must be established beyond a fair doubt.

Because of the exception of "collision" in all the bills of lading, the cargo rests under the same burden.

As between the two ships the application of this rule can hardly be contested. It has been laid down in terms of unmistakable plainness in *The Carroll* v. *Green* (*The Carroll*), 75 U. S. 8 Wall. 302, 306 (19: 392); *Thompson* v. *The Great Republic* (*The Great Republic*), 90 U. S. 23 Wall. 20, 35 (23: 55, 59); *Alexandre* v. *Machan* (*The City of New York*), 147 U. S. 71, 85 (37: 84, 90); *The Oregon*, 158 U. S. 186, 197 (39: 943, 949); *The Delaware*, 161 U. S. 459, 479 (40: 771, 776); and in the decisions of the lower courts: *The Edgar F. Luckenbach*, 8 U. S. App. 9, 50 Fed. Rep. 129, 1 C. C. A. 498; *The Mexico*, 78 Fed. Rep. 653, 655, 656; *The E. A. Packer*, 49 Fed. Rep. 92, 96; *The Athabasca*, 45 Fed. Rep. 651, 655; *The Manistee*, 7 Biss. 37; *The Umbria*, 166 U. S. 404, 409 (41: 1053, 1058).

By reason of the exception of "collision" in all the bills of lading, the same rule should be applied as against the cargo.

As soon as the carrier shows the damage is within an exception in the bill of lading, the burden of proof shifts, and the shipper, to defeat the operation of the exception, must prove want of skill or diligence.

Western Transp. Co. v. *Downer*, 78 U. S. 11 Wall. 129 (20: 160); *Memphis & C. R. Co.* v. *Reeves*, 77 U. S. 10 Wall. 176 (19: 909); *Clark* v. *Barnwell*, 53 U. S. 12 How. 272, 280 (13: 983, 988); *Wertheimer* v. *Pennsylvania R. Co.* 17 Blatchf. 421; *The Neptune*, 6 Blatchf. 193; *The Glendarroch*, [1894] P. 226; *The Hindoustan*, 35 U. S. App. 175, 67 Fed. Rep. 794, 14 C. C. A. 650; *The New Orleans*, 26 Fed. Rep. 44; *The Norway*, Brown & L. Adm. 404, 407, 408; *Phillips* v. *Clark*, 2 C. B. N. S. 156; *Wyld* v. *Pickford*, 8 Mees. & W. 443, 459; *Czech* v. *General Steam Nav. Co.* L. R. 3 C. P. 14; *Craig* v. *De Largy*, 16 Scot. L. Rep. 750; *Dobbie* v. *Williams*, 21 Scot. L. Rep. 667; *The R. D. Bibber*, 8 U. S. App. 42, 50 Fed. Rep. 841, 2 C. C. A. 50; *Hunt* v. *The Cleveland*, Newb. Adm. 221; *Union Ins. Co.* v. *Shaw*, 2 Dill. 23; *Vaughan* v. *630 Casks of Sherry Wine*, 7 Ben. 509; *Dedekam* v. *Vose*, 3 Blatchf. 44, 47; *The David and Caroline*, 5 Blatchf. 266.

And unless it is shown by the shipper that the loss might have been prevented by the use of due care, the damage is presumed to have occurred without negligence.

The Live Yankee, Deady, 422; *The R. D. Bibber*, 8 U. S. App. 42, 50 Fed. Rep. 841, 2 C. C. A. 50.

The Plymothian was not in fault for failing to stop and reverse earlier.

The Victory's position when she sounded her first two-blast signal is involved in a conflict of testimony, but, on the clear weight of the evidence, she was then to the north of Craney Island.

The Plymothian was justified in presuming the Victory would pass port to port until some contrary sign appeared which produced an actual risk of collision.

When these vessels were as far apart as buoy 9 and Craney Island they were in no risk of collision, and the only rule then applicable to them was that each should keep to its own starboard side of the channel, so as to avoid any risk as they came nearer. Each was entitled to presume that the other would act lawfully; would keep to its own side; if temporarily crowded out of her proper course would

return to it as soon as possible; and that each would pursue the customary track of vessels in the channel, regulating its action so as to avoid danger rather than to incur it.

Nichels v. *The Servia* (*The Servia*), 149 U. S. 144 (37:681); *Alexandre* v. *Machan* (*The City of New York*), 147 U. S. 72 (37: 84); *The Josephine B.* 20 U. S. App. 105, 58 Fed. Rep. 813, 7 C. C. A. 495; *The Harrisburgh*, 9 Fed. Rep. 169; *Ludwig* v. *The Free State* (*The Free State*), 91 U. S. 200 (23: 299); *The Bridgeport*, 6 Blatchf. 3; *The Nessmore*, 41 Fed. Rep. 437; *Hutchinson* v. *The Northfield*, 154 U. S. 629, 630, and (24: 680); *The Delaware*, 161 U. S. 469 (40: 775).

So long as the vessels were port to port the Plymothian proceeding at moderate speed was not bound to stop or reverse, against the chance that the other vessel might depart from the rules of the navigation. So long as she was not seen to be departing from them, the Plymothian was not in fault for keeping on.

Marshall v. *The Adriatic* (*The Adriatic*), 107 U. S. 512 (27: 497); *The Jesmond*, L. R. 4 P. C. 1; *The John King*, 1 U. S. App. 64, 49 Fed. Rep. 469, 1 C. C. A. 319.

The Plymothian would not have been bound to stop and reverse at once if she had heard a prior two-blast signal from the Victory at the time she claims to have blown it.

No fault on the part of the Plymothian has been established, nor indeed alleged, under inspectors' rule 8.

The court of appeals erred in overruling the finding of fact made by the district judge on the conflicting evidence of witnesses produced before him, that the headway of the Plymothian was completely stopped at the time of collision.

The Corsica v. *Schuyler* (*The Corsica*), 76 U. S. 9 Wall. 630 (19: 804); *The Umbria*, 166 U. S. 404 (41: 1053).

The appellate court should not reverse a finding of fact made by the district court upon conflicting testimony of witnesses produced before him, unless it appears to be clearly against the weight of evidence.

The Charles Hebard, 6 U. S. App. 641, 56 Fed. Rep. 315, 5 C. C. A. 516; *The Warrior*, 7 U. S. App. 559, 54 Fed. Rep. 534, 4 C. C. A. 498; *The Royal*, 14 U. S. App. 30, 54 Fed. Rep. 204, 4 C. C. A. 285; *The City of New York*, 14 U. S. App. 39, 54 Fed. Rep. 181, 4 C. C. A. 268; *The Shackamaxon*, 26 U. S. App. 694, 66 Fed. Rep. 75, 13 C. C. A. 335; *The Jersey City*, 1 U. S. App. 244, 51 Fed. Rep. 527, 2 C. C. A. 365; *The Niagara*, 1 U. S. App. 658, 52 Fed. Rep. 890, 3 C. C. A. 342; *The Grafton*, 1 Blatchf. 173; *The Sampson*, 4 Blatchf. 28; *The Florida*, 4 Blatchf. 470; *The Sunswick*, 5 Blatchf. 280; *Guimarais's Appeal*, 28 Fed. Rep. 528; *Levy* v. *The Thomas Melville*, 37 Fed. Rep. 271; *The Albany*, 48 Fed. Rep. 565; *The Alijandro*, 15 U. S. App. 98, 56 Fed. Rep. 621, 6 C. C. A. 54; *The S. S. Wilhelm*, 16 U. S. App. 356, 59 Fed. Rep. 169, 8 C. C. A. 72; *The Phœnix*, 20 U. S. App. 127, 58 Fed. Rep. 928, 7 C. C. A. 572.

The absence of a special lookout in the bow is immaterial, unless there be proof that his absence contributed to the collision.

The Blue Jacket v. *Tacoma Mills Co.* (*The Blue Jacket*), 144 U. S. 371, 389, 390 (36: 469, 478); *The Nacoochee* v. *Moseley* (*The Nacoochee*), 137 U. S. 330, 341 (34: 687, 691); *The Oregon*, 158 U. S. 186, 195 (39: 943, 948); *Northwest Transp. Co.* v. *Boston Marine Ins. Co.* 41 Fed. Rep. 793, 798.

The Plymothian, if in any degree at fault for the collision, is freed from responsibility to her cargo by the express provisions of the bills of lading under which she carried it.

The bill of lading No. 48 of the Gulf, Colorado, & Santa Fé Railway Company was a contract to carry to the seaboard merely, and to forward the goods from there upon the terms and conditions of the steamship's form of bill of lading, and that the shipper, by the terms of the contract, made the first carrier his agent, to agree upon carriage from the seaboard to the port of destination, upon the terms and conditions in the form of the steamship's bill.

Moore v. *Harris*, L. R. 1 App. Cas. 318, 3 Asp. Mar. L. Cas. 173; *Detroit & M. R. Co.* v. *Farmers' & M. Bank*, 20 Wis. 122; *Hinckley* v. *New York C. & H. R. R. Co.* 56 N. Y. 429; *Watts* v. *The Saxon*, 11 La. Ann. 43; *Union Exp. Co.* v. *Shoop*, 85 Pa. 325.

Cases illustrative of the English law on the subject of negligence clauses, to which reference is made under the foregoing stipulation, are:

Chartered Mercantile Bank v. *Netherlands India Steam Nav. Co.* L. R. 10 Q. B. Div. 521, 5 Asp. Mar. L. Cas. 65; *The Duero*, L. R. 2 Adm. & Eccl. 398; *Taubmann* v. *Pacific Steam Nav Co.* 26 L. T. N. S. 704; *Steel* v. *State Line S. S. Co.* L. R. 3 App. Cas. 72; *Manchester, S. & L. R. Co.* v. *Brown*, L. R. 8 App. Cas. 703; *Grill* v. *General Iron Screw Collier Co.* L. R. 1 C. P. 600; *The Cressington* [1891] P. 152.

English cases as to responsibility for the neglect of a pilot, to which reference is also made, are:

Carruthers v. *Sydebotham*, 4 Maule & S. 77; *The Maria*, 1 W. Rob Adm. 95; *The Agricola*, 2 W. Rob. Adm. 10; *The Bilboa*, Lush. Adm. 149, 154; *The Halley*, L. R. 2 P. C. 193; *The Hector*, L. R. 8 Prob. Div. 218, 224; *General Steam Nav. Co.* v. *British & C. Steam Nav. Co.* L. R. 3 Exch. 330.

Where it appears expressly that the parties contracted with reference to a common law, it is the law of this country that such foreign law prima facie should be applied in expounding the contract.

Wayman v. *Southard*, 23 U. S. 10 Wheat. 1, 48 (6: 253, 264); *Pritchard* v. *Norton*, 106 U. S. 124, 137 (27: 104, 109); *Watts* v. *Camors*, 115 U. S. 353, 362 (29: 406, 409); *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* (*The Montana*), 129 U. S. 397, 447 (32: 788, 794); *The Oranmore*, 24 Fed. Rep. 922, 928; *Dobell* v. *S. S. Rossmore Co.* [1895] 2 Q. B. 408.

The mere fact that a clause of the contract valid by the foreign law would be opposed to the public policy of this country, if made with reference to our law, is not generally regarded as a ground for refusing to enforce the law the parties have adopted.

Cox v. *United States*, 31 U. S. 6 Pet. 203 (8: 370).

A state court called upon to administer the law of another state or of a foreign state or of

a foreign country could refuse to do so, upon grounds which would justify this court in a similar refusal, yet in practice they do not regard the public policy of their own state as a sufficient ground for applying their own law, instead of the foreign law, where the latter would otherwise be applicable.

Fonseca v. *Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 340; *Forepaugh* v. *Delaware, L. & W. R. Co.* 128 Pa. 217, 5 L. R. A. 508, and cases there cited; *Brown* v. *Browning*, 15 R. I. 422; *Gross* v. *Jordan*, 83 Me. 380; *Dugan* v. *Lewis*, 79 Tex. 246, 12 L. R. A. 93.

If any fault be found on the part of the Plymothian, not covered by the bills of lading, it was slight as compared with the faults of the Victory, and the court should therefore apportion the damages in accordance with the degree of the faults.

The court may divide the damages in any proportion it thinks proper.

Waring v. *Clarke*, 46 U. S. 5 How. 441, 503 (12: 226, 255); *The Max Morris* v. *Curry* (*The Max Morris*), 137 U. S. 1, 15 (34: 586, 590).

Under the operation of the limited liability acts one vessel has frequently been adjudged to bear a greater amount of damages than the other, where both are to blame, a case that frequently arises where the interests of the third vessel or its cargo are involved.

Reynolds v. *Vanderbilt* (*The North Star*), 106 U. S. 17 (27: 91); *The Alabama* v. *De Las Casas* (*The Alabama and The Game-Cock*), 92 U. S. 695 (23: 763); *The City of Hartford* (*The City of Hartford and The Unit*), 97 U. S. 323 (24: 930); *The Sterling* v. *Petersen* (*The Sterling and The Equator*), 106 U. S. 647 (27: 98); *The George Washington* v. *Cavan* (*The Washington and The Gregory*), 76 U. S. 9 Wall. 513, 516 (19: 787, 788); *The Mary Ida*, 20 Fed. Rep. 741.

Mr. **Robert M. Hughes** for the Victory.

Mr. **Wilhelmus Mynderse**, with *Messrs. Butler, Notman, Joline, & Mynderse*, for the Canton Insurance Company:

The Victory, by her faults, caused or contributed to the collision.

The Victory should have ported on seeing the Plymothian, instead of which she starboarded.

The Delaware, 161 U. S. 459 (40: 771).

The Victory should have stopped and reversed her engines earlier than she did.

The statute provides:

"Rule twenty-one. Every steam vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse."

U. S. Rev. Stat. § 4233.

This rule has received the careful consideration of courts and of writers.

Marsden, Maritime Collisions, 2d ed. 381, 397; *The Khedive*, L. R. 5 App. Cas. 876; *The Beryl*, L. R. 9 Prob. Div. 137; *The Ceto*, L. R. 14 App. Cas. 670; *The Knight*, 43 Fed. Rep. 895; *The North Star*, 43 Fed. Rep. 807; *The Aurania*, 29 Fed. Rep. 124; *Marshall* v. *The Adriatic* (*The Adriatic*), 107 U. S. 512, 515 (27: 497, 498); *The Frisia*, 28 Fed. Rep. 249; *The Memnon*, 6 Asp. Mar. L. Cas. 317, 488.

The Plymothian, by her faults, caused or contributed to the collision.

The Plymothian should have maintained a proper lookout.

The Manhasset, 34 Fed. Rep. 408, 417.

In such a case the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been.

The Pennsylvania v. *Troop* (*The Pennsylvania*), 86 U. S. 19 Wall. 125 (22: 148); *The City of Washington* v. *Baillie* (*The City of Washington*), 92 U. S. 31, 36 (23: 600, 602).

The vessels were not in fact a thousand yards apart at that time, for the Plymothian had already proceeded some distance down the river; but even if they had been a thousand yards apart they were, when their respective rates of speed are considered, distant from each other less than three minutes of time. Under cross signals, if such had been recognized, it was the duty of the Plymothian to act instantly for safety; a duty which was recognized by her when at a later stage she did hear a cross signal from the Victory.

U. S. Rev. Stat. § 4323, rule 21; pilot rule 3; *The Baltimore*, 56 Fed. Rep. 127; *The Knight*, 43 Fed. Rep. 895; *The Aurania*, 29 Fed. Rep. 127; *The Frisia*, 28 Fed. Rep. 249; Marsden, Maritime Collisions, 2d ed. 381-397.

The Plymothian should have blown danger signals, and should have stopped and reversed her engines earlier than she did.

The Plymothian was in fault for persisting in porting after she saw that the Victory was starboarding.

The Beryl, L. R. 9 Prob. Div. 137, 142, 144.

The Plymothian is not relieved from responsibility by the terms of her bills of lading.

It is against public policy to permit a carrier to exempt himself from the consequences of the negligence of his servants.

New York C. R. Co. v. *Lockwood*, 84 U. S. 17 Wall. 357, 378 (21: 627, 640).

The rule has been extended from the strict applications resting upon the carrier by land to cover those of a carrier by sea.

Liverpool & G. W. Steam Co. v. *Phenix Ins. Co.* (*The Montana*), 129 U. S. 397 (32: 788).

The bills of lading were issued nearly two years before the passage of the Harter act.

27 Stat. at L. 445, chap. 105.

The carrier sought to avoid the rules of our existing national public policy by a provision that the contract shall be construed by the "law of the flag of the vessel carrying the goods." That, and kindred provisions have been overruled in our courts as invalid as embodying attempts at evasion by the carrier.

The Energia, 56 Fed. Rep. 124; *Lewisohn* v. *National S. S. Co.* 56 Fed. Rep. 602; *The Iowa*, 50 Fed. Rep. 561; *The Brantford City*, 29 Fed. Rep. 373; *The Guildhall*, 58 Fed. Rep. 796; *The Glenmavis*, 69 Fed. Rep. 472; *Rousillon* v. *Rousillon*, L. R. 14 Ch. Div. 351, 369; *Hope* v. *Hope*, 8 DeG. M. & G. 743.

The true test applied by this court to determine the validity of any provision in a bill of lading is the measure of what is "just and reasonable in the eye of the law."

New York C. R. Co. v. *Lockwood*, 84 U. S. 17 Wall. 357, 380, 382 (21: 627, 640, 641).

While the more frequent practice in this country undoubtedly follows the rule of equal division the result is often reached that a greater burden is thrown upon one vessel than

upon another in order to afford complete indemnity to owners of cargo, or to other persons who have sustained damage, though free from fault themselves. Such instances have arisen when one of two faulty vessels was of insufficient value to pay her full one half. Then the other guilty vessel has been compelled to make up the deficiency.

The George Washington v. *Cavan* (*The Washington and The Gregory*), 76 U. S. 9 Wall. 513, 516 (19: 787, 788); *The Alabama* v. *De Las Casas* (*The Alabama and The Game-Cock*), 92 U. S. 695 (23: 763); *The City of Hartford* v. *Rideout* (*The City of Hartford and The Unit*), 97 U. S. 323 (24: 930); *The Sterling* v. *Petersen* (*The Sterling and The Equator*), 106 U. S. 677 (27: 99).

Aside from these instances where the greater loss has been thrown upon one vessel through accidental circumstances, it has not been unprecedented to make a decree imposing a heavier burden upon one because of her graver fault.

The Mary Ida, 20 Fed. Rep. 741, 747; *The Explorer*, 20 Fed. Rep. 135; *The Wanderer*, 20 Fed. Rep. 140; *The Max Morris*, 24 Fed. Rep. 860, 28 Fed. Rep. 881, 137 U. S. 1 (34: 586); *The Catharine* v. *Dickinson*, 58 U. S. 17 How. 173–177 (15: 233–235).

416] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

The district court and the circuit court of appeals concurred in finding the Victory grossly in fault, and we see no reason for arriving at any other conclusion. In our opinion the collision was the direct consequence of the Victory's disregard of the rule of the road and her reckless navigation.

In any aspect of the case, the rule of the road was to keep to the right.

By rule 18 of the regulations prescribed by the act of April 29, 1864, carried forward in § 4233 of the Revised Statutes, "if two vessels under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other."

The first rule of the supervising inspectors is to the same effect.†

417] *And this was proved to be the usage in the navigation of the Elizabeth river, and known to the master of the Victory.

These vessels were approaching each other in such directions and with such bearings as required them to keep to the right. The distance between Craney Island light and buoy No. 9 was about 1⅛ miles. When the Plymothian was at buoy No. 9 the Victory was somewhat to the north of or near Craney Island. As the Plymothian straightened down the channel, opposite buoy 9, she was near the eastern side and heading straight down the channel course N. ¼ or ½ E. She was obliged to swing, on leaving the pier, to round the buoy, but had steadied down as she passed it. The evidence thoroughly established that she was never on the westerly side of the channel. We think the district judge was amply justified in finding as he did that the Plymothian had not, "in coming out from Lambert's pier, gone over to the west of the channel near to red buoy No. 22; and had not, after doing so, recrossed the channel to reach its position near buoy 9, as claimed by the Victory's counsel. The tide was not strong enough to force her over there, and it would have been out of her course to have gone there. The testimony is conclusive to that effect."

The Victory when in the neighborhood of Craney Island was either in mid-channel or to the westward of it, and on the Plymothian's port bow. The Victory's witnesses admitted starboarding twice for different schooners and hard starboarding just before the collision; but both of the lower courts, in accordance with the great weight of evidence, found that the Victory was not prevented by other vessels in the channel, either from going on the westerly side or from staying there, *while the testimony of the Victory's pi- [418 lot indicated that his object in heading over for the easterly side of the channel was to cut off some of the distance into port by passing close to buoys Nos. 7 and 9.

Moreover, as immediately after straightening down the Plymothian ported a little and then hard ported, even if the Victory had been heading at a gradual angle across the channel all the way from Craney Island the vessels would have been approaching each other from an oblique direction, which would have brought the inspectors' second rule into play, that vessels so situated "shall pass to the right of each other as if head and head, or nearly so."

† "Rule I.—When steamers are approaching each other 'head and head' or nearly so, it shall be the duty of each steamer to pass to the right or port side of the other; and the pilot of either steamer may be first in determining to pursue this course and thereupon shall give as a signal of his intention one short and distinct blast of his steam whistle, which the pilot of the other steamer shall answer promptly by a similar blast of his steam whistle, and thereupon such steamers shall pass to the right or port side of each other; but if the course of such steamers is so far on the starboard of each other as not to be considered by pilots as meeting 'head and head' or nearly so, the pilot so first deciding shall immediately give two short and distinct blasts of his steam whistle, which the pilot of the other steamer shall answer promptly by two similar blasts of his steam whistle, and they shall pass on the left or on the starboard side of each other.

"Note.—In the night steamers will be considered meeting head and head so long as both the colored lights on each are in view of the other.

"Second situation.—Here the green light only will be visible to each, the screens preventing the red light from being seen. They are therefore passing to starboard, which is rulable in this situation, each pilot having previously signified his intention by two blasts of the steam whistle."

Rule II.—When steamers are approaching each other in an oblique direction (as shown in diagram of the fourth situation), they shall pass to the right of each other, as if meeting head and head or nearly so, and the signals by whistles shall be given and answered promptly as in that case specified."

"Rule III.—If when steamers are approaching each other the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving several short and rapid blasts of the steam whistle; and if the vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway until the proper signals are given, answered, and understood, or until the vessels shall have passed each other."

The starboard-hand rule had no application. Although when the Plymothian started from the pier her starboard side must necessarily have been down stream as she turned, the vessels were never starboard to starboard after she had rounded buoy 9 and straightened down the channel and the Victory had passed Craney Island and straightened up S. ¼ W. Indeed, the rule applicable when two vessels "are crossing so as to involve risk of collision," that "the vessel which has the other on her own starboard side shall keep out of the way," is ordinarily inapplicable to vessels coming around bends in channels, which may at times bring one vessel on the starboard of the other. It has often been held as a general rule of navigation that vessels approaching each other in narrow channels, or where their courses diverge as much as 1¼ or 2 points, are bound to keep to port and pass to the right, whatever the occasional effect of the sinuosities of the channel. *New York & B. Transportation Co.* v. *Philadelphia & S. Steam Navigation Co.* 63 U. S. 22 How. 461 [16: 397]; *Union S. S. Co.* v. *New York & V. S. S. Co.* 65 U. S. 24 How. 307 [16: 699]; *The Vanderbilt* ["*The Vanderbilt* v. *McKibbon*"], 73 U. S. 6 Wall. 225 [18: 823]; *The Johnson* ["*The Joseph Johnson* v. *McCord*"], 76 U. S. 9 Wall. 146 [19: 610]; *The John L. Hasbrouck* ["*Lyman* v. *The John L. Hasbrouck*"], 93 U. S. 405 [23: 962]; *The Berkshire*, 33 U. S. App. 531, 540.

It is interesting to note that *Union Steamship Co.* v. *New York & V. Steamship Co.* was a case of collision in the channel of the Elizabeth river, where the steamship Jamestown, outward bound, took the eastern side of the 419]channel, rounding *Lambert's Point near the buoy, and proceeded on her course N. ¼ E. She was struck by the Pennsylvania, coming up, by reason of the Pennsylvania putting her helm to starboard instead of keeping her proper course, or porting when it became known that the Jamestown was approaching; and it was held that the Pennsylvania was solely to blame.

The principle was embodied in article 21 of the international regulations adopted by the act of March 3, 1885 (23 Stat. at L. 438, chap. 354), providing that "in narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid channel which lies on the starboard side of such ship," which is article 25 of the regulations adopted August 19, 1890 (26 Stat. at L. 320, chap. 802), and put in operation, after some postponements and amendments, in 1897 (29 Stat. at L. 885, 893); and of the act of June 7, 1897 (30 Stat. at L. 96, chap. 4).

In *The Pekin* [1897] A. C. 532, articles 21 and 22 of these regulations were considered. Article 21 is given above and article 22 read as follows: "Where by the above rules one of two ships is to keep out of the way, the other shall keep her course."

That was an appeal from the decision of the supreme court for China and Japan, sitting in admiralty, in which the steamship Normandie was alone held to blame for a collision which took place between her and the steamship Pekin in the river Whangpoo on April 3, 1896. The case was thus stated by Sir Francis Jeune, delivering judgment in the privy council: "At Pootung Point the Whangpoo makes a sharp bend towards the south, returning indeed on its course at something more than a right angle, and to the eastwards of that point the stream is divided by a line of buoys into two navigable channels, the northern being called the inside, and the southern the outside, channel. The westernmost of these buoys is known as the Old Dock buoy. The Pekin was proceeding up the inside channel along the line of buoys, that is to say on the starboard side of that channel, and the Normandie was coming down the river to the southward of mid-channel. It is clear *that when near the Old Dock buoy [420 the Pekin ported, and that at or about the same time the Normandie starboarded. The Normandie afterwards endeavored to port, but her helm failed to act, owing to what is termed the 'Chow Chow' water, which is, it would appear, a well-known area of eddies or whirlpools off Pootung Point. The result was that a collision occurred well to the north of the river, and somewhat to the eastwards of Pootung Point, the stem of the Normandie striking the port bow of the Pekin. The evidence is not clear as to the whistles given by the two vessels. The learned Chief Justice of the Supreme Court has found that 'at the same time two blasts of the Normandie's whistle were blown as a signal to the Pekin, those on board the Pekin simultaneously blew one blast of her whistle.' Those on the Pekin dispute the double blast of the Normandie; but their Lordships think that, accepting as they do the above finding as correct, it may well be that one of the two whistles of the Normandie coincided with the one whistle of the Pekin, and so those on the Pekin heard only one whistle from the Normandie, and believed that only one was given."

The appeal raised the question of the conduct of both vessels. The Normandie was manifestly in fault. As to the conduct of the Pekin two charges were insisted on by counsel, and after setting them forth, the opinion thus proceeded: "The first of these charges raises the question, Were those two vessels crossing vessels within the meaning of article 22? and also the further question whether the Pekin kept her course. The effect of article 22 has been made clear by several authorities. The cases of *The Velocity*, L. R. 3 P. C. 44; *The Ranger*, L. R. 4 P. C. 519, and *The Ocean*, L. R. 3 Prob. Div. 60, have explained and illustrated the distinction which exists in the effect of this rule as regards vessels navigating the open sea and those passing along the winding channels of rivers. The crossing referred to in article 22 is 'crossing so as to involve risk of collision,' and it is obvious that while two vessels in certain positions and at certain distances in regard to each other in the open sea may be crossing so as to *involve risk of collision, it [421 would be completely mistaken to take the same view of two vessels in the same positions and distances in the reaches of a winding river. The reason, of course, is that the vessels must follow, and must be known to intend to follow, the curves of the river bank. But vessels may, no doubt, be crossing vessels within article 22 in a river. It depends on their presumable courses. If at any time two vessels, not end on, are seen, keeping the courses to be

expected with regard to them respectively, to be likely to arrive at the same point at or nearly at the same moment, they are vessels crossing so as to involve risk of collision; but they are not so crossing if the course which is reasonably to be attributed to either vessel would keep her clear of the other. The question, therefore, always turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends on the nature of the locality where she is at that moment. Their lordships have restated these propositions because they appear to them decisive of this part of the present case. They are advised by their assessors, and it appears to them clear, that, having regard to the features of the locality at the time the Pekin ported her helm, that is to say when she was near the Old Dock buoy, the vessels were not crossing vessels within the meaning of article 22. It was reasonable for those on the Pekin, as, without fault on their part, they did not hear the double blast of the Normandie before they took action with their helm, to assume that the Normandie would take the outside channel, in which case their courses would not cross, or would take the southern side of the inside channel, in which case their courses would indeed cross, but not so as to involve risk of collision."

We ought to add that, in the case before us, even if the steamers had been so far on the starboard of each other as to justify the pilots in considering that they were not meeting "head and head," or nearly so, there was no pretense of an agreement to go starboard to starboard under inspector's rule I.; nor was this a case for the application of rule III.

Testing the Victory's conduct by settled [422] rules, she was *plainly in fault for not keeping to the right, and in attempting to cross the Plymothian's course, and her speed renders her conduct still more blameworthy. It does not seem to be controverted that at the time of leaving the lighthouse her speed was 5½ knots through the water, and there was a tide force of 2 knots, which would make 7½ knots over the ground. The circuit court of appeals found that from Craney Island up her speed through the water was 6 or 7 miles an hour, with a two-mile tide assisting her, which would make her speed over the bottom 8 or 9 miles. Certainly she must be held to have known that she was approaching the Plymothian so as to involve the risk of collision, and should have slackened her speed under rule 21, and have stopped and reversed sooner than she did, when she was informed by sight and hearing that her effort to crowd the Plymothian off her rightful course must be unsuccessful.

If she could not port and keep on her own side, she should have reversed at least as early as when her second two-blast signal was blown and not assented to by the Plymothian, yet it was the Plymothian that immediately reversed on hearing that signal and blew three danger signals, while the Victory did not blow her danger signals until after that, and manifestly did not reverse as early as the Plymothian. At the collision the Plymothian's headway had been stopped, but the Victory had such headway on that she threw the Plymothian's bows around to starboard, while her own bows cut through the Plymothian's three decks and stringer plates, a distance of at least 15 inches, and were damaged as far back as 3 feet.

None of the excuses the Victory set up for being on the wrong side of the channel tended to palliate her guilt. The only time at which the Plymothian could have been on the Victory's starboard bow was when the Victory was below Craney Island, and she was bound to govern herself by the bearings of the vessels as they were after she straightened up the channel course from Craney Island south, and then the vessels were port to port. The Victory met a few steamers, *but her captain and [423] pilot admitted that they did not force the Victory out of her course, and they were passed near Craney Island, or the lighthouse, or far below the place of collision. So there were two or three schooners in the channel, but both the courts below found that they did not prevent the Victory from doing her duty by porting and keeping to the right, and her presence near them at all was attributable to her having left the western side of the channel.

We need not elaborate in view of the concurrence of the courts below, and have gone so far into the evidence on this branch of the case because it illustrates the point on which those courts were at variance.

As between these vessels, the fault of the Victory being obvious and inexcusable, the evidence to establish fault on the part of the Plymothian must be clear and convincing in order to make a case for apportionment. The burden of proof is upon each vessel to establish fault on the part of the other.

The recognized doctrine is thus stated by Mr. Justice Brown in *The Umbria*, 166 U. S. 404, 409 [41: 1053, 1057]: "Indeed, so gross was the fault of the Umbria in this connection that we should unhesitatingly apply the rule laid down in *The City of New York* [*Alexandre* v. *Machan*], 147 U. S. 72, 85 [37: 84, 90], and *The Ludvig Holberg*, 157 U. S. 60, 71 [39: 620, 624], that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor."

"Collision" was an exception in all the bills of lading, and, laying out of view the "negligence" and "flag" clauses, as the damage was occasioned by collision and within the exception, it rested upon the underwriters in this case to defeat the operation of the exception by proof of such negligence on the part of the Plymothian as would justify a decree against her if sued alone. *Clark* v. *Barnwell*, 53 U. S. 12 How. 272, 280 [13: 985, 988]; *Western Transportation Co.* v. *Downer*, 78 U. S. 11 Wall. 129 [20: 160]; *The City of Hartford and The Unit* [*The Hartford* v. *Rideout*], 97 U. S. 323, 325 [24: 930]; *The Ludvig Holberg*, 157 U. S. 60 [39: 620].

Apparently it is a hardship for the underwriters on the Plymothian's cargo to be compelled to bear a portion of their own loss, but if the Plymothian was free from fault, this is merely *the result of the limitation of li- [424] ability acts, the value of the victory not being sufficient to pay the entire damages sustained.

The circuit court of appeals and the district court arrived at different conclusions in respect of the Plymothian's entire freedom from fault. The district court held that the Plymothian was without blame, while the circuit court of appeals was of opinion that she was not wholly blameless, because she kept her course "without taking any precaution whatever until too late, and when the pending collision became inevitable." Whether she may not have been slightly in fault may be a close question. This is often so when subsequent knowledge of what might have prevented disaster tends to qualify the inquiry as to the prior duty to avert it. But after all, the question is, as pointed out by Mr. Justice McLean in *Williamson* v. *Barrett*, 54 U. S. 13 How. 101 [14: 68], whether it was the duty of the master, in the exercise of due care and caution in the management of his vessel, to give a particular order. And on a careful consideration of the evidence, we think that the Plymothian was not bound to change her course, or to stop and reverse earlier than she did, and these are the only elements of fault imputed to her.

Were the position and course and signals of the Victory such that the Plymothian was bound to change her course or to stop and reverse sooner than she did?

The Plymothian in passing the buoy straightened down the channel course on the easterly side. The only change she made after straightening down was by porting her helm, which put her closer to the easterly edge of the channel at the time of the collision. She left her pier at 4 o'clock P. M., under half speed until she rounded the buoy, when the engines were put full speed ahead, 767 yards from the point of collision. The full speed of the Plymothian was 7 knots. The tide was running against her with a force of 2 knots. She had her engines at full speed against the tide perhaps five minutes, and both the courts below found her speed over the ground was about 4 miles an hour. The Victory blew two double-blast signals and a three-blast signal before the 425]collision. *The evidence of her crew was that the two-blast signals were sounded within a half a minute or a minute of each other, when the steamer was half way between Craney Island and buoy No. 7, and that the three-blast followed a minute or so later. The Plymothian heard only one two-blast signal and the three-blast signal, at that time, as appeared from disinterested evidence on both sides. None of these independent witnesses heard two double blasts and a three-blast signal from the Victory in short succession. All of them, who saw or heard the first two blasts, testified that that signal was blown when the Victory was to the north of or about Craney Island. And, in her petition for limitation of liability, the Victory claimed to have blown that signal "soon after passing Craney Island light," and placed the Plymothian at that time as "apparently starting down the river from opposite Lambert's Point." But if she blew two blasts twice, where her captain and pilot said she did, they were blown close together. The Plymothian's evidence showed that she heard but one, and if the Victory blew two blasts twice within such a short interval as she claims, it would seem that one of them overlapped the whistle from the Plymothian, or it may be that the last two blasts were overlapped by the Plymothian's danger signal.

The evidence largely preponderates that only one signal of two blasts and the signal of three blasts could be heard in the neighborhood of the Plymothian at the time the Victory claims she repeated the two-blast signal and followed it up with three; and we think the conclusion is sustained by the weight of evidence that the Victory's first two-blast signal was blown before she passed Craney Island, when the vessels were so far apart that the Plymothian would not have been bound to stop if she had heard or seen that signal, and as there were at least two river steamboats between the vessels at the time her pilot might have supposed that the Victory's two blasts were intended for one of them rather than for him. However, the Plymothian did not see or hear that signal, and cannot be held in fault as contributing to the collision because she failed to see or hear what would not have *been[426 followed by any change of course; and if there were two two-blast signals within a half a minute, then it is fair to conclude on the evidence that one of them was overlapped by the whistle of the Plymothian. The Plymothian acted immediately and effectively on hearing the two-blast signal she did hear, and succeeded in stopping her headway, and this when the risk of collision first appeared, which was when the Victory last starboarded. The course of the Victory was, we have said, along mid-channel or to the west of it, and did not involve a risk of collision until she made a change to port under a starboard helm, just before sounding the two-blast signal heard by the Plymothian. Her witnesses admit that they were starting straight up the channel after passing Craney Island light, heading S. ¼ W. The channel course below Craney Island, as shown by the chart, was S. by E., and in heading S. ¼ W. her helm must have been ported, and the vessels were port to port. The testimony of the Plymothian's officers and crew was to the effect that the Victory was on their port bow all the way up from below Craney Island to the point where she changed her course just before blowing a two-blast signal, and they are corroborated by independent and disinterested witnesses. The Victory's witnesses testified to starboarding for two or three schooners, who were near the point of collision, and this would account for her sheer to port, as observed on the Plymothian, when she took her precautions for safety. Each of these vessels was entitled to presume that the other would act lawfully; would keep to her own side; if temporarily crowded out of her course would return to it as soon as possible; and that she would pursue the customary track of vessels in the channel, regulating her action so as to avoid danger. *The Servia* [*Nichels* v. *The Servia*], 149 U. S. 144 [37: 681]; *The City of New York* [*Alexandre* v. *Machan*], 147 U. S. 72 [37: 84]; *Belden* v. *Chase*, 150 U. S. 674 [37: 1218].

The rule applicable to them was that each should keep to her own starboard side of the channel. So long as the vessels were port to port, the Plymothian, proceeding at moderate

speed, was not bound to stop and reverse on the chance that the other vessel might depart from
427] the rules of navigation. *Nor would the Plymothian necessarily have been bound to stop and reverse at once if she had heard a two-blast signal from the Victory at the time when the Victory claims to have blown it. That was, the Victory says, half way between buoy No. 7 and Craney Island, which would be 600 yards from the buoy, while the Plymothian was 300 yards above the buoy, which would make the distance between the vessels 900 yards or ½ mile, as the district judge found. The Plymothian was entitled to rely on her repeated single blast to correct the error of the Victory until it was made apparent by a further cross signal or from a change of heading that she was persisting in her wrongful course.

The case of *The Stephanotis* and *The Horton*, cited to us from the Shipping Gazette and Lloyd's List, of July 26, 1894, was similar in its main features to the one before us. The collision occurred on the river Tyne. On the part of the Stephanotis it appeared that she was bound up on the north side of the channel, at a moderate speed, in a snowstorm, when the Horton was observed about 250 yards off, also on the north side of the river, in such a position as to make it impracticable for the Stephanotis to pass up between the Horton and the buoys. She thereupon sounded two short blasts and starboarded her helm, afterwards repeating the signal. A short blast was then heard from the Horton, which was seen to be approaching as if under a port helm. The Stephanotis came ahead, helm a-starboard, her engines going full speed ahead, as the only means of avoiding a collision. The case for the Horton was that she was keeping to the south of mid-channel, going down the river at about 4 knots. The Stephanotis was seen coming up the river ½ mile away, bearing right ahead. The Stephanotis thereupon blew one blast, and the Horton responded with one blast, and then ported and steadied her helm. When the vessels were in a position to clear port to port, the Stephanotis blew two short blasts, and the Horton, after replying with one short blast, again slightly ported her helm. The Stephanotis, however, blew two more
428] blasts, and *as she was then seen to be under a starboard helm, the Horton's whistle was blown a short blast, and her engines were set full speed astern, but the Stephanotis struck the Horton, doing her great damage.

The master of the rolls, Lord Esher, said: "The advice which we have received from the gentlemen who assist us is precisely that which struck me the moment I heard the circumstances of this case. The advice to us is that there was time and distance for the Stephanotis to have ported after the Horton blew one blast, and that the master of the Horton might reasonably have expected that he would do so. When the master or pilot of the Horton heard the first two whistles which were the beginning of the other man's starboarding; and when at that moment starboarding could have but little effect, he had a right reasonably to suppose that the man who at that moment was starboarding his helm, or was beginning to do so, seeing him there, and being told by him that he was porting, would have ample time and distance, if he did not choose to persist in starboarding, to have put his helm to port, or to have ceased starboarding, and then they would have gone clear. But he persisted in starboarding. Then comes the question, Ought the pilot or captain of the Horton to have stopped or reversed, or stopped even, at that moment when the other was beginning to starboard? The answer is that his beginning to starboard could hardly have been for the Horton, but must have been for some other reason, and that the master and pilot of the Horton might reasonably have supposed that when, if anybody had looked, they must have seen the Horton, and must have known that the Horton was porting—they had a right to suppose that the Stephanotis would stop starboarding immediately, and would have ported her helm. If so, it was not unreasonable and unseamanlike, I think, for the Horton to keep on as she did. By the time that two ship's lengths were passed over by the two vessels approaching each other—that is the time of the second blast—the collision was inevitable. It seems to me that the judgment of the president, and the advice of his trinity masters was too severe. It was requiring men *to do[429 what no man ought to be expected to do under such strange circumstances. Therefore, with great deference, I disagree with the severity of their sentence, and think the Stephanotis ought to be held solely to blame."

Similar views were expressed by Judge Brown of the southern district of New York in *The Florence*, 68 Fed. Rep. 940.

In respect of both these vessels, the captain was acting as lookout on the bridge, but there was no lookout stationed on the bows. Can it be said that the absence of such a lookout on the Plymothian contributed to the injury? Her captain, pilot, and third officer were all on the bridge and the view was clear and unobstructed. Would a lookout on the bows have heard or seen more than they did? The bearing of this inquiry is, of course, on the failure of the Plymothian to detect the first alleged two-blast signal blown by the Victory. We have already indicated that the evidence is to our minds satisfactory that that two-blast signal was blown when the Victory was below Craney Island lighthouse. If so, the vessels were 1⅛ miles apart and the Victory was on the Plymothian's port bow. The Plymothian blew three single blast signals after that time, and neither of them were dissented from by the Victory until the last one, and the proper manœuvers to avoid the risk then created were promptly taken. But, if it were assumed that the first two-blast signal was blown when the Victory was half way between Craney Island and buoy No. 7, the vessels were still ½ mile apart with room to correct the proposed erroneous course. And if the Victory blew her second two-blast signal inside of a half minute after the first, as her witnesses testified, and the Plymothian upon hearing one of the two immediately acted on it, the failure to hear the other cannot be considered a fault under the circumstances.

We are of opinion that the Plymothian was on her proper course; that she was not bound to anticipate the conduct of the Victory; and

that she took all proper precautions as soon as chargeable with notice of risk of collision. The result is that we agree with the district [430]court in the conclusion that the *Victory was wholly to blame and that the Plymothian was free from fault.

Decree of the Circuit Court of Appeals reversed, the costs of that court to be equally divided between the owners of the Victory and the underwriters; *decree of the District Court affirmed;* costs in this court for preparing and printing the record to be paid by the owners of the Victory, all other costs in this court to be divided equally between the owners of the Victory and the underwriters.

MARGARET A. MUSE, Hippolite Filhiol, Francis J. Watts, *et al.*, *Plffs. in Err.*,
v.
ARLINGTON HOTEL COMPANY.

(See S. C. Reporter's ed. 430-437.)

Federal question, when does not arise.

A case does not involve the construction or application of the Constitution of the United States, or the validity or construction of a treaty, so that writ of error will lie directly from this court to the United States circuit court merely because the complaint in ejectment states a reliance on a certain article of a treaty and the 5th Amendment of the Constitution, without asserting that any right, title, privilege, or immunity is derived from either Constitution or treaty, or indicating in what way the cause of action is claimed to arise from either, when the court does not decide any question as to the application or construction of the Constitution or validity or construction of the treaty, but holds that plaintiffs' title failed because of noncompliance with the Spanish law.

[No. 59.]

Argued October 26, 27, 1897. Decided December 6, 1897.

IN ERROR to the Circuit Court of the United States for the Eastern District of Arkansas to review a judgment of that court, dismissing the complaint with costs in an action in ejectment brought by Margaret A. Muse *et al*, against the Arlington Hotel Company, for possession of land in the county of Garland, state of Arkansas, and for damages for the wrongful possession thereof. *Dismissed.*

See same case below, 68 Fed. Rep. 637.

Statement by Mr. Chief Justice **Fuller:**

Margaret A. Muse and others filed their original complaint in ejectment against the Arlington Hotel Company July 25, 1894, in the circuit court of the United States for the eastern district of Arkansas, to which defendant demurred. Pending the demurrer, plaintiffs filed an amended complaint, in which they averred that defendant was "a corporation organized *under the laws of the state of [431] Arkansas, and doing business at the city of Hot Springs in that state;" and that plaintiffs, except "Alice F. South, who is a citizen and resident of Coahuila, Mexico," were all citizens and residents of the United States, some of Louisiana, some of Texas, some of Mississippi, and one of Illinois.

That they are the only heirs at law of Don Juan Filhiol, who died intestate, a citizen of Louisiana, in 1821; and that they are the owners in fee simple of a league of land described in the complaint.

Plaintiffs alleged that Filhiol was born in France in 1740; that he left that country in 1763, going to San Domingo, and thence to Philadelphia in 1779, and finally arrived in New Orleans in May of that year, where he joined the volunteers in the war between Spain and England; that in 1783 he was appointed by the King of Spain captain of the army and commandant of the militia and assigned to duty at the post of Ouachita in Louisiana, under instructions from Don Estevan Miro, the governor general of that province.

That, on December 12, 1787, Filhiol memorialized the governor of Louisiana and West Florida for a grant of land, whereon the governor ordered a survey of the land applied for, and that before February 22, 1788, Don Carlos Trudeau, the then surveyor general of Louisiana, made a survey in accordance with the law as it then existed, and made a report thereof, with figurative plan, and procès verbal in due form, in and by which the land was described; that the survey, figurative plan, and procès verbal have been lost or destroyed, and plaintiffs could not produce them, but they alleged that on February 22, 1788, Miro, as governor, made and delivered to Filhiol a grant for a certain league of land, the description of which was set forth in the complaint; that the grant was made while Filhiol was acting as commandant of the post of Ouachita, as a reward for his civil and military services in his position as commandant; and that Miro, as governor, was by the Spanish colonial laws vested with power to make grants of land and to convey by such grants the absolute fee simple to the lands granted.

*Plaintiffs further averred that the land[432] granted by Miro to Filhiol consisted of a certain 1 square league with the hot springs at the city of Hot Springs as its center, the description, metes, and bounds of which league were more accurately described in the survey, figurative plan, and procès verbal; and, setting forth a translation of the grant, plaintiffs stated that after the delivery of the grant to Filhiol, December 6, 1788, Trudeau, who was then public and private surveyor of Louisiana, made and delivered to Filhiol a certificate of measurement of the land, a translation of which was also given; that the making and delivery of this certificate was a delivery of the

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws, see notes to Jackson, Hart, v. Lamphire, 7: 679, and Commercial Bank v. Buckingham, 12: 169.

judicial possession of the land, and had the force and effect of segregating it from the public domain, and that the grant vested full and complete title in the grantee.

It was further alleged that Filhiol sold and conveyed the land, November 25, 1803, to his son-in-law, Bourgeat, passing the deed before the military and civil commandant of Ouachita, the deed being witnessed by two witnesses, who signed the act in the presence of two others, and a copy of which was set out; that the deed was immediately reported to the proper office of Louisiana and was afterwards duly recorded; that Bourgeat retroceded the same lands to Filhiol by deed passed before the judge of the parish of Pointe Coupee, July 17, 1806; that this deed (a copy of which was given) was duly filed and recorded; and that Filhiol never thereafter parted with his title to the land. And plaintiffs allege that when these deeds were made the Spanish colonial law forbade any public officer having authority to receive acknowledgments and pass deeds for the conveyance of lands to pass such deeds or receive acknowledgments thereof, unless they knew that the vendor had title to the lands proposed to be sold.

Plaintiffs also averred that in 1819 Filhiol leased the hot springs to one Dr. Wilson for five years; that shortly thereafter, in 1821, Filhiol died; and that ever since his death plaintiffs had always urged their title to the property, and employed agents and attorneys to do so for them, and that during a large part of this time they had been embarrassed by the want of the original grant, which had been [433] mislaid; that often *and repeated searches were made by plaintiffs for it, but without success, but that lately, in 1883, the grant had been found.

The complaint continued: "Said plaintiffs state that they claim title to said league of land so granted by said Estevan Miro, as governor of said province, to the said Juan Filhiol, as the heirs at law of said Juan Filhiol, and they state that they will rely upon the following written evidences of their title for the maintenance of this action:

"First. On the grant made by Don Estevan Miro, as governor of the province of Louisiana, on February 22, 1788, to Don Juan Filhiol, a translation of which grant is filed herewith, marked 'Exhibit A,' and made part hereof.

"Second. On the certificate of measurement or survey made by Carlos Trudeau, surveyor of the province of Louisiana, on December 6, 1788, and delivered by him on that date to Don Juan Filhiol, a translation of which, marked 'Exhibit B,' is filed herewith and made part hereof.

"Third. On the deed of said land made by Don Juan Filhiol to Narcisso Bourgeat on November 25, 1803, a translation of which is herewith filed, marked 'Exhibit C,' and made part hereof.

"Fourth. On the deed or retrocession of said land made by Narcisso Bourgeat to Don Juan Filhiol on the 17th of July, 1806, a translation of which deed or retrocession is herewith filed, marked 'Exhibit D,' and made part hereof.

"Fifth. On the 3d article of the treaty between the United States of America and the French Republic of April 30, 1803, which was ratified on the 21st of October, 1803.

"Sixth. On the 5th Amendment to the Constitution of the United States."

And plaintiffs then alleged that defendant was in the unlawful possession of part of the land, "which portion is included in the Hot Springs Mountain Reservation, in the city of Hot Springs, county of Garland, state of Arkansas, the boundary lines of which reservation were established by the Hot Springs commission by public surveys in pursuance of the laws of the United States;" and this was followed by a *particular description of the [434] land so alleged to be unlawfully possessed.

Plaintiffs charged that defendant had been in such unlawful possession since the 3d day of March, 1892, during all of which time plaintiffs had title to and the right of possession of said land; and alleged that by reason of such wrongful possession they had been damaged in the sum of $20,000; and prayed judgment for possession and damages. To this amended complaint defendant demurred, and also filed an answer and exceptions.

The circuit court sustained the demurrer and exceptions, and entered judgment dismissing the complaint with costs, whereupon this writ of error was sued out directly to that court.

The circuit court, Williams, J., held, 68 Fed. Rep. 637, that the alleged granting papers were ineffectual to perfect title, because there was no showing that the acts required by law to be performed,—to wit, the making of an actual survey on the ground; the certification and approval of the same; and the delivery of possession,—had ever been performed; that the claim was barred under the act of Congress of May 26, 1824, entitled An Act Enabling the Claimants to Lands within the Limits of the State of Missouri and Territory of Arkansas to Institute Proceedings to Try the Validity of their Claims (4 Stat. at L. 52, chap. 173); and by the act of Congress known as the Hot Springs act of June 11, 1870 (16 Stat. at L. 149, chap. 126); that the claim, if originally valid, must be considered as having been abandoned; and that plaintiffs were estopped from claiming title to the land under the facts disclosed.

Messrs. **John G. Carlisle** and *Logan Carlisle* for plaintiffs in error.

Messrs. **G. B. Rose** and *U. M. Rose* for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

*Writs of error may be sued out direct- [435] ly from this court to the circuit courts in cases, among others, in which the construction or application of the Constitution of the United States is involved, or in which the validity or construction of any treaty made under the authority of the United States is drawn in question. Act of March 3, 1891 (26 Stat. at L. 826, chap. 517, § 5). If this case does not fall within one or both of these classes, this writ of error cannot be maintained.

As ruled in *Ansbro* v. *United States*, 159 U. S. 695, 697 [40: 310], "a case may be said to involve the construction or application of the

Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision." *Cornell* v. *Green*, 163 U. S. 75, 78 [41: 76, 77].

The same rule is applicable in respect of the validity or construction of a treaty. Some right, title, privilege, or immunity dependent on the treaty must be so set up or claimed as to require the circuit court to pass on the question of validity or construction in disposing of the right asserted. *Borgmeyer* v. *Idler*, 159 U. S. 408 [40: 199].

The general doctrine has been frequently announced in cases involving the jurisdiction of this court under the 25th section of the judiciary act of September 24, 1789 (§ 709 of the Revised Statutes); and acts relating to the revision of judgments of the supreme court and court of appeals of the District of Columbia and the supreme courts of the territories, as well as in cases involving the jurisdiction of the circuit courts. *Baltimore & Potomac R. R. Co.* v. *Hopkins*, 130 U. S. 210 [32: 908], and cases cited: *United States* v. *Lynch*, 137 U. S. 280 [34: 700]; *South Carolina* v. *Seymour* [*United States, South Carolina*, v. *Seymour*], 153 U. S. 353 [38: 742]; *New Orleans* v. *Benjamin*, 153 U. S. 411 [38: 764]; *Linford* v. *Ellison*, 155 U. S. 503 [39: 239]; *Durham* v. *Seymour*, 161 U. S. 235 [40: 682]; *Hanford* v. *Davies*, 163 U. S. 273 [41: 157]; *Oxley Stave Company* v. *Butler County*, 166 U. S. 648 [41: 1149].

The amended complaint stated that plaintiffs **436**] would "rely upon *the following written evidences of their title for the maintenance of this action," and enumerated, among them, "the 3d article of the treaty between the United States of America and the French Republic of April 30, 1803, which was ratified on the 21st of October, 1803;" and "the 5th Amendment to the Constitution of the United States;" but nowhere was any right, title, privilege, or immunity asserted to be derived from either Constitution or treaty. There was nothing to indicate in what way, if any, the cause of action was claimed to arise from either.

The 5th Amendment prohibits the deprivation of property without due process of law, and the taking of private property for public use without compensation. The treaty of cession (Public Treaties, p. 232) provided for the protection of the inhabitants of the territory ceded in the enjoyment of their property. But neither amendment nor treaty gave what was not already possessed.

The jurisdiction of the circuit court was invoked on the ground of diverse citizenship, and not on the ground that the case arose "under the Constitution or laws of the United States or treaties made, or which shall be made, under their authority." Act of August 13, 1888, chap. 866, § 1 (25 Stat. at L. 433). And it is settled that in order to give the circuit court jurisdiction of a case as so arising, that it does so arise must appear from the plaintiff's own statement of his claim. *Colorado Cent. Consol. Min. Co.* v. *Turck*, 150 U. S. 138 [37: 1030]; *Press Publishing Co.* v. *Monroe*, 164 U. S. 105 [41: 367].

If this case had been taken to the circuit court of appeals, the decision of that court would have been final under the 6th section of the statute, and it might well be concluded that therefore the writ of error would not lie under the 5th section.

In respect of plaintiffs' case as stated in their complaint, the circuit court decided no question as to the application or construction of the Constitution or the validity or construction of the treaty.

The ground, among other grounds, in defeat of plaintiffs' action, that the claim was barred by the act of June 11, 1870, *was indeed [**437** sustained, but that was as matter of construction, and the constitutionality of the act, if held to apply to the claim rather than to the amenability of the United States to suit, was not considered; nor does it appear that the judgment of the circuit court was invoked upon it. In this court it was contended for plaintiffs in error that the act was an enabling act authorizing suits to be brought against the United States which otherwise could not have been maintained; that the limitation operated on the jurisdiction and not on the right; and that to bar title if suit were not brought within ninety days was so unreasonable that the intention to do so could not be imputed to Congress. These forcible suggestions would undoubtedly have been accorded due weight by the circuit court of appeals, but we are unable to deal with them on this writ.

The circuit court also held that plaintiffs' title failed because of noncompliance with the Spanish law. It was not pretended that the treaty, the validity of which was confessedly not in dispute, could be so construed as to compel judicial recognition of unconsummated claims, and it was for the circuit court to determine into what category the alleged grant fell. In doing so, the construction of the treaty was not drawn in question in any manner.

Writ of error dismissed.

Mr. Justice **Harlan** and **Mr. Justice White** dissented.

THE RESOLUTE.

(See S. C. Reporter's ed. 437-443.)

Libel for seamen's wages—jurisdiction of court of admiralty—question of lien.

1. A court of admiralty has jurisdiction of a libel for seamen's wages, which accrued while the

NOTE.—*As to exemption of seamen's wages*, see note to Tod v. Kentucky Union R. Co. (C. C. A. 6th C.) 18 L. R. A. 310.

As to what places the jurisdiction of admiralty is confined, see note to Allen v. Newberry, 16: 110.

As to conclusiveness of judgments in admiralty; when may be re-examined,—see note to Williams v. Armroyd, 3: 392.

As to when a lien or right to a lien is assignable, see note to Davis v. Bilsland, 21: 969.

As to liens for wharfage, see note to *Re* Easton, 24: 373.

vessel was in the custody of a receiver appointed by a state court, upon the foreclosure of a mortgage upon the property of a railroad company, owner of the vessel, where the vessel has been sold, and has passed into the hands of her purchaser, and the receiver has been discharged.

2. The only requirements necessary to give jurisdiction to a court of admiralty of a suit *in rem* for the breach of a contract, are: first, that the contract sued upon is a maritime contract; and, second, that the property proceeded against is within the lawful custody of the court.

3. The question of lien or no lien in a libel to enforce a lien on a ship is one of the merits, and not of jurisdiction.

[No. 135, 136.]

Submitted November 12, 1897. Decided December 6, 1897.

NO. 135 is an appeal from a decree of the District Court for the District of Oregon awarding to the libellant, George Dowsett, the amount due to him individually, and as assignee of one Tellefson for wages as seamen upon the tug Resolute, the only question being whether or not the District Court had jurisdiction. There was also a motion to dismiss. *Jurisdiction of the District Court affirmed.*

No. 136 is also a libel for wages of Henry E. Wilson and others, and involves the same questions as No. 135 and is disposed of in the same way.

See same cases below, 69 Fed. Rep. 742.

Statement by Mr. Justice **Brown:**

This was an appeal from the district court for the district of Oregon, awarding to the libellant, George Dowsett, the sum of $825.50 due to him individually, and the further sum of $358.02 due to him as the assignee of one Tellefson, for wages as seamen upon the tug Resolute. The tug was engaged in the business of towing vessels and barges on and over the bar between Yaquina bay and the Pacific ocean, and the waters tributary thereto, within the district of Oregon.

The libel, which was filed on April 26, 1894, was in the ordinary form of a libel for seamen's wages, except that it alleged that the vessel was at that time in the hands of a receiver of a circuit court for the state of Oregon. Upon application being made for a warrant for arrest, it was refused upon the ground that the tug was within the custody of a receiver of a state court. Subsequently, and on February 25, 1895, upon affidavit that the receiver had been discharged and the property sold, the order denying the warrant of arrest and directing that the libel remain in abeyance until the tug should be discharged from the custody of the state court, was vacated, and a warrant of arrest ordered to issue. The tug having been released upon bond given, the libel was thereupon amended by alleging that while the said services were being rendered the steam tug was in charge of a receiver appointed by the circuit court of the state of Oregon, and that she had since been sold to parties having notice of libellant's claim, and had been discharged from such receivership. Exceptions were thereupon filed to the libel upon the ground that it showed that when the services were rendered the steam tug was in charge of, and operated by, a receiver of the Oregon & Pacific Railroad Company, a corporation, the owner of said steam tug; and that no maritime or other lien had arisen by reason of such employment, or by the rendition of such services; and also that the court had no jurisdiction *in the premises. Upon a hearing [439 before the court, these exceptions were overruled, and leave given to answer the amended libel.

Claimants having elected not to answer the libel, their default was entered, and a final decree awarded in favor of the libellant in the amount claimed by him; whereupon the claimants prayed an appeal to this court; and the district court certified that "the only question arising upon said appeal is the question as to whether or not, under the facts stated in the amended libel and the exceptions thereto, this court acquired or had jurisdiction to pronounce the said decree."

Messrs. **L. B. Cox,** *W. W. Cotton, Thomas O'Day,* and *C. F. Lord,* for the motion to dismiss and for appellees:

The court below had jurisdiction and its decrees should be affirmed.

Rhode Island v. *Massachusetts*, 37 U. S. 12 Pet. 718 (9: 1258); *Ex parte Gordon*, 104 U. S. 516 (26: 815); *The Belfast* v *Boon* (*The Belfast*), 74 U. S. 7 Wall. 624 (19: 266); *Ex parte Watkins*, 32 U. S. 7 Pet. 572 (8: 788); *Smith* v. *McKay*, 161 U. S. 356 (40: 731); *Schunk* v. *Moline, M. & S. Co.* 147 U. S 500 (37: 255); *Laidlaw* v. *Oregon R. & Nav. Co.* 81 Fed. Rep. 876; *The Harrisburg* v. *Richards*, 119 U. S. 199 (30: 358; *Barton* v. *Brown* (*The Corsair*), 145 U. S. 335 (36: 727).

Where a court of equity has jurisdiction of the subject-matter and of the parties, the granting or withholding of the relief is purely a question going to the merits, and not one involving the jurisdiction of the court.

Smith v. *McKay*, 161 U. S. 355 (40: 731).

If a maritime lien arose, the enforcement of such lien was within the exclusive jurisdiction of the district court, and no action of any person whomsoever could transfer jurisdiction over such lien to the state court of Oregon; and no action of such state court could extinguish such lien.

Moran v. *Sturges*, 154 U. S. 256, 285 (38: 981, 991).

Seamen employed by a receiver appointed to operate a vessel are entitled to a lien for wages.

A seaman's lien on the ship for his wages does not depend upon contract, but is fixed by law as an incident of his lawful employment on board and cannot be waived without the seaman's express consent.

The International, 30 Fed. Rep. 375, 377; *The L. L. Lamb*, 31 Fed. Rep. 29, 32; *The Atlantic*, 53 Fed. Rep. 607, 608; *The Sirocco*, 7 Fed Rep. 599.

The liens of the respondents were not and could not be devested by any proceedings had in the state court.

The lien of a seaman for wages may be assigned, and a bona fide assignment carries to the assignee all of the rights and securities of the original holder.

The New Idea, 60 Fed. Rep. 294; *The Amer-*

ican Eagle, 19 Fed. Rep. 879; *The M. Vandercook*, 24 Fed. Rep. 472; *The Hull of a New Ship*, 2 Ware, 203; *The Sarah J. Weed*, 2 Low. Dec. 555; *The Liberty No. 4*. 7 Fed. Rep. 231; *The Victorian*, 24 Or. 124; Jones, Liens, § 1798.

Messrs. **John W. Whalley** and **William T. Muir,** opposed to motion to dismiss and for appellants:

Under the judiciary act of 1891 the test of a right to an appeal to this court from a circuit or district court of the United States is the question to be reviewed. If it is purely a jurisdictional one the appeal lies exclusively to this court.

Smith v. *McKay*, 161 U. S. 355 (40: 731); *Shields* v. *Coleman*, 157 U. S. 168 (39: 660); *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322 (39: 438); *United States* v. *Jahn*, 155 U. S. 109 (39: 87); *McLish* v. *Roff*, 141 U. S. 661 (35: 893).

Under the general maritime law an employee on board a vessel engaged in navigation is entitled to a lien upon the vessel for sums due him and arising out of his employment. This lien he may enforce in an admiralty court by a proceeding *in rem*.

The Advance, 60 Fed. Rep. 766; *The Samuel Marshall*, 6 U. S. App. 389, 54 Fed. Rep. 396, 4 C. C. A. 385; *The Sirocco*, 7 Fed. Rep. 599; *The Erastina*, 50 Fed. Rep 126; *Beinecke* v. *The Secret*, 3 Fed. Rep. 665, 667; *Consolidated Coal Co.* v. *The Secret*, 6 Fed. Cas. 338; *Scott* v. *Failes*, 5 Ben. 82.

Property in the custody of a receiver is in the custody of the law.

Wiswall v. *Sampson*, 55 U. S. 64 (14: 327); *McNulta* v. *Lochridge*, 141 U. S. 327, 332 (35: 796).

Those who contract with a receiver must look to the trust property and its proceeds for compensation.

Barton v. *Barbour*, 104 U. S. 126, 130 (26: 672, 675); *Turner* v. *Peoria & S. R. Co.* 95 Ill. 124, 35 Am. Rep. 144; *Vanderbilt* v. *Central R. Co.* 43 N. J. Eq. 669.

It is the duty of a court appointing a receiver to pay the debts of the receivership out of all moneys coming into the receiver's hands, either from the operation of the road, or the sale of the *corpus* of the property. And the debts contracted for necessary operating expenses are, in equity, a lien on the property, prior to the lien of the mortgage. One of the purposes of the sale of the property by the court of equity is to pay these liens.

Kneeland v. *American Loan & T. Co.* 136 U. S. 89 (34: 379); *Kneeland* v. *Brass Foundry & Mach. Works*, 140 U. S. 592 (35: 543).

The appointment of a receiver does not discharge any prior lien.

Moran v. *Sturges*, 154 U. S. 256, 282 (38: 981, 990); High, Receivers, 3d ed. § 138.

The admiralty jurisdiction of courts of the United States, although exclusive on some subjects, is concurrent upon others. The courts of common law deal with ships or vessels as other personal property.

Taylor v. *Carryl*, 61 U. S. 20 How. 583 (15: 1028) *et seq.*; *Freeman* v. *Howe*, 65 U. S. 24 How. 450, 451, 456 (16: 749, 750); *The Ad. Hine* v. *Trevor*, 71 U. S. 4 Wall. 555, 556 (18: 451); *The Moses Taylor* v. *Hammons*, 71 U. S. 4 Wall. 411, 412 (18: 397); *Tefft* v. *Sternberg*, 40 Fed. Rep. 2–5, 5 L. R. A. 221; *Leon* v. *Galceron*, 78 U. S. 11 Wall. 185 (20: 74); *American S. B. Co.* v. *Chace*, 83 U. S. 16 Wall. 522 (21: 369); *Sherlock* v. *Alling*, 93 U. S. 99 (23: 879); *Schoonmaker* v. *Gilmore*, 102 U. S. 118 (26: 95); *Home L. Ins. Co.* v. *Dunn*, 86 U. S. 19 Wall. 223 (22: 69); *New Orleans* v. *New York Mail S. S. Co.* 87 U. S. 20 Wall. 387 (22: 354).

By the law of most, if not all, civilized nations, the sale of a vessel by a proceeding *in rem*, in a court of competent jurisdiction, extinguishes all liens upon her and vests a clear and indefeasible title in the purchaser.

Freeman v. *Howe*, 65 U. S. 24 How. 450 (16: 749); *Tefft* v. *Sternberg*, 40 Fed. Rep. 2, 5 L. R. A. 221; *Fitz* v. *The Galiot Amelie* (*The Amelie*), 73 U. S. 6 Wall. 18 (18: 806); *Taylor* v. *Carryl*, 61 U. S. 20 How. 583 (15: 1028).

Mr. Justice **Brown** delivered the opinion of the court:

The sole question presented by the record in this case is whether the court was correct in assuming jurisdiction of a libel for seamen's wages which accrued while the vessel was in the custody of a receiver appointed by a state court, upon the foreclosure of a mortgage upon the property of the Oregon & Pacific Railroad Company, owner of the tug.

Jurisdiction is the power to adjudicate a case upon the merits, and dispose of it as justice may require. As applied to a suit *in rem* for the breach of a maritime contract, it presupposes, first, that the contract sued upon is a maritime contract; and second, that the property proceeded against is within the lawful custody of the court. These are the only requirements necessary to give jurisdiction. Proper cognizance of the parties and subject-matter being conceded, all other matters belong to the merits.

*The contention of libellant is that, as a [440 maritime lien is the sole foundation of a proceeding *in rem*, such facts must be averred as to show that a lien arose in the particular case; or, at least, that if the libel shows that a lien could not have existed, it should be dismissed for want of jurisdiction. The averment relied upon in this libel is that the vessel was at the time the services were rendered in the hands of a receiver appointed by a state court. This fact, however, is not absolutely inconsistent with a lien *in rem* for seamen's wages. *Pawson* v. *Cunningham* [21 U. S. App. 466], 63 Fed. Rep. 132. It may have been expressly bargained for by the receiver, it may be implied from the peculiar circumstances under which the services were rendered, or it might be held to have arisen from the peremptory language of the statute (Rev. Stat. § 4535), that "no seaman shall, by any agreement other than is provided by this title, forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and every stipulation in any agreement inconsistent with any provision of this title . . . shall be wholly inoperative." Prima facie, the rendition of mariner's services imports a lien, and the mere fact that the vessel is navigated by a receiver does not necessarily negative such lien, although there may be facts in the particular case to show that the above statute does

not apply, or that credit was expressly given to the owner, to the charterer, or to some third person. In fact, the question of lien or no lien is not one of jurisdiction, but of merits.

It is true that there can be no decree *in rem* against the vessel except for the enforcement of a lien given by the maritime law, or by a state law; but if the existence of such a lien were a question of jurisdiction, then nearly every question arising upon the merits could be made one of jurisdiction. Thus supplies furnished to a vessel import a lien only when they are sold upon her credit; and the defense ordinarily made to such claims is that they were sold upon the personal credit of the owner or charterer; but certainly it could not be claimed that this was a question of jurisdiction. The existence of a lien for collision depends upon the question of fault or no fault, **441]***but it never was heard of that it thereby became a question of jurisdiction. Salvage services, too, ordinarily import a lien of the very highest rank; but it has sometimes been held that, if such services are rendered by seamen in the employ of a wrecking tug, or by a municipal fire department, no lien arises, for the reason that the men are originally employed for the very purpose of rescuing property from perils of the sea or loss by fire. In the case under consideration a portion of the libellant's claim arises by assignment from Tellefson, and the authorities are almost equally divided upon the question whether such assignment carries the lien of the assignor to his assignee. Obviously these are not jurisdictional questions.

In determining the question of a lien in the case under consideration much may depend upon the manner in which the vessels were sold by the receiver. Were they sold in bulk, and merely as a part of the entire property of the insolvent corporation, upon the foreclosure of the mortgage, or was each vessel sold separately, and subject to the liens for mariner's wages which accrued before and while they were in the possession of the receiver? Did the order direct these vessels to be sold free of maritime liens, or subject to them, or was it silent in this particular? Were the lienholders upon these vessels paid from the purchase money, according to their relative rank, as they would have been had the sale been conducted by a court of admiralty? If they were, that would amount to very strong, if not conclusive, evidence against the subsequent endeavor to enforce the liens in a court of admiralty. We cannot assume that the court would authorize its receiver to run these vessels without making some provision for a preferential payment of their current expenses. *Meyer* v. *Western Car Co.* [*Myer* v. *Car Co.*], 102 U. S. 1 [26: 59]; *Kneeland* v. *American Loan & T. Co.* 136 U. S. 89 [34: 379]. None of these were questions which went to the jurisdiction of the court to entertain the libels, but were such as would properly arise, either upon the exception to the libels, or upon an answer putting the facts in issue.

Had the vessel, at the time the warrant of arrest was served, been in the actual custody of the receiver, a different question *would [**442** have been presented; but the facts of this case show that she had been sold, and had passed into the hands of her purchaser, and that the receiver had been discharged.

The case of *Ex parte Gordon*, 104 U. S. 515 [26: 814], goes even farther than is necessary to support the action of the district court in assuming jurisdiction of this case. In that case a writ of prohibition was sought to restrain the district court for the district of Maryland from proceeding against a vessel to recover damages for loss of life in a collision. It was held that as the case was one of a maritime tort, of which the district court unquestionably had jurisdiction, it was for that court to decide whether the vessel was liable for pecuniary damages resulting from the loss of life. "Having jurisdiction," said the chief justice, "in respect to the collision, it would seem necessarily to follow that the court had jurisdiction to hear and decide what liability the vessel had incurred thereby." The question was held not to be jurisdictional, but one properly arising upon the merits. See also *Re The Charkieh*, L. R. 8 Q. B. 97; *Schunk* v. *Moline, M. & S. Co.* 147 U. S. 500 [37: 255]; *Smith* v. *McKay*, 161 U. S. 355 [40: 731].

So, too, in *Re Fassett*, 142 U. S. 479 [35: 1087], the owner of the yacht Conqueror filed a libel for possession, against her and the collector for the port of New York, claiming delivery of the vessel to him and damages against the collector, who had seized her as a dutiable import. The collector applied to this court for a writ of prohibition, alleging that the district court had no jurisdiction of the suit. We held that the subject-matter of the libel was a marine tort; that the question whether the vessel was liable to duty was properly justiciable in the district court, and that that court had jurisdiction. Said Mr. Justice Blatchford, in delivering the opinion of the court (p. 484) [35: 1088]: "The district court has jurisdiction to determine the question, because it has jurisdiction of the vessel by attachment, and of Fassett by monition; and for this court to decide in the first instance, and in this proceeding, the question whether the yacht is an article imported from a foreign country and subject to duty under the customs-revenue laws, would be to decide that question as a matter of original jurisdiction, *and not of appellate jurisdiction, while,[**443** as a question of original jurisdiction, it is duly pending before the district court of the United States, on pleadings which put that very question in issue." See also *Ex parte Cooper*, 143 U. S. 472 [36: 232].

The case of *Wilson et al.* v. *The Resolute* (No. 136) is also a libel for wages, and involves precisely the same questions as are involved in the case of Dowsett, and will be disposed of in the same way. Claimants have mistaken their remedy in these cases, and should have appealed to the circuit court of appeals.

The decrees of the District Court, in so far as they assume jurisdiction of these cases, are therefore affirmed.

*THE WILLIAM H. HOAG.

THE THREE SISTERS.

(See S. C. Reporter's ed. 443, 444.)

Lien on vessel—jurisdiction of admiralty court.

1. The question of lien or no lien in a libel to enforce a lien on a ship is one of the merits, and not of jurisdiction.
2. The question whether the master of a vessel has proceeded within the time allowed by law for the enforcement of his claim of a lien on the vessel for his wages goes to the merits only, and does not affect the jurisdiction of the admiralty court of a libel for such wages.

[Nos. 137, 138.]

Submitted November 12, 1897. Decided December 6, 1897.

ON APPEAL from a decree of the District Court of the United States for the District of Oregon awarding R. J. Young *et al.* certain amounts for services as seamen, the only question here for consideration being the jurisdiction of the District Court. *The jurisdiction of the District Court affirmed.*

See same case below, 69 Fed. Rep. 742.

The facts are stated in the opinion.

Messrs. **John W. Whalley** and **William T. Muir** for appellants.

Messrs. **L. B. Cox**, *W. W. Cotton*, *Thomas O'Day*, and *C. F. Lord* for appellees.

Mr. Justice **Brown** delivered the opinion of the court:

These cases differ from those already disposed of (*ante*, 533) only in the fact that the libels contain claims by the masters of those vessels, with an averment that during the time they were employed there was an officer known as the purser; that the agents of the receiver and 444]the purser collected and received all *the earnings of the vessel from both passengers and freight, and paid over such earnings in the ordinary course of business to the receiver; that none of the earnings of the vessel passed through the hands of the masters, and that their sole duties consisted in navigating the steamers upon routes selected by the receiver within the state of Oregon, and that all the supplies and materials were purchased by the said receiver through other agents and servants. This allegation is evidently designed to raise the question whether the ancient doctrine enforced upon the court of admiralty by prohibition from Westminster Hall, that the master has no lien for his wages, and which was declared to be the law by this court in the case of *The Orleans* v. *Phoebus*, 36 U. S. 11 Pet. 175 [9: 667], has any application to modern methods, where a purser or other agent is employed by the owner to collect the freights and pay the bills of the vessel, the practice formerly being for the master to receive all the freight, pay the crew and buy the supplies. The denial of the lien of the master was based upon the theory that he had a lien upon the freight for his wages, and having the freight in his own hands was presumed to pay himself. The argument is made that, the reason for the rule having ceased to exist, the rule itself, which denied the master a lien upon the vessel, has become obsolete.

A lien was also claimed and admitted on behalf of the masters under a local statute of Oregon; but it was also insisted in defense thereto that the masters had not proceeded within the time allowed by law for the enforcement of such claim.

The latter question, at least, if not the former, did not affect the jurisdiction of the court, but went to the merits alone.

The decrees of the court below in these cases are also, in respect to jurisdiction, affirmed.

*The Journal title of these cases is *Oregon Central & Eastern Railway Company, Claimant, etc., Appt., v. R. J. Young et al.*

THOMAS W. STEWART, Administrator of the Estate of John Andrew Casey, *Plff. in Err.*, [445

v.

BALTIMORE & OHIO RAILROAD COMPANY.

(See S. C. Reporter's ed. 445–450.)

Action for death, when brought in another state—action for death in Maryland may be brought in the District of Columbia.

1. An action for a tort causing the death of a person in a state whose statute has provided a right of action therefor can be maintained in any other state in which the common-law obstacle to such an action has been removed, if the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced.
2. An action for the death of a person caused by negligence in Maryland, whose statute requires the action to be brought by the state for the use of the wife, husband, parent, or child of the deceased, may be brought in the District of Columbia, by the personal representatives of the deceased, as provided by the statute of that District, for the benefit of the persons designated in the statute of Maryland, although by the statute of Maryland the jury apportion the damages among the parties interested, while by the statute of the District of Columbia the damages are distributed according to the laws of distribution.

[No. 97.]

Argued November 8, 1897. Decided December 6, 1897.

NOTE.—*As to rights of action for causing death, accruing under foreign statutes; enforceability; proper party plaintiff; what limitations of time and amount apply*, see note to Nelson v. Chesapeake & O. R. Co. (Va.) 15 L. R. A. 583, and Wooden v. Western N. Y. & P. R. Co. (N. Y.) 13 L. R. A. 458.

As to death; caused by negligence; aggravation of existing disease allowed for in damages; pecuniary loss only recoverable; pain and suffering; exemplary and punitive damages not recoverable; state statutes construed; contributive causes of death; action for death of relative; of husband; of wife; of cousin; action by parent for death of child; loss of services of child, —see note to Morgan v. Southern P. R. Co. (Cal.) 17 L. R. A. 71.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment of that court affirming the judgment of the Supreme Court of that District in favor of the defendant upon a demurrer to the declaration, in an action brought by Thomas W. Stewart, administrator, etc., against the Baltimore & Ohio Railroad Company for damages for killing the plaintiff's intestate through the negligence of said railroad company in the state of Maryland. *Reversed*, and case remanded for a trial upon the merits.

See same case below, 6 App. D. C. 56.

Statement by Mr. Justice **Brewer:**

On October 22, 1894, plaintiff in error as plaintiff filed in the supreme court of the District of Columbia an amended declaration containing two counts. The first alleged that John Andrew Casey, plaintiff's intestate, was killed through the negligence of the defendant company, in the state of Maryland; that said intestate left surviving no parent or child but only his wife, Alice Triplett Casey, for whose benefit this action was brought. The second count set forth, in addition to the matters disclosed in the first, a statute of the state of Maryland in respect to recovery in such cases. A **446**] demurrer *to this declaration was sustained and judgment entered for defendant. This was affirmed by the court of appeals of the District of Columbia, and from such judgment of affirmance plaintiff has brought the case here on error.

The statute in force in the District of Columbia (23 Stat. at L. 307, chap. 126), provides for recovery in case the act causing death is done within the limits of the District of Columbia; that "the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured;" that the recovery shall not exceed $10,000; that the action shall be brought in the name of the personal representative of the deceased, and within one year after his death; and that the damages recovered shall not be appropriated to the payment of the debts of the deceased, but inure to the benefit of his or her family, and be distributed according to the provisions of the statute of distributions. The Maryland statute which is copied in the declaration (Rev. Code Maryland 1878, p. 724), provides in the 1st section that whenever the death of a person shall be caused by the wrongful act, negligence, etc., of another, "the person who would have been liable if death had not ensued shall be liable to an action for damages." Sections 2 and 3 are as follows:

"Sec. 2. Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the state of Maryland, for the use of the person entitled to damages, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the above-mentioned parties, in such shares as the jury by their verdict shall find and direct: *Provided*, That not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced *within[**447** twelve calendar months after the death of the deceased person.

"Sec. 3. In every such action, the equitable plaintiff on the record shall be required, together with the declaration, to deliver to the defendant, or his attorney, a full particular of the persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered."

Mr. **Edwin Sutherland** for plaintiff in error.

Messrs **George E. Hamilton** and *Michael J. Colbert* for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The court of appeals was of opinion that the action could not be maintained under the statute of the District of Columbia because that authorizes recovery only in case the injury causing death is done within the limits of the District, nor under the Maryland statute because of the peculiar form of remedy prescribed therein, citing in support of the latter contention *Pollard* v. *Bailey*, 87 U. S. 20 Wall. 520 [22: 376]. A statute of Alabama made stockholders of a bank individually liable for its debts, and according to the construction given to it by the supreme court of the state the remedy provided was a suit in equity, whereas in that case a single creditor had sued one of the stockholders in an action at law; and in denying the right to maintain such action this court observed, page 526 [22: 378]:

"The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation, and provide for the manner of its enforcement. . . . The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced *by [**448** an appropriate common-law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

To like effect was cited *Fourth National Bank* v. *Francklyn*, 120 U. S. 747 [30: 825]. The court of appeals was of opinion that the statute in Maryland not only created a statutory liability but prescribed a particular remedy, and that no action could be maintained, either in Maryland or elsewhere, unless that special remedy was pursued.

Notwithstanding the ability with which the arguments in support of this conclusion are presented in the opinion of the court of appeals, we are unable to concur therein. A negligent act causing death is in itself a tort, and, were it not for the rule founded on the maxim *actio personalis moritur cum persona*, damages therefor could have been recovered in

an action at common law. The case differs in this important feature from those in which a penalty is imposed for an act in itself not wrongful, in which a purely statutory delict is created. The purpose of the several statutes passed in the states, in more or less conformity to what is known as Lord Campbell's act, is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial for the benefit of the persons injured by the death. An action to recover damages for a tort is not local but transitory, and can as a general rule be maintained wherever the wrongdoer can be found. *Dennick* v. *Central Railroad Company*, 103 U. S. 11 [26: 439]. It may well be that where a purely statutory right is created the special remedy provided by the statute for the enforcement of that right must be pursued, but where the statute simply takes away a common-law obstacle to a recovery for an admitted tort it would seem not unreasonable to hold that an action for that tort can be maintained in any state in which that common-law obstacle has been removed. At least it has been held by this court in repeated cases that an action for such a tort can be maintained "where the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public [449]policy of the state in which the *right of action is sought to be enforced." *Texas & Pacific Ry. Co.* v. *Cox*, 145 U. S. 593, 605 [36: 829, 833]. See also *Dennick* v. *Central Railroad Company*, 103 U. S. 11 [26: 439]; *Huntington* v. *Attrill*, 146 U. S. 657 [36: 1123]; *Northern Pacific R. R. Co.* v. *Babcock*, 154 U. S. 190 [38: 958].

What are the differences between the two statutes? As heretofore noticed, the substantial purpose of these various statutes is to do away with the obstacle to a recovery caused by the death of the party injured. Both statutes in the case at bar disclose that purpose. By each the death of the party injured ceases to relieve the wrongdoer from liability for damages caused by the death, and this is its main purpose and effect. The two statutes differ as to the party in whose name the suit is to be brought. In Maryland the plaintiff is the state; in this District the personal representative of the deceased. But neither the state in the one case nor the personal representative in the other has any pecuniary interest in the recovery. Each is simply a nominal plaintiff. While in the District the nominal plaintiff is the personal representative of the deceased, the damages recovered do not become part of the assets of the estate, or liable for the debts of the deceased, but are distributed among certain of his heirs. By neither statute is there any thought of increasing the volume of the deceased's estate, but in each it is the award to certain prescribed heirs of the damages resulting to them from the taking away of their relative.

For purposes of jurisdiction in the Federal courts regard is had to the real rather than to the nominal party. *Browne* v. *Strode*, 9 U. S. 5 Cranch, 303 [3: 108]; *M'Nutt* v. *Bland*, 43 U. S. 2 How. 9 [11: 159]; *State of Maryland, for Use of Markley*, v. *Baldwin*, 112 U. S. 490, [28: 822]. See also *Gaither* v. *Farmers' & Mechanics' Bank of Georgetown*, 26 U. S. 1 Pet. 37, 42 [7: 48, 45], in which the issue submitted to the jury was, as stated, one between the bank to the use of Thomas Corcorran, plaintiff, and Gaither, the defendant, upon which the court said: "This practice is familiar with the Maryland courts, and when the action originates in that form, the *cestui que use* is regarded as the real party to the suit." It is true those were actions on contract, and this is an action for a tort, *but still in such an [450 action it is evident that the real party in interest is not the nominal plaintiff but the party for whose benefit the recovery is sought; and the courts of either jurisdiction will see that the damages awarded pass to such party.

Another difference is that by the Maryland statute the jury trying the cause apportion the damages awarded between the parties for whose benefit the action is brought, while by the statute of the District the distribution is made according to the ordinary laws of distribution of a decedent's estate. But by each the important matter is the award of damages, and the manner of distribution is a minor consideration. Besides, in determining the amount of the recovery the jury must necessarily consider the damages which each beneficiary has sustained by reason of the death. By neither statute is a fixed sum to be given as a penalty for the wrong, but in each the question is the amount of damages. It is true that the beneficiaries of such an action may not in every case be exactly the same under each statute, but the principal beneficiaries under each are the near relatives, those most likely to be dependent on the party killed, and the remote relatives can seldom, if ever, be regarded as suffering loss from the death.

We cannot think that these differences are sufficient to render the statute of Maryland in substance inconsistent with the statute or public policy of the District of Columbia, and so, within the rule heretofore announced in this court, it must be held that the plaintiff was entitled to maintain this action in the courts of the District for the benefit of the persons designated in the statute of Maryland. *The judgment will be reversed*, and the case remanded for a trial upon the merits.

GUADALUPE THOMPSON, Admin- [451
istratrix of the Estate of Alfred Bent, Deceased, *et al.*, *Appts.*,

v.

MAXWELL LAND GRANT & RAILWAY COMPANY *et al.*

(See S. C. Reporter's ed. 451-471.)

Second appeal—judicial notice—presumption as to decree—decree against infants.

1. Whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit.
2. This court takes judicial notice of its own opinion, and may properly examine it in order to de-

NOTE.—*As to infancy not a defense in trover or for a tort*, see note to Vasse v. Smith, 3: 207.

As to acts of infant, when void and when voidable,

termine what matters were considered, and upon what grounds the judgment was entered.

3. It will be presumed that a court which enters a consent decree against infants has made an inquiry as to whether or not it is for the interest of the infants.

4. The fact that a guardian *ad litem* was an ignorant and inexperienced woman, and that there may have been some irregularities in the proceedings by which a consent decree against infants was rendered, does not make it subject to attack if there was no fraud, imposition, or error in the transaction or decree, and her interests were looked after by her brother-in-law, who was a capable business man, and also by counsel learned in the law.

[No. 90.]

Argued November 2, 3, 1897. Decided December 6, 1897.

APPEAL from a decree of the Supreme Court of the Territory of New Mexico affirming the decree of the District Court of that State in favor of the plaintiffs, Maxwell Land Grant Railway Company *et al.*, against Guadalupe Thompson, administratrix, etc., *et al.*, adjudging that the defendants have no interest in or title to the premises, and that the plaintiff's title be quieted to a tract of land known as the Maxwell Land Grant. *Affirmed.*

See same case, 95 U. S. 391 (24: 481).

Statement by Mr. Justice **Brewer:**

The facts in this case are as follows: In 1841 the Republic of Mexico made a grant to Charles Beaubien and Guadalupe Miranda of a large tract of land, generally known of late as the Maxwell Land Grant; so known because Lucien B. Maxwell, having acquired title from Beaubien and Miranda or their heirs, was, or at least claimed to be, for many years the sole owner. In September, 1859, the heirs of Charles Bent, namely, Alfred Bent and his two sisters, Tere-
[452] sina Scheurick *and Estefana Hicklin, brought a suit in the district court for the county of Taos in the territory of New Mexico, against Beaubien, Miranda, and Maxwell, claiming that under a parol contract their father, Charles Bent, was interested with Beaubien and Miranda in the ownership of the grant, and praying that such interest be established and decreed, and that it be also set off to them by partition. In June, 1865, upon the pleadings and proofs the court decreed to them an undivided fourth part of the grant, and appointed commissioners to make partition, giving specific directions for their guidance. Nothing was done under this decree. Soon thereafter negotiations were entered into between plaintiffs and Maxwell for a compromise of the litigation on the basis of Maxwell paying them a money consideration to relinquish their claim. It was agreed by the three plaintiffs that Alfred Bent and Aloys Scheurick, the husband of one of the sisters, should act in the matter as their agents to sell to Maxwell for the best price they could obtain, but never less than $21,000, or what Beaubien's heirs received. This compromise was advised and approved by their counsel. A conference was had in September or October, 1865, at Maxwell's residence, at which Alfred Bent demanded $21,000 and Maxwell offered $18,000. Alfred Bent returned from that conference to Taos, where the family resided, without having effected a definite agreement as to the price. The plaintiffs, however, considered the sale as good as made, but Alfred Bent advised his coplaintiffs that they could get a few thousands more by being quiet a few days, insisting, however, on having as much as the Beaubien heirs should receive. The plaintiffs expected to close the bargain in a few days, were ready to make the deeds as soon as the matter was settled, and the deeds were in fact written out by Scheurick, the husband of one of the plaintiffs. Before the compromise was consummated and on December 15, 1865, Alfred Bent died, leaving surviving him his widow, Guadalupe Bent, and three infant children, Charles, Julian, and Alberto Silas, aged respectively six, four, and one years. On April 12th his widow was appointed administratrix of his estate and qualified. Just before his death Alfred Bent made a will, by which *he gave and bequeathed to his wife, "for [453] the maintenance of her and my three children, Charles, William, and Silas Bent, all of my real and personal property." But this will was not presented until March, 1867, when it was approved and admitted to probate. Beaubien, one of the original grantees, had left six children surviving. Maxwell married one of them, and between April 4, 1864, and January 1, 1870, purchased the interests of the other five for a consideration of not more than $3,500 each. On April 9, 1866, the death of Alfred Bent was suggested, and his minor children and heirs, Charles, Julian, and Alberto Silas, were by order of the court substituted as complainants in place of their father. On April 12th the mother of these minors, Guadalupe Bent, was by the court appointed guardian *ad litem* and commissioner in chancery for such minors, with full power to execute deeds or carry into execution all sales or transfers made of their interest in and to the real estate described in the suit to Lucien B. Maxwell. A settlement with Maxwell was concluded by Aloys Scheurick, acting for his wife, his wife's sister and her husband, and the widow as guardian *ad litem* for the minor children of Alfred, which was acceptable to all the parties, by which Maxwell was to pay the sum of $18,000 for the conveyance of the interest of the Bent heirs. This compromise was advised by their leading counsel. In May the two sisters, by separate deeds, conveyed their interests to Maxwell, and during the same month Guadalupe Bent, as guardian *ad litem* and reciting the order of April 12, also executed to Maxwell a conveyance of the interest of the minors. Each of these conveyances purported to be for the sum of $6,000. At the next term of the

and by whom voidable, see note to Tucker v. Moreland, 9: 345.

As to infancy in avoidance of deeds, see note to Harding v. Handy, 6: 429.

As to control of guardian ad litem or next friend over action, see note to Eidam v. Finnegan (Minn.) 16 L. R. A. 507.

As to effect of judgment against infants, see note to Johnson v. Waterhouse (Mass.) 11 L. R. A. 440

court, about four months after the execution and delivery of these deeds, and on September 10, 1866, a further order or decree was entered, which reads as follows:

"Whereas an interlocutory decree was rendered at a former term of this court in the above cause, decreeing one fourth of the land mentioned in the petition herein to the complainants in this cause, and appointing commissioners to divide and set apart the portion so decreed, and whereas said interlocutory decree was never carried into effect, and whereas 454] since the time *of the rendition of said decree a mutual agreement has been made between the parties to this cause, settling and determining all the equities to the same:

"It is therefore hereby ordered, adjudged, and decreed by the mutual consent and agreement of the said complainants as well as of the said defendants in this cause, that the interlocutory decree above mentioned, together with all orders made under and by virtue of the same, be set aside; and by the mutual consent and agreement of the said parties, it is hereby further ordered, adjudged, and decreed that the said Lucien B. Maxwell, one of the defendants in this cause, pay to the said complainants the sum of $18,000, to be divided among them *per stirpes*, that is, to the said Aloys Scheurick and Teresina Bent, his wife, one third part, and to Alexander Hicklin and Estefana Bent, his wife, another third part, and to Charles Bent, Julian Bent, and Alberto Silas Bent, the children and heirs of Alfred Bent, deceased, the remaining third part, to be equally divided among the said last named and to be paid into the hands of Guadalupe Bent, widow of the—Alfred Bent, deceased, and guardian *ad litem* for said children for the purposes of the said division.

"And upon the further consent and agreement of the said parties, it is hereby further ordered, adjudged, and decreed that the said Alexander Hicklin and Estefana Bent, his wife, the said Aloys Scheurick and Teresina Bent, his wife, and the said Guadalupe Bent, guardian *ad litem* for Charles Bent, Julian Bent, and Alberto Silas Bent, children and minor heirs of the said Alfred Bent, deceased, within ten days from the day of the date of this decree, make, execute, and deliver to the said Lucien B. Maxwell good and sufficient deeds of conveyance of all their right, title, interest, estate, claim, and demand of, in, and to the lands in controversy in this cause; the said Guadalupe Bent, guardian *ad litem* as aforesaid, in the name of Charles Bent, Julian Bent, and Alberto Silas Bent, minor heirs as aforesaid, and the said Alexander Hicklin and Estefana Bent, his wife, and the said Aloys Scheurick and Teresina Bent, his wife, in their own names. And by further consent and agreement between the said parties, it is hereby further ordered, 455] adjudged, *and decreed that the costs of this suit shall be paid, each of the said parties to pay the separate costs in the same made by themselves."

In April, 1870, Maxwell, claiming to have the full title to the entire grant, conveyed all except a few acres to the Maxwell Land Grant & Railway Company. In August of that year Maxwell and the Maxwell Company filed a bill in the district court against the appellants Guadalupe Thompson and her husband (the former being the widow of Alfred Bent, who had since intermarried with George W. Thompson), and the three minor children of Alfred Bent, which, after reciting in a general way the history of the grant and the proceedings in the former suit, alleged that it was doubtful whether the order and decree of September, 1866, fully expressed the agreements of the parties, or fully canceled and discharged all claims that the infant heirs of Alfred Bent had in the land, and prayed that the defendants be adjudged to have no interest in or title to the premises, equitably or otherwise, and that the plaintiffs' title be quieted. Subsequently the bill was amended, and thereafter, the defendants having answered and proofs having been taken, a decree was entered sustaining the prayer of the bill and quieting the title of the plaintiffs in the premises. This decree was affirmed on appeal by the supreme court of the territory, but on further appeal to this court was reversed (95 U. S. 391 [24: 481]), and the case remanded to the territorial courts for further proceedings. Subsequent proceedings having been had therein a new decree was entered by the district court in favor of the plaintiffs, which on appeal to the supreme court of the territory was affirmed and from such decree of affirmance this appeal has been taken.

Messrs. **John G. Carlisle**, *James O'Hara*, *Caldwell Yeaman*, *E. T. Wells*, *R. T. McNeal*, *John G. Taylor*, *S. D. Rouse*, and *Logan Carlisle* for appellants.

Messrs. **Frank Springer**, **A. B. Browne**, and *A. T. Britton* for appellees.

*Mr. Justice **Brewer** delivered the [456 opinion of the court:

It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case. *Wayne County Supervisors* v. *Kennicott*, 94 U. S. 498 [24: 260], and cases cited in the opinion; *Clark* v. *Keith*, 106 U. S. 464 [27: 302]; *Chaffin* v. *Taylor*, 116 U. S. 567 [29: 727]; *Northern P. Railroad Company* v. *Ellis*, 144 U. S. 458 [36: 504]; *Great Western Telegraph Company* v. *Burnham*, 162 U. S. 339, 343 [40: 991, 993].

Whenever a case comes from the highest court of a state for review, and by statute or settled practice in that state the opinion of the court is a part of the record, we are authorized to examine such opinion for the purpose of ascertaining the grounds of the judgment. *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.* 125 U. S. 18 [31: 607]; *Kreiger* v. *Shelby R. R. Co.* 125 U. S. 39 [31: 675]; *Egan* v. *Hart*, 165 U. S. 188 [41: 680]. We take judicial notice of our own opinions, and although the judgment and the mandate express the decision of the court, yet we may properly examine the opinion in order to determine what matters were considered, upon what grounds the judgment was entered, and what has become settled for future disposition of the case.

We therefore turn to the former opinion

and the mandate to see what was presented and decided. The ground upon which the reversal was ordered was that the hill as presented, especially after the amendment, was technically a hill of review, and as such could not be maintained for three reasons: First, because the decree sought to be reviewed was a consent decree; secondly, because the hill was filed on behalf of an assignee of the original defendant; and, thirdly, because it sought a modification of the decree upon a matter of fact not appearing upon the record, without alleging any newly discovered evidence unknown to the parties before that decree. The opinion by Mr. Justice Bradley gives a full history of the litigation, the substance of the 457]allegations in the bill of complaint, *and points out why, especially after the amendment, it must be regarded as a bill of review. The amendment put into the prayer these words: "That for the aforesaid errors of law, apparent on the face of the said decree of 10th September, 1866, the same may be reviewed and reversed in the points herein complained of." But after demonstrating that the bill as it stood must be deemed a bill of review, and not sustainable, the opinion proceeds:

"Nevertheless, the general purpose which it evidently had in view—the quieting of the title to the land in question—is one towards which a court of equity is always liberally disposed, as tending to promote the peace of society and the security of property. And if, instead of seeking to reverse the decree of September, 1866 (which, for like reasons of public policy, as applicable to the security of judgments that have passed into *rem adjudicatam*, is not allowable), the bill had sought to carry that decree more effectually into execution, it would have been free from legal objections, and equally conducive to the object in view."

And then, after quoting from Lord Redesdale, it adds:

"The bill in this case, as originally filed, before it was converted by amendment into a bill of review, and abating the allegations of error in the original decree, approximated to the character of such a bill as might have been sustained. The proofs show a case which, in our judgment, supports the conclusions of the decree, to the effect that the terms of compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent) were advantageous to the said infants, and were so considered and accepted by the court in their behalf. But, so far as the present decree undertook to reverse and modify the decree of September, 1866, we think it is clearly erroneous. Still, although we feel obliged to reverse the present decree, we do not think that the bill should be absolutely dismissed. And, as the whole question between the parties has been fully litigated on the proofs, it would be unreasonable to require that these should be taken over again.

"Our conclusion is, that the present decree 458]must be reversed *with costs, and that the cause be remanded to the court below, with directions to allow the complainants to amend their bill as they shall be advised, and with liberty to the defendants to answer any new matter introduced therein; and that all the proofs in the cause shall stand as proofs upon any future hearing thereof, with liberty to either party to take additional proofs upon any new matter that may be put in issue by the amended pleadings."

The mandate contained an order in the language of the last paragraph.

Although the former decree was reversed on the ground that the hill as it stood was technically a bill of review and could not, under the circumstances, be maintained, obviously the decision went beyond the determination of this matter. The case was not remanded with instructions to dismiss the bill as one not maintainable. It was decided that there were allegations in the bill which, if certain matters were stricken out, would make it properly one to more effectually carry into execution the consent decree of September, 1866, to establish beyond further controversy the settlement then made, and to quiet the title of the plaintiffs. It was also perceived and decided that the proofs already taken made out a case which justified such relief, and that while the proofs did not establish one of the principal facts set forth in the original bill, to wit, that the settlement was simply carrying into effect a compromise concluded with Alfred Bent, the father of the minors, during his lifetime, they did establish that such settlement made by the mother and guardian was advantageous to the infants, and was so considered and accepted by the court in their behalf. Not only was there no dismissal of the bill, but beyond that the case was not opened for new proofs in respect to matters distinctly put in issue by the pleadings as they stood and in respect to which it was determined that the proofs already in were sufficient. The plaintiffs were authorized to amend their bill, as they should be advised, but obviously this contemplated such amendments as would make the bill one of the character and scope indicated in the opinion. The defendants were given leave to answer any *new matter that should he introduced [459 into the hill, thus impliedly excluding the right to make new answer to those matters which should not be changed. And further, while it was ordered that the proofs already taken should stand as proofs upon any future hearing, no leave was given to take further testimony upon the matters already in issue, but simply to make additional proofs upon any new matter that might be put in issue by the amended pleadings. Language could not be clearer to show that this court decided that certain matters then in issue were sufficiently and effectually determined hy the proofs already in, and did not throw open the case for additional proofs upon such matters. To now consider the case as reopened in its entirety and to inquire whether each and all of the matters in issue are or are not established by the proofs, including those taken subsequently to the prior decision, would be to practically treat the case as entirely new and ignore that which was considered and determined on the former hearing.

In the light of that decision it is not difficult to reach a conclusion upon the record as it now stands. When the case went back to the trial court the plaintiffs added no new matter to their bill. They made ten amendments, nine of which consisted simply in striking out

certain paragraphs and sentences, and the tenth in transposing the position in the bill of one paragraph. There was, therefore, nothing new to which the defendants were called upon, or permitted by the decision, to make answer. The parts of the bill stricken out were such as tended to make it, according to the opinion of this court, technically a bill of review, and left it strictly such a bill as was approved of in that opinion. The defendants filed answers to the amended bill. These answers contained new matter. This new matter was substantially that the consent decree of September, 1866, was not made at the request or with the consent of the solicitor of the defendants or any of them, nor did the minors or anyone having authority to represent them ever authorize any solicitor to consent to any decree for the transfer or surrender of their rights; that the pretended agreement and proceedings were fraudu-**460**] lent as to *the minors, and involved an unjust, erroneous, and illegal sacrifice of their just and valid rights; that their interest in the grant alleged to have been sold, released, or surrendered for the sum of $6,000 was at that time worth not less than $100,000, and is now worth a much greater sum, and that the alleged settlement and compromise was not in any way beneficial or advantageous to the minors, or necessary for their support or maintenance. The record now brought before us contains none of the proofs taken and offered on the hearing, but only the findings of fact made by the court. This is in accordance with the procedure prescribed by statute for the review in this court of cases heard and determined in the territorial courts. It does appear, however, that after the return to the trial court of the mandate in this case, and on April 7, 1882, the children of Alfred Bent commenced an independent suit against the Maxwell Land Grant Company and all other parties supposed to have any interest in the grant, to establish their title to a one-twelfth part of the estate; that issues were made up in that case and proofs taken, and that by consent of counsel the proofs taken in that case were used as proofs in this. The findings of fact in the two cases are substantially similar. In that a decree was entered dismissing the bill, and it is now pending in this court, the next case on its docket, and submitted and argued with this. It may well be considered within the scope of the prior decision that as no new matter was introduced into the plaintiffs' bill the defendants were not warranted in setting up any new defenses, and that upon the issues as they stood after the amendments to the bill, striking out portions thereof and the proofs then taken, the only thing which the trial court ought to have done was to have entered a decree thereon quieting the plaintiffs' title in accordance with the views expressed by this court.

But passing that, and considering the case in the light of the issues as they stand upon the amended pleadings and the findings of fact made by the lower court, we are clearly of opinion that its decree in favor of the plaintiffs must be sustained. These findings show that in **461**] the lifetime of Alfred *Bent the counsel of himself and his two sisters advised them to settle with Maxwell rather than take the award of the commissioners; that on a conference between Alfred Bent, acting for himself and his sisters, he demanded $21,000 as the consideration of such settlement, and that Maxwell offered $18,000, a difference of $3,000 or only $1,000 for each of the three parties plaintiff; and, while no definite agreement was then completed, the Bents considered the sale as good as made, prepared deeds for carrying such settlement into effect, and only waited on the advice of Alfred Bent that by delaying a few days they might get more money, he insisting that they should receive as much as the Beaubien heirs obtained. The findings also show that the amount which was finally accepted was larger proportionately than that which the Beaubien heirs received for their interests; so that while it may be technically true that no settlement was accomplished during the lifetime of Alfred Bent, it does appear that negotiations had proceeded so far that the Bent heirs considered one accomplished and prepared to carry it into effect. Scheurick and Hicklin, the husbands of Alfred Bent's two sisters, as well as the four husbands of the Beaubien heirs, who during these years sold and conveyed their interest to Maxwell for less sums proportionally than the Bent heirs received, were intelligent men, ranked among the best citizens of the community, and were considered men of wealth and influence, so the case is not one of an advantage taken of ignorance and inexperience. It further appears that the compromise as finally made was advised by the leading counsel for the Bent heirs; that the sisters, who were adults, with their husbands, executed deeds for the same amount and have never since questioned the propriety and validity of the settlement. The findings also show that "at and about the year 1866, and for several years thereafter, there was no demand for or sales of undivided interests in lands of the quantity, character, and location of those in question, such as to create any ascertainable market value thereof;" that the opinions of the witnesses examined in the present suit varied from 2½ cents to $1.25 per acre, and that it *is impossible to satis- [**462** factorily ascertain or fix what was the value per acre of the grant at that time, the "value being largely speculative for the future." The court further expressly finds that the mother and guardian *ad litem* knew the character and scope of the instrument she was signing; knew that it was a settlement of the claims in favor of her children; was satisfied with the sum paid, and "that no fraud, imposition, or error has been shown to have entered into said transaction, or to have brought about said compromise decree."

That infants are bound by a consent decree is affirmed by the authorities, and this notwithstanding that it does not appear that a prior inquiry was made by the court as to whether it was for their benefit. In 1 Dan. Ch. Pl. & Pr. 163, it is said:

"Although the court does not usually, where infants are concerned, make a decree by consent, without an inquiry whether it is for their benefit, yet when once a decree has been pronounced without that previous step, it is considered as of the same authority as if such an inquiry had been directed, and a certificate

thereupon made that it would be for their benefit; and in the same manner an order for maintenance, though usually made after an inquiry, if made without, would be equally binding." (In support of these propositions many authorities are cited in a note.) "An infant defendant is as much bound by a decree in equity as a person of full age; therefore, if there be an absolute decree made against a defendant who is under age, he will not be permitted to dispute it, unless upon the same grounds as an adult might have disputed it; such as fraud, collusion, or error."

In *Walsh* v. *Walsh*, 116 Mass. 377 [17 Am. Rep. 162], a decree had been entered as follows: "And the plaintiff and the defendants, . . . Thomas Keyes, . . . and also in his capacity of guardian *ad litem* of Bridget Walsh and William Walsh, consenting to the following decree; and this court being satisfied upon the representations of counsel that the decree is fit and proper to be made as against the said Bridget and William; it is thereupon ordered and adjudged and decreed," **463**] etc. On *a bill of review filed by the minors this decree was challenged, among other reasons, on the ground that it appeared to have been made by consent of their guardian *ad litem* and upon the representations of counsel without proof. The court decided against the contention, and speaking in reference thereto, through Mr. Chief Justice Gray, said:

"An infant is ordinarily bound by acts done in good faith by his solicitor or counsel in the course of the suit, to the same extent as a person of full age. *Tillotson* v. *Hargrave*, 3 Madd. 494; *Levy* v. *Levy*, Id. 245. And a compromise, appearing to the court to be for the benefit of an infant, will be confirmed without a reference to a master; and, if sanctioned by the court, cannot be afterwards set aside except for fraud. *Lippiat* v. *Holley*, 1 Beav. 423; *Brooke* v. *Lord Mostyn*, 33 Beav. 457, and 2 De G. J. & S. 373.

"If the court does pronounce a decree against an infant by consent, and without inquiry whether it will be for his benefit, he is as much bound by the decree as if there had been a reference to a master and a report by him that it was for the benefit of the infant. *Wall* v. *Bushby*, 1 Bro. Ch. 484; 1 Dan. Ch. Pl. & Pr. 164. The case falls within the general rule, that a decree made by consent of counsel, without fraud or collusion, cannot be set aside by rehearing, appeal, or review. *Webb* v. *Webb*, 3 Swanst. 658; *Harrison* v. *Rumsey*, 2 Ves. Sr. 488; *Bradish* v. *Gee*, 1 Ambl. 229; *S. C.* 1 Kenyon, K. B. 73; *Downing* v. *Cage*, 1 Eq. Cas. Abr. 165; *Toder* v. *Sansam*, 1 Bro. P. C. 468; *French* v. *Shotwell*, 5 Johns. Ch. 555."

Ordinarily, indeed, a court before entering a consent decree will inquire whether the terms of it are for the interest of the infants. It ought in all such cases to make the inquiry, and because it is its duty so to do it will be presumed, in the absence of any showing to the contrary, that it has performed its duty. In this case, while the decree fails to recite the making of such an inquiry, there is nothing to indicate that it was not made; the circumstances tend strongly to show that it was in fact made, and the finding is that the conclusion reached by the chancellor as to the advisability of the settlement was a sound exercise of his discretion. It is true the *findings show that[**464** this decree of September, 1866, was not made by the personal procurement, knowledge, or consent of said Scheurick or Guadalupe Bent, and the fact of the entry thereof was unknown to them for several years thereafter. They also show that there is no pleading, order, or proceeding of record disclosing whether or not any inquiry was made by the court; but it does appear that the parties plaintiff, including the infants, were represented by counsel; that the guardian *ad litem* as well as the other adult plaintiffs fully understood the settlement and assented to it; and it is not strange that, having executed conveyances, they left to counsel such further action as should be deemed necessary to perfect the transfer of title. Further, in April prior to this decree, not only was the suit revived in the name of the infant heirs of Charles Bent, but on motion of the solicitors for plaintiffs their mother was appointed guardian *ad litem* and commissioner in chancery, with full power to execute deeds and carry into execution all sales or transfers of their interest in the real estate described to the defendant Maxwell. The court was therefore early advised of the fact of a proposed settlement. The consent decree shows fully the terms of the settlement, and it certainly is not straining the presumption in favor of judicial action to assume that the court would not have permitted the entry of this decree, providing for a settlement whose terms were thus disclosed, without being satisfied that such settlement was for the interest of the minors who were under its charge.

Again, the copy of the order directing the appointment of the mother as guardian *ad litem* and giving her authority to make the conveyance was incorporated into the deed which she knowingly executed, so that any inspection of the deed would have disclosed the fact that proceedings were being taken in court looking to the accomplishment of this compromise and settlement. There was no concealment or secrecy in the matter. In this connection we are referred to this paragraph in the opinion of the supreme court of the territory, filed in the companion case to which we have heretofore referred:

"We do not enter into a discussion at large of the testimony *by which it is claimed [**465** that the decree of September, 1866, is successfully impeached upon the ground of fraud, and while we are not prepared, in view of the testimony submitted since the decision in *Thompson* v. *Maxwell* [*Thompson* v. *Maxwell Land-Grant Co.*], 95 U. S. 400 [24: 485], to say that 'the proofs show a case which, in our judgment, supports the conclusions of the decree, to the effect that the terms of compromise made by the adult parties to the suit (including the mother and guardian of the infant heirs of Alfred Bent) were advantageous to the said infants and were so considered and accepted by the court in their behalf,' we do hold that the judgment of the court at that time in so considering and accepting said terms was shown to be a fair and reasonable exercise of the chancellor's discretion, and that

no fraud, imposition, or error has been shown to have entered into said transaction or to have brought about said compromise decree."

It will be seen from this that while the supreme court of the territory, under the new proofs presented, was unable to express itself as strongly as this court had done, it did consider that the judgment of the chancellor in considering and accepting the terms of settlement was a fair and reasonable exercise of his discretion. In other words, that court seems to have been of the opinion that under the later testimony it could not be said that the settlement was in fact advantageous to the infants, but at the same time found that the chancellor not only made inquiry and considered it, but also exercised discretion in approving it; and that, certainly, is all that is necessary to uphold a decree of a court. It would be strange, indeed, if, when those authorized to represent minors, acting in good faith, make a settlement of claims in their behalf, and such settlement is submitted to the proper tribunal, and after examination by that tribunal is found to be advantageous to the minors and approved by a decree entered of record, such settlement and decree can thereafter be set aside and held for naught on the ground that subsequent disclosures and changed conditions make it obvious that the settlement was not in fact for the interests of the minors, and that it would have been better for them to have retained rather than compro-
466]mised their *claims. If such a rule ever comes to be recognized it will work injury rather than benefit to the interests of minors, for no one will make any settlement of such claims for fear that it may thereafter be repudiated. The best interests of minors require that things that are done in their behalf, honestly, fairly, upon proper investigation, and with the approval of the appropriate tribunal, shall be held as binding upon them as similar actions taken by adults.

Again, it is said that it appears from the findings that the guardian *ad litem* was a Mexican woman, and, at the time of the execution of the deed, ignorant of the English language, unfamiliar with business or with her duties as guardian, without knowledge of the boundaries or extent of the grant or of the character and value thereof; that Maxwell represented to Scheurick that the grant was not as large as it was supposed to be; that it did not extend into Colorado or beyond the Red river, whereas it did so extend over 200,000 acres; that Scheurick and the guardian *ad litem* believed and were influenced by said representations; that Maxwell, while generous and magnanimous in many respects, was unscrupulous and tyrannical as well, a resolute and determined man, of large wealth and great influence throughout the county of Taos and territory of New Mexico; that he made threats that unless the Bent heirs accepted $18,000 for their claims they would never get anything, and that such threats were communicated to the guardian *ad litem*, and that these matters influenced her in making the settlement and conveyance. But it also appears that it was not definitely known at the time where was the boundary line between Colorado and New Mexico; that the guardian *ad litem* acted in concert with the adult plaintiffs who were dealing with their own interests on the same terms, and that she was willing to make the same settlement they did. And when we take into consideration the character, the ability, and standing of the husbands of the other adult plaintiffs, the fact that their interests were alike, that they all acted together, that the settlement which was finally made was so nearly that which the father of these minors had proposed in his lifetime, the fact that no fraud, imposition, or error *entered into[**467** the transaction or brought about the settlement, it is going too far to hold that the mere weakness and ignorance of the guardian *ad litem*, whose interests were looked after by her brother-in-law and counsel, or the strength and vigor of the opposing party, are sufficient to invalidate a decree otherwise not open to objection.

Again, it is urged that the whole of the consideration had not been paid by Maxwell at the time of the commencement of this suit. The findings are that, as to the payment, the testimony is conflicting. It seems that Maxwell gave notes for the amount to each of the three plaintiffs. The guardian *ad litem* testified that the note she received had been paid—so testifying because her second husband, Thompson, to whom she was married about thirteen months after the death of Alfred Bent, and to whom, at the time of the marriage, she delivered the note with everything else she had, told her it had been paid. Other witnesses testified that only a portion of it had been paid, and the court found that the weight of the evidence was that at the beginning of the suit a considerable sum was still unpaid, but how much could not be ascertained. Maxwell was at all times a man of ample financial responsibility. No part of the proceeds of the note was paid directly to the minors or their mother, but Thompson, her second husband, supported, maintained and educated the minors during their minority with the funds of his wife and himself the same as his own children, keeping no separate account. The sum and substance of all this is, that each of the three separate plaintiffs took notes for the money Maxwell was to pay in settlement. Whether these notes drew interest or not is not disclosed, but Maxwell was a man of large financial ability, from whom the notes could have been collected at any time if the parties desired, and if either of them permitted the note to remain uncollected it must be assumed that it was for some good reason, possibly for the sake of the interest which the note drew. There is no finding that the note to the guardian *ad litem* had not long since been paid, but simply that it had not been fully paid at the time this suit was commenced, to wit, in 1870. If what was paid was not paid to *the guardian *ad litem* it was because[**468** she had turned the note, as well as all other papers she had, over to her second husband. Whatever may be said as to the carelessness or the irregularity of these proceedings it cannot be doubted that substantially the proceeds of the note went to the benefit of the children, for they were supported and educated by the second husband the same as his own children. In this connection also it is well to notice the

fact that, according to the inventory filed by the widow of Alfred Bent as administratrix, outside of the real estate and the note received from Maxwell, the total assets of the estate were $1,408. The claims admitted and allowed in the probate court amounted to $2,423; and while certain witnesses familiar with his affairs testified that he had both real and personal property other than that in the inventory, both in New Mexico and Colorado, it does not appear what amount, if any, there was of such property. It would seem from this that the interests of the minors required the settlement of this claim against Maxwell, in order to secure funds for their maintenance and education, for the whole personal estate of their father, as shown by the inventory, was not sufficient to pay the claims allowed.

These are all the matters which are called to our attention as tending to impugn the validity of this consent decree, and even if we were at liberty under the terms of the prior decision to consider all these new matters we are of opinion that there is not enough in them, singly or together, to justify us in disturbing the settlement which was made and the decree which was entered.

In determining the validity of this transaction it must be remembered that the petition filed in the original case brought by Alfred Bent and his sisters disclosed that the interest which their father claimed in the grant arose out of a parol agreement, and so it is not strange that after a decree had been rendered in their favor their counsel advised a settlement and the receipt of money rather than take the chances of further review in an appellate court; that Alfred Bent, the father of these minors, with his sisters, entered upon negotiations looking to a settlement of their claims and that although there was a difference **469**]*of $3,000 between what was demanded and what Maxwell offered, they considered the question as settled, and prepared deeds for the purpose of making conveyances of their interests, and that the delay in fully consummating this settlement was owing to the hope of getting a little more money; that only the accidental death of Alfred Bent prevented the consummation of that settlement, a settlement by adults, and one which would never have afforded any excuse for further litigation, as is shown by the acceptance on the part of the two sisters of the settlement in their favor; that while the guardian *ad litem* was an ignorant and inexperienced woman, her interests were looked after by her brother-in-law, who was a capable business man, and by counsel learned in the law; and, while there may have been some irregularities in the proceedings, yet it is affirmatively found that there was no fraud, imposition, or error in the transaction or the decree. Surely under those circumstances the decree ought not to be disturbed.

But there is another aspect in which the equities of this case may fairly be considered. The will of Alfred Bent gave the entire estate to his widow—gave it, it is true, for the maintenance of herself and her children, but nevertheless passed the title to her; and though the will had not been probated at the time of this settlement, it was soon thereafter, and, of course, became operative as and from the date of his death, so that at the time of the settlement the title to this property was in her. The owner by his will gave this property to his widow, and by such will trusted to her to make such disposition of it as she should deem best, relying upon her to use the proceeds for her own maintenance and that of her children. He had a right to make such a disposition of the property and intrust it absolutely to her, and that in respect to this property it was not an unwise disposition is evident, for although he must have known of her inexperience in matters of business, he also knew that her interests were identical with those of his sisters, and that their common interests would be cared for by those competent to look after such affairs. If the settlement made by the sisters, as adults, *is beyond challenge, should not[**470** that made by the widow, also an adult, be upheld, and for the same reasons? The question, under those circumstances, would be not whether she was guilty of any wrongful use of the funds which she received, but whether she, as the holder of the title, was fraudulently led into the settlement. It is, of course, not necessary to rest this case upon such suggestions, but they are certainly worthy of consideration in determining its equities.

In conclusion, it may not be inappropriate to call attention to some things which are matters of public history, and which are referred to at some length in the *Maxwell Land-Grant Case*, 121 U. S. 325 [30: 949]. The Mexican colonization law limited the amount of a grant to a single individual to 11 square leagues, and it was claimed that all grants like these in which outboundaries were named were to be taken as simply grants of 11 square leagues per individual, to be laid off within such outboundaries. As there were in this case two grantees, Beaubien and Miranda, it was according to the claim a grant by the Mexican authorities of only 22 square leagues or 97,424$\frac{8}{10}$ acres; that while this, with other grants, was, on June 21, 1860, confirmed by act of Congress (12 Stat. at L. 71, chap. 167), the claim was still made that the confirmation was operative only for the 22 square leagues; that some of the Secretaries of the Interior of the United States refused to issue patents in such cases for any more than 11 square leagues per individual grantee, and not until the case of *Tameling* v. *United States Freehold & E. Company*, 93 U. S. 644 [23:998], decided in 1876, was it settled that such an act of confirmation was equivalent to a grant *de novo*, and included all the lands within the outboundaries. Indeed, in the opinion in the *Maxwell Land-Grant Case, supra*, decided in 1887, it is intimated that the *Tameling Case* was not conclusive upon the question, because that was an action in ejectment in which the legal title shown by the patent prevailed, and not until the case then being considered, in which was a direct attack by the United States upon a patent, could it be held that there was a final adjudication of the question. So that while the owners of the land grant were claiming as against the government the whole area*within the outboundaries[**471** it was still an unsettled question whether they would finally succeed in obtaining more than the 22 square leagues. Was it not a wise set-

tlement for parties, whose claim to an interest in what might be found to be less than 100,000 acres rested simply on a parol agreement therefor, to obtain for that interest a sum which was more than half what the best government land could be purchased for? We think it can be well said, in the language of the supreme court of New Mexico, "that the judgment of the court at that time in so considering and accepting said terms was shown to be a fair and reasonable exercise of the chancellor's discretion."

We see no error in this record, and *the decree is affirmed.*

Mr. Justice **Shiras** and Mr. Justice **White** dissent.

CHARLES BENT *et al.*, *Appts.*,
v.
GUADALUPE MIRANDA, Jesus G. Abreu, as Surviving Executor of the Last Will of Charles Beaubien, Luz B. Maxwell, *et al.*

(See S. C. Reporter's ed. 471.)

[No. 91.]

Argued November 2, 3, 1897. Decided December 6, 1897.

APPEAL from the Supreme Court of the Territory of New Mexico.

Messrs. **John G. Carlisle,** *James O'Hara, Caldwell Yeaman, E. T. Wells, R. T. McNeal, John G. Taylor, S. D. Rouse,* and *Logan Carlisle* for appellants.

Messrs. **Frank Springer,** *A. B. Browne,* and *A. T. Britton* for appellees.

This is a case, the companion of that just decided, as has been indicated in the opinion in that case, and the same considerations compel an affirmance of the decree herein.

Mr. Justice **Shiras** and Mr. Justice **White** dissent.

L. H. HYER
v.
RICHMOND TRACTION COMPANY *et al.*

(See S. C. Reporter's ed. 471–488.)

Specific performance of contract, when refused.

A contract between two persons for mutual cooperation in securing a franchise for a street railway, and the equal division of what may be realized from the enterprise, will not be enforced in equity by decreeing that one of the persons who has been excluded by the other from the benefit of the franchise, which was granted to the latter by the city with knowledge of all the facts, shall have a one-half interest in the franchise, property, and stock of the corporation to which the franchise was granted, but he will be left to his remedy at law.

[No. 379.]

Submitted October 18, 1897. Decided December 6, 1897.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree of that court affirming the decree of the Circuit Court of the United States for the Eastern District of Virginia, dismissing a suit in equity brought by L. H. Hyer, plaintiff, against the Richmond Traction Company *et al.*, defendants, to procure a decree that the plaintiff is the owner of one-half interest in the Traction Company's franchise, property, and stock, and to secure to him the possession and enjoyment of the same. *Case remanded to the Circuit Court with directions to modify the decree so as to make it one dismissing the suit without prejudice to an action at law.*

Statement by Mr. Justice **Brewer:**

On October 30, 1895, appellant, as plaintiff, filed his bill against the defendants in the circuit court of the United States for the eastern district of Virginia. After some changes, he, on April 18, 1896, filed an amended and supplemental bill. The sufficiency of this was challenged by demurrer. The demurrer was sustained, and on August 22 a decree was entered dismissing the bill. From that decree the plaintiff appealed to the court of appeals, which court, on May 14, 1897, ordered that the decree of the circuit court be affirmed, without prejudice. Whereupon the case was removed to this court by certiorari.

It appears from the allegations in the amended and supplemental bill that the plaintiff, whose attention had been for some time devoted to the matter of street railways in the city of Richmond, Virginia, succeeded in obtaining from the city council a franchise for the construction and operation of a street railway *on Broad street, in that city. An[473 ordinance, passed on June 17, granted the franchise to the plaintiff and his associates under the name and style of the Richmond Conduit Company. The terms of this ordinance differed in some respects from those of the one prepared by the plaintiff who declined to accept it or to proceed under it in the form in which it had passed the council. But upon an open conference with the committee on streets of the city council plaintiff was assured that changes would be made rendering the franchise acceptable to him, provided he would deposit in one of the banks of the city of Richmond the sum of $10,000, upon certain conditions embodied in a paper prepared by the city attorney. On July 17 he caused the deposit to be made, and gave satisfactory guaranties of the good faith of himself and associates, and of their purpose to construct the railway, which guaranties, as he was assured, would secure the modification of the grant in accordance with his suggestions. While in Richmond, and conferring with the various committees of the city council with regard to this franchise, he became aware that certain other parties were seeking to secure a grant of a like franchise to them, under the name and style of the Richmond Traction

NOTE.—*As to when specific performance decreed, and when refused,* see notes to Hepburn v. Dunlop, 4: 65; Colson v. Thompson, 4: 253; and Brashier v. Gratz, 5: 322.

As to discretion as to granting specific performance; remedy at law,—see notes to McCarter v. Armstrong (S. C.) 8 L. R. A. 625; and Frink v. Thomas (Or.) 12 L. R. A. 239.

As to certainty and definiteness of contract, see note to Woodruff v. Woodruff (N. J. Eq.) 1 L. R. A. 881.

Of contract for corporate stock, see note to Bumgardner v. Leavitt (W. Va.) 12 L. R. A. 770.

Company, and that the defendant, P. B. Shield, was apparently the head of this movement, but he had not been successful in obtaining the passage of any ordinance by the city council. In the early part of August, 1895, the plaintiff went to the city of New York, to make arrangements for constructing the railway as soon as the amendments had been made to the ordinance. While there he was in the banking house of Stewart & Co., who had been advising with him with a view of aiding him financially in the prosecution of his enterprise, and there ascertained that the defendant Shield was also in conference with the said firm of Stewart & Co., seeking aid in the prosecution of his Richmond Traction Company scheme. Stewart & Co. advised the consolidation of the two interests, to wit, the interest of plaintiff and his associates in the conduit company with that of Shield and his associates in the traction company. After some conferences a contract was entered into between plaintiff and Shield, **474]** which took the *form of a joint letter to the banker, of which the following is a copy:

New York, August 9, 1895.

S. H. G. Stewart, Esq., 40 Wall street, City.

Dear Sir: We, the undersigned, L. H. Hyer, of Washington, District of Columbia, and Phil. B. Shield, of Richmond, Virginia, have this day entered into the following agreement: That both of us being interested in the procuring of a franchise for and the construction of a street railway on Broad street, in the city of Richmond, Virginia, with collateral lines, have made the following agreement: That we hereby bind ourselves, in our own behalf and for our associates, mutually to co-operate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise.

It is further agreed between us that the deposit already made with the State Bank of Richmond, at Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the 17th day of August, 1895; and further, it is agreed that the application and franchise to be presented to the common council of the city of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system.

Among ourselves we will decide what names are proper to be used in the franchise and the policy we will use in procuring the same.

Yours very respectfully,

(Signed) L. H. Hyer.
(Signed) Phil. B. Shield.

Plaintiff was authorized to act for himself and associates, and the defendant Shield repre- **475]**sented that he had a power of *attorney from all parties interested in the traction company scheme, and he did actually represent them.

It was agreed between the parties to this contract that a full statement and explanation of the action of the two companies should be made to the city authorities of Richmond, and in fact it was so made. Plaintiff fully performed all the promises and covenants entered into in said contract in behalf of himself and his associates, but being detained by a serious illness was unable to proceed immediately to Richmond, and trusted to the defendant Shield and his associates to carry out other terms of the contract and secure the franchise for the mutual benefit of both interests. Disregarding this contract, Shield and his associates secured the passage of an ordinance granting the franchise to them, and wholly ignoring plaintiff and his associates. The first section of this ordinance provides: "That the Richmond Traction Company, composed of John W. Middendorf, John L. Williams, Everett Waddey, Reuben Sherreffs, Philip B. Shield, Charles T. Child and W. F. Jenkins, be, and the same is hereby, permitted to construct and operate a street railway within the limits of the city, along the following routes, under and subject to the conditions and provisions hereinafter set forth: A double track in Broad street," etc. Subsequent sections cast various obligations upon the company in respect to the construction and operation of the railway, the use by other companies of the tracks, and the payment of a certain per cent of the gross receipts into the treasury of the city. The last section is as follows:

"Fourteenth. Said Richmond Traction Company, and all such persons as now compose said company, or who may hereafter unite with them, are, in virtue of the authority vested in the common council of Richmond pursuant to the act of the general assembly of Virginia, passed March 20, 1860, entitled 'An Act to Authorize the Common Council of Richmond to Authorize Persons to Construct Railroads in the Streets of Said *City,' declar- **[476** ed to be a corporation, and are vested with all the rights and privileges conferred, or intended to be conferred, by said acts on persons or companies authorized by said council of the city of Richmond to construct railroads in the streets of said city, and are likewise bound by all the restrictions of said act."

All the parties named in the first section of this ordinance were duly notified of the claims of plaintiff and his associates under the contract of August 9, notwithstanding which they ignored plaintiff and his associates and proceeded to organize a corporation, taking all the stock to themselves, paying nothing therefor, but receiving certificates purporting to be of fully paid stock. Plaintiff, after alleging that he is the holder of all the interests represented by himself and his associates, prayed that he be decreed the owner of one-half interest in the traction company's franchise, property, and stock, and specifically for certain orders to secure to him the possession and enjoyment of such interest.

Messrs. **Robert Stiles** and **Addison L. Holladay** for petitioner Hyer.

Messrs. **W. W. Henry,** *E. R. Williams, S. D. Schmucker,* and *George Whitelock* for Richmond Traction Company *et al.*

Mr. Justice **Brewer** delivered the opinion of the court:

Two questions arise in this case: First, whether the contract sued on is, under the

facts and circumstances disclosed in the bill, void as against public policy; and, if not, whether the case presented is one which calls for the interposition of a court of equity, or should be determined in a court of law.

In respect to the first question, it will be borne in mind that upon a demurrer, whatever the facts in the case may really be, we must take them to be as stated in the bill. So, in determining the question of the validity of this contract it must be assumed that there was no concealment; that everything was open and public, and nothing withheld from the knowledge of the city council, or any parties interested in the matter. The case thus presented is: Two parties apply separately to a city council for a franchise to construct a street railway. The banker from whom each of the parties is [477] seeking *financial assistance advises them to unite and make a single application. They do so, and thereafter the city council, aware of both interests, of the two applications, of the advice to consolidate and the party by whom it is given, and of all the terms of the consolidation, grants the franchise to only one of the parties. Was the agreement to unite in one application against public policy and void?

In the view we have taken of the second of these questions it is unnecessary to definitely determine the answer which should be given to the first, though it may not be inappropriate to observe that the vice which is so frequently detected in contracts and agreements of a similar nature lies in the fact of secrecy, concealment, and deception; the one applicant, though apparently antagonizing the other, is really supporting the latter's application, and the public authorities are misled by statements and representations coming from a supposed adverse but in fact friendly source. It would scarcely be doubted that two or more parties may properly unite in a partnership or corporation and thus unitedly make, in the name of the partnership or corporation, a single application for a grant or franchise; and, if they may so unite before any application, it is not easy to see why they may not so unite after having once made separate applications, providing all the facts and circumstances are fully disclosed and the public and the public authorities act upon full knowledge; and if they may sometimes so unite, an agreement for uniting is not necessarily void. As said by the New York court of appeals in *Atcheson* v. *Mallon*, 43 N. Y. 147, 151 [3 Am. Rep. 678]: "A joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed, and not secret. The risk, as well as the profit, is joint and openly assumed. The public may obtain at least the benefit of the joint responsibility, and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders [478] and weigh the merits of the bid." *See also *Smith* v. *Greenlee*, 2 Dev. L. 126 [38 Am. Dec. 639]; *Phippen* v. *Stickney*, 3 Met. 384; Greenhood, Public Policy, p. 190, rule 177.

It may be noticed that there is nothing in the agreement reduced to writing, or as interpreted by the facts stated, which tends to show any thought or purpose of using corrupt or improper influences to secure the action of the city council. So that, upon the record as it stands, the question is, narrowly, whether any agreement to unite between parties who have applied, or contemplate application, for a franchise is, under all circumstances, necessarily void as against public policy.

The case is also easily distinguishable from those of contracts merely to abstain from bidding. An agreement not to bid tends to diminish the number of bidders and thus prima facie to lessen the probable profitableness of the sale or contract. Yet, even in cases of public sales, the rule laid down by this court is that agreements to unite in a bidding are not *per se* void. Some other element than the mere fact of union must exist before the agreement is to be condemned. *Kearney* v. *Taylor*, 56 U. S. 15 How. 494 [14: 787]. In that case, at a public sale a portion of a farm was purchased by a company, organized pending the sale and making the purchase with the view of laying out and establishing a town thereon. After discussing the question of competition, and the reasons which had led courts to frequently denounce such combinations for the purpose of bidding, the opinion adds (p. 520 [14: 797]):

"These observations are sufficient to show that the doctrine which would prohibit associations of individuals to bid at the legal public sales of property, as preventing competition, however specious in theory, is too narrow and limited for the practical business of life, and would oftentimes lead inevitably to the evil consequences it was intended to avoid. Instead of encouraging competition, it would destroy it. And sales, in many instances, could be effected only after a sacrifice of the value, until reduced within the reach of the means of the individual bidders. We must therefore look beyond the mere fact of an association *of persons formed for the pur- [479] pose of bidding at this sale, as it may be not only unobjectionable, but oftentimes meritorious, if not necessary, and examine into the object and purposes of it; and if, upon such examination, it is found that the object and purpose are, not to prevent competition, but to enable, or as an inducement to the persons composing it to participate in, the biddings, the sale should be upheld; otherwise if for the purpose of shutting out competition and depressing the sale so as to obtain the property at a sacrifice. Each case must depend upon its own circumstances; the courts are quite competent to inquire into them, and to ascertain and determine the true character of each."

The observations thus made show that every case must be determined upon its peculiar facts and circumstances, and the courts, before condemning an agreement to unite in a bid, must see that the agreement is such as really destroys the value of competitive bidding; and these observations, it must be noticed, were made in respect to a case in which a public sale had been ordered. The sale was therefore something which must take place, and the question of making a sale was not discretionary with the sheriff or other officer charged with the duty of making the sale. But here the city of Richmond was not bound to grant any franchise. It was free to deter-

mine whether it would grant or not, and, if it did, what form of street transportation should be adopted, and might also well consider the character, the financial ability, and the situation of the various applicants in determining to whom it would be best for the public interests to grant such a franchise.

Where the grantor or vendor has not determined the question of grant or sale, and it is still a matter of discretion whether a grant or sale shall be made, it would seem that there were less cogent reasons for denouncing a combination or agreement of parties with a view of making a proposal. *Morrison* v. *Darling*, 47 Vt. 67, 72. In that case it appeared that two parties each contemplated purchasing property belonging to a third. One of the two promised the other a certain sum if he would not **480**]interfere with him*in obtaining the property and would assist him in making the purchase. It was held that the agreement was valid. The court, after referring to the rule pertaining to the cases of public sales, said: "But in this case, the owner of the share of the estate was under no obligation to sell to anyone, and there was no stipulation to resort to any illegal or improper means to mislead the owner, or to induce a sale by any fraud or artifice. We do not think such contract can be held void as against public policy."

But, as observed, every case must depend upon its own circumstances, and it may be that when the facts in this case are disclosed by the testimony they will be found to differ materially from those stated in the bill. Inasmuch as we are of the opinion that, even if the contract be valid, the plaintiff's remedy is in a court of law rather than in a court of equity, it is not wise to attempt to definitely determine whether, under the circumstances stated, this contract was or was not void as against public policy, for such determination might prove to be, in the final result, the mere answer to a moot question. It will be more satisfactory to pass upon the question when the surrounding facts are fully developed by testimony

We pass, therefore, to the second question, which is: Assuming this contract to be valid, was the plaintiff's remedy in equity or at law? According to the allegations, the city council was aware of the two parties, of their agreement to unite in one application, of all the facts surrounding the agreement and proposed union, and with such knowledge it granted this public franchise to one party alone. In the exercise of its judgment in respect to the public interests, the city council determined that it was better that the defendants should have this franchise than that the united parties should have it. In the face of this determination by the authorities having special charge of the public interests, and ignorant as we must be of the reasons which controlled the city council in making this award to the one singly rather than to the two jointly, it would be improper for a court of equity to compel a consolidation of those interests. For reasons which must be held to be sufficient **481**]*and controlling, the city council deemed it not wise to grant this franchise to the two, but gave it to the one. Shall the courts overrule this determination, and intrust the franchise to the two rather than to the one? They have no general supervision over the judgment and action of public authorities. The city holds its grantee responsible for the proper discharge of the duties imposed by its grant of the franchise. It may well have determined that it did not desire the plaintiff to have any interest in it, or anything to do with the management of the street railway, and that the best interests of the city would be subserved by committing it, primarily at least, to the defendants alone. Shall the courts say that such determination was erroneous, or may be overruled simply because of a private contract between two parties? It must be remembered that according to the allegations the city council knew of the union of interests, and yet declined to recognize such union. It may be said that by authorizing these defendants to incorporate, it put it in their power to let the plaintiff and his associates or anyone else into the enterprise. Of course, the city council knew that the franchise when granted could be alienated by the grantees, and yet notwithstanding this possible alienation the fact remains that the city council determined that the primary parties to receive the franchise—the ones upon whom the burden of the contract should be laid—were the defendants alone, and not in conjunction with the plaintiff or his associates.

It is obvious that if two interests, which it may be believed are now not in harmony, if not decidedly antagonistic, are let into equal control of a franchise such as this, the public interests may suffer. Harmony in management is no inconsiderable factor in securing the best possible results, and if the parties in interest are of two minds as to how the railway shall be managed, what improvements shall be made, and, in general, what shall be done in connection therewith, it is not difficult to perceive that their antagonism may prevent that efficiency which will tend to make the street railway of the greatest advantage to the public.

This conclusion, while not interfering with the right of the *plaintiff to maintain his[**482** action at law for the damages resulting from the defendants' breach of contract, at the same time preserves the city's control over the franchise, and upholds its determination as to the party or parties to whom it is willing to intrust such franchise.

But beyond these relations of the public to the enterprise, courts are not often wont to compel parties to unite interests and work together. And here it may be well to notice that the contract was not one in terms for a partnership in the management of the railway but only one for a division of the profits. The parties stipulated to co-operate in securing the franchise and to divide equally the profits, but left the question of control and management unsettled. The application, it is true, was to be in the name of the Richmond Traction Company, but who should compose that company was, according to the last clause of the contract, to be subsequently determined. It may, however, be conceded that there is an implication of joint ownership as well as of joint interest in the management, and in the profits arising therefrom, and thus it may be said that the contract was really one for a partnership. It is seldom that a court of equity will decree that a partnership which has been agreed upon shall be carried into ef-

fect. More frequently is it called upon to release parties from partnership agreements on the ground that their antagonism prevents the fulfilment of the purposes of the partnership, and it would seem like a contradiction to force antagonistic parties to form a partnership when it is one of the recognized rules of equity that such antagonism is ground for dissolving a partnership already existing. It is true that the ordinance contemplates the formation of a corporation, and courts will sometimes decree the specific performance of a contract for the transfer of stock. But the ordinance was passed after the contract, and, as we have seen, the most that can be said of the contract is that it contemplated the creation of a partnership. The fact that thereafter the city council deemed it best to provide by ordinance that the grantees of the franchise should incorporate does not change the scope of the contract It is precisely the same that it **483**] would have been if the *council had granted the franchise to Shield personally, and authorized him as an individual to construct and operate the railway. How, then, can it be said that this contract is to be deemed one for the transfer of shares of stock in a corporation? No corporation then existed. The Richmond Traction Company, in whose name the application was to be made, was not then a corporation and became one only on the passage of the ordinance. There was no certainty that one would ever be formed; there was no agreement that one should be formed, and the rights of the parties must be determined by the facts as they were at the time of the contract and the terms which entered into it. But even if it be considered as a contract specifically for the transfer of stock, what is the rule in respect to actions in case of a breach thereof? If stock has a recognized market value, courts will ordinarily leave the parties to their action at law for damages for breach of the agreement to sell, but in cases where the stock has no recognized market value, is not purchasable in the market, or has a value which is not settled but contingent upon the future workings of the corporation, equity will sometimes decree specific performance of a contract of purchase. It is in reliance upon this that plaintiff claims the right to a decree for specific performance. The enterprise, he says, is a new one; it is difficult to put a fair pecuniary value on the stock or on the franchise. It is one of those things contingent largely on the successful working of the railway. It must be conceded that there is force in the contention that only by letting the plaintiff into the possession of the interest he claims can adequate compensation be secured. At the same time the present value of the franchise and therefore of the stock of the corporation owning the franchise is not wholly beyond estimate. That which it may have three or four years hence may depend largely upon the matter of management. But it is a franchise which has definite possibilities. The miles of track covered by it, the population adjacent to the line, and, therefore the number of people likely to avail themselves of its advantages, the cost of construction and of operation, are all well-known facts, and upon such known facts it is not impossible for **484**] *a jury to form a fair estimate of the value of the franchise, and, therefore, of the damage which the plaintiff has sustained by the repudiation of the contract to give him a half interest in it.

The authorities generally support these views. In Pomeroy's Specific Performance of Contracts, § 290, the author, citing several cases, says: "It is well settled as a general rule, that an agreement to enter into a partnership which would be literally performed by executing the partnership articles, or to carry on a partnership already established, will not be specifically enforced."

In *Hill* v. *Palmer*, 56 Wis. 123, 129 [43 Am. Rep. 703], the court observes:

"It is also well settled that the wrongful refusal by a party to a contract of copartnership to permit the firm to commence business, or, as it is sometimes termed, to *launch* the partnership business, is ground for an action at law by the injured partner to recover damages of the partner whose wrongful act has defeated the purposes for which the copartnership was formed. The cases which so hold, both in England and in this country, are very numerous. Indeed, the authorities seem to be quite uniform in so holding. The following are a few of the cases referred to: *Venning* v. *Leckie*, 13 East, 7; *Gale* v. *Leckie*, 2 Stark. 107; *Wadsworth* v. *Manning*, 4 Md. 59; *Glover* v. *Tuck*, 24 Wend. 153; *Bagley* v. *Smith*, 10 N. Y. 489 [61 Am. Dec. 756]; *Terrill* v. *Richards*, 1 Nott & M'C. 20; *Ellison* v. *Chapman*, 7 Blackf. 224; *Williams* v. *Henshaw*, 11 Pick. 79 [22 Am. Dec. 366]; *Addams* v. *Tutton*, 39 Pa. 447; *Vance* v. *Blair*, 18 Ohio, 532 [51 Am. Dec. 467]; 1 Story, Eq. Jur. § 665; Collyer, Partn. § 245; 2 Lindley, Partn. 4th ed. 1025, and cases cited in notes."

Powell v. *Maguire*, 43 Cal. 11, disclosed, like the case at bar, an agreement in respect to a franchise to be obtained from the legislature for the mutual benefit of plaintiff and defendant. The franchise in that case was for maintaining a steam ferry, and it appeared that the defendant, after obtaining the franchise in his own name, constructed a ferryboat at his own expense, and operated it between the points named in the charter. The suit was one to obtain *specific performance of the agree- [**485** ment, and it was held that it could not be maintained, the court saying, on page 19:

"Upon these facts, it is obvious that if the plaintiff's rights rested solely on a verbal agreement to the effect that he and defendant would establish and maintain the ferry at their joint expense and for their joint benefit, without reference to the franchise, the plaintiff's only remedy would be an action at law for a breach of contract. He would have no right to participate in the profits of an enterprise to which he had contributed nothing, and could claim no interest in a boat constructed by the defendant at his own expense and for his own use, nor in the earnings thereof. In such cases it is well settled that, when the partnership was never launched, and when one of the copartners has proceeded to conduct the enterprise in his own name, at his own cost, and for his own exclusive benefit, excluding the other party therefrom, and repudiating the partnership agreement, the only remedy of the injured party is an action at law for a breach of contract. There would be, in such a case, no existing partnership, but only an agreement to

form one, which was never consummated by launching the enterprise."

In that case, also, it was held that the contract was against public policy, the facts in respect to the contract not having been disclosed to the legislature at the time the franchise was granted. In respect to this it was said (p. 21):

"When the legislature grants a franchise to a particular person, his associates and assigns, it delegates to him the right to select the person thereafter to be associated with him in the enterprise. . . . But if several persons desiring to obtain a franchise from the legislature, in which they are all to be mutually interested, see fit to ask it in the name of one only, public policy requires that they should be made to rely solely on his good faith in carrying out the agreement; and if he repudiates the contract on obtaining the franchise a court of equity will grant no relief. It may be that, if the legislature had known beforehand who the real parties in interest were, they would not have made the grant; and if the courts could be appealed to, to enforce such secret an-
486] tecedent *agreements, unsupported by any subsequent acts of the ostensible beneficiary, it is evident that powerful secret combinations would be formed to procure vicious legislation under false pretenses."

These authorities might be multiplied, but they are sufficient to show the general rule controlling actions of this kind. For these reasons and upon these authorities we are of the opinion that the suit for specific performance cannot be maintained. The decree of the circuit court was one dismissing the bill absolutely. In view of the doubt which rests as to the validity of the contract we think it should have been a dismissal without prejudice and the order will be, therefore, that *the case be remanded to the Circuit Court with directions to modify the decree so as to make it one dismissing the bill without prejudice to an action at law.*

Mr. Justice **Harlan** concurring:

I am of opinion that the object as well as the effect of the contract set out in the bill was to diminish competition in reference to the obtaining of a public franchise. For that reason it was detrimental to the public interests, and one in respect of which a court of equity ought not to give any aid to either party. In addition to this view, it appears upon the face of the ordinance in question that the city council of Richmond named the persons by whom that franchise was to be exercised; and a court of equity ought not to force another party into connection with those whom the city council thus designated. Aside from these considerations, I am of opinion that if the plaintiff has any remedy at all, he has an adequate one at law. Upon this last ground I acquiesce in the judgment of the majority of the court in this case.

Mr. Justice **Brown** dissenting:

Mr. Justice Peckham and myself are unable to concur in that part of the opinion of the
487]court which holds that the *complainant is not entitled to relief in equity. Neither the agreement between Hyer and Shield of August 9, 1895, nor the negotiations of these parties with the common council of the city of Richmond, contemplated or implied a partnership between them. Not only is it a fact of which we may take notice that street railways are universally constructed and operated by corporations, but it was one of the stipulations of the agreement of August 9, 1895, that "the application and franchise to be presented to the common council of the city of Richmond" should "be that of the Richmond Traction Company for the building of an overhead trolley or cable railway system." The franchise of June 17, 1895, was granted by an ordinance of this council to Hyer and his associates under the corporate name of the "Richmond Conduit Railway Company," while the rival competing scheme of Shield was applied for under the name and style of the "Richmond Traction Company." Not only must the common council have understood that it was contracting with a corporation, but there is nothing to show that it placed any special reliance upon the personal qualities of Shield or his associates. Indeed, the facts set forth in the bill in this connection show conclusively there could have been no such reliance.

While the entire stock of the Richmond Traction Company may have been taken in their names, there was nothing to prevent that stock from being transferred at any time to other parties; nor could the city have had any personal claim against Shield or his associates. The transaction was with the corporation, and with the corporation alone, and in a legal point of view it was a matter of entire indifference to the city who became the owners of the stock. The entire stock of the company might have been transferred to other parties the day after the charter was granted without any violation of its provisions. In fact, the common council is alleged to have understood that the interests of the two companies had been consolidated, and granted the charter to the traction company, with knowledge that Hyer and his associates were to participate equally in the enterprise.

Under such circumstances, we think it clear that the court *should have entertained a[**488**
bill for the specific performance of this contract, and not have relegated the parties to the doubtful and unsatisfactory remedy of an action at law. We understand the rule to be, as stated by Cook on Stock & Stockholders, § 338, that "if the stock contracted to be sold is easily obtained in the market, and there are no particular reasons why the vendee should have the particular stock contracted for, he is left to his action for damages. But where the value of the stock is not easily ascertainable, or the stock is not to be obtained readily elsewhere, or there is some particular and reasonable cause for the vendee's requiring the stock contract to be delivered, a court of equity will decree a specific performance, and compel the vendor to deliver the stock."

This principle is particularly applicable to a case of this kind, where the corporation was but recently formed, the railroad yet unconstructed, and its shares of uncertain value —if indeed they had any market value at all. To require the complainant, under these circumstances, to bring a personal action for a breach of contract against Shield, who is alleged to be hopelessly insolvent and wholly unable to respond in damages, is to offer him the shadow and deny him the substance of relief.

J. J DOUGLAS, *Plff. in Err.*,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 488-505.)

Legislative power—state decision—power of this court—lottery grant, not a contract—revocation of grant—res judicata.

1. The legislature of a state cannot contract away its power to establish such regulations as are reasonably necessary from time to time to protect the public morals against the evils of lotteries.
2. This court is not required to accept the principles announced by a state court as to the extent to which the contract clause of the Federal Constitution restricts the powers of the state legislature.
3. This court possesses paramount authority, when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, to determine for itself the existence or nonexistence of the contract set up, and whether its obligation has been impaired by the state enactment.
4. A lottery grant is not in any sense a contract within the meaning of the Constitution of the United States, but is simply a gratuity and a license which the state, under its police power and for the protection of public morals, may at any time revoke and forbid the further conduct of the lottery.
5. No right of the lottery grant acquired during the life of the grant, on the faith of or by any agreement with the grantee, can be exercised after the revocation of such grant and the forbidding of the lottery, if its exercise involves a continuance of the lottery as originally authorized.
6. A state decision that a contract with a city respecting a lottery was valid when made is not *res judicata* as to the validity of a subsequent provision of the state Constitution or statutes prohibiting all lotteries.

[No. 10.]

Argued October 12, 13, 1897. Decided November 29, 1897.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment of that court reversing the judgment of the Louisville law and equity court overruling a demurrer to the answer and dismissing an action brought by the Commonwealth of Kentucky against J. J. Douglas *et al.* The judgment of the court of appeals of Kentucky adjudged that the constitutional provision of that state forbidding lotteries and gift enterprises was valid and, as applied to the defendant's claim of a lottery privilege, was not repugnant to the Constitution of the United States. *Affirmed.*

The facts are stated in the opinion.

Messrs. **John G. Carlisle, D. W. Sanders,** and *Aaron Kohn* for plaintiff in error.

Messrs. **W. S. Taylor,** Attorney General of Kentucky, and *William Goebel* for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

By § 226 of the Constitution of Kentucky of 1891 it is provided that "lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed. The general assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked."

By joint resolution of the general assembly passed January 30, 1892, the attorney general of that commonwealth was directed, in [490 execution of this constitutional provision, to immediately institute and prosecute such legal proceedings as might be necessary to suppress or revoke all lotteries or lottery franchises, privileges, or charters operated in Kentucky.

In conformity with that resolution the present action was instituted in the Louisville law and equity court. The petition charged that the defendants were exercising in the city of Louisville, Kentucky, and elsewhere, without lawful warrant, the right, privilege, and franchise to operate a lottery. The relief asked was a judgment preventing the exercise by the defendants of such lottery franchise.

The defendant Douglas in his answer set out numerous acts of legislation under the authority of which he claimed the right to conduct the lottery in question. He insisted that the statutory and constitutional provisions invoked in support of the action were repugnant to the clause of the Constitution of the United States prohibiting any state from passing a law impairing the obligation of contracts.

The defense was sustained by the court of original jurisdiction, which overruled a demurrer to the answer; and the commonwealth having declined to plead further, its petition was dismissed. That judgment was reversed by the court of appeals of Kentucky, and the validity of the above constitutional provision relating to lotteries, and as applied to the defendant's claim of a lottery privilege, was adjudged not to be repugnant to the Constitution of the United States.

The case is here upon writ of error sued out by Douglas, who claims that by the final judgment of the highest court of Kentucky he has been denied a right and immunity secured to him by the Constitution of the United States.

It appears that under authority conferred by various legislative enactments which need not be specially set forth, the mayor and board of councilmen of the city of Frankfort, a municipal corporation of Kentucky, made, Decem

Note.—*As to legality of raffle where one owns all the chances*, see note to Thornhill v. O'Rear (Ala.) 31 L. R. A. 792.

As to drawing by purchasers of lots, see note to Lynch v. Rosenthal (Ind.) 31 L. R. A. 835.

As to constitutional questions, see note to Stevens v. Carter (Or.) 31 L. R. A. 342.

As to following Federal decision on constitutional questions, see note to State, Board of Transportation, v. Sioux City, O. & W. R. Co. (Neb.) 31 L. R. A. 47.

Federal rule as to following state decision on state statutes, see note to Illinois Trust & S. Bank v. Arkansas City (C. C. A. 8th C.) 34 L. R. A. 518.

As to effect of state decisions on state Constitution and statutes, see note to Rhodes v. United States National Bank (C. C. A. 7th C.) 34 L. R. A. 742.

ber 31, 1875, a written agreement with one E. S. Stewart, whereby that city sold, conveyed, and assigned to him a scheme of lottery composed of 30,900 classes which it had devised, not more than two of which were to be drawn [491] on each day, Sundays excepted, *until the whole number should have been fully drawn; Stewart to have the right to control and operate such scheme in accordance with the provisions of the acts under which the city proceeded. The agreement provided that, in consideration of the above sale, assignment, and transfer, Stewart should pay to the city of Frankfort various sums of money at stated times. As required by the agreement, and in conformity with the acts of assembly, he executed to the commonwealth a bond in the penal sum of $100,000, conditioned for a faithful compliance with the provisions of those acts, and for the payment of all sums stipulated to be paid to the city of Frankfort, as well as all prizes drawn in any class under said lottery scheme.

By an act approved March 22, 1890, the general assembly of Kentucky repealed the charter of the Frankfort lottery. Ky. Acts 1889–90, vol. 1, pp. 42, 43. But Stewart had died before the passage of that act, and by contract with his wife, as sole legatee and devisee of his estate, Douglas acquired the right to operate the lottery scheme that had been acquired by Stewart.

It is stated in the answer—and, as this case was determined upon demurrer to the answer, it must be assumed in the present action to be true—that Stewart and Douglas fully complied with all the provisions of the above contract, paid all instalments due the city of Frankfort as the same became payable, fully performed every condition of his contract and bond, and was ready and willing to carry out the same according to the terms, stipulations, and covenants thereof.

The answer further averred that on the 11th day of September, 1878, the court of appeals of Kentucky, in the case of *Webb* v. *Commonwealth of Kentucky*—brought to enjoin the exercise of the privilcges of a lottery grant—adjudged that the sale of a lottery franchise, under the authority of the state, vested in the vendee a property right to conduct such lottery in accordance with the terms of his contract, which could not be repealed by the legislature of the state, and held § 6 of article 21, chapter 28, of the Revised Statutes, attempting such repeal, to be void so far as it affected the [492] *rights of the purchaser under a contract made before the passage of the act.

The answer also contained the following averments: "Defendant says that he has a vested right to conduct the lottery business by drawing the classes contained in the scheme which the city of Frankfort sold and conveyed to E. S. Stewart under the terms, conditions, and covenants of the contract of December 31, 1875, executed and delivered as aforesaid, and that there has never been at any time more than two classes in said scheme drawn in one day, and there are a large number of classes in said scheme yet to be drawn; that his said right under his said contract was authorized and approved by the commonwealth of Kentucky, repeatedly adjudged valid by the judicial tribunals of this state, and such right has always been held by the courts of this state inviolable and not subject to repeal, alteration, or modification by subsequent legislatures. Defendant says that he has paid large sums of money for said scheme devised as aforesaid and said contract, and has made contracts and incurred liabilities involving large sums of money upon the faith of said contract, and relying upon the terms thereof and upon the decisions of the courts of the state adjudging said contract to be valid, obligatory, and inviolable."

In support of the contention that the contracts for the purchase of the lottery scheme in question were valid and irrepealable, the defendant in his answer referred to an act of the general assembly approved May 17, 1886, declaring that "every corporation or person to whom a lottery franchise has been granted by the general assembly of this commonwealth, and which franchise has been declared by a judgment of the court of appeals to be a lawful and existing one, or the lawful grantee, alienee, legatee, or assignee of such franchise, shall be authorized to operate and conduct a lottery in this commonwealth when he, she, or it shall have filed with the auditor of public accounts a certified copy of the judgment rendered, and the opinion delivered by the court of appeals in a case heard and determined before it, in which it has determined that a lottery could be lawfully operated under said *grant from the general assembly of this [493] commonwealth, and obtain from the said auditor a license (which is hereby authorized and directed to issue on the filing of said copies hereinbefore required), reciting the filing of said copies, and authorizing the operation of said lottery for one year from the date thereof, on the condition that said licensee shall, within five days thereafter, pay to the said auditor of the state the sum of $2,000; and said license issued by said auditor, as hereinbefore directed, and any and all renewals thereof, as hereinafter provided for, shall be conclusive evidence in all the courts of this commonwealth of the rights of the licensee to operate a lottery for the period therein named, etc."

Under that statute the defendant obtained a license from the auditor of public accounts, from year to year, and paid to the state $2,000 annually every year since the passage of that act.

The answer also stated: "And the general assembly of Kentucky, further recognizing the property rights of this defendant under his said contract, by an act of the general assembly of the state approved May 12, 1884, enacted that the general council of the city of Louisville should by ordinance provide for the payment of $200 per annum for every lottery office or agency therefor in the city of Louisville, which ordinance was accordingly passed by the general council of the city of Louisville, and is now a valid and existing law, and this defendant has paid the city of Louisville $200 for each office operated by him, and at the time of the institution of this suit had paid the city of Louisville the sum of $200 for each office he then operated in advance for one year from the time of the issue of the license, and that the said licenses thus obtained have not yet expired."

The defendant, in addition, pleaded *res judicata* in respect of the matters involved in this action. This defense is thus set forth: "The defendant further states that after the making of the contract between the city of Frankfort and said E. S. Stewart, as set forth in the second paragraph hereof, the commonwealth of Ken-
494] tucky, by her attorney general, *filed a petion in the Franklin circuit court against the city of Frankfort, the said E. S. Stewart and others, in the nature of a writ of quo warranto, alleging in said petition that the said E. S. Stewart and others claiming under him were selling lottery tickets under the said grant, claiming under the contract referred to in the second paragraph herein; and further alleged that the said board of councilmen of the city of Frankfort had no title to said lottery franchise and had no authority to sell and convey the scheme as set forth in said contract, and that the defendants in said action were engaged in selling tickets under said contract in violation of law, and that the exercise of the privileges by them was injurious to public morals by tempting the people into the immoral habit of gaming, and that the said defendants were usurping the franchise, all of which matters and things are now relied upon in this action and are the identical matters for which relief is sought in this case; and that by the said petition the plaintiffs herein sought in said action to enjoin and oust the defendants therein from proceeding further to sell tickets and operate the lottery privileges claimed by them, which are the identical rights claimed herein, and the court was asked to hold the said franchise void and to annul and adjudge as canceled all rights of the defendants therein; that said defendants filed their answer in said case and joined issue upon the allegations of the said petition; that thereafter, upon motion of the commonwealth of Kentucky, the said action was transferred from the Franklin circuit court to the Oldham circuit court; that in the said case such proceedings were had that the court finally entered a judgment declaring that under the act of March 16, 1869, referred to in paragraph 2 hereof, the city of Frankfort and the board of councilmen of said city did obtain the legal title to said lottery franchise and the classes thereof; and further, that the said city of Frankfort, under the act of March 28, 1872, referred to in paragraph 2, were authorized to sell and dispose of said scheme upon such terms as they deemed proper, and that said act was constitutionally valid and binding and authorized such sale and transfer, and that the contract made between the city of Frankfort and the said E. S. Stew-
495] *art, which is the same contract relied upon herein, was a valid and subsisting obligation and enforceable as a legal obligation. From said judgment of the Oldham circuit court, the commonwealth of Kentucky prayed an appeal to the court of appeals of Kentucky, and the said court of appeals of Kentucky, on the 27th day of February, 1878, entered a judgment affirming the judgment of the Oldham circuit court, and adjudged in said action that the general assembly of the commonwealth of Kentucky by the act of March 16, 1869, did confer upon the board of councilmen of the city of Frankfort the said lottery franchise, and that the said act was valid, and that the city of Frankfort, by reason thereof, was the owner of the scheme named in the contract referred to, and that under the act of March 28, 1872, the city of Frankfort had the legal right to sell and dispose of the same upon such terms and conditions as it deemed proper, and that the said sale to the said E. S. Stewart and the contract in relation thereto was binding and valid, and had been entered into in strict conformity with the said acts of the general assembly. A copy of the pleadings in said case and the opinions and judgments of said courts will be filed herewith as a part hereof. The defendant says that by reason of the proceedings in said action and the judgments of the courts thereupon the plaintiff is barred from bringing or maintaining this action; that the legality of the act of March 28, 1872, and the validity of the contract of E. S. Stewart with the city of Frankfort are matters *res judicata* by reason of said judgment, and he pleads and relies upon the same herein."

The Federal question presented for our determination arises upon the claim of the plaintiff in error—which was denied by the final judgment of the highest court of Kentucky—that the agreement between the city of Frankfort and E. S. Stewart, by which the latter became the owner of the lottery scheme devised by that city, under the authority of law, was a contract the obligation of which the state was forbidden by the Constitution of the United States to impair either by legislative enactment or by constitutional provision.

If this interpretation of the Federal Constitution be correct, *it will follow that any [496 provision in the Constitution or in the statutes of Kentucky forbidding lotteries and gift enterprises in that commonwealth, and revoking the lottery privileges or charters theretofore granted, is null and void as to the defendant Douglas, who succeeded to the rights acquired by Stewart under the agreement of 1875 with the city of Frankfort. This necessarily results from the declaration that the Constitution of the United States is the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding.

This court had occasion many years ago to say that the common forms of gambling were comparatively innocuous when placed in contrast with the widespread pestilence of lotteries; that the former were confined to a few persons and places, while the latter infested the whole community, entered every dwelling, reached every class, preyed upon the hard earnings of the poor, and plundered the ignorant and simple. *Phalen* v. *Virginia*, 49 U. S. 8 How. 163 [12: 1030].

Is a state forbidden by the supreme law of the land from protecting its people at all times from practices which it conceives to be attended by such ruinous results? Can the legislature of a state contract away its power to establish such regulations as are reasonably necessary from time to time to protect the public morals against the evils of lotteries?

These questions arose and were determined, upon much consideration, in *Stone* v. *Mississippi*, 101 U. S. 814, 819, 821 [25: 1079, 1080, 1081].

It will be seen from the report of that case

that the legislature of Mississippi chartered the Mississippi Agricultural, Educational,& Manufacturing Aid Society, with authority to raise money by way of lottery; and in consideration thereof the society paid $5,000 into the treasury of the state, and agreed to pay, and did pay, an annual tax of $1,000, together with ½ of 1 per cent on the amount of receipts derived from the sale of certificates. While the society's charter was in force, the state adopted a new Constitution declaring that the legislature should never authorize a lottery, nor should the sale of lottery tickets be allowed nor any lottery theretofore authorized be permitted to be drawn or tickets therein be **497**]*sold. This was followed by the passage of an act prohibiting lotteries,and making it unlawful to conduct one in the state. The question was then raised by an information in the nature of quo warranto, whether the lottery privilege given by the society's charter could be withdrawn or impaired by the state legislation—that society having, as was conceded, complied with all the conditions upon which its charter was granted. The supreme court of Mississippi held that the state could withdraw the lottery privilege which it had granted. And that conclusion was questioned upon writ of error sued out from this court.

Chief Justice Waite, who delivered the unanimous judgment of the court in that case, said: "The question is therefore directly presented, whether, in view of these facts, the legislature of a state can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot devest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." Again, referring to lotteries: "They disturb the checks and balances of a well ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, 'by the casting of lots, or by lot, chance, or otherwise,' might be 'awarded' to them from the accumulations of others. Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Anyone, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity and through their properly constituted **498**]agencies,may*resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the state. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal."

It is suggested that, in important particulars, the opinion and judgment in *Stone* v. *Mississippi* was modified by the decision in *New Orleans* v. *Houston*, 119 U. S. 265, 275 [30: 411, 414]. So far from this being true the principles announced in the former case were recognized and held to have no application in the latter case. In *New Orleans* v. *Houston* the question was whether the legislature of Louisiana could destroy or impair a lottery charter granted and authorized by the Constitution of that state. This court, speaking by Mr. Justice Matthews, said: "It is undoubtedly true that no rights of contract are or can be vested under this constitutional provision which a subsequent Constitution might not destroy without impairing the obligation of a contract, within the sense of the Constitution of the United States, for the reason assigned in the case of *Stone* v. *Mississippi*. But an ordinary act of legislation cannot have that effect, because the constitutional provision has withdrawn from the scope of the police power of the state, to be exercised by the general assembly, the subject-matter of the granting of lottery charters, so far as the Louisiana State Lottery Company is concerned, and any act of the legislature contrary to this prohibition is upon familiar principles null and void. The subject is not within the jurisdiction of the police power of the state, as it is permitted to be exercised by the legislature under the Constitution of the state." So that in *New Orleans* v. *Houston* it was decided that while a lottery grant was not a contract within the meaning of the Federal Constitution, the obligation of which was protected against impairment by the state making the grant, the legislature could not strike *down a lottery which the funda-[**499** mental law of the state had authorized.

In the argument on behalf of the plaintiff in error much stress was laid upon former decisions of the court of appeals of Kentucky relating to rights acquired under lottery grants. Our attention has been particularly called to *Gregory's Exrx.* v. *Trustees of Shelby College Lottery*, 2 Met. (Ky.) 589, 598. From the report of that case it appears that the legislature of Kentucky in 1838 granted to Shelby College the privilege of raising the sum of $100,000 by lottery, with authority to sell or dispose of the scheme or any classes of the lottery. In 1855 the provision of the Revised Statutes, declaring that all lottery privileges should cease, took effect. And the question arose as to the effect of that enactment upon the rights of one who had loaned money to the college upon the faith of the lottery grant, and to secure the loan had taken from the trustees of the institution a mortgage upon their rights under the lottery franchise. The court of appeals of Kentucky, conceding that the grant of a privilege to raise money by a lottery was a mere gratuity, was not an act of incorporation, conferred no charter rights, and did not amount to a contract, proceeded: "Although, therefore, the legislature has the power to repeal the grant of a lottery privilege where no rights have accrued under it, and though lot-

teries have a demoralizing tendency and exercise a very pernicious influence over the ignorant and credulous part of the community, and for this reason have been almost universally denounced by the law-making power in the different states of the Union, yet if rights have been acquired or liabilities incurred upon the faith of the privilege conferred by the grant, it would be obviously unjust to permit such rights to be devested by a legislative revocation of the privilege. If, therefore, any vested rights have been acquired under the present grant, before the passage of the repealing law, then, to the extent of such rights at least, that law must be regarded as unconstitutional and inoperative. This conclusion is, we think, fully sanctioned by the following ad-
500 judged cases: **Dartmouth College* v. *Woodward*, 17 U. S. 4 Wheat. 518 to 643 [4: 629 to 660]; *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 88 [3: 163]; *University of Maryland* v. *Williams*, 9 Gill & J. 365 [31 Am. Dec. 72]; *Terrett* v. *Taylor*, 13 U. S. 9 Cranch, 43, 52 [3: 650, 655]; *City of Louisville* v. *University of Louisville*, 15 B. Mon. 642, 692. The plaintiff, Waller, before the repealing act was passed, had, on the faith of the lottery grant, advanced large sums of money, which were appropriated by him for the benefit of Shelby College, and the trustees of the college had mortgaged to him their rights under the lottery franchise for his indemnity. As the lottery privilege was granted for the benefit of Shelby College, and the money was advanced by Waller with the assent of the trustees of the college, under the belief that it would be realized eventually from the lottery, he became thereby invested with the right to the use of the grant until from such use the sum was produced which he had advanced for the benefit of the college. This was a vested right of which he could not be devested by an act of the legislature. So far, therefore, as the repealing statute interferes with or affects this right, it is unconstitutional and inoperative." These principles were recognized in cases subsequently decided by the same court.

The defendant insists that his rights, having been acquired when these decisions of the highest courts of Kentucky were in full force, should be protected according to the law of the state as it was adjudged to be when those rights attached. But is this court required to accept the principles announced by the state court as to the extent to which the contract clause of the Federal Constitution restricts the powers of the state legislatures? Clearly not. The defendant invokes the jurisdiction of this court upon the ground that the rights denied to him by the final judgment of the highest court of Kentucky, and which the state seeks to prevent him from exercising, were acquired under an agreement that constituted a contract within the meaning of the Federal Constitution. This contention is disputed by the state. So that the issue presented makes it necessary to inquire whether that which the defendant asserts to be a contract was a contract of the class to which the Constitution of the United States refers. This court must determine—indeed, it cannot, consistently with its duty, refuse to
501]determine—upon its own responsibility, in each case as it arises, whether that which a party seeks to have protected under the contract clause of the Constitution of the United States is a contract the obligation of which is protected by that instrument against hostile state legislation.

In *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 1 Black, 436, 443 [17: 173, 177], which involved the contract clause of the Constitution, it was contended that this court should accept as conclusive the interpretation placed by the supreme court of Ohio upon the Constitution and laws of that state as affecting certain state legislation which, it was alleged, constituted a contract, the obligation of which could not be impaired by legislation. Mr. Justice Wayne, delivering the unanimous judgment of the court, said: "The constructions given by the courts of the states to state legislation and to state Constitutions have been conclusive upon this court, *with a single exception*, and that is when it has been called upon to interpret the contracts of states, 'though they have been made in the forms of law,' or by the instrumentality of a state's authorized functionaries in conformity with state legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the supreme court of a state, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation if this court could not decide, independently of all adjudication by the supreme court of a state, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the supreme court of a state? It never was intended, and cannot be sustained by any course of reasoning, that this court should or could with fidelity to the Constitution of the *United States follow the [**502** construction of the supreme court of a state in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the supreme court of a state upon such a contract, whether it be one claimed to be such under the form of state legislation, or has been made by a covenant or agreement by the agents of a state, by its authority."

The doctrine that this court possesses paramount authority, when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, to determine for itself the existence or nonexistence of the contract set up, and whether its obligation has been impaired by the state enactment, has been affirmed in numerous other cases. *Ohio Life Ins. Co.* v. *Debolt*, 57 U. S. 16 How. 416, 451 [14: 997, 1011]; *Wright* v. *Nagle*, 101 U. S. 791, 794 [25: 921, 922]; *Louisville Gas Co.* v. *Citizens' Gaslight Co.* 115 U. S. 683, 697 [29:

510, 515]; *Vicksburg, S. & P. Railroad Co.* v. *Dennis*, 116 U. S. 665, 667 [29: 770, 771]; *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18, 36 [31: 607, 614]; *Bryan* v. *Board of Education*, 151 U. S. 639, 650 [38: 297, 302]; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 493 [38: 793, 796]; *Bacon* v. *Texas*, 163 U. S. 207, 219 [41: 132, 137].

In view of these adjudications it is clear that we are not required to accept as authoritative in this case the decision of the court of appeals of Kentucky in *Gregory's Exrx.* v. *Trustees of Shelby College Lottery*, above cited, to the effect that a legislative revocation of a lottery grant is a violation of the Constitution of the United States so far as such revocation affects rights acquired on the faith of the privilege conferred by the grant, and the exercise of which involves the continuance of that privilege for such time as may be necessary for the full enjoyment of those rights. On the contrary, we hold that a lottery grant is not, in any sense, a contract within the meaning of the Constitution of the United States, but is simply a gratuity and license which the state, under its police powers, and for the protection of the public morals, may at any time revoke, and forbid the further conduct of the lottery; and that no right acquired during the life of the **503]** grant, on the faith of or by *agreement with the grantee, can be exercised after the revocation of such grant and the forbidding of the lottery, *if its exercise involves a continuance of the lottery as originally authorized.* All rights acquired on the faith of a lottery grant must be deemed to have been acquired subject to the power of the state to the extent just indicated; nevertheless, rights acquired under such a grant consistently with the law as it was when they were so acquired, and which rights may be exercised and enjoyed without conducting a lottery forbidden by the state, are, of course, not affected, and could not be affected, by the revocation of such grant. Here the defendant insists that as the agreement under which Stewart became the owner of the Frankfort lottery scheme was lawful when made, he, as assignee of Stewart, is protected by the Constitution of the United States in carrying on that lottery, despite the prohibition of all lotteries and the revocation of all lottery grants by the present Constitution of Kentucky adopted after the transfer to Stewart of the benefit of that scheme. For the reasons stated, this contention must be overruled. It could not be sustained without overruling *Stone* v. *Mississippi*, which we have no inclination to do.

Some stress has been laid by counsel upon the fact that, in an action brought by the state in the nature of quo warranto against the city of Frankfort, and which was determined upon appeal by the court of appeals of Kentucky on the 27th day of February, 1878, it was adjudged that the contract between that city and Stewart was a valid and binding contract; and, consequently, the state is barred, upon the principle of *res judicata*, from maintaining the present action. The opinion in that case has not been published in the regular reports, but a copy of it appears in the record. It is sufficient, in answer to the contention of the defendant, to say that the case referred to, as appears from the opinion of the state court, involved nothing more than the validity of the agreement of 1875 between the city of Frankfort and Stewart, under the law as it was when such agreement was made, and did not necessarily involve any inquiry as to the power of the state, by legislative or constitutional provision, and without violating *the clause of the **[504** Constitution of the United States prohibiting the passage of state laws impairing the obligation of contracts, to revoke an existing lottery grant and prohibit all lotteries within its limits. The thing adjudged in the case referred to fully appears from the statement made by the court of appeals of Kentucky of the conclusion which it reached, namely: "We therefore conclude that the legislature of 1869 conferred on the board of councilmen of the city of Frankfort franchises, powers, and authority equal or exactly similar to those that had by the act of 1838 been conferred on the managers, which include the privilege of raising $100,000 by operating a lottery." A decision that the agreement between the city of Frankfort and Stewart was, when made, valid under the laws of Kentucky, did not determine, as between the state and those asserting rights under that agreement, that the state could not, by subsequent legislative enactment or by constitutional provision, and so far as the Constitution of the United States was concerned, prohibit all lotteries, and thereby prevent the exercise by those asserting the right under or by virtue of that agreement, to carry on a lottery against the expressed will of the state.

We have felt some embarrassment arising from the conflict between the present decision and the former decisions of the highest court of Kentucky upon the general subject of lotteries, and as to the power of the state, by contract, to so tie its hands that it may not revoke, in its discretion, grants of lottery privileges, and prohibit the carrying on of all lotteries. But that embarrassment has been greatly lessened by the fact that that court, in its opinion in the present case, after referring to *Stone* v. *Mississippi*, said: "It seems to us that this decision defining the provision of the Federal Constitution as to what subjects are contracts and protected by it, and that lottery grants, though paid for, are not protected by said provision, is binding upon this court, and has the effect to overrule its decisions holding the contrary view. But apart from the binding force of the decision, it seems that its logic is conclusive and convincing in drawing the distinction between the contractual *and gov- **[505** ernmental power of the states, to wit, that the provisions of the Federal Constitution in reference to contracts only inhibits the states from passing laws impairing the obligations of such contracts as relate to property rights, but not to subjects that are purely governmental." In the same opinion it was well observed that, under any other doctrine than that announced in *Stone* v. *Mississippi*, the legislature, by giving or bartering away the power to guard and protect the public morals, could "convert the state into dens of bawdy houses, gambling shops, and other places of vice and demoralization, provided the grantees paid for the privileges, and thus deprive the state of its power to repeal the grants and all control of

the subjects as far as the grantees are concerned, and the trust duty of protecting and fostering the honesty, health, morals, and good order of the state would be cast to the winds, and vice and crime would triumph in their stead. Now, it seems to us that the essential principles of self-preservation forbid that the commonwealth should possess a power so revolting, because destructive of the main pillars of government."

We perceive no error in the judgment of the Court of Appeals of Kentucky, and it is affirmed.

Mr. Justice **Shiras** agrees that the judgment should be affirmed, but does not concur in all the reasoning of this court.

UNITED STATES, *Plff. in Err.*, *v.* UNION PACIFIC RAILWAY COMPANY *et al.*

(See S. C. Reporter's ed. 505-513.)

Certificate for instruction.

A certificate of questions whether or not the United States can recover from a railroad company or its receivers the whole or any part of moneys paid by the United States to Indians for improvements upon lands sold to a railroad company, or for moneys paid to individual Indians on account of a right of way through lands of their tribe, is insufficient, as it does not present distinct points or propositions of law which can be distinctly answered without regard to the other issues of law involved, but brings up the whole case for consideration and disposition; and as the answers to the questions will require the construction of various Indian treaties, of the Pacific Railroad acts, and the consolidation of railroad companies.

[No. 133.]

Argued December 2, 1897. Decided December 13, 1897.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit certifying to this court certain questions and propositions of law for its decision in an action brought by the United States in the Circuit Court of the United States for the District of Kansas against the Union Pacific Railway Company *et al.* to recover certain amounts due from said railroad company, its successors or assigns, under a treaty with the Delaware tribe of Indians, and for damage done the said Indians in the destruction and taking of property by said company to reimburse the United States for moneys appropriated. *Certificate dismissed.*

Statement by Mr. Chief Justice **Fuller:**

This was a suit brought by the United States in the circuit court of the United States for the district of Kansas against the Union Pacific Railway Company and its receivers, as directed by the act of July 13, 1892 (27 Stat. at L. 126, chap. 164), to recover certain amounts "found by the Department of the Interior to be due from said railroad company, its successors or assigns, under the last paragraph of the 2d article of the treaty with the Delaware Tribe of Indians of May 30, 1860, and under the concluding clause of the 3d article of said treaty, and for damage done the said Indians in the taking and destruction of the property by said railroad company, which sums when recovered shall be used to reimburse the United States for the sum appropriated in the foregoing paragraph."

That sum was $39,675.16, of which $10,715.75 was to be paid to individual members of the Delaware tribe for improvements on lands sold to the Leavenworth Company, and $28,959.41 was to be paid to individual members of the tribe for right of way through their allotted lands.

The first count of the petition alleged that in the year 1831, and for a long time prior thereto, the United States were the owners in fee simple of all the lands lying north of the Kansas and west of the Missouri rivers, in the then territory of Kansas, and that by the terms of the treaty made between the United States and the Delaware Indians, proclaimed March 24, 1831, the United States conveyed and secured to that nation, as a permanent home, a certain tract, describing it, with an outlet; that afterwards, in the year 1854, by the terms of another treaty, the nation ceded to the United States all their right, title, and interest in and to their country lying west of the state of Missouri, and situate in the fork of the Missouri and Kansas rivers, and also their right and interest in the outlet, with certain designated exceptions.

*It was further averred that articles 11 [507] and 12 of the latter treaty provided that the country reserved for the permanent home of the Delawares might on request be surveyed and allotted; and that roads and highways laid out by authority of law should have a right of way through the reservation; "and railroad companies, when the lines of their roads necessarily pass through the said reservation, shall have the right of way, on payment of a just compensation therefor in money;" that afterwards the Delawares signified their wish that a portion of the lands reserved for their home might be divided and allotted; and thereupon, by the terms of a treaty entered into May 30, 1860, it was provided, among other things, that a portion of the reservation should be surveyed and allotted as stated, and by the last clause of article 2 thereof that "the improve-

NOTE.—*As to definiteness of question to be certified; whole case must not be set up; whole case cannot be split up into distinct points; importance of questions; points of difference; question not general; question not abstract; question to be perfectly stated; question of fact not to be involved; necessary facts to be stated; sufficiency of evidence or indictment; demurrer; what will be considered; questions held proper; Illinois decisions; Iowa decisions; New Jersey decisions; Ohio decisions; Texas decisions; Wyoming decisions; criminal cases; tax cases,*—see note to Waco Water & Light Co. v. Waco (Tex.) 31 L. R. A. 392.

As to jurisdiction of United States Supreme Court in cases certified on division of circuit court; on what division should be,—see note to Webster v. Cooper, 13: 325.

ments of the Indians residing on the lands to be sold shall be valued by the United States, and the individual owners thereof shall receive the amount realized from the sale of the same, to be expended in building other improvements for them on the lands retained." By article 8 it was provided that as to the remaining lands, after the tracts in severalty and those for special objects named in the treaty had been selected and set apart, the Leavenworth, Pawnee, & Western Railroad Company, a Kansas corporation, should have the prior right of purchase upon the payment into the United States Treasury, which payment should be made within six months after the quantity of said land was ascertained, in gold or silver coin, of such a sum as three commissioners, to be appointed by the Secretary of the Interior, should appraise to be the value, and providing that such value should not be placed below the value of $1.25 per acre, exclusive of the cost of survey.

That, upon payment, a patent should be issued directly to the company; that the United States would accept the trust imposed on them and apply the money resulting from such disposition of the lands in the manner prescribed by the treaty of 1854; and it was "also agreed that said railroad company shall have the per-
508] petual right of way over any portion *of the lands allotted to the Delawares in severalty, on the payment of a just compensation therefor, in money, to the respective parties whose lands are crossed by the line of railroad."

It was then alleged that by the terms of the treaty the United States became and were the trustees of the Delawares for the purposes provided for therein; that the Leavenworth Company, prior to 1867, accepted the terms of the treaty and agreed to purchase the unallotted lands of the Delawares and to pay for them and the improvements thereon in accordance therewith; and that all the rights of the company in and to the lands and its liability for the lands and improvements, and all the rights and liabilities of its grantee, successor, and assignee, the Union Pacific Railway Company, were fixed by the terms of said treaties, and that the Leavenworth Company, and its grantee, successor, and assignee, the Union Pacific Railway Company, took the lands "subject to the conditions set forth in said treaties as to the payment therefor and as to the payment for said improvements thereon;" that the United States on October 20, 1860, appointed three commissioners to inspect and appraise the value of the land and improvements which the Leavenworth Company had become entitled to purchase, and they appraised the improvements at the value of $9,534.25, and returned the appraisement, a schedule of which was made part of the petition. But at the time of that appraisement and of the purchase of the lands by the Leavenworth Company there were other improvements not included, which were afterwards appraised at the sum of $1,181.50, and an itemized statement of these improvements was attached.

The United States further averred that the Leavenworth Company was unable to carry out the terms of the purchase of the lands and improvements and pay for the same as provided for in the treaty, and that afterwards a further treaty was made and entered into on or about July 2, 1861, ratified August 6, 1861, which in terms referred to the provisions for the sale of the lands and improvements in the prior treaties, by which last-mentioned treaty it was provided that the *Leavenworth [**509**
Company might execute its bonds with interest coupons attached, the principal sum to be $286,742.15, and execute a mortgage on 100,000 acres of land, as set forth in a letter of the Commissioner of Indian Affairs to the Secretary of the Interior, dated May 29, 1861, said mortgage to be conditioned for the payment of the bonds, both principal and interest, the bonds and mortgage being executed by the company in lieu of the payment previously provided for; but no provision was made in the last-mentioned treaty for any change in the time or manner of paying for said improvements, and the bonds and mortgage were executed to secure the payment of the purchase price of the lands only, exclusive of the value of the improvements, the amount whereof was not included in the mortgage.

It was also averred that through changes in the name of the Leavenworth Company, and through a consolidation by and with other railroad companies, the Union Pacific Railway Company succeeded to all the franchises, property rights, and interests of the said Leavenworth Company, and became and was subject to all the liabilities of that company under and by virtue of the said several treaties, and under and by virtue of the purchase of said Delaware Indian lands and the improvements thereon; that thereafter, by the terms of the treaty entered into on the 4th day of July, 1866, which treaty was ratified on or about the 26th day of July, 1866, in article 1st thereof it was provided "that the United States shall secure and cause to be paid to said Indians the full value of all that part of their reservation, with the improvements then existing on the same, heretofore sold to the Leavenworth, Pawnee, & Western Railroad Company, according to the terms of a treaty ratified August 22, 1860, and supplemental treaties, and in accordance with the conditions, restrictions, and limitations thereof."

That thereby plaintiffs became and were sureties for the payment of the value of said improvements, and trustees for the Delaware Indians to collect and dispose of the money as provided therein; and that neither the Leavenworth Company nor any of its assignees or successors, nor the Union Pacific *Railway [**510**
Company, nor its receivers, defendants herein, have paid for said improvements, and that they remain due and wholly unpaid by defendants.

That by an act of Congress, approved July 13, 1892, there was appropriated and paid to the Delaware Indians the sum of $10,715.75, which sum the United States paid to those Indians as sureties under the treaties and in discharge of the trust created thereby.

And plaintiffs said that by the terms of the treaties and by the acceptance thereof by the Leavenworth Company and its grantee, successor, and assignee, the Union Pacific Railway Company, the latter became and was liable to plaintiffs, as sureties and trustees, for money paid out and expended on behalf of defendants

for said improvements in the sum of $10,715.75, which sum, together with interest thereon from May 30, 1860, was now due and wholly unpaid.

The second count averred that by virtue of the treaties mentioned in the first count, the Leavenworth Company became entitled to a right of way across the Delaware Reservation, and across the lands subsequently allotted in severalty to Delawares on payment of a just compensation therefor; that the United States under the treaties became trustees for the Delawares to collect and account for the amount due them for such right of way and the sureties of the railroad companies for the payment of the same: That the Leavenworth Company under these treaties laid out a right of way and constructed a railroad over and across the reservation and over and across certain parcels of land allotted in severalty to Delaware Indians, and thereby became liable to the United States as trustees for the Delawares for the damages thereby sustained by the latter; that a reasonable compensation for the right of way across the allotted lands amounted to $28,959.41, which amount was ascertained by an appraisement by a commission appointed under the treaty; that the Union Pacific Railway Company was the successor of the Leavenworth Company, and liable for the amount due the Indians for the right of way; that the amount specified was [511] appropriated and paid the *Delaware Indians by the United States under the act of July 13, 1892, as sureties, and was due from the railway company.

To these counts demurrers were sustained by the circuit court and judgment entered in favor of defendants. The case was then carried to the circuit court of appeals for the eighth circuit and that court certified to this court the two counts, the demurrers, and the judgment thereon, and its desire for instruction "upon the following questions and propositions of law arising upon the record in such cause, to the end that it may properly decide said cause:

"First. Upon the facts stated in the first and second counts of said petition, is the United States entitled to recover from the Union Pacific Railway Company, or the receivers thereof, the whole or any part of the sum of $10,715.75, heretofore paid by the United States to the Delaware Indians, pursuant to the act of Congress of July 13, 1892 (27 Stat. at L. 126, chap. 164), for improvements upon lands sold to the Leavenworth, Pawnee, & Western Railroad Company?

"Second. Upon the facts stated in the first and second counts of said petition, is the United States entitled to recover from the Union Pacific Railway Company, or the receivers thereof, the whole or any part of the sum of $28,954.41, heretofore paid by the United States to individual members of the tribe of Delaware Indians, pursuant to the provisions of the act of Congress of July 13, 1892, for and on account of right of way though allotted lands belong to members of said tribe, which right of way was secured by the Leavenworth, Pawnee, & Western Railroad Company, in accordance with the concluding clause of article 3 of a treaty concluded with the tribe of Delaware Indians on May 30, 1860?

"Third. Upon the facts stated in the first and second counts of said petition, were the demurrers thereto properly sustained?"

Mr. **John K. Richards,** Solicitor General, for plaintiff in error.

Messrs. **John F. Dillon,** *A. L. Williams,* and *Harry Hubbard* for defendants in error.

*Mr. Chief Justice **Fuller** delivered [512 the opinion of the court:

It is settled that the certification provided for in §§ 5 and 6 of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517), is governed by the rules laid down in respect of certificates of division under the Revised Statutes. *Columbus Watch Company* v. *Robbins*, 148 U. S. 266 [37: 445]; *Maynard* v. *Hecht*, 151 U. S. 324 [38: 179]; *Graver* v. *Faurot*, 162 U. S. 435 [40: 1030]; *Cross* v. *Evans*, 167 U. S. 60 [42: 77].

By those rules as repeated in these cases from prior decisions, each question had to be a distinct point or proposition of law, clearly stated, so that it could be distinctly answered without regard to the other issues of law in the case; to be a question of law only, and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case; and could not embrace the whole case, even where its decision turned upon matter of law only, and even though it was split up in the form of questions. *Fire Insurance Asso.* v. *Wickham*, 128 U. S. 426 [32: 503]; *Dublin Township* v. *Milford Savings Institution*, 128 U. S. 510 [32: 533].

The questions propounded in this certificate do not present distinct points or propositions of law, clearly stated, so that each could be distinctly answered without regard to the other issues of law involved, and they obviously bring the whole case up for consideration and disposition.

Elaborate argument on behalf of the government was made at the bar, dealing with the Delaware treaties of 1831, 1854, 1860, 1861, and 1866, and the construction of various provisions thereof; with the construction of the Pacific Railroad act of July 1, 1862 (12 Stat. at L. 489, chap. 120); and also with the legislation in relation to the incorporation of the Leavenworth, Pawnee, & Western Railroad Company; its change of name; and consolidation with other railroad companies, under the name of the Union Pacific Railway Company. Laws Kan. 1855, p. 914; Act of July 2, 1864 (13 Stat. at L. 356, chap. 216); Resolution of March 3, 1869 (15 Stat. at L. 348); Act of March 3, 1869 (15 Stat. at L. 324, chap. 127).

*Defendants in error contended that [513 the petition was fatally defective in respect of any ground of liability for the improvements; that there was no sale of the improvements separate from the lands; that the stipulated patent carried title to the improvements with the lands; that by § 2 of the Pacific Railroad act of July 1, 1862, the United States granted the right of way through the reservation and undertook to extinguish the Indian title; that the grant was of a free right of way, and the

United States were estopped by it from maintaining the second cause of action; that this question was *res judicata* by the judgment of the supreme court of Kansas in *Grinter* v. *Kansas Pacific Ry. Co.* 23 Kan. 642; that the line of the Kansas Pacific Company upon the right of way in question was not the line of the Leavenworth, Pawnee, & Western Railroad Company or its successor, but of an independent corporation created by an act of Congress; and that even on the theory of the government the defense of laches and limitations was available and formed a complete bar.

To answer the questions certified would require us to consider the several matters thus pressed on our attention; to pass upon questions of law not specifically propounded; and to dispose of the whole case. It follows that the certificate is insufficient under the statute.

Certificate dismissed.

SPRINGER LAND ASSOCIATION *et al.*, *Appts.*, *v.* PATRICK P. FORD.

(See S. C. Reporter's ed. 513 532.)

Lien claimant's statement—sufficiency of claim—more claimed than due—lands subject to lien—lien for irrigation ditch.

1. A lien claimant's "statement of his demands after deducting all just credit and offset," as required by N. M. Comp. Laws, § 1524, is sufficiently made by stating the amount of balance due after deducting just credits and offsets, for excavating and embankments made under a specific contract, of which a copy is attached to the claim, although it does not state the details of the transaction, or the payments that have been made, or that there had been an estimate and acceptance by the engineer who was to give certificates of performance.
2. A claim of lien naming the person by whom the claimant was employed, and stating the names of the owners or reputed owners of the lands, is not insufficient under N. M. Comp. Laws, § 1524, because it does not state the authority of the person who employed him.
3. The fact that a lien is claimed for a greater sum than is actually owing or is actually covered by the lien does not vitiate the claim when honestly made.
4. The area of land subject to a lien depends on the character of the improvement for which the lien is claimed.
5. A lien for an irrigation ditch extends to the tract of land necessary to a convenient use of the improvement for the purposes contemplated in its construction and benefited thereby.

[No. 89.]

Argued November 5, 8, 1897. Decided December 13, 1897.

APPEAL from a decree of the Supreme Court of the Territory of New Mexico affirming the decree of the District Court of New Mexico for the County of Colfax in an action to foreclose a mechanic's lien upon an irrigating ditch and reservoir system, the land covered thereby, and the lands intended to be irrigated, the decree being in favor of Patrick P. Ford, plaintiff, against the Springer Land Association *et al.*, for the amount of the lien. *Affirmed.*

See same case below, 41 Pac. 541.

Statement by Mr. Chief Justice **Fuller:**

*This was a bill filed by Patrick P. Ford [515 against the Springer Land Association and others in the district court of New Mexico for the county of Colfax, to foreclose a mechanic's lien upon an irrigating ditch and reservoir system; the land covered thereby, the right of way therefor, and the particular lands intended to be irrigated. A cross bill was filed by the Springer Land Association and other defendants. The cause was heard on pleadings and proofs, and on findings of fact and conclusions of law duly made and filed, the district court entered a decree in favor of Ford adjudging a lien for the sum of $22,097.75, with interest and costs, on the ditch and reservoirs in question, together with the right of way, specifically describing them, and also on 22,000 acres of land appurtenant to the ditch and to be irrigated thereby, specifying forty-six sections in four designated townships.

It was further decreed that the Springer Land Association and other defendants pay or cause to be paid the sum found due, with interest and costs ($3,000 thereof to be paid to the clerk of the court), within ninety days, and in case of default that the property be sold by a special master and the proceeds distributed as prescribed, $3,000 to be retained by the clerk of the court to await the determination of a suit by Dargle, a subcontractor, to recover the amount of $2,279.30, with interest and costs, or its payment and discharge by Ford. If a surplus was realized at the sale it was to be held subject to the further order of the court; if a deficiency resulted, the amount was to be reported by the master to the court.

The case was carried to the supreme court of the territory, which found the facts, in substance, to be these:

On October 26, 1888, the Springer Land Association entered into a contract with Patrick P. Ford for the grading work in the construction of a certain ditch line and reservoir system for irrigation in Colfax county, New Mexico, which contract and the specifications forming part of it were set forth at length.

The contract provided: "The party of the first part agrees to furnish all necessary tools

NOTE.—*As to when a lien or right to a lien is assignable*, see note to Davis v. Bilsland, 21: 969.

As to priority between mortgage and mechanics' lien, see note to Brooks v. Burlington & S. W. R. Co. 25: 1057.

As to filing account for lien in two bills of particulars, see note to Smith v. Neubauer (Ind.) 33 L. R. A. 685.

As to filing statement of lien on each county, see note to Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co. (C. C. A. 6th C.) 34 L. R. A. 625.

As to right to file a single mechanics' lien against several buildings, see note to Wilcox v. Woodruff (Conn.) 17 L. R. A. 314.

As to who are laborers within statute for lien, see note to Tod v. Kentucky U. R. Co. (C. C. A. 6th C.) 18 L. R. A. 305.

As to priority of mechanics' lien, see note to Bohn Mfg. Co. v. Kountze (Neb.) 12 L. R. A. 33.

516]and labor and perform all the *work of grading required in the construction of the Cimarron ditch and its accessories. Said work to be done in a thorough and workmanlike manner, and in full accordance with the specifications hereto attached and made a part of this contract. Said first party agrees to begin work within ten days after signing this contract, and to complete the same on or before July 1, 1889. The party of the second part agrees to pay said first party for work so done at the rate of 11 cents per cubic yard, without classification. And the amounts due for said work shall be paid at the time and in the manner described in the specifications hereto attached."

Specification 11 related to allowance for extra work when done under the orders of the engineer.

Specifications 13 and 15 were:

"13. Subcontracts.— Subcontracts must be submitted to the engineer, and receive his approval, before work is begun under them. No second subcontractor will be allowed. Subcontractors will be bound by the same specifications as the contractor, and will be equally under the authority of the engineer."

"15. Estimates.—On or about the 1st day of each current month, the engineer will measure and compute the quantity of material moved by the contractor during the preceding month; he will certify the amount to the company, together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary delay, and the amount thereof, less ten (10) per cent retained, will be paid to the contractor in cash within ten days thereafter. This retained percentage will be held by the company as a guarantee for the faithful completion of the work, and will be paid in full with the final estimate upon the certificate of the engineer accepting and approving the work, it being expressly understood that the failure of the contractor to fulfil his obligations will work a forfeiture of this retained percentage to the company. The amount due to the contractor under the final estimate will only be paid upon satisfactory showing that the work is free from all danger, from liens or claims of any kind, through failure on his part to liquidate his just indebtedness as connected with this work."

517] *"Previous to the making of the last-mentioned contract and on May 1, 1888, the Maxwell Land Grant Company made a contract with C. C. Strawn and associates, who afterwards organized the Springer Land Association, which succeeded to their rights and obligations, by which the Maxwell Company gave to them a right of way for the proposed irrigation system of ditches and reservoirs, and by which said agreement it was, among other things, provided that with the view of selling certain of its lands at an enhanced value, and in consideration of certain perpetual water rights and franchises, to be granted to it by the other party, it agreed to set apart and reserve from sale 22,000 acres of its lands, to be selected by the other party, and give to the other party a certain portion of the proceeds which might be derived from the sale of said lands when sold. These lands were under the proposed ditch system and to be irrigated by it, and by this agreement Strawn and his associates were to expend about $60,000, or a sufficient sum, to complete the enterprise on the proposed plan." This contract was set forth *in extenso*.

"The title of the lands at that time and at all times afterwards was and remained in the Maxwell Land Grant Company, except as to the rights acquired by Strawn and associates and their successors in interest under said contract. The same contract constituted Strawn and his associates and successors in interest the agents of the Maxwell Company to the extent of and for the purpose of carrying into effect the spirit and intent of the contract as to the sale of the said lands, but that party, the Springer Land Association, had no other title in the lands than as given by said contract.

"Five days subsequent to the making of his grading contract complainant Ford entered into another contract with the Springer Land Association by which he agreed to select and accept one section of land under the proposed ditch system at the stipulated price of $8,000, to be taken as part payment on the contract price for Ford's grading work, by way of deduction of that sum from the final estimates on the contract for the construction of said ditch.

"The contract of May 1, 1888, designated one E. H. Kellogg *as the engineer to [518 have charge of the construction of said system of ditches and reservoirs. No engineer was named in the contract between Ford and the Springer Land Association of October 26, 1888, but said Kellogg, with the assent of all parties, acted throughout as the supervising engineer.

"Ford let subcontracts for portions of the work to McGarvey, Dargle, and Haynes."

That with Dargle was given in full, and the three were of like form and tenor and approved by the engineer. Each contained this clause: "It is mutually agreed that the amounts of these subestimates will in no case be demanded or paid in advance of the payment of the regular estimate."

Estimates, as provided by the contract of October 26, 1888, were made by the supervising engineer from time to time, which were audited and paid by the Springer Land Association up to about May, 1889.

Estimate No. 6 was dated April 30, 1889, and showed the amount then due and payable, after reserving 10 per cent, to be $5,010.92. The amount of this estimate has never been paid.

June 13, 1889, the engineer gave Ford a written acceptance of the work and a final estimate, set forth at large in the findings. The total amount payable under the contract was $48,553.56. The six prior estimates aggregated $35,928.03, and the last and final estimate was for $12,625.53, but as the sixth estimate of $5,010.92 had not been paid the total amount due was $17,636.45.

"This amount the Springer Land Association refused to audit and pay on the ground that the sum so stated was in excess of the amount due; that the work had not been completed according to contract; that the engineer's final estimate was erroneous either through fraud, inadvertence, or mistake, because the subcontractors had not been paid the

several sums due them on the work by Ford, and that the property was not free from danger from liens, and also that Ford should accept the section of land which he had agreed to accept and which he had previously selected in payment of $8,000 of the amount of such final estimate.

"The Springer Land Association procured to
519] be made and *properly executed a deed of conveyance by the Maxwell Land Grant Company, which held the title, to Patrick P. Ford, conveying to him the section of land which had been selected by said Ford, and had the said deed present in the hands of an agent of said Maxwell Company on June 19, 1889, when the representative of the Springer Land Association, said Ford, and his subcontractors met for final settlement; said deed to be delivered to said Ford upon payment to the agent of said Maxwell Company by the Springer Land Association of $4,000. The representative of the Springer Land Association had with him at that time, for the purpose of making settlement with Ford, currency and valid checks on a responsible Chicago bank for $17,000. He notified said agent and Ford that he was ready to pay the $4,000 to the agent of the Maxwell Company for the deed if Ford would settle with his subcontractors. Ford examined the deed and made no objection to it. McGarvey, one of the subcontractors then present, claimed that Ford owed him about $4,000, which Ford disputed as to $300 of it. Ford would not settle unless McGarvey would accept the amount he admitted and give him a receipt in full, which McGarvey refused to do, and claimed that he had a lien on the ditch and reservoir for the amount of his claim. The agent of the Springer Land Association offered to pay the subcontractors directly if Ford would agree with them as to the amounts due them. No settlement was made between Ford and McGarvey. McGarvey then informed the agent of the Springer Land Association that the work was not done according to contract, upon which the latter disputed the correctness of the final estimate and ultimately refused to audit the same. The said disagreement between Ford and subcontractor McGarvey was one of the reasons why the deed was not delivered to Ford. The representative of the Springer Land Association did not tender to the agent of the Maxwell Company the amount due it upon said deed, and that no sufficient tender of the deed was made to Ford to require him in law to accept it."

The sums claimed by the several subcontractors at that time amounted to $7,537.72.

520] *Thereupon, on July 3, 1889, complainant Ford filed his notice of claim of lien for $17,634.27 alleged to be due on the contract, including all moneys due subcontractors at that time; and $390 for extra work.

This claim asserted a lien on the ditch and right of way and the 22,000 acres of land to secure the payment of said two sums according to the contract, a copy of which and the specifications was attached to and made part of the claim; stated when the work was commenced, completed, and accepted; made the Springer Land Association and others, and the Maxwell Land Grant Company and others, parties to the notice; gave the Maxwell Land Grant Company and others as the reputed owners; stated that claimant was employed to do the work "by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn as president;" and that "the terms, time given, and conditions of said contract are those that fully appear in the copy of the said contract which is attached hereto and made a part hereof." It was properly verified, duly filed and recorded, and action commenced within the statutory time.

McGarvey and Dargle, subcontractors, filed notices of liens and commenced suits, and Dargle's suit was pending at the date of the decree.

The findings continued:

"It appears by the admissions in the pleadings and from the testimony that the 22,000 acres of land outside of the ditches and reservoirs and the right of way for the same were appurtenant to said ditch and reservoirs—were under said ditch and to be irrigated thereby; that the same were included within the sections described in the notice of lien and bill of complaint. It does not appear that the particular sections described were selected or segregated by the Springer Land Association under its contract of May 1, 1888, as capable of irrigation, and it does appear that in a number of the said sections only portions of the section were selected, because a number of them were not flooded or situated so as to be overflowed with water or irrigated from the ditch. All of said *sections were situated[521 between the line of said ditch and the river, and were enhanced in value by reason of its construction.

"It appears that complainant Ford paid to his several subcontractors all amounts due them under the first five monthly estimates, but at the time of the commencement of this suit had not paid what was due them under the sixth estimate (May, 1889) nor under the final estimate of June 13, 1889."

It was also found that there was no collusion between Ford and the engineer as charged in the cross bill; that the acceptance by the engineer was conclusive, and the amount shown by his estimates correct.

The decree was affirmed (41 Pac. Rep. 541) and an appeal was then taken to this court.

Errors were assigned as follows:

"1. That the claim or notice of lien to foreclose which this suit was brought was insufficient in law to create a lien.

"2. That the amount claimed and adjudged as a lien was excessive, and included claims not due or payable.

"3. That the final estimate was not payable by reason of the existence of liens of subcontractors.

"4. That defendant should be entitled to be credited with the sum of $8,000 on the final estimate, on account of land which was to have been taken in payment thereon.

"5. That no lien attached to the land outside of the ditches, reservoirs, and the right of way for the same."

The Compiled Laws of New Mexico of 1884, tit. 24, chap 1, contain these sections:

"Sec. 1519. A lien is a charge imposed upon specific property, by which it is made security for the performance of an act.

"Sec. 1520. Every person performing labor upon, or furnishing materials to be used in the construction, alteration, or repair of, any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road, or aqueduct to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for the work or labor done or materials furnished by each, respectively, whether done or
522]furnished at the instance of the *owner of the building or other improvement or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of any mining, or of the construction, alteration, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner, for the purposes of this act."

"Sec. 1522. The land upon which any building, improvement, or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencement of the work, or of the furnishing the materials for the same, the land belonged to the person who caused said building, improvement, or structure to be constructed, altered, or repaired, but if such person owned less than a fee-simple estate in such land, then only his interest therein is subject to such lien."

"Sec. 1524. Every original contractor, within ninety days after the completion of his contract, and every person, save the original contractor, claiming the benefit of this act, must, within sixty days after the completion of any building, improvement, or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record with the county recorder of the county in which such property or some part thereof is situated, a claim containing a statement of his demands, after deducting all just credit and offset, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or some other person."

"Sec. 1526. The recorder must record the claim in a book kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed; and for which he may receive the same
523]fees as are *allowed by law for recording deeds and other instruments."

"Sec. 1529. Every building or other improvement mentioned in § 1520, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this act; unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, or the intended construction, alteration, or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon.

"Sec. 1530. The contractor shall be entitled to recover upon a lien filed by him only such amount as may be due to him according to the terms of his contract, after deducting all claims of subcontractors under him who have filed liens for work done and materials furnished, as aforesaid, and in all cases where a lien shall be filed under this act for work done or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action the owner may withhold from the contractor the amount of money for which lien is filed, and in case of judgment against the owner, or his property, upon the lien, the said owner shall be entitled to deduct from any amount due, or to become due, by him to the contractor the amount of such judgment and costs; and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable."

Mr. **Frank Springer** for appellants.

Messrs. **Joel F. Vaile,** *Edward O. Wolcott, Charles W. Waterman,* and *William W. Field* for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Although mechanics' liens are the creation of statute, the legislation being remedial should be so construed as to effectuate its object. *Davis* v. *Alford,* 94 U. S. 545 [24: 283]; *Flagstaff Silver Mining Co.* v. *Cullins,* 104 U. S. 176 [26: 704].

Substantial compliance, in good faith, with the requirements of the particular law is sufficient, and the test of such compliance is to be found in the statute itself.

These enactments vary in the different states and territories, and to the variance in their terms judicial decisions necessarily conform.

Section 1524 of the Compiled Laws of New Mexico required the contractor, in order to obtain the benefit of the act, to file for record "a claim containing a statement of his demands, after deducting all just credit and offset, with the name of the owner, or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials."

The claim duly filed by Ford was preceded by a title describing the Springer Land Association and others and the Maxwell Land Grant Company and others, as "owners or reputed owners;" and stated a demand for the sum of $17,634.27, as "the balance due and owing to the said Patrick P. Ford, by the

aforesaid owners, or reputed owners, after deducting all just credits and offsets for excavating and embankments done and performed by him under a certain contract entered into by the said the Springer Land Association, a copy of which contract is hereto annexed and made a part of this claim of lien. As also for the further sum of three hundred and ninety dollars ($390) for excavating and hauling, ordered by the engineer in charge of said ditch, and allowed by him in pursuance of the provisions
525] of said contract;" and it *stated when the work was commenced and when it was finished, and that on the last date it was "completed and accepted." It gave the names of the reputed owners of the land as the Maxwell Land Grant Company and others, enumerating them, trustees of that company; and alleged that claimant "was employed to do the said work by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn as president." And it added that "the terms, time given, and conditions of said contract are those that fully appear in the copy of said contract which is attached hereto and made a part hereof."

We entirely agree with the supreme court of the territory that this claim of lien was sufficient under the statute in respect of all these particulars. It is attacked by counsel for appellants because containing "no statement of the amount of work done; nor of the payments made; nor the estimate or acceptance by the engineer;" and also because "erroneous as to the party from whom due." But this statute did not require, as many such statutes do, "a just and true account," or a "full and true account" of the details of the transaction, and this work was done under a special contract, at so much per cubic yard, to be paid for on engineer's certificates. In our judgment Ford's statement of his demands, with the copy of the contract and specifications annexed, was in reasonable and adequate compliance with the statute.

As to the name of the person by whom Ford was employed, the claim was specific; and the names of the owners or reputed owners of the lands, and their connection with the transaction, were also given with sufficient clearness. With reference to similar statutory provisions, the supreme court of California in *Hender Lumber Company* v. *Gottschalk*, 81 Cal. 641, 646, said: "There is nothing in the section, or any other, that requires the materialman to state in his claim of lien what relation the person to whom he furnished the material bore to the owner, whether contractor or agent; nor does the burden of determining whether any contract made, or attempted to be made, between the owner and contractor, was valid or not, rest on him when he comes to file his lien.
526] *He must state the facts required by the statute. Whether the person to whom he furnished the material had authority to bind the owner, and entitle the materialman to a lien, is a matter of pleading and proof at the trial." And in *Jewell* v. *McKay*, 82 Cal. 144, it was held that it was not even necessary that the notice of lien should state that the owner of the land had knowledge of the work.

By § 1520 of this statute a lien is given for work or labor done at the instance of the owner of the improvement "or his agent;" by § 1529 it is provided that every improvement "constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein," unless he shall give notice that he will not be responsible for the same; and by § 1522, the land upon which any improvement is constructed, "together with a convenient space about the same," is also subject to the lien if at the commencement of the work it belonged to the person who caused the improvement to be constructed.

The contract of May, 1888, between the Maxwell Land Grant Company and those who afterwards constituted the Springer Land Association was entered into for the construction of this irrigating system, and it expressly made the Springer Land Association "the agent of the Maxwell Land Grant Company," with power to do all acts necessary to carry out the proposed improvement, and to sell and dispose of the lands designed to be benefited thereby; and the findings of the supreme court were to the effect that the Maxwell Land Grant Company was the person at whose instance the improvement was made, and knew at the time that the work was being carried on.

The courts below concurred in their findings that the amounts demanded were the amounts due, and the decree provided for the payment of the only outstanding claim of a subcontractor. But it is urged that the aggregate claimed in the notice of lien was so excessive as to invalidate the lien in whole or in part.

*We do not understand that as between
527] the parties the fact that a lien is claimed for a greater sum than is actually owing, or is actually covered by the lien, vitiates the claim when honestly made; and under the findings it is impossible to impute bad faith in this instance.

The contract contained this provision: "The amount due to the contractor under the final estimate will only be paid upon satisfactory showing that the work is free from all danger of liens or claims of all kinds, through failure on his part to liquidate his just indebtedness as connected with this work."

And it is said that "the final estimate of $12,625.53 was not yet due," in that the subcontractors had not been paid in full, and the work, therefore, was not free from all danger of liens. The findings show, however, that by the contracts between Ford and his subcontractors, approved by the supervising engineer, the amounts due the subcontractors, on monthly subestimates, were in no case to "be demanded or paid in advance of the payment of the regular estimate;" that Ford on payment of the regular estimates had paid his subcontractors in full; and that the subestimates for May and the final subestimates had not been paid because appellants had not paid Ford his May and final estimates under their contract with him. The May estimate due him was for $5,010.43, and the balance of $12,625.53 contained nearly $4,000 of retained percentage, being 10 per cent of the amount due for work done up to the time the May estimate was issued; while the amounts claimed

by the subcontractors on the completion of the work aggregated $7,537.72. It is quite clear that if there were any danger from liens or claims of any kind, this was not "through failure on his part to liquidate his just indebtedness as connected with this work," but solely by reason of the failure to pay him according to the terms of the contract. And it should be noted that the correctness of Ford's claim does not appear to have been questioned until the 19th of June, 1889, when one of the subcontractors having become involved in a dispute with Ford over the sum of $300, suggested to the Springer Land Association that the work had not been done according to the
528] contract, *a suggestion which the findings show was without foundation.

Appellants' counsel further contended that the lien was excessive because appellants were entitled to a credit of $8,000 for land which Ford had agreed to accept in part payment of the final estimate.

At the conference, on the 19th of June, 1889, between the agents of the Maxwell Land Grant Company and of the Springer Land Association, Ford, and the subcontractors, the Maxwell agent had in his possession a deed conveying a section of land to Ford, which he notified the Springer agent he was ready to deliver upon the payment of $4,000 by the Springer Land Association. The Springer agent responded that he was willing to pay the $4,000 if Ford would settle with the subcontractors, but he did not perform the condition and accept the deed. Nor was any tender of the deed made to Ford, who was simply informed that if he would, compulsorily, do that which the default of the Springer Company had theretofore rendered impracticable, then the Springer agent would obtain the deed for delivery to Ford. Nor did it appear that since that day there had been any offer to deliver, or a declaration of a willingness to deliver, the deed. The findings show that Ford carried out the conditions of the contract by him to be kept and performed; that he made no objection to the deed, and would have been willing to receive it, but for appellants' failure on their part; and they cannot now be allowed to insist that Ford should be required to accept what they have not indicated a willingness or readiness to deliver; still less that the lien should be held invalidated because Ford did not credit $8,000 for land never conveyed to him.

Finally it is objected that the demand of $390 for extra work rendered the entire claim of lien inefficacious, but it is obvious that this was not an overstatement which could have that effect. Though there is no specific finding by the supreme court in reference to this item, the findings of the district court show that the extra work was performed under the direction of the engineer, and that the bills therefor were approved by him to an amount
529] exceeding this minor demand, *which under the specifications appellants were bound to pay. It was properly included in the notice of lien, and, being manifestly due, the decree ought not to be reversed or even modified, because it formed part of the amount decreed.

The last error assigned is that no lien attached to the land outside of the ditches, reservoirs, and the right of way to the same.

The statute gave a lien for labor performed or materials furnished in the construction of ditches, not only on the ditch and the land through which it was constructed, but on so much of the land about the same as might be required for its use, "to be determined by the court on rendering judgment."

This tract of 22,000 acres was the tract for whose irrigation the ditch was constructed and by which it was to be benefited. The ditch and the land were inseparably connected as parts of the common enterprise, and to sever the ditch from the land would render the ditch practically valueless. The claim of lien stated, the bill in this case averred, and the answer admitted, that Ford contracted to perform the work of grading required in the construction of the Cimarron ditch and its accessories, the ditch being situated as described; and "that the said ditch has and appurtenant thereto along its entire length, land as passageway about 60 feet in width; as also lateral ditches and reservoirs, and the land covered thereby, and also appurtenant to said ditch, 22,000 acres of land in said county, and under said ditch, and to be irrigated thereby, and described as follows," namely, certain sections enumerated.

The contract with the Maxwell Land Grant Company showed that it caused the improvement to be made for the purpose of supplying water to the entire acreage under the ditch, and, in consideration of the construction of the improvement, gave to the Springer Land Association an interest in the 22,000 acre tract. The improvement was projected and constructed upon the property as an entirety, though the contract contemplated that after its completion the tract should be cut up and sold in small holdings, the Maxwell Company manifestly causing the improvement to be made for the express purpose of rendering the land salable.

*To limit the land upon which the lien[530 was given to the strip of land 60 feet in width and 26 miles long, which was actually occupied by the ditch, and exclude the tract which the ditch was constructed to benefit by its continuous operation, would, it seems to us, be to unreasonably circumscribe the meaning of the statute. And appellants' pleading not only admitted that all of the 22,000 acre tract was appurtenant to the improvement and benefited by it, but the courts of New Mexico distinctly found this to be so, and that the tract was necessary to the convenient use of the improvement for the purposes contemplated in its construction.

The truth is that what area of land is subject to lien in a given case largely depends on the character of the improvement. The extent of ground proper and necessary to the enjoyment of a building, a wall, or a fence, would not be the same as that required for or appertaining to an irrigation system, but the principle of determination is the same.

This ditch was to expend its waters on this tract and could not be used or operated without it. Each was dependent on the other, and both were bound together in the accomplishment of a common purpose. The lien must apply to the entire tract or be confined to the right of way through which it took its course, and

to narrow it down to the latter would be to disregard the very terms of the statute.

Appellants admitted the tract to appertain to the ditch and the supreme court so found, and that it was required for the use and operation thereof. We perceive no adequate ground for declining to accept that conclusion.

The description of the land was by sections and townships, and forty-six sections were enumerated. As the sections, if full, would contain 29,440 acres, and as the enterprise embraced 22,000 acres—though it was estimated by the Maxwell contract that the ultimate capacity of the ditch might be adequate to the irrigation of 30,000 acres—it is insisted that the description was void for uncertainty or that the decree was erroneous as including more land than could on any theory be held to appertain to the ditch. But a Con-
531] gressional *township of thirty-six sections does not necessarily contain thirty-six times 640 acres; and subdivision 5th of § 2395 of the Revised Statutes provides: "Where the exterior lines of the townships which may be subdivided into sections or half sections exceed, or do not extend 6 miles, the excess or deficiency shall be specially noted, and added to or deducted from the western and northern ranges of sections or half sections in such township, according as the error may be in running the lines from east to west, or from north to south."

The supreme court pointed out that sixteen of these sections were bounded by the northern and western lines, and held that the court might as well presume that the alleged discrepancy was accounted for by a deficiency in the government surveys, as that the forty-six sections contained the full quantity. And it should be remembered that the acreage occupied by the ditch, the lateral ditches, and reservoirs must have been considerable.

Again, as the supreme court said, quantity in description must yield to definite description by metes and bounds, or by name and number. Quantity may aid but cannot control such description.

The claim of lien, after describing the ditch, its accessories, and right of way, and the 22,000 acres, added, "all of which ditch, laterals, and reservoirs and lands as aforesaid are plotted and laid out on the plan hereto attached and made a part of this claim of lien." This was so stated in the bill and admitted in the answer.

While one of the findings is somewhat obscure, and, standing alone, might create a doubt as to the identification of the particular tract, yet the findings taken together and in connection with the plat evidently made this certain; and as the correctness of the description and acreage was admitted, any contention in this regard comes too late.

The supreme court expressly found that it appeared "by the admissions in the pleadings and from the testimony that the 22,000 acres of land outside the ditches and reservoirs and the right of way for the same were appurtenant
532] to said ditch and *reservoirs and were under said ditch and to be irrigated thereby."

We think it cannot now be urged that the description was void for uncertainty, or that the decree included more land than was connected with the ditch.

Decree affirmed.

THOMAS BRAM, Otherwise Called Thomas C. Bram, Otherwise Called Thomas M. Bram, Otherwise Called A. Thomas Bram, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 532-573.)

Confession of accused—used to his prejudice—estoppel—violation of Constitution—voluntary character of confession—circumstances of its being made—when inadmissible—sufficiency of indictment—grand juror allowed to affirm—admissibility of evidence.

1. Where a conversation with the accused is offered in evidence as a confession, and is admissible only as a confession, the measure of proof resulting from it is not to be considered in determining its admissibility.
2. The use which was made of the prisoner's statement precludes the state from saying that it was not used to his prejudice.
3. The prosecution cannot offer illegal evidence to prove guilt, and then, for the purpose of avoiding the consequence of its wrongful admission, be heard to assert that the evidence was

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NOTE.—*As to confession of accused; when evidence against him,*—see note to Hopt v. Utah, 28: 262.

As to evidence of conversation between parties, see note to Ferguson v. Rafferty (Pa.) 6 L. R. A. 33.

As to confidential communications when excluded; when not,—see note to Reagan v. Aiken, 34: 892.

As to threats by deceased in cases of homicide; when admissible in evidence,—see note to Wiggins v. Utah, 23: 941.

Confessions of accused, when admissible in evidence against him; when not admissible.

The hope of immunity where no promise has been made is not such inducement as to make inadmissible a confession by defendant charged with murder. State v. Griffin, 48 La. Ann. 1409.

A confession made by one of two persons jointly indicted for murder, implicating the other, which is brought out in impeachment of his denial of the confession on cross-examination as a witness for the defense, should not be allowed to go to the jury as substantive evidence of the guilt of the one implicated thereby, but should be limited to the purposes of impeachment. State v. Reed, 49 La. Ann. 704.

A written statement in the nature of a confession, voluntarily made and sworn to at an inquest by defendant charged with burning a building, after he has been warned that he is not obliged to incriminate himself, is admissible against him. Com. v. Wesley, 166 Mass. 248.

That statements by accused to an officer while under arrest have a tendency when considered with other facts to prove guilt does not constitute them confessions within the rule requiring preliminary proof of the voluntary character of confessions before their admission. People v. Hickman, 113 Cal. 80.

A confession by one charged with murder after his arrest and while confined in jail, made to the county attorney for whom the accused sent of his own accord, is not involuntary so as to be inadmissible in evidence because the accused was in terror of a mob or because confessions had previously been obtained from him by other persons by improper means. Laughlin v. Com. 18 Ky. L. Rep. 640.

A confession by a boy fifteen years old in jail on

not prejudicial because it did not tend to prove guilt.

4. A confession which is not voluntary is not admissible in evidence under the Fifth Amendment to the Federal Constitution, declaring that no person shall be compelled in a criminal case to be a witness against himself.

5. The voluntary character of an alleged confession depends on the question whether the making of the statement was voluntary and without inducement or compulsion, and not whether the particular communications contained in it were voluntary or not.

6. The mere fact that a confession is made to a police officer while the accused is under arrest, in or out of prison, or is drawn out by his questions, does not necessarily render the confession involuntary; but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statements made by the prisoner are voluntary.

7. The statement of an accused person while under arrest in a foreign country and in the office of a detective, where he has been or is being stripped of his clothing, and is charged with having committed a murder on the high seas, and told that his cosuspect had charged him with the crime, and that if he had an accomplice he should say so and not have the blame of the horrible crime on his own shoulders, cannot be admitted as a voluntary confession because of any implication of guilt from his reply.

8. The recital in an indictment, that it was presented "upon the oath" of the jurors, when in fact one of them affirmed, instead of taking the oath, does not render the indictment invalid, as the defect, if any, is harmless under U. S. Rev. Stat. § 1025.

9. Failure to show, either in the indictment or in the proof, that a grand juror who was allowed to affirm had conscientious scruples against taking an oath, does not render the indictment void.

10. The indirect effect of evidence to fortify the credit of a witness cannot affect its admissibility if it is relevant to the issue.

11. The opinion of a medical witness whether or not a man standing at the hip of a recumbent person, and striking blows on that person's head and forehead with an axe, would necessarily be spattered with or covered with some of the blood,—is admissible.

[No. 340.]

Argued October 18, 19, 1897. Decided December 13, 1897.

a charge of murder in the first degree is not incompetent merely because made to a detective assuming to be in jail on a similar charge and to be planning an escape, in the absence of any persuasion, promise, or threats by the latter. Burton v. State, 107 Ala. 109.

A statement by defendant in a prosecution for murder to the officer who arrested him, with reference to the motive actuating him in striking the deceased, is admissible, where the officers have testified that neither they, nor anyone to their knowledge, made any threat against the defendant, or told him it would be better to make a statement, or offered any inducement whatever to him to make a statement. Simon v. State, 108 Ala. 27.

A confession by the accused of a crime other than that charged, while not admissible as a substantive fact, may, when not separable from a competent confession, go to the jury under cautionary directions from the court. Gore v. People, 162 Ill. 259.

Confessions offered under conflicting proof as to whether they were or were not voluntary may be considered under instruction to disregard them if the jury are satisfied that they were involuntary. Burdge v. State, 53 Ohio St. 512.

That a confession was made under excitement, and while in a state of great nervousness, does not deprive it of its character as a voluntary statement. State v. Jones, 47 La. Ann. 1524.

No preliminary inquiry to determine whether a confession was voluntary is necessary before admitting it in evidence, where the circumstances already proved show that it must have been voluntary. People v. Kamaunu, 110 Cal. 609.

The substance of a confession may be given in evidence without giving the exact words. State v. Desroches, 48 La. Ann. 428.

The actual commission of a robbery by an alleged accomplice of defendant cannot be proved by the extrajudicial confessions of such accomplice,—especially where they are not made within the presence or hearing of defendant. People v. Oldham, 111 Cal. 648.

The mere presence of officers when a confession of crime is made is not an influence which renders the confession inadmissible. Pierce v. United States, 160 U. S. 355 (40: 454.)

That a confession was made to a jailer while defendant was in close confinement does not deprive it of its character as a voluntary statement. State v. Jones, 47 La. Ann. 1524.

Any degree of influence exerted in obtaining a confession, by any person having authority over the charge against a prisoner or over his person, will prevent its use as evidence against him. Robinson v. People, 159 Ill. 115.

On the trial of an indictment for murder it appeared that the prisoner, who was an ignorant Italian laborer, unfamiliar with the English language, was arrested, without warrant, as the suspected murderer, and while under arrest was taken by the officer having him in charge before a coroner's inquest, and, after proof had been given of the homicide, was examined on oath by the district attorney and the coroner as to circumstances tending to connect him with the crime. It did not appear that he was informed that he was not bound to answer questions tending to criminate himself. It was error to permit the prosecution to prove, under objections and exceptions, the statements so made by the prisoner. People v. Mondon, 103 N. Y. 211, 57 Am. Rep. 709.

In People v. McMahon, 15 N. Y. 384, the defendant was arrested by a constable, without warrant, on a charge of having murdered his wife. The constable took him before the coroner, who was holding an inquest on the body, by whom he was sworn and examined as a witness. It was held that the evidence thus given was not admissible on the prisoner's trial for the murder, and his conviction was reversed upon that ground. In the judgment, all the judges who heard the case concurred. People v. Mondon, 103 N. Y. 217, 57 Am. Rep. 709.

Where a prisoner, in speaking of the testimony of a witness against him, said "that what C said was true as far as he went, but that he did not say all, or enough," it was held that this remark was not admissible as a confession. The court in this case said: "The objection to the evidence is, that in reality the prisoner made no confession of guilt at all; the conversation was rather a declaration of innocence than a confession of guilt." Finn v. Com. 5 Rand. (Va.) 701.

The real question is whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth from fear of the threat or hope of profit from the promise.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment of that court adjudging Thomas Bram to be guilty of murder and condemning him to suffer death; the homicide being committed on the high seas. *Reversed, with directions for a new trial.*

The facts are stated in the opinion.

Messrs. **James E. Cotter** and **Asa P. French** for plaintiff in error.

Messrs. **James E. Boyd**, Assistant Attorney General, and *John K. Richards*, Solicitor General, for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

This writ of error is prosecuted to a verdict and sentence thereon, by which the plaintiff was found guilty of murder, and condemned to suffer death. The homicide was committed on board the American ship Herbert Fuller while on the high seas bound from Boston to a port in South America. The accused was the first officer of the ship, and the deceased, of whose murder he was convicted, was the master of the vessel. The bill of exceptions, after stating the sailing of the vessel from Boston on the 2d of July, 1896, with a cargo of lumber, gives a general summary of the facts leading up to and surrounding the homicide as follows:

She had on board a captain, Charles I. Nash; Bram, the defendant; a second mate, August W. Blomberg; a steward, and six seamen; also the captain's wife, Laura A. Nash, and one passenger, Lester H. Monks.

The vessel proceeded on her course toward her port of destination until the night between July 13 and July 14. On that night at 12 o'clock the second mate's watch was relieved by the mate's watch, of which Bram, the defendant, was *the officer in charge. The cap-[535 tain, his wife, the passenger Monks, and the

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United States v. Stone, 8 Fed. Rep. 232; Rex v. Gibbons, 1 Car. & P. 97; Reg. v. Reason, 12 Cox, C. C. 228; Reg. v. Reeve, 12 Cox, C. C. 179.

Where the confession is induced by the actual infliction of pain it will, of course, be inadmissible in evidence. Hector v. State, 2 Mo. 166, 22 Am. Dec. 454.

The rule has long been settled in our law that while free and voluntary confession of guilt is of the highest order of evidence, one extorted is never received. Miller v. People, 39 Ill. 457.

Confessions of a defendant indicted for larceny, made to the prosecutor and owner of the property stolen, upon inducements held out by him that if the defendant would disclose his evidence he would use his influence to get him acquitted, are not admissible in evidence against him. People v. Smith, 15 Cal. 409.

Confessions of a prisoner charged with murder, that he committed the crime, are incompetent, if fairly traceable, as the inciting cause, to a promise made by the chief prosecuting attorney, that if the prisoner would confess he would do all he could to save him. Simmons v. State, 61 Miss. 243.

Where a person assumes the guilt of the prisoner, as where he states to him, "You have got your foot in it, and somebody else was with you; now, if you did break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth,"—it was held that a confession in response to this statement had the effect to impress upon the prisoner's mind that he would fare better by confessing his guilt of the crime, and this inducement vitiates any confession evoked under its influence. Kelly v. State, 72 Ala. 244.

The remark made to the prisoner, Now kneel you down: I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty,—has been held not to render a confession inadmissible. Rex v. Wild, 1 Moody, C. C. 452.

Also the remark, "Don't run your soul into more sin, but tell the truth," has been held not to make a confession inadmissible. Reg. v. Sleeman, 6 Cox, C. C. 245.

Also, the remark to a prisoner, "An honest confession is good for the soul," has been held not to render a confession inadmissible in evidence. Matthews v. State, 9 Lea, 124, 42 Am. Rep. 667.

In People v. Barker, 60 Mich. 277, it was held that where confessions were made by the accused to a detective, falsely pretending to be the counsel of the accused, they were not to be admitted in evidence. State v. Russell, 83 Wis. 337.

A confession made by a prisoner is not involuntary merely because it was made while in custody, to the sheriff who had arrested him. Murphy v. People, 63 N. Y. 590.

Confessions made without inducement to the chief of police, by a prisoner immediately after his arrest, are admissible against him. Com. v. Sheehan, 163 Mass. 170; People v. Wentz, 37 N. Y. 303.

Where the prosecutor asked the defendant for the money which he had taken, and, before it was produced, said: "I only want my money, and if you give me that, you may go to the devil if you please," upon which the defendant took part of the money from his pocket, and said that was all he had left, a majority of the judges held that the evidence was inadmissible. Rex v. Jones, Russ. & R. C. C. 152; Rex v. Parratt, 4 Car. & P. 570.

A voluntary statement by defendant charged with murder, after a warning that any statement he may make will be used against him, and he need say nothing about it unless he desires to do so, is admissible in evidence. Com. v. Bezek, 168 Pa. 603.

A confession voluntarily made to one not an officer or having control over the accused, without any inducement held out, is admissible against the accused. State v. Hedgepath, 125 Mo. 14.

A witness is competent to testify to a confession which he swears was made by the accused to a third person in the dark, although he did not see the accused, but only knew him by his voice, as the sufficiency of the identification is for the jury. Fussell v. State, 93 Ga. 450.

Any sufficient testimony to rebut the presumption that a confession which was prompted by any degree of influence which has been exerted upon the person making it will justify the court in admitting such confession. Bartley v. People, 156 Ill. 234.

A confession is admissible against a codefendant who was present and remained silent when it was made. Sparf v. United States, 156 U. S. 51, 115 (39: 343, 366).

A confession is competent evidence, although threats and promises have been made, where it satisfactorily appears that it was not induced thereby. Bartley v. People, 156 Ill. 234.

A confession of murder by defendant to a detective not known to be such, upon his promise that if she would tell him "all about it," he would give her something so that she could not be "caught" is admissible in evidence. State v. Harrison, 115 N. C. 706.

first mate, and the second mate, all lived in the aftercabin, occupying separate rooms. . . . The crew and the steward slept forward in the forward house.

When the watch was changed at midnight, Bram, the defendant, took the deck; the seamen Loheac and Perdok went forward on the lookout, and Charles Brown, otherwise called Justus Leopold Westerberg, his true name, took the wheel, where it was his duty to remain till 2 o'clock, at about which time he was relieved by Loheac. The second mate went to his room and the seamen of his watch to their quarters at 12 midnight, and there was no evidence that any of them or the steward appeared again till daylight.

The passenger Monks, who occupied a room on the starboard side of the cabin, between the chart room where the captain slept and the room on the forward starboard side where Mrs. Nash slept, with doors opening from the passenger's room into both the chart room used by the captain as his room and that of Mrs. Nash, was aroused not far from 2 o'clock—the exact time is not known, as he says—by a scream, and by another sound characterized by him as a gurgling sound. He arose, went to the captain's room, and found the captain's cot overturned and the captain lying on the floor by it. He spoke, but got no answer; put his hand on the captain's body and found it damp or wet. He then went to Mrs. Nash's room, did not see her, but saw dark spots on her bedding, and suspected something wrong. He went on deck and called the mate, the defendant, telling him the captain was killed. Both went below, took down the lantern hanging in the main cabin, burning dimly, turned it up and went through the captain's room to the passenger's room, and the passenger there put on a shirt and pantaloons. They then both returned to the deck, the mate on the way stopping a brief time in his own room. Bram and Monks remained talking on deck till about daybreak, when the steward was called and told what had happened. Up to this time no call had been made for the second mate nor had anyone visited his room. Later it was found that Captain
536] Nash, his wife, and *Blomberg, the second mate, were all dead, each with several wounds upon the head, apparently given with a sharp instrument like an axe, penetrating the skull and into the substance of the brain, and the second mate lying on his back with his feet crossed, in his berth; Mrs. Nash, in her bed, in her room, and at the back side of the bed, and Captain Nash in his room as already stated.

The whole crew was called at or about daylight and informed of the deaths.

The bodies were removed from the cabin and placed in the jolly boat, and the boat was towed astern to Halifax. The cabin was then locked, Bram taking the keys, and it remained locked till the vessel reached Halifax.

At first, after the discovery of the murders, there was some hesitancy as to where the vessel should go. At the defendant's suggestion she was headed to go to Cayenne, in French Guiana, but the plan was changed and she steered for Halifax, Nova Scotia, where she arrived July 21, and was taken possession of by the local authorities at the instance of the consul-general of the United States.

At first, after the discovery of the murders, Bram, on whom had devolved the command of the ship, made Brown chief mate and Loheac second mate.

No blood or spots of blood were ever discovered on the person or the clothing of any person on board, nor did anything direct suspicion to anyone.

In a day or two, suspicion having been excited in respect to the seaman Brown, the crew, under the supervision of Bram, seized him, he not resisting, and put him in irons. All the while the officers and seamen remained on deck. Bram navigated the ship until Sunday before they reached Halifax on Tuesday, and after the land of Nova Scotia was in sight, when, Brown having stated to his shipmates, or some of them, that he saw into the cabin through a window in the afterpart and on the starboard side of the house, and saw Bram, the mate, kill the captain. In consequence of this statement of Brown, the crew, led by the steward, suddenly overpowered the mate and put him in irons, he making no resistance, but *declaring his innocence. Bram and [537
Brown were both carried into Halifax in irons.

The bill of exceptions further states that when the ship arrived at Halifax the accused and Brown were held in custody by the chief of police at that place, and that whilst in such custody the accused was taken from prison to the office of a detective and there questioned under circumstances to be hereafter stated. Subsequently to this occurrence at Halifax, all the officers, the crew, and the passenger, were examined before the American consul and gave their statements, which were reduced to writing and sworn to. They were thereafter, at the request of the American consul, sent to Boston, where the accused was indicted for the murder of Nash, the captain, of Mrs. Nash, and the second mate Blomberg. The trial and the conviction, now under review, related to the first of these charges. The errors which are here assigned as grounds for reversal are more than sixty in number, and are classified by the counsel for the accused as follows: (a) Questions raised preliminary to the trial. (b) Questions raised during the trial. (c) Questions raised in connection with two motions for a new trial.

We first examine the error relied on which seems to us deserving of the most serious consideration. During the trial a detective by whom the accused was questioned whilst at Halifax was placed upon the stand as a witness for the prosecution, for the purpose of testifying to the conversation had between himself and the accused at Halifax, at the time and place already stated. What took place between the accused and the detective at the time of the conversation, and what occurred when the witness was tendered in order to prove the confession, is thus stated in the bill of exceptions:

Nicholas Power, of Halifax, called by the government, testified that he was connected with the police department of Halifax, and had been for thirty-two years, and for the last fifteen years of that time as a detective officer; that after the arrival of the Herbert Fuller at Halifax, in consequence of a conversation with

Charles Brown, he made an examination of Bram, the defendant, in the witness's office, **538]** in the city hall at *Halifax, when no one was present besides Bram and the witness. The witness testified that no threats were made in any way to Bram, nor any inducements held out to him.

The witness was then asked: "What did you say to him and he to you?"

To this the defendant's counsel objected. The defendant's counsel was permitted to cross-examine the witness before the court ruled upon the objection, and the witness stated that the conversation took place in his office, where he had caused the defendant Bram to be brought by a police officer; that up to that time the defendant had been in the custody of the police authorities of Halifax, in the custody of the superintendent of police, John O'Sullivan; that the witness asked that the defendant should be brought to his office for the purpose of interviewing him; that at his office he stripped the defendant and examined his clothing, but not his pockets; that he told the defendant to submit to an examination, and that he searched him; that the defendant was then in custody and did everything the witness directed him to do; that the witness was then a police officer acting in his official capacity; that all this took place before the defendant had been examined before the United States consul, and that the witness did not know that the local authorities had at that time taken any action, but that the defendant was held for the United States—for the consul general of the United States.

The witness answered questions by the court as follows:

Q. You say there was no inducement to him in the way of promise or expectation of advantage?

A. Not any, your honor.

Q. Held out?

A. Not any, your honor.

Q. Nor anything said, in the way of suggestion to him that he might suffer if he did not —that it might be worse for him?

A. No, sir; not any.

Q. So far as you were concerned, it was entirely voluntary?

A. Voluntary, indeed.

539] *Q. No influence on your part exerted to persuade him one way or the other?

A. None whatever, sir; none whatever.

The defendant then renewed his objection to the question what conversation had taken place between Bram and the witness for the following reasons: That at the time the defendant was in the custody of the chief of police at Halifax; that the witness in an official capacity directed the police authorities to bring the defendant as a prisoner to his private office and there proceed to take extraordinary liberties with him; he stripped him; the defendant understood that he was a prisoner, and he obeyed every order and direction that the witness gave. Under these circumstances the counsel submitted that no statement made by the defendant while so held in custody and his rights interfered with to the extent described was a free and voluntary statement, and no statement as made by him bearing upon this issue was competent.

The objection was overruled, and the defendant excepted on all the grounds above stated, and the exceptions were allowed.

The witness answered as follows:

When Mr. Bram came into my office, I said to him: "Bram, we are trying to unravel this horrible mystery." I said: "Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder." He said: "He could not have seen me; where was he?" I said: "He states he was at the wheel." "Well," he said, "he could not see me from there." I said: "Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. "But," I said "some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." He said: "Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it." He was rather short in his replies.

Q. Anything further said by either of you?

A. No; there was nothing further said on that occasion.

*The direct examination of this wit- **[540** ness was limited to the interview between the witness and the defendant Bram.

On cross-examination of the witness Power, he testified that at the time of the above-stated examination he took possession of a pair of suspenders belonging to the defendant, and kept the same in his office until the prisoners were coming to Boston—the whole crew and the passenger were imprisoned at Halifax, and sent as prisoners to Boston—when he handed them over to the Halifax superintendent of police, and they were sent to Boston, with other property of the defendant.

Defendant's counsel, upon the ground of showing interest on the part of the witness, then asked: "What other articles belonging to the defendant did you take possession of at that time?"

This line of inquiry was objected to by the district attorney on the ground that the matter was not opened on the direct examination, and the defendant could call the witness as part of his case if he saw fit. The court excluded the inquiry, ruling that it was not proper cross-examination and did not tend to show interest, and the defendant duly excepted, and the exception was allowed.

The contention is that the foregoing conversation between the detective and the accused was competent only as a confession by him made; that it was offered as such, and that it was erroneously admitted, as it was not shown to have been voluntary. The question thus presented was manifestly covered by the exception which was taken at the trial. When it was proposed to examine the detective officer as to the conversation had by him with the accused, objection was duly made. The court thereupon allowed the officer to be examined and cross examined as to the circumstances attending the conversation which it was proposed to offer as a confession. When this examination was concluded the accused renewed his objection, and his exception to the admissibility of the conversation was allowed and

regularly noted. The witness then proceeded to give the conversation. To say that under these circumstances the objection which was **541**] twice presented *and regularly allowed should have been renewed at the termination of the testimony of the witness, would be pushing to an unreasonable length the salutary rule which requires that exceptions be taken at the trial to rulings which are considered erroneous, and the legality of which are thereafter to be questioned on error. There can be no doubt that the manner in which the exception was allowed and noted fully called attention to the fact that the admission of the conversation was objected to because it was not voluntary, and the overruling of this objection is the matter now assigned as error here. Indeed, in the argument at bar no contention was made as to the sufficiency and regularity of the exception. It is manifest that the sole ground upon which the proof of the conversation was tendered was that it was a confession, as this was the only conceivable hypothesis upon which it could have been legally admitted to the jury. It is also clear that in determining whether the proper foundation was laid for its admission, we are not concerned with how far the confession tended to prove guilt. Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequence of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt. The principle on the subject is thus stated in a note to § 219 of Greenleaf on Evidence: "The rule excludes, not only direct confessions, but any other declaration tending to implicate the prisoner in the crime charged, even though, in terms, it is an accusation of another, or a refusal to confess. *Rex* v. *Tyler*, 1 Car. & P. 129; *Rex* v. *Enoch*, 5 Car. & P. 539. See further, as to the object of the rule, *Rex* v. *Court*, 7 Car. & P. 486, per Littledale, J.; *People* v. *Ward*, 15 Wend. 231." Nor from the fact that in *Wilson* v. *United States*, 162 U. S. 621 **542**] [40: 1096], mention *was made of the circumstance that the statement of the accused was a mere denial of guilt accompanied with exculpatory explanations, does the decision in that case conflict with the principle we have just stated. The ruling there made that error to the prejudice of the accused did not arise from the admission of the statement there considered, was based, not alone upon the nature of the statement, but upon "the evidence of its voluntary character, the absence of any threat, compulsion, or inducement, or assertion or indication of fear, or even of such influence as the administration of an oath has been supposed to exert." p. 624 [40: 1097].

The contradiction involved in the assertion that the statement of an accused tended to prove guilt, and therefore was admissible, and then after procuring its admission claiming that it did not tend to prove guilt, and could not, therefore, have been prejudicial, has been well stated by the supreme court of North Carolina (*State* v. *Rorie* (1876) 74 N. C. 148):

"But the state says this was a denial of guilt and not a confession. It was a declaration which the state used to procure a conviction; and it is not for the state to say the declaration did not prejudice the prisoner's case. Why introduce it at all unless it was to lay a foundation for the prosecution? The use which was made of the prisoner's statement precludes the state from saying that it was not used to his prejudice."

In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the 5th Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself." The legal principle by which the admissibility of the confession of an accused person is to be determined is expressed in the text-books.

In 3 Russell on Crimes, 6th ed. 478, it is stated as follows:

"But a confession in order to be admissible must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises,*however slight, nor by the exertion [**543** of any improper influence. . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted."

And this summary of the law is in harmony with the doctrine as expressed by other writers, although the form in which they couch its statement may be different. 1 Greenl. Ev. 15th ed. § 219; Wharton, Crim. Ev. 9th ed. § 631; 2 Taylor, Ev. 9th ed. § 872[3]; 1 Bishop, New Crim. Proc. § 1217, ¶ 4.

These writers but express the result of a multitude of American and English cases, which will be found collected by the authors and editors either in the text or in notes, especially in the ninth edition of Taylor, second volume, tenth chapter, and the American notes, following page 588, where a very full reference is made to decided cases. The statement of the rule is also in entire accord with the decisions of this court on the subject. *Hopt* v. *Utah* (1883) 110 U. S. 574 [28: 262]; *Sparf* v. *United States* (1895) 156 U. S. 51, 55 [39: 343, 345]; *Pierce* v. *United States* (1896) 160 U. S. 355 [40: 454], and *Wilson* v. *United States* (1896) 162 U. S. 613 [40: 1090].

A brief consideration of the reasons which gave rise to the adoption of the 5th Amendment, of the wrongs which it was intended to prevent, and of the safeguards which it was its purpose unalterably to secure, will make it clear that the generic language of the amendment was but a crystalization of the doctrine as to confessions, well settled when the amendment was adopted, and since expressed in the text-writers and expounded by the adjudications, and hence that the statements on the

subject by the text-writers and adjudications but formulate the conceptions and commands of the amendment itself. In *Boyd* v. *United States*, 116 U. S. 616 [29: 746], attention was called to the intimate relation existing between the provision of the 5th Amendment securing one accused against being compelled to testify against himself, and those of the 4th Amend-
544] ment *protecting against unreasonable searches and seizures; and it was in that case demonstrated that both of these amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change. In commenting on the same subject, in *Brown* v. *Walker*, 161 U. S. 596 [40: 821], the court, speaking through Mr. Justice Brown, said:

"The maxim *Nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly imbedded in English as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fun-
545] damental law, so that a maxim *which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."

There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was imbedded in that system as one of its great and distinguishing attributes.

In *Burrowes* v. *High Commission Court* (1616) Bulst. 49, Lord Coke makes reference to two decisions of the courts of common law as early as the reign of Queen Elizabeth, wherein it was decided that the right of a party not to be compelled to accuse himself could not be violated by the ecclesiastical courts. Whatever, after that date, may have been the departure in practice from this principle of the common law (Taylor, Ev. § 886[2]), certain it is that, without a statute so commanding, in *Felton's Case* (1628) 3 How. St. Tr. 371, the judges unanimously resolved, on the question being submitted to them by the King, that "no such punishment as torture by the rack was known or allowed by our law."

Lord Hale died December 25, 1676. In the first volume of his Pleas of the Crown (1st ed. 1736), treating of the subject of confessions in cases of treason, it is said at p. 304:

"That the confession before one of the privy council or a justice of the peace being *voluntary made without torture* is sufficient as to the indictment or trial to satisfy the statute, and it is not necessary that it be a confession in court; but the confession is sufficient if made before him that hath power to take an examination."

In the second volume, at p. 225, it is said:

"When the prisoner is arraigned, and demanded what he saith to the indictment, either he confesseth the indictment, or pleads to it, or stands mute, and will not answer. The confession is either simple, or relative in order to the attainment of some other advantage. That which I call a simple confession is, where the defendant *upon [546 hearing of his indictment without any other respect confesseth it, this is a conviction; but it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 27 Assiz. 40. If it be but an extra judicial confession, tho it be in court, as where the prisoner freely tells the fact, and demands the opinion of the court, whether it be felony, tho upon the fact thus shown it appear to be felony, the court will not record his confession, but admit him to plead to the felony not guilty. 22 Assiz. 71. Stamf. P. C. Lib. 2, cap. 51, fol. 142*b*."

In chapter 38 of vol. 2, at p. 284, after referring to the power of justices of the peace and coroners, under the statutes of Philip & Mary, to take examinations of accused persons, but not upon oath, and that the same might be read in evidence on the trial of the prisoner, it is said:

"But then, 1. Oath must be made either by the justice or coroner that took them, or the clerk that wrote them, that they are the true substance of what the informer gave in upon oath, and what the prisoner confessed upon his examination. 2. As to the examination of the prisoner, it must be testified that he did it freely without any menace, or undue terror imposed upon him; for I have often known the prisoner disown his confession upon his examination, and hath sometimes been acquitted against such his confession."

Gilbert, in his treatise on Evidence (2d ed., published in 1760), says, at p. 139:

" . . . But then this confession must be voluntary and without compulsion; for our law

in this differs from the civil law, that it will not force any man to accuse himself; and in this we do certainly follow the law of nature, which commands every man to endeavor his own preservation; and therefore pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on."

In Hawkins' Pleas of the Crown (6th ed., by Leach, published in 1787), book 2, chap. 31, it is said:

"Sec. 2. . . . And where a person upon **547]** his arraignment *actually confesses himself guilty, or unadvisedly discloses the special manner of the fact, supposing that it doth not amount to felony where it doth, yet the judges, upon probable circumstances, that such confession may proceed from fear, menace, or duress, or from weakness, or ignorance, may refuse to record such confession, and suffer the party to plead not guilty."

In § 3, chap. 46, it is stated that examinations by the common law before a Secretary of State or other magistrate for treason or other crimes not within the statutes of Philip & Mary, and also the confession of the defendant himself in discourse with private persons, might be given in evidence against the party confessing. A note (2) to this section, presumably inserted by the editor (see note to *Gilham's Case*, 2 Moody, 194, 195), reads as follows:

"The human mind under the pressure of calamity is easily seduced; and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted (*vide* O. B. 1786, p. 387), is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction."

Although the English reports, prior to the separation, are almost devoid of decisions applying the principles stated by Lord Hale, Hawkins, and Gilbert, both the opinion of Lord Mansfield in *Rex* v. *Rudd* (1775) Cowp. 333, and that of Mr. Justice Wilson, some years after the separation, in *Lambe's Case* (1791) 2 Leach, C. C. 4th ed. 552, make it certain that the rule as stated by Hawkins, Gilbert, and Hale was considered in the English courts as no longer open to question and as one of the fundamental principles of the common law. Looking at the doctrine as thus established, it would seem plainly to be deducible that as the principle, from which, under the law of nature, it was held that one accused could **548]** not be compelled to *testify against himself, was in its essence comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from moral causes, the rule formulating the principle with logical accuracy came to be so stated as to embrace all cases of compulsion which were covered by the doctrine. As the facts by which compulsion might manifest itself, whether physical or moral, would be necessarily ever different, the measure by which the involuntary nature of the confession was to be ascertained was stated in the rule, not by the changing causes, but by their resultant effect upon the mind, that is, hope or fear, so that, however diverse might be the facts, the test of whether the confession was voluntary would be uniform, that is, would be ascertained by the condition of mind which the causes ordinarily operated to create. The well-settled nature of the rule in England at the time of the adoption of the Constitution and of the 5th Amendment, and the intimate knowledge had by the framers of the principles of civil liberty which had become a part of the common law, aptly explains the conciseness of the language of that Amendment. And the accuracy with which the doctrine as to confessions as now formulated embodies the rule existing at common law and imbedded in the 5th Amendment was noticed by this court in *Wilson* v. *United States*, *supra*, where, after referring to the criteria of hope and fear, speaking through Mr. Chief Justice Fuller, it was said: "In short, the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort." 162 U. S. 623 [40: 1096].

In approaching the adjudicated cases for the purpose of endeavoring to deduce from them what quantum of proof, in a case presented, is adequate to create, by the operation of hope or fear, an involuntary condition of the mind, the difficulty encountered is, that all the decided cases necessarily rest upon the state of facts which existed in the particular case, and therefore furnish no certain criterion, since the conclusion that a given state of fact was adequate to have produced an involuntary confession does not establish that the same result has been created by a different although somewhat similar condition of fact. *Indeed, the embarrassment which **[549** comes from the varying state of fact, considered in the decided cases, has given rise to the statement that there was no general rule of law by which the admissibility of a confession could be determined, but that the courts had left the rule to be evolved from the facts of each particular case. 2 Taylor, Ev. § 872[2]. And, again, it has been said that so great was the perplexity resulting from an attempt to reconcile the authorities that it was manifest that not only must each case solely depend upon its own facts, but that even the legal rule to be applied was involved in obscurity and confusion. *Green* v. *State*, 88 Ga. 516; *State* v. *Patterson*, 73 Mo. 695, 705; *State* v. *Matthews*, 66 N. C. 106, 109.

The first of these statements but expresses the thought that whether a confession was voluntary was primarily one of fact, and therefore every case must depend upon its own proof. The second is obviously a misconception, for however great may be the divergence between the facts decided in previous cases and those presented in any given case, no doubt or obscurity can arise as to the rule itself, since it is found in the text of the Constitution. Much of the confusion which has resulted from the effort to deduce from the adjudged cases what would be a sufficient quantum of proof to show that a confession was or was not voluntary, has arisen from a

misconception of the subject to which the proof must address itself. The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent. With this understanding of the rule we come to a consideration of the authorities.

By statutes enacted early in the second half of the sixteenth century (1 & 2 Ph. & M. chap. 13, and 2 & 3 Ph. & M. chap. 10), justices of the **550**] peace *were directed on accusations of felony to "take the examination of the said prisoner and information of them that bring him." In 1555, the judges directed that the examination of prisoners should be without oath (Kelyng. 2), and the reason of this rule, Starkie on Evidence (2d ed. p. 29) says, was that an examination under oath "would be a species of duress and a violation of the maxim that no one is bound to criminate himself." The ruling of the judges in this regard was recognized in the statute of 7 Geo. IV. chap. 64, which, although requiring "information of witnesses" to be "upon oath," simply directed an "examination" of the accused.

But, even where the examination was held without oath, it came to be settled by judicial decisions in England that before such an examination could be received in evidence it must appear that the accused was made to understand that it was optional with him to make a statement. *Rex* v. *Green* (1833) 5 Car. & P. 312; *Reg.* v. *Arnold* (1838) 8 Car. & P. 621. The reason upon which this rule rested undoubtedly was, that the mere fact of the magistrate's taking the statement, even though unaccompanied with an oath, might, unless he was cautioned, operate upon the mind of the prisoner to impel him involuntarily to speak. The judicial rule as to caution was finally embodied into positive law by the statute of 11 & 12 Vict. chap. 42, where, by § 18, the magistrate was directed, after having read or caused to be read to the accused the depositions against him, to ask the accused: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial."

The English courts were frequently called upon to determine whether language used by a magistrate when about to take the examination of one accused tended to induce in the mind of the latter such hope or fear as to lead to involuntary mental action. In *Reg.* v. *Drew* (1837) 8 Car. & P. 140, and *Queen* v. *Harris* (1844) 1 Cox, C. C. 106, though the accused had been cautioned not to say anything to pre-**551**] judice himself, the further *statement, in substance, by the magistrate or his clerk, that what the prisoner said would be taken down, and "would" be used for or against him at his trial, was held by Coleridge, J., to be equivalent to saying that what the prisoner chose to say might be used in his favor at the trial, and to be a direct inducement to make a confession, rendering the statement incompetent as evidence. Like rulings were also made in cases where similar assurance that the statement of the prisoner would be used were made to him by a police officer. *Reg.* v *Morton* (1843) 2 Moody & R. 514, and *Reg.* v. *Furley* (1844) 1 Cox, C. C. 76.

In cases where statements of one accused had been made to others than the magistrate upon an examination, differences of opinion arose among the English judges, as to whether a confession made to a person not in a position of authority over the accused was admissible in evidence after an inducement has been held out to the prisoner by such person. *Rex* v. *Spencer* (1837) 7 Car. & P. 776. It was finally settled, however, that the effect of inducements must be confined to those made by persons in authority (*Reg.* v. *Taylor* (1839) 8 Car. & P. 734; *Reg.* v. *Moore* (1852) 2 Den. C. C. 522); although, in the last-cited case, while former precedents were followed, the court expressed strong doubts as to the wisdom of the restriction. (p. 527.) There can be no question, however, that a police officer, actually or constructively in charge of one in custody on a suspicion of having committed crime, is a person in authority within the rule, and as this is so well established, we will not consider the adjudicated cases in order to demonstrate it, but content ourselves with a reference to the statement on the subject made in Russell on Crimes, third volume, at page 501.

Many other cases in the English reports illustrate the application of the rule excluding statements made under inducement improperly operating to influence the mind of an accused person.

In *Reg.* v. *Thompson* (1783) 1 Leach, C. C. (4th ed.) 291, a declaration to a suspected person, that unless he gave a more satisfactory account of his connection with a stolen bank note his *interrogator would take him [**552** before a magistrate, was held equivalent to stating that it would be better to confess, and to have operated to lead the prisoner to believe that he would not be taken before a magistrate if he confessed. Baron Hotham, after commenting upon the evidence, in substance, said that the prisoner was hardly a free agent at the time, as, though the language addressed to him scarcely amounted to a threat, it was certainly a strong invitation to the prisoner to confess, the manner in which it had been expressed rendering it more efficacious.

In *Cass's Case* (1784) 1 Leach, C. C. 293, *note*, a confession induced by the statement of the prosecutor to the accused, "I am in great distress about my irons; if you will tell me where they are, I will be favorable to you," was held inadmissible. Mr. Justice Gould said that the slightest hopes of mercy held out to a prisoner to induce him to disclose the fact was sufficient to invalidate a confession.

In the cases following, statements made by a prisoner were held inadmissible, because in-

duced by the language set out in each case: In *Rex* v. *Griffin* (1809) Russ. & R. C. C. 151, telling the prisoner that it would be better for him to confess; in *Rex* v. *Jones* (1809) Russ. & R. C. C. 142, the prosecutor saying to the accused that he only wanted his money, and if the prisoner gave him that he might go to the devil, if he pleased; in *Rex* v. *Kingston* (1830) 4 Car. & P. 387, saying to the accused, "You are under suspicion of this, and you had better tell all you know;" in *Rex* v. *Enoch and Pulley* (1833) 5 Car. & P. 539, saying: "You had better tell the truth or it will lie upon you, and the man go free;" in *Rex* v. *Mills* (1833) 6 Car. & P. 146, saying: "It is no use for you to deny it, for there is the man and boy who will swear they saw you do it;" in *Sherrington's Case* (1838) 2 Lewin, C. C. 123, saying: "There is no doubt thou wilt be found guilty, it will be better for you if you will confess;" in *Rex* v. *Thomas* (1833) 6 Car. & P. 353, saying: "You had better split, and not suffer for all of them;" in *Rex* v. *Simpson* (1834) 1 Moody, C.C. 410, and Russ. & R. C. C. 410, repeated importunities by neighbors and relatives of the prosecutor, coupled **553**] with assurances to the *suspected person that it would be a good deal worse for her if she did not, and that it would be better for her if she did, confess; in *Rex* v. *Upchurch* (1836) 1 Moody, C. C. 465, saying: "If you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; if William H. (another person suspected, and whom the prisoner had charged) is found clear, the guilt will fall on you. Pray tell me if you did it;" in *Reg.* v. *Croydon* (1846) 2 Cox, C. C. 67, saying: "I dare say you had a hand in it; you may as well tell me all about it;" in *Reg.* v. *Garner* (1848) 1 Den. C. C. 329, saying: "It will be better for you to speak out."

In *Reg.* v. *Fleming* (1842) Arm. M. & O. 330, statements of a police officer suspected of having committed a crime, in answer to questions propounded by his superior in office, after the latter had warned the accused to be cautious in his answers, were held inadmissible. The court said: "The prisoner and the witnesses being both in the police force, the prisoner, as the witness admitted, might have conceived himself bound to tell the truth; and the caution was not of that nature which should make the confession of the prisoner admissible."

In the leading case of *Reg.* v. *Baldry* (1852) 2 Den. C. C. 430, after full consideration, it was held that the declaration made to a prisoner, who had first been cautioned that what he said "would" be used as evidence, merely imported that such statement "might" be used, and could not have induced in the mind of the prisoner a hope of benefit sufficient to lead him to make a statement. The cases of *Rex* v. *Drew*, *Reg.* v. *Harris*, *Rex* v. *Morton*, and *Reg.* v. *Furley*, heretofore referred to, were held to have been erroneously decided.

In the course of the argument, counsel for the prisoner cited and commented upon *Cass's Case*, *Rex* v. *Thomas*, *Sherrington's Case*, and *Rex* v. *Enoch*, also heretofore referred to, as illustrating the doctrine that assuring the accused that it would be better for him to speak, or other intimation given of possible benefit, would invalidate a confession thus induced. After counsel had concluded his reference to these cases, Pollock, C. B., said (p. 432): "There is no doubt as to the application *of the [**554** rule in those cases, which are all familiar to the judges and to the bar."

In the course of the opinion subsequently delivered by him Chief Baron Pollock said (p. 442):

"A simple caution to the accused to tell the truth, if he says anything, it has been decided not to be sufficient to prevent the statement made being given in evidence, and although it may be put that when a person is told to tell the truth, he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. He is reminded that he need not say anything, but if he says anything let it be true. It has been decided that that would not prevent the statement being received in evidence by Littledale, J., in the case of *Rex* v. *Court*, 7 Car. & P. 486, and by Rolfe, B., in a case at Gloucester (*Reg.* v. *Holmes*, 1 Car. & K. 248), but where the admonition to speak the truth has been coupled with any expression importing that it would be better for him to do so, it has been held that the confession was not receivable, the objectionable words being that it would be better to speak the truth, because they import that it would be better for him to say something. This was decided in the case of *Reg.* v. *Garner*, 1 Den. C. C. 329. The true distinction between the present case and a case of that kind is, that it is left to the prisoner a matter of perfect indifference whether he should open his mouth or not."

In *Reg.* v. *Moore* (1852) 2 Den. C. C. 523, also decided by the court of crimiual appeal, an admonition to a person suspected of crime that she "had better speak the truth," was held not to vitiate a subsequent confession, because not made by a person in authority. Parke, B., delivering the opinion of the judges, said, in substance (p. 526), that one element in the consideration of the question whether a confession ought to be excluded was "whether the threat or inducement was such as to be likely to influence the prisoner," and "that if the threat or inducement was held out, *actually or constructively*, by a person *in authority*, it cannot be received, *however slight the threat or inducement.*"

*In *Reg.* v. *Cheverton* (1862) 2 Fost & F. 833, a statement made by a policeman to a person in his custody, that "you had better tell all about it, it will save you trouble," was held to operate as a threat or inducement sufficient to render what was said by the prisoner inadmissible. [**555**

In *Reg.* v. *Fennell* (1881) L. R. 7 Q. B. Div. 147, the court for crown cases reserved referred approvingly to the statement of the rule contained in Russell on Crimes, and, "upon all the decided cases," held inadmissible a statement made induced by the prosecutor saying to the prisoner in the presence of an inspector of police: "The inspector tells me you are making housebreaking implements; if this is so you had better tell the truth, it may be better for you."

The latest decision in England on the subject of inducement, made by the court for crown cases reserved, is *Reg.* v. *Thompson* [1893] 2 Q. B. 12. At the trial a confession was of-

fered in evidence, which had been made by the defendant before his arrest upon the charge of having embezzled funds of a certain corporation. Objection was interposed to its reception in evidence, on the ground that it had been made under the operation of an inducement held out by the chairman of the company in a statement to a relative of the accused, intended to be and actually communicated to the latter, that "it will be the right thing for Marcellus (the accused) to make a clean breast of it." The evidence having been admitted and the prisoner convicted, the question was submitted to the upper court whether the evidence of the confession was properly admitted. The opinion of the appellate court was delivered by Cave, J., and concurred in by Lord Coleridge, C. J., Hawkins, Day, and Wills, JJ. After stating and adopting the ruling of Baron Parke in *Reg.* v. *Warringham*, 2 Den. C. C. 447, note, to the effect that it was the duty of the prosecutor to satisfy the trial judge that the confession had not been obtained by improper means, and that where it was impossible to collect from the proof whether such was the case or not, the confession ought not to be received, the opinion referred approvingly to the declaration of Pollock, C. B., in *Reg.* v. 556] *Baldry*, that the true ground of the exclusion of statements not voluntary was that "it would not be safe to receive a statement made under any influence of fear." The court then quoted the rule laid down in Russell on Crimes as being a statement of the principles which had been restated and affirmed by the Lord Chief Justice in the *Fennell Case*, and added:

"If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask, Is it proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible."

After reviewing the evidence and holding that, under the ruling of Pollock, C. B., in the *Baldry Case*, it was immaterial whether the statements made by the chairman were calculated to elicit the truth, and intimating that they tended to lead the prisoner to believe that it would be better for him to say something, the opinion concluded with deciding that "on the broad, plain ground that it was not proved satisfactorily that the confession was free and voluntary," the confession ought not to have been received.

Whilst, as we have said, there is no question that a police officer having a prisoner in custody is a person in authority within the rule in England, and therefore that any inducement by him offered, calculated to operate upon the mind of the prisoner, would render a confession as a consequence thereof inadmissible, there seems to be doubt in England whether the doctrine does not extend further, and hold that the mere fact of the interrogation of a prisoner by a police officer would *per se* render the confession inadmissible, because of the inducement resulting from the very nature of the authority exercised by the police officer, assimilating him in this regard to a committing or examining magistrate. 3 Russell, Crimes, p. 510, note *t*. In *Reg.* v. *Johnston* (1864) 15 Ir. C. L. Rep. 60, this subject was elaborately considered by the *Irish court of criminal [557 appeal, seven of the judges writing opinions, and the majority concluding, on a full consideration of the English and Irish authorities, that a policeman was not such an official as would render *per se* any confession elicited by his questioning the prisoner inadmissible, although the fact of his questioning became an important element in determining whether inducement resulted from the language by him used. The English authorities, however, referred to in the above note to Russell on Crimes, are later in date than *Reg.* v. *Johnston*, although they emanate from nisi prius courts and not from appellate tribunals. Whatever be the rule in this regard in England, however, it is certain that where a confession is elicited by the questions of a policeman, the fact of its having been so obtained it is conceded may be an important element in determining whether the answers of the prisoner were voluntary. The attempt on the part of a police officer to obtain a confession by interrogating has been often reproved by the English courts as unfair to the prisoner and as approaching dangerously near to a violation of the rule protecting an accused from being compelled to testify against himself. *Berriman's Case* (1854) 6 Cox, C. C. 388; *Cheverton's Case* (1862) 2 Fost. & F. 833; *Mick's Case* (1863) 3 Fost. & F. 822; *Regan's Case* (1867) 17 L. T. N. S. 325, and *Reason's Case* (1872) 12 Cox, C. C. 228.

From this review it clearly appears that the rule as to confessions by an accused (leaving out of consideration the rule now followed in England restricting the effect of inducements, according as such inducements were or were not held out by persons in authority) is in England to-day what it was prior to and at the adoption of the 5th Amendment, and that, whilst all the decided cases necessarily rest upon the state of facts which the cases considered, nevertheless the decisions as a whole afford a safe guide by which to ascertain whether in this case the confession was voluntary, since the facts here presented are strikingly like those considered in many of the English cases.

We come then to the American authorities. In this court the general rule that the confession must be free and voluntary, *that [558 is, not produced by inducements engendering either hope or fear, is settled by the authorities referred to at the outset. The facts in the particular cases decided in this court and which have been referred to manifested so clearly that the confessions were voluntary that no useful purpose can be subserved by analyzing them. In this court also it has been settled that the mere fact that the confession is made to a police officer, while the accused was under arrest in or out of prison, or was drawn out by his questions does not necessarily render the confession involuntary, but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statements of

the prisoner were voluntary. *Hopt* v. *Utah*, 110 U. S. 574 [28: 262]; *Sparf* v. *United States*, 156 U. S. 51, 55 [39: 343, 345]. And this last rule thus by this court established is also the doctrine upheld by the state decisions.

In the various state courts of last resort the general rule we have just referred to, that a confession must be voluntary, is generally recognized; although in Indiana there is a statute authorizing confessions obtained by inducements to be given in evidence to the jury with all the attending circumstances, except when made under the influence of fear produced by threats, while it is also provided that a conviction cannot be had by proof of a confession made under inducement, "without corroborating testimony." Revised Stat. Ind. 1881, § 1802. And in the Texas Code of Procedure, art. 750, it is provided that confessions shall not be used against a prisoner at his trial, "if, at the time it was made, the defendant was in jail or other place of confinement, nor where he was in custody of an officer, unless such confession be made in the voluntary statement of the accused, taken before an examining court in accordance with law; or be made voluntarily, after having been first cautioned that it may be used against him; or unless, in connection with such confession, he make statement of facts or of circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or instrument with which he states the offense was committed."

559] *The English doctrine which restricts the operation of inducements solely to those made by one in authority has been adopted by some state courts, but disapproved of in others, as in Ohio. *Spears* v. *State*, 2 Ohio St. 583. Whether it is one which should be followed by this court in view of the express terms of the Constitution, need not be now considered as it does not arise under the state of facts here presented. In some it is also held that the fact that the accused is examined on oath by a magistrate or coroner, or by a grand jury, with or without an oath, will, *per se*, exclude confessions, because of the influence presumed to arise from the authority of the examining officer or body. *People* v. *McMahon* (1857) 15 N. Y. 384, followed in *People* v. *Mondon* (1886) 103 N. Y. 211, 218 [57 Am. Rep. 709]; *State* v. *Matthews* (1872) 66 N. C. 106; *Jackson* v. *State* (1879) 56 Miss. 311, 312; *State* v. *Clifford* (1892) 86 Iowa, 550. This doctrine as to examining magistrates is in some states enforced by statutes somewhat similar in character to the English statutes. 2 Taylor, Ev. § 888, note 2.

In some of the states it has been held that where questions are propounded to a prisoner by one having a right to ask them, and he remains silent, where from the nature of the inquiries, if innocent, reply would naturally be made, the fact of such silence may be weighed by the jury. See authorities collected in Chamberlayne's note to 2 Taylor on Evidence, pp. 588[4] *et seq.*

Having stated the general lines upon which the American cases proceed, we will not attempt to review in detail the numerous decisions in the various courts of last resort in the several states, treating of confessions in the divergent aspects in which that doctrine may have presented itself, but will content ourselves with a brief reference to a few leading and well considered cases treating of the subject of inducements, and which are, therefore, apposite to the issue now considered.

In the following cases, the language in each mentioned was held to be an inducement sufficient to exclude a confession or statement made in consequence thereof: In *Kelly* v. *State* (1882) 72 Ala. 244, saying to the prisoner, "You have got your foot in it, and somebody else was with you; now, *if you did [**560** break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth;" in *People* v. *Barric*, 49 Cal. 342, saying to the accused, "It will be better for you to make a full disclosure;" in *People* v. *Thompson* (1890) 84 Cal. 598, 605, saying to the accused, "I don't think the truth will hurt anybody. It will be better for you to come out and tell all you know about it, if you feel that way;" in *Berry* v. *United States* (1893) 2 Colo. 186, 188, 203, advising the prisoner to make full restitution, and saying, "If you do so it will go easy with you; it will be better for you to confess; the door of mercy is open and that of justice closed;" and threatening to arrest the accused and expose his family if he did not confess; in *State* v. *Bostick* (1845) 4 Harr. (Del.) 563, saying to one suspected of crime, "The suspicion is general against you, and you had as well tell all about it, the prosecution will be no greater, I don't expect to do anything with you; I am going to send you home to your mother;" in *Green* v. *State* (1891) 88 Ga. 516, saying to the accused, "Edmund, if you know anything, it may be best for you to tell it," or "Edmund, if you know anything, go and tell it, and it may be best for you;" in *Rector* v. *Commonwealth* (1882) 80 Ky. 468, saying to the prisoner in a case of larceny, "It will go better with you to tell where the money is; all I want is my money, and if you will tell me where it is, I will not prosecute you hard;" in *Biscoe* v. *State* (1887) 67 Md. 6, saying to the accused, "It will be better for you to tell the truth and have no more trouble about it;" in *Com.* v. *Nott* (1883) 135 Mass. 269, saying to the accused, "You had better own up; I was in the place when you took it; we have got you down fine; this is not the first you have taken; we have got other things against you nearly as good as this;" in *Com.* v. *Meyers* (1894) 160 Mass. 530, saying to the accused, "You had better tell the truth;" in *People* v. *Wolcott* (1883) 51 Mich. 612, saying to the accused, "It will be better for you to confess;" in *Territory* v. *Underwood* (1888) 8 Mont. 131, saying to the prisoner that it would be better *to tell [**561** the prosecuting witness all about it, and that the officer thought the prosecuting witness would withdraw the prosecution or make it as light as possible; in *State* v. *York* (1858) 37 N. H. 175, saying to one under arrest immediately before a confession, "If you are guilty you had better own it;" in *People* v. *Phillips* (1870) 42 N. Y. 200, saying to the prisoner, "The best you can do is to own up; it will be better for you;" in *State* v. *Whitfield* (1874) 70 N. C. 356, saying to the accused, "I believe you are guilty; if you are, you had better say so; if you are not, you had better say that;" in *State* v.

Drake (1893) 113 N. C. 624, saying to the prisoner, "If you are guilty, I would advise you to make an honest confession; it might be easier for you. It is plain against you;" in *Vaughan* v. *Commonwealth* (1867) 17 Gratt. 576, saying to the accused, "You had as well tell all about it."

We come, then, to a consideration of the circumstances surrounding, and the facts established to exist, in reference to the confession, in order to determine whether it was shown to have been voluntarily made. Before analyzing the statement of the police detective as to what took place between himself and the accused it is necessary to recall the exact situation. The crime had been committed on the high seas. Brown, immediately after the homicide, had been arrested by the crew in consequence of suspicion aroused against him, and had been by them placed in irons. As the vessel came in sight of land, and was approaching Halifax, the suspicions of the crew having been also directed to Bram, he was arrested by them and placed in irons. On reaching port, these two suspected persons were delivered to the custody of the police authorities of Halifax and were there held in confinement awaiting the action of the United States consul, which was to determine whether the suspicious which had caused the arrest justified the sending of one or both of the prisoners into the United States for formal charge and trial. Before this examination had taken place the police detective caused Bram to be brought from jail to his private office, and when there alone with the detective *he was stripped of his clothing*, and either whilst the detective was in the act of so stripping him, or after he was de-
562] nuded, *the conversation offered as a confession took place. The detective repeats what he said to the prisoner, whom he had thus stripped, as follows:

"When Mr. Bram came into my office I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me. Where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' "

The fact, then, is, that the language of the accused, which was offered in evidence as a confession, was made use of by him as a reply to the statement of the detective that Bram's cosuspect had charged him with the crime, and, although the answer was in the form of a denial, it was doubtless offered as a confession because of an implication of guilt which it was conceived the words of the denial might be considered to mean. But the situation of the accused, and the nature of the communication made to him by the detective, necessarily overthrows any possible implication that his reply to the detective could have been the result of a purely voluntary mental action; that is to say, when all the surrounding circumstances are considered in their true relations, not only is the claim that the statement was voluntary overthrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind.

It cannot be doubted that placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that if he remained silent it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person, and it cannot be conceived that the converse impression would not also have naturally arisen that by denying there was hope of removing the suspicion from himself. If this must have been the state of mind of one situated as was the prisoner when the confession was made, how in reason *can it be said that the [563 answer which he gave and which was required by the situation was wholly voluntary and in no manner influenced by the force of hope or fear? To so conclude would be to deny the necessary relation of cause and effect. Indeed, the implication of guilt resulting from silence has been considered by some state courts of last resort, in decided cases, to which we have already made reference, as so cogent that they have held that where a person is accused of guilt, under circumstances which call upon him to make denial, the fact of his silence is competent evidence as tending to establish guilt. Whilst it must not be considered that by referring to these authorities we approve them, it is yet manifest that if learned judges have deduced the conclusion that silence is so weighty as to create an inference of guilt, it cannot, with justice, be said that the mind of one who is held in custody under suspicion of having committed a crime would not be impelled to say something, when informed by one in authority that a cosuspect had declared that he had seen the person to whom the officer was addressing himself commit the offense, when otherwise he might have remained silent but for fear of the consequences which might ensue; that is to say, he would be impelled to speak either for fear that his failure to make answer would be considered against him, or of hope that if he did reply he would be benefited thereby. And these self evident deductions are greatly strengthened by considering the place where the statements were made and the conduct of the detective towards the accused. Bram had been brought from confinement to the office of the detective, and there, when alone with him, in a foreign land, while he was in the act of being stripped or had been stripped of his clothing, was interrogated by the officer, who was thus, while putting the questions and receiving answers thereto, exercising complete authority and control over the person he was interrogating. Although these facts may not, when isolated each from the other, be sufficient to warrant the inference that an influence compelling a statement had been exerted, yet when taken as a whole, in conjunction with the nature of the communication made, they give room to the strongest inference that the *statements of Bram were not [564 made by one who in law could be considered a free agent. To communicate to a person suspected of the commission of crime the fact that his cosuspect has stated that he has seen him commit the offense, to make this statement to him under circumstances which call imperatively for an admission or denial and to ac-

company the communication with conduct which necessarily perturbs the mind and engenders confusion of thought, and then to use the denial made by the person so situated as a confession, because of the form in which the denial is made, is not only to compel the reply but to produce the confusion of words supposed to be found in it, and then use statements thus brought into being for the conviction of the accused. A plainer violation as well of the letter as of the spirit and purpose of the constitutional immunity could scarcely be conceived of.

Moreover, aside from the natural result arising from the situation of the accused and the communication made to him by the detective, the conversation conveyed an express intimation rendering the confession involuntary within the rule laid down by the authorities. What further was said by the detective? " 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' " But how could the weight of the whole crime be removed from the shoulders of the prisoner as a consequence of his speaking, unless benefit as to the crime and its punishment was to arise from his speaking? Conceding that, closely analyzed, the hope of benefit which the conversation suggested was that of the removal from the conscience of the prisoner of the merely moral weight resulting from concealment, and therefore would not be an inducement, we are to consider the import of the conversation, not from a mere abstract point of view, but by the light of the impression that it was calculated to produce on the mind of the accused, situated as he was at the time the conversation took place. Thus viewed, the weight to be removed by speaking natur-
565] ally imported *a suggestion of some benefit as to the crime and its punishment as arising from making a statement.

This is greatly fortified by a consideration of the words which preceded this language—that is, that Brown had declared he had witnessed the homicide, and that the detective had said he believed the prisoner was gulity and had an accomplice. It, in substance, therefore, called upon the prisoner to disclose his accomplice, and might well have been understood as holding out an encouragement that by so doing he might at least obtain a mitigation of the punishment for the crime which otherwise would assuredly follow. As said in the passage from Russell on Crimes already quoted, "The law cannot measure the force of the influence used or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted." In the case before us we find that an influence was exerted, and as any doubt as to whether the confession was voluntary must be determined in favor of the accused, we cannot escape the conclusion that error was committed by the trial court in admitting the confession under the circumstances disclosed by the record.

Our conclusion that the confession was wrongfully admitted renders it unnecessary to pass on the serious question arising from the ruling of the trial court by which in cross-examination the accused was denied the right to ask the detective as to an article of personal property taken from the prisoner at the time the alleged confession was had. In other words, that the accused could not bring out by way of cross-examination everything which took place at the time of the alleged confession, but was compelled, in order to do so, to make the detective his own witness, and therefore be placed in the position where he could not impeach him. We are also, as the result of our conclusion on the subject of the confession, relieved from examining the many other assignments of error, except in so far as they present questions which are likely to arise on the new trial.

We will now briefly consider the alleged errors of this character.

*By plea and supplemental plea in **[566** abatement, and by motion to quash, defendant, preliminary to the trial, attacked the sufficiency of the indictment, because one of the grand jurors was permitted to affirm and the indictment failed to state that such juror was "conscientiously scrupulous" of being sworn, and because the indictment recited that it was presented upon the "oath" of the jurors, when, in fact it was presented upon the oath *and affirmation* of the jurors. At the hearing of the pleas in abatement, it appeared that when the grand jurors were impaneled one of them, upon being called to be sworn, stated that he affirmed, and declined to take an oath, and after his fellows had been regularly sworn he was formally affirmed to the same duties specified in the oath administered to the others. It is also stated in the record, following the recital of the issuance of venires for grand and petit jurors that,—

"In obedience to the said order of court, and to the venires issued thereunder, the following named grand jurors attended on the 15th day of October, A. D. 1896. On that day the said grand jurors were duly impaneled as the grand jury for the October term of this court, A. D. 1896. All of said grand jurors, being impaneled aforesaid, were duly sworn, except grand juror William Merrill, Junior, of West Newbury, who duly affirmed, twenty-one grand jurors being in attendance."

In § 1 of the Revised Statutes of the United States it is provided, among other things, that, in determining the meaning of the Revised Statutes, "a requirement of an 'oath' shall be deemed complied with by making affirmation in judicial form." Section 800 also provides that:

"Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practised in such state court, so far as such may be practicable *by the courts of the United States or **[567**

the officers thereof. And for this purpose the said courts may, by rule or order, conform the designation and impaneling of juries, in substance, to the laws and usages relating to jurors in the state courts from time to time in force in such state. This section shall not apply to juries to serve in the courts of the United States in Pennsylvania."

The Public Statutes of Massachusetts 1882, chap. 213, § 6, provides as follows:

"Sec. 6. When a person returned as grand juror is conscientiously scrupulous of taking the oath before prescribed he shall be allowed to make affirmation, substituting the word 'affirm' instead of the word 'swear,' and also the words 'this you do under the pains and penalties of perjury,' instead of the words 'so help you God.'"

And § 3 of chap. 3 of the same statutes provides as follows (p. 58):

"In the construction of statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general court or repugnant to the context of the same statute, that is to say, . . . Fourteenth. The word 'oath' shall include 'affirmation' in cases where, by law, an affirmation may be substituted for an oath."

The objection that the indictment recited that it was presented "upon the oath" of the jurors, when the fact was that it was presented upon the "oath and affirmation" of the jurors, is without merit. Waiving a consideration of the question whether, under the provisions of the statutes to which reference has been made, the word "oath" might not properly be construed as meaning either "oath" or "affirmation," the recital alluded to was purely formal, and if defective was open to amendment. The record disclosing the fact that all of the grand jurors were duly sworn except grand juror William Merrill, who was "duly affirmed," the defendant could not have been prejudiced by the form of the statement made in the indictment, and the defect, if any, was rendered harmless by the curative provisions of § 1025, Revised Statutes.

568] *The further objection that neither in the indictment nor in the proof at the hearing of the pleas in abatement was it affirmatively stated or shown that grand juror Merrill, before being permitted to affirm, was proved to have possessed conscientious scruples against taking an oath, is practically concluded by the disposition made of the objection just passed upon, and is rendered nugatory by the terms of § 1025, Revised Statutes. Further, the mode of ascertaining the existence or nonexistence of such conscientious scruples was committed to the discretion of the officer who affirmed the juror, and such affirmation conclusively established that the officer had properly exercised his discretion. *Commonwealth* v. *Fisher*, 7 Gray, 492; *State* v. *Adams*, 78 Me. 486.

The remaining assignments which we deem it proper to notice relate to the overruling of objections interposed to questions propounded to certain witnesses in the character of experts. Some of these objections were made to hypothetical questions asked a number of sailors, reciting the condition of things assumed to have been established by the evidence as existing about the time of the killing, *viz.*, the speed of the Herbert Fuller, the condition of her sails, direction of wind, etc., and inquiry as to the effect it would have on the vessel if the wheelman had taken his hands off the wheel, and what effect would be produced by lashing the wheel under similar conditions. These questions were evidently intended to supplement the testimony of Brown, who swore that he stood with both hands on the wheel during the time between 12 and 2 o'clock, and, consequently, when the murders were committed. The questions were competent, as the testimony sought to be elicited was relevant to the issue. Aside from the testimony of Brown the evidence against Bram was purely circumstantial, and it was clearly proper for the government to endeavor to establish, as a circumstance in the case, the fact that another person who was present in the vicinity at the time of the killing, could not have committed the crime. The testimony sought to be adduced had this tendency, and the fact that it might operate indirectly to fortify the credit of such person as a witness in the cause could not affect its admissibility.

*An objection to a question asked of a [569 medical witness, whether, in his opinion, a man standing at the hip of a recumbent person and striking blows on that person's head and forehead with an axe would necessarily be spattered with, or covered with, some of the blood, was also properly overruled. We think the assumed facts recited in the question were warranted by the proof in the case, and that the evidence sought to be elicited from the witness was of a character justifying an expression of opinion by the witness, the jury after all being at liberty to give to the evidence such weight as in their judgment it was entitled to. *Hopt* v. *Utah*, 120 U. S. 430 [30: 708].

The judgment is reversed, and the cause remanded with directions to set aside the verdict and to order a new trial.

Mr. Justice **Brewer** dissenting:

I dissent from the opinion and judgment in this case—

First, because I think the testimony was not open to objection. "A confession if freely and voluntarily made is evidence of the most satisfactory character." *Hopt* v. *Utah*, 110 U. S. 574, 584 [28: 262, 267]; reaffirmed in *Sparf* v. *United States*, 156 U. S. 51, 55 [39: 343, 345]. The fact that the defendant was in custody and in irons does not destroy the competency of a confession. "Confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises." *Sparf* v. *United States*, *supra*. See also *Wilson* v. *United States*, 162 U. S. 613–623 [40: 1090–1096].

The witness Power, when called, testified positively that no threats were made nor any inducements held out to Bram, and this general declaration he affirmed and reaffirmed in response to inquiries made by the court and the defendant's counsel. The court, therefore, properly overruled the objection at that time made to his testifying to the statements of defendant. It is not suggested that there was error in this ruling, and the fact that in-

ducements were held out is deduced only from the testimony subsequently given by Power of [570] the conversation between him and Bram. The first part of that conversation is as follows: "When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me; where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.'" In this there is nothing which by any possibility can be tortured into a suggestion of threat or a temptation of hope. Power simply stated the obvious fact that they were trying to unravel a horrible mystery, and the further fact that Brown had charged the defendant with the crime, and the replies of Bram were given as freely and voluntarily as it is possible to conceive.

It is strange to hear it even intimated that Bram up to this time was impelled by fear or allured by hope caused in the slightest degree by these statements of Power.

The balance of the conversation is as follows: "I said, 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies." And here, it is argued, was a suggestion of a benefit—the holding out of a hope that a full disclosure might somehow inure to his advantage. To support this contention involves a refinement of analysis which, while it may show marvelous metaphysical ability, is of little weight in practical affairs. But even if it did carry any such improper suggestion it was made at nearly the close of the conversation, and that this suggestion then made had a retroactive effect and transformed the previous voluntary statements of Bram into statements made under the influence of fear or hope, is a psychological process which I am unable to com- [571] prehend. The only reply which *Bram made to the question containing this supposed improper suggestion was this: "Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it." Can it for a moment be thought that such a reply was so significant that permitting it to go to the jury compels the putting at naught this protracted trial, and overthrowing the deliberate verdict of the twelve men who heard the evidence and condemned the defendant? With all respect to my brethren who are of a different opinion, I can but think that such a contention is wholly unsound, and that in all this conversation with Bram there was nothing of sufficient importance to justify the reversal of the judgment.

Again, there is a lack of any proper objection or exception, and if there is any one thing which may be considered as settled in all appellate courts it is that an error in the admission of testimony will not be considered unless there was a specific objection and exception at the trial. "To authorize any objection to the admission or exclusion of evidence, or to the giving or refusal of any instructions to the jury, to be heard in this court, the record must disclose, not merely the fact that the objection was taken in the court below, but that the parties excepted at the time to the action of the court thereon." *Hutchins* v. *King*, 68 U. S. 1 Wall. 53, 60 [17: 544, 546]; *United States* v. *McMasters*, 71 U. S. 4 Wall. 680, 682 [18: 311, 313]. "Our power is confined to exceptions actually taken at the trial." *Pittsburgh, C. & St. L. Railway Company* v. *Heck*, 102 U. S. 120 [26: 58]. See also *Moore* v. *Bank of Metropolis*, 38 U. S. 13 Pet. 302 [10: 172]; *Camden* v. *Doremus*, 44 U. S. 3 How. 515 [11: 705]; *Zeller's Lessee* v. *Eckert*, 45 U. S. 4 How. 289, 297 [11: 979, 982]; *Phelps* v. *Mayer*, 56 U. S. 15 How. 160 [14: 643]; *Dredge* v. *Forsyth*, 67 U. S. 2 Black, 563 [17: 253]; *Young* v. *Martin*, 75 U. S. 8 Wall. 354 [19: 418]; *Belk* v. *Meagher*, 104 U. S. 279 [26: 735]; *Hanna* v. *Maas*, 122 U. S. 24 [30: 1117]; *White* v. *Barber*, 123 U. S. 392, 419 [31: 243, 252]; *Stewart* v. *Wyoming Cattle Ranche Company*, 128 U. S. 383 [32: 439]; *Anthony* v. *Louisville & N. Railroad Company*, 132 U. S. 172 [33: 301]; *Block* v. *Darling*, 140 U. S. 234 [35: 476]; *Bogk* v. *Gassert*, 149 U. S. 17 [37: 631].

It is true these were civil cases. For it is only in the later history of this court that we have had jurisdiction of writs *of error [572] in criminal cases, but the law is equally applicable to the latter. "It is the duty of counsel seasonably to call the attention of the court to any error in impaneling the jury, in admitting testimony, or in any other proceeding during the trial by which his rights are prejudiced, and in the case of an adverse ruling to note an exception." *Alexander* v. *United States*, 138 U. S. 353, 355 [34: 954, 956]. "The general rule undoubtedly is that an objection should be so framed as to indicate the precise point upon which the court is asked to rule." *Sparf* v. *United States*, 156 U. S. 51, 56 [39: 343, 345]; *Holder* v. *United States*, 150 U. S. 91 [37: 1010]; *Tucker* v. *United States*, 151 U. S. 164 [38: 112].

It is true the defendant objected to the admission of the conversation before it was given, but upon the state of facts as then presented unquestionably the trial court ruled properly in permitting the witness to testify, for he positively declared that there was neither threat nor promise, intimidation nor inducement. If it be true, as the court now holds, that in the progress of his testimony it was developed that he did make a statement which carried an inducement—a suggestion of hope—it was then the duty of the defendant to call the attention of the court to the matter, either by objecting to any further disclosures of the conversation, or else by a motion to strike out. Nothing of the kind took place. Defendant was apparently content to let all of the subsequent conversation come in. Can it be held that the court erred in not of its own motion stopping the witness, or striking out the testimony, or instructing the jury to disregard it, when defendant asked nothing of the kind? Surely by this decision we practically overrule the long line of authorities heretofore

cited affirming the necessity of calling the attention of the trial court to the specific matter, obtaining its ruling thereon and saving an exception thereto before there is any jurisdiction in this court to review. Nor is this a mere technical and arbitrary rule which may be dispensed with whenever the exigencies of any case seem to demand, and in no other way a ground for reversal can be discovered. It may be, and undoubtedly often is, the case, that though incompetent testimony be given the defendant prefers that it shall remain in order, 573] for certain *purposes, to take advantage of it in the argument before the jury. Can it be possible that he may obtain this advantage, and, having obtained and used it, insist that, because of such incompetent testimony, he is entitled to a reversal of the judgment against him? *Wilson* v. *United States*, 162 U. S. 613-624 [40: 1090-1096]. Who shall say that this defendant, though at first objecting to any testimony respecting his statements, yet, after hearing what the witness said, did not prefer that such testimony remain, as it disclosed that, at the very first moment he was informed that Brown charged him with the crime, he protested that Brown was not in a position where he could see who did the killing? Indeed, for anything in this record to the contrary, he, when a witness in his own behalf, may have given the same version of the conversation, and admitted that his statements were voluntarily made. Who shall say that he did not wish to argue before the jury that the claim made of Brown's inability to see what took place was not an excuse suggested only by the exigencies of the trial, but was presented at the very first moment of the charge; and if he was willing to let the testimony remain and have all the advantage which he could take of it in argument before the jury, can it be that he can now come to this court and say, "True I did not object to this specific testimony, nor ask to have it stricken out, but it was incompetent," and obtain a reversal on the ground of its admission?

I dissent, therefore, first, because I think the testimony was properly received; and, secondly, because no motion was made to strike it out and no exception taken to its admission.

The **Chief Justice** and Mr. Justice **Brown** concur in this dissent.

LOUIS B. ADAMS and Watson N. Shilling, *Appts.*,
v.
HIRAM H. HENDERSON, George H. Burgitt, Administrator of Edward A. Reed, Deceased, and Millie G. Reed.

(See S. C. Reporter's ed. 573-583.)

Power of court of equity to correct mutual mistake in contract—good and indefeasible title in fee—encumbrance—when payments may be recovered back.

1. A court of equity has power to correct a mutual mistake in the description of land, and make the contract for the sale of the land conform to the real intention of the parties.
2. A good and indefeasible title in fee imports such ownership of the land as enables the owner to exercise absolute and exclusive control of it as against all others.
3. Land encumbered with the right of a railroad company, for all time, to pass over and across it for the purpose of prospecting for and mining minerals other than coal, is not held by a good and indefeasible title in fee simple, which a purchaser who buys under representations from the seller that he has such a title can be compelled to accept.
4. Cash payments for land, made on the basis of a good and indefeasible title, may be recovered back by the purchaser when it is found that the vendor cannot make such a title.

[No. 70.]

Argued and Submitted November 1, 1897. Decided December 6, 1897.

APPEAL from a decree of the Supreme Court of the Territory of Utah affirming the decree of the District Court of the Fourth Judicial District of that Territory adjudging a contract for the sale of land made between Louis B. Adams *et al.* and Edward A. Reed *et al.* to be void, and also adjudging void three promissory notes and a mortgage. *Affirmed.*

The facts are stated in the opinion.

Messrs. **J. M. Wilson,** *P. L. Williams, Kimball & Kimball, John F. Dillon,* and *E. Ellery Anderson,* for appellants:

The sellers, Adams and Schilling, had good title to the premises in question at the time of the sale to Reed and Henderson.

The lands were included within the Union Pacific land grant conferred upon that company by the act of July 2, 1862. It is entirely settled that, by the terms of this act and subject to the exceptions therein contained, there was granted to the Union Pacific Railroad Company an immediate legal title to the lands referred to in the grant, which lands became fixed as to metes and bounds by the location of the road.

Deseret Salt Co. v. *Tarpey*, 142 U. S. 141 (35: 999); *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44 (22: 551); *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733 (23: 634); *Missouri, K. & T. R. Co.* v. *Kansas P. R. Co.* 97 U.S. 491 (24: 1095); *St. Joseph & D. C. R. Co.* v. *Baldwin*, 103 U. S. 426 (26: 578); *Grinnell* v. *Chicago, R. I. & P. R. Co.* 103 U. S. 739 (26: 456); *Wright* v. *Roseberry*, 121 U. S. 488 (30: 1039); *Rutherford* v. *Greene*, 15 U. S. 2 Wheat. 196 (4: 218).

In an action to rescind a contract relating to the sale of real estate based upon an allegation that the seller has not such title as he contracted to convey, the burden of proof is on the party seeking to rescind.

1 Greenl. Ev. § 74; Stevens, Ev. art. 93; Baylie, Onus Probandi, 65; *Woolley* v. *Newcombe*, 87 N. Y. 605; *Mathis* v. *Tennessee & C. Rivers R. Co.* 83 Ala. 411; *Greenblatt* v. *Hermann*, 144 N. Y. 13; *Butler* v. *Miller*, 15 B. Mon. 617; *Hunt* v. *Utter*, 15 Ind. 318; *Buford*

NOTE.—*As to personal liability for encumbrance assumed*, see note to Boone v. Clark (Ill.) 5 L. R. A. 276.

As to rights of successive purchasers of portions of mortgaged land, see note to Boone v. Clark (Ill.) 5 L. R. A. 276.

v. *Guthrie*, 14 Bush, 677; *Simpson* v. *Hawkins*, 1 Dana, 303; *Union P. R. Co.* v. *Barnes*, 27 U. S. App. 42, 64 Fed. Rep. 80, 12 C. C. A. 42; *McNeall* v. *Calkins*, 50 Ill. App. 17; *Peck* v. *Houghtaling*, 35 Mich. 127.

The confirmation by Congress of the title is in law and legal effect a grant of the land, since a legislative act of confirmation operates not only as a conveyance, but also as a statute or a law enacted by proper authority declaring the force and effect of such conveyance, which is that the title of the confirmee is made effectual for all intents and purposes from the time of its inception.

Hoofnagle v. *Anderson*, 20 U. S. 7 Wheat. 212 (5: 437); *Ryan* v. *Carter*, 93 U. S. 78, 82 (23: 807, 808); *Langdeau* v. *Hanes*, 88 U. S. 21 Wall. 521, 529 (22: 606, 608); *Tripp* v. *Spring*, 5 Sawy. 209, 216.

Where a deed is executed in pursuance of a contract for the sale of land, all prior proposals and stipulations are merged, and the deed is deemed to express the final and entire contract between the parties.

Williams v. *Hathaway*, 19 Pick. 388; *Jones* v. *Wood*, 16 Pa. 25; *Carter* v. *Beck*, 40 Ala. 599.

Nothing short of actual positive fraud as distinguished from legal fraud will justify a decree of rescission for misrepresentation.

Southern Development Co. v. *Silva*, 125 U. S. 247 (31: 678); *Wilde* v. *Gibson*, 1 H. L. Cas. 632; *Joliffe* v. *Baker*, L. R. 11 Q. B. Div. 272; *Brownlie* v. *Campbell*, L. R. 5 App. Cas. 937; *Key* v. *Jennings*, 66 Mo. 356; *Clark* v. *Tennant*, 5 Neb. 549.

Where the means of knowledge respecting the matters falsely represented are equally open to purchaser and vendor, the former is charged with knowledge of all that by the uses of such means he could have ascertained

Clark v. *Reeder*, 158 U. S. 505, 523 (39:1070, 1077); *Farrar* v. *Churchill*, 135 U. S. 609–615 (34: 246–250).

In actions to rescind for fraud or untruthful representation, or in actions to recover damages for fraud or misrepresentation, the accused must be found guilty either of misrepresentation, with knowledge that the fact represented is untrue, or else he must be found guilty of representing that he had knowledge of the facts, when in point of fact he had no such knowledge.

Southern Development Co. v. *Silva*, 125 U. S. 247 (31: 678); *Farnsworth* v. *Duffner*, 142 U. S. 43 (35: 931); *Wakeman* v. *Dalley*, 51 N. Y. 27, 10 Am. Rep. 551.

Messrs. **Charles C. Richards** and *James H. Macmillan*, for appellees:

Adams and Shilling never did have a good indefeasible estate in fee simple to the land in controversy, either at the time of the sale to Reed and Henderson, or at the time of the trial of this action.

Barden v. *Northern P. R. Co.* 154 U. S. 320 (38: 999); *Ankeny* v. *Clark*, 148 U. S. 357 (37: 480); *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241 (35: 999).

In an action to rescind a contract relating to the sale of real estate based upon the allegations that the seller has not such title as he contracted to convey, the burden of proof is on the parties seeking to rescind.

The deed given by Adams and Schilling on the 27th day of March, 1890, to Reed and Henderson was an executory contract for the reason that it did not contain the right description of the property.

Hanson v. *Michelson*, 19 Wis. 499; *Petesch* v. *Hambach*, 48 Wis. 447; *Eaton* v. *Eaton*, 15 Wis. 260; *Mastin* v. *Halley*, 61 Mo. 200; *Fitch* v. *Gosser*, 54 Mo. 267.

Material representations which are untrue, though innocently made, or the concealment of material facts by mistake or inadvertence, when relied on and become the foundation of the active relations between the parties, operate as a "surprise and imposition" and constitute such fraud as will move a court of equity to decree a rescission of an executory contract.

Hexter v. *Bast*, 125 Pa. 52; *Chatham Furnace Co.* v. *Moffatt*, 147 Mass. 403; *Colzhausen* v. *Simon*, 47 Wis. 106; *Grant* v. *Law*, 29 Wis. 99; *Knowlton* v. *Amy*, 47 Mich. 204; *Bullitt* v. *Farrar*, 42 Minn. 8, 6 L. R. A. 149; *Litchfield* v. *Hutchinson*, 117 Mass. 195; *Smith* v. *Richards*, 38 U. S. 13 Pet. 26 (10: 42).

As a rule all representations which are untrue and which materially affect the value of the property which forms the subject of the contract will furnish grounds for rescission even though they may have been made without fraudulent intent.

Allen v. *Hart*, 72 Ill. 104; *Bennett* v. *Judson*, 21 N. Y. 238; *Mulvey* v. *King*, 39 Ohio St. 491; *Wilcox* v. *Iowa Wesleyan University*, 32 Iowa, 369; *Alvarez* v. *Brannan*, 7 Cal. 503, 68 Am. Dec. 274.

A fraudulent representation, by one who assumes to have personal knowledge, to the purchaser of real estate, that there is no encumbrance thereon, and upon which representations the purchaser relies and acts to his injury, will sustain an action for the tort, although the purchaser might have discovered the fraud by searching the records.

McKee v *Eaton*, 26 Kan. 226; *David* v. *Park*, 103 Mass. 501; *Babcock* v. *Case*, 61 Pa. 427, 100 Am. Dec. 654; *Linn* v. *Green*, 5 McCrary, 380, 17 Fed. Rep. 407.

And if the representations were made to influence the conduct of another party in a matter of business, and they did influence him to his prejudice, equity will interfere and grant him relief.

Ainslie v. *Medlycott*, 9 Ves. Jr. 19; *Smith* v. *Richards*, 38 U. S. 13 Pet. 38 (10: 48); *Harding* v. *Randall*, 15 Me. 332; *Turnbull* v. *Gadsden*, 2 Strobh. Eq. 14; *McFerran* v. *Taylor*, 7 U. S. 3 Cranch, 281 (2: 440).

Mr. Justice **Harlan** delivered the opinion of the court:

By a final decree of the district court of the fourth judicial district of the territory of Utah a contract for the sale of certain land, made March 27, 1890, between L. B. Adams

As to mistake in quantity of land; relief from,—see note to Trinkle v. Jackson (Va.) 4 L. R. A. 525.

As to court of equity to correct mistakes, see note to Miller v. Powers (Ind.) 4 L. R. A. 483.

As to assumpsit, for money paid on illegal contract, see note to State, McCarty, v. Nelson (Minn.) 4 L. R. A. 300.

and W. N. Shilling on one side, and Edward A. Reed and H. H. Henderson on the other side, and three promissory notes given by the purchasers, together with a mortgage executed by them to secure the payment of such notes, were adjudged to be null and void.

It was also adjudged that Henderson and Burgitt—the latter having become guardian of the person and estate of Reed who was incapable of conducting his own affairs—recover of **575]** Adams *and Shilling the amount paid by Henderson and Reed on the agreed price of the land purchased by them from Adams and Shilling.

The decree was affirmed by the supreme court of the territory, and the case is here for review upon the appeal of Adams and Shilling.

The material facts out of which the case arises, and which are embodied in a report of a special master in chancery, are as follows:

In March, 1890, Shilling and Adams, in response to an inquiry made by Reed and Henderson, stated that they owned and had a good, indefeasible title in fee simple to 440 acres of land lying a few miles west of Ogden City, Weber county, Utah territory.

The lands referred to—as was understood by all parties at the time—were the east half of section 9, township *5* north of range 2 west of the Salt Lake meridian; the south half of the southwest quarter of said section; and the northeast quarter of the southwest quarter of that section.

Reed and Henderson had not at that time seen the land, and had no knowledge as to the title. But Shilling and Adams promised that they would furnish an abstract of title. Reed and Henderson, relying and acting upon the representation of Adams and Shilling that they had a good and indefeasible estate in fee simple to the lands inquired about, without investigating the title, purchased an undivided two-thirds interest in the 440 acres for the sum of $7,333.32, of which one third was to be paid and was paid in cash, and time was given for the payment of the balance with interest. They would not have made the purchase if they had not believed the above representation as to title to be true.

On the 27th of March, 1890, Reed and Henderson received from Adams and Shilling a deed of general warranty for the following land: An undivided two thirds of the east half of section 9, township *6* north of range 2 west of the Salt Lake meridian, of the south half of the southwest quarter of that section, and of the northeast quarter of the southwest quarter of the same section, in Weber county, Utah.

The land contracted for, it will be observed, **576]** was in *township *5*, while the land actually conveyed was in township *6*. But the grantors intended by the above deed to convey an undivided two thirds of the land in township 5, and the grantees supposed that the estate embraced by the conveyance was that which they intended to purchase. But by mistake of the scrivener, the premises conveyed were described as lying in township 6.

At the time the above deed was received the grantees, in addition to the cash payment of one third of the purchase price, executed two promissory notes payable to the grantors for the sum of $2,444.45, each bearing 8 per cent interest, payable one year and six months from March 26, 1890, and secured by a mortgage on the premises. But in that mortgage, by the mistake of the scrivener who prepared it, the land was described as lying in township 6. The mortgage was duly signed, witnessed, and acknowledged, Reed and Henderson, at the time, fully believing and acting upon the representation of the grantors as to title, and paying to the grantors the interest on said notes down to and including September 26, 1890, which amounted to $180. They also signed a promissory note of June 26, 1891, payable to the Utah National Bank of Ogden, Utah, for the sum of $391.10, as the interest on the above notes, which were held by the bank. The note last named was brought into court, and when the final decree was rendered it was still in court for the defendants.

The plaintiffs Shilling and Adams failed to furnish an abstract of title; and Reed and Henderson, having an opportunity to sell the land in township 5, and assuming that that was the land conveyed to and mortgaged back by themselves, procured an abstract on the 3d day of September, 1891.

The above lands in township 5 are within 10 miles of the line of the Union Pacific Railroad, and within the limits of the lands granted to that company by the act of Congress of July 1, 1862. 12 Stat. at L. 489, chap. 120. They lie in a valley at the base of the Wasatch mountains, and had theretofore been used and cultivated as agricultural lands. But no exploration or examination has ever been made on them for coal or minerals of any kind or description.

*As bearing on the condition of the **[577** title to the land in township 5, it may be stated that the Union Pacific Railroad Company twice mortgaged all the lands granted to it by the act of Congress of July 1, 1862, and the act amendatory thereof approved July 2, 1864 (12 Stat. at L 489, chap. 120; 13 Stat. at L. 356, chap. 216); one of the mortgages being dated April 16, 1867, and the other, December 18, 1873.

Adams and Shilling acquired by proper conveyance made in 1889 all the interest of the Union Pacific Railroad Company in the lands in township 5, sold by them to Reed and Henderson, and freed from the liens created by the above mortgages, except that the deed received by them from that company contained a clause, *reserving* "to the said Union Pacific Railroad Company the *exclusive right* to prospect *for coal and other minerals* within and underlying said lands, and to mine for and remove the same if found, and for this purpose it shall have the right of way over and across said lands a space necessary for the conduct of said business thereon without charge or liability for damage therefor."

No patent has ever issued from the government for the land in township 5.

Parties applied to Reed and Henderson for the purchase of that land, but they declined and refused to buy, and a sale by them was defeated.

Within two days of the 3d of September, 1891, and before the bringing of this action, Reed and Henderson ascertained that the plaintiffs were not the owners of and had no

title to the land which the deed from Adams and Shilling purported to convey to them, that is, to the land in township 6.

On or about the 4th day of September, 1891, Reed and Henderson notified Adams and Shilling that they rescinded the contract of sale, and demanded, not only the return to them of the moneys paid on account of their purchase, with interest, but the surrender of the two notes of $1,444.45 each, bearing date March 27, 1890, and the note for $391.10, dated June 26, 1891. All of those notes had been returned by the bank to Adams and Shilling.

After Reed and Henderson notified Adams **578**]and Shilling of *the rescission of the contract of sale, and before the bringing of this suit, Adams and Shilling tendered another deed—a special warranty deed, containing a proper description of the land intended to be sold by them to Reed and Henderson. The latter refused to accept that deed, saying that they rescinded the contract of sale; that Adams and Shilling did not have a good title to the land described therein; and urging the objection also that the deed was not one of general warranty. The deed so tendered was dated September 29, 1891.

At the time Adams and Shilling tendered the deed of special warranty, the title to the land therein described was encumbered by the above reservation in the deed of 1889 made by the Union Pacific Railroad Company to Adams and Shilling, of an exclusive right in the Union Pacific Railroad Company to mine, under said land, for coal and other minerals, and to remove the same.

Subsequently, the Union Pacific Railroad Company executed and delivered to Reed and Henderson a quitclaim deed dated November 2, 1891, and which was acknowledged November 17, 1891, and duly recorded on the 8th of January, 1892. This deed released the land in township 5 from the claim of that company under the *coal* reservation contained in the deed of 1889. But it did not release the right of that company to prospect for and mine "other minerals" under that land.

On the 28th of March, 1890, Reed and Henderson let, leased, and demised unto Adams and Shilling, who were occupying the land, for the term of six months from that date, the land in township 5. But neither Henderson nor Reed ever actually occupied any part of it.

Neither of the notes described in the mortgage of March 27, 1890, made by Reed and Henderson, has been paid. Adams and Shilling are still the owners and holders of them, as well as of the mortgage. The amount unpaid on those notes is the principal of each one, with interest from September 26, 1890, at the rate of 8 per cent per annum.

The relief sought by the suit was a decree reforming the mortgage given by Reed and Hen- **579**]derson so as to correctly *describe the land in township 5, and then a sale thereof in satisfaction of the costs of the action, and the balance of the purchase money, with a personal decree for any deficiency in purchase price that may be found to exist.

The defendants controverted the right of the plaintiffs to any decree, and by cross-complaint, asked the cancelation of the above mortgage and notes, and a judgment for the amount they had paid to the plaintiffs with interest.

The decree rendered was in accordance with the prayer of the cross-complaint. In legal effect it was a decree rescinding the contract between the parties, because of the inability of the plaintiffs to make a sufficient title to the lands sold by them.

Under the facts stated, the case is within a very narrow compass. It is found, and the plaintiffs and defendants agree, that the former intended to sell, and the latter intended to buy, the land in township 5. By mistake the vendors conveyed land in another township which they did not intend to sell, to which they had no title, and which the defendants had no thought of buying; and by mistake, the grantees, in order to secure the purchase price for the land they in fact purchased, mortgaged back to the plaintiffs the land in township 6 which the latter had assumed to convey to them. That a court of equity has power to correct this mutual mistake, make the instruments given in execution of the contract conform to the real intention of the parties, as established by clear and convincing proof, and hold the parties to their actual agreement, cannot be doubted.† But before the mortgage executed by the defendants can be reformed so as to properly describe the land which the plaintiffs intended to sell, and which the defendants intended to buy and mortgage back, *it must appear that the plain- [**580** tiffs have such title as they represented themselves to have when selling the land. A good and indefeasible title in fee imports such ownership of the land as enables the owner to exercise absolute and exclusive control of it as against all others.

That the plaintiffs have no such title is too clear to admit of dispute. They hold under the Union Pacific Railroad Company. They accepted a conveyance from that company which expressly reserved, in its favor, and without limit of time, an exclusive right not only "to prospect for coal and other minerals" under the land in question, and "to mine for and remove the same if found," but "a right of way over and across said lands a space necessary for the conduct of said business thereon without charge or liability for damage therefor." It does not appear that the railroad company is under any legal obligation to surrender or waive this reservation. The plaintiffs cannot compel it to do so. It is true that the reservation was subsequently released or withdrawn, so far as it related to coal, but it is in full force as to other minerals. So that the plaintiffs, in effect, ask that, instead of a good and indefeasible title in fee simple, the defendants shall take and pay for land encumbered with the right of the railroad company for all time, to pass over and across it for the purpose of prospecting for and mining minerals other than coal. A court of equity could not com-

† Snell v. Atlantic F. & M. Insurance Co. 98 U. S. 85, 88, 89 [25: 52, 54]; Simpson v. Vaughan, 2 Atk. 33; Henkle v. Royal Exchange Assur. Co. 1 Ves. Sr. 318; Gillespie v. Moon, 2 Johns. Ch. 585; Keisselbrack v. Livingston, 4 Johns. Ch. 144, 148; Inskoe v. Proctor, 6 T. B. Mon. 311, 316; Hendrickson v. Ivins, 1 N. J. Eq. 562, 568; Wesley v. Thomas, 6 Harr. & J. 24, 26; Newson v. Bufferlow, 1 Dev. Eq. 382; Braddy v. Parker, 4 Ired. Eq. 430, 432; Bailey v. Bailey, 8 Humph. 233; Clopton v. Martin, 11 Ala. 187.

pel the defendants to take and pay for land thus encumbered without making for the parties a contract which they did not choose to make for themselves. "Equity," this court said in *Hunt* v. *Rousmanier's Admrs.* 26 U. S. 1 Pet. 1, 14 [7: 27, 33], "may compel parties to perform their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same. The former is a legitimate branch of its jurisdiction, and in its exercise, is highly beneficial to society; the latter is without its authority, and the exercise of it would be, not only an usurpation of power, but would be highly mischievous in its consequences."

Reference was made in argument to the fact that no patent has ever been issued to the rail-[581]road company for the land in *question, and it has been suggested by the defendants that if it was discovered, before a patent issued, that it was mineral land, the title of the company would fail altogether; for the grant made by Congress to the company did not include mineral lands. *Barden* v. *Northern Pacific Railroad Company*, 154 U. S. 288, 331 [38: 992, 1003]. We do not think it necessary to consider this aspect of the case, nor to determine whether the plaintiffs would be entitled to the relief asked, if the mineral reservation had not been made by the railroad company, and nothing else appeared affecting the title except the fact that no patent had been issued by the United States, together with a possibility that before the issuing of a patent the land might be ascertained to be mineral land which did not pass under the grant by Congress. We forbear any expression of opinion upon that point, because, if it be assumed for the purposes of this case that the fact just stated would not stand in the plaintiffs' way, we are of opinion that the mineral reservation made by the railroad company is in itself such an encumbrance as prevents the plaintiffs from making a good and indefeasible title to the land.

It is suggested that the reservation as to "other minerals" ought not to be deemed an obstacle to the relief asked, because it may never appear that there are any minerals under the land; that it cannot be assumed, in the absence of proof, that the defendants are likely to be disturbed in the full and complete enjoyment of the land for every purpose for which it is adapted. On the other hand, it cannot be affirmed, in view of the discovery of valuable minerals in many parts of the west, that there are no minerals, other than coal, under the land in question. What the defendants are entitled to is a marketable title—a good and indefeasible title in fee. But that they will not obtain if forced to take the land subject to the railroad company's right of way over it for the purpose of prospecting for and mining minerals, which may be taken off, when found. From that burden they cannot be relieved in any way except by the voluntary action of the railroad company.

But it is contended by the plaintiffs that the act of March 3, 1887, *entitled "An Act [582] to Provide for the Adjustment of Land Grants Made by Congress to Aid in the Construction of Railroads and for the Forfeiture of Unearned Lands, and for Other Purposes" (24 Stat. at L. chap. 376), the act of March 2, 1896 (29 Stat. 556, at L. 42, chap. 39), and the concurrent resolution of June 10, 1896 (29 Stat. at L. Appx. p. 10), confirmed as against the United States the right and title of bona fide purchasers of lands contained within the limits of railroad grants; so that, as against such bona fide purchasers, the United States, by the acts cited, expressly disclaims any rights whatever, and confirms absolutely the title of such bona fide purchasers. By this contention is meant that the act of March 3, 1887, as the same has been construed by this court in *United States* v. *Winona & St. Peter Railroad Company*, 165 U. S. 463, 466-469 [41: 789, 791], protects the title of Adams and Shilling as bona fide purchasers, even if, before a patent was issued by the United States, the lands in question should prove to be mineral lands.

It is sufficient, upon this point, to say that if the legislative enactments referred to have any reference whatever to *mineral* lands—if they were held applicable to lands purchased in good faith from the railroad company, and which turned out to be mineral lands that Congress never granted—that would only remove one of the difficulties which, it is insisted, are in the way of plaintiffs. For, if the plaintiffs' title is, under the legislation of 1887 and 1896, good as against the United States, there will still remain the encumbrance upon it arising from the right reserved by the railroad company, for all time—whether the plaintiffs or their vendees consented or not—to go upon the lands in question, for the purpose of prospecting and mining for minerals other than coal, and removing any found there. A patent would convey the interest of the United States in the land. But it would not destroy or release the mineral reservation made by the Union Pacific Railroad Company in its deed to Adams and Shilling. Purchasers from Adams and Shilling would be bound by that reservation, even if the United States issued a patent to the railroad company or to its vendees.

The result of these views is that the defendants were not *bound to accept the deed [583] tendered by the plaintiffs; and as it appears that the plaintiffs cannot make such a title as they agreed to give, as the cash payment was made upon the basis of a good and indefeasible title in the plaintiffs, the defendants were entitled upon their cross-complaint, framed in accordance with the established modes of procedure in the territory, to have a decree which, in effect, rescinds the contract, and gives them back what they paid.

The decree is affirmed.

Re TAMPA SUBURBAN RAILROAD COMPANY, *Petitioner.*

Certiorari, when will not be granted.

(See S. C. Reporter's ed. 583–588.)

A certiorari cannot be granted to review a preliminary restraining order, and an order appointing a receiver and continuing an injunction in aid of a receivership, on the ground that these orders are void for want of power in the judge to grant them outside of his circuit, when they are made in a case in which an appeal can be taken from a final decree to the circuit court of appeals, since there is a plain and adequate remedy by appeal from such interlocutory orders in such cases under the judiciary act of March 3, 1891, as amended by the act of February 18, 1895.

[Original.]

Argued November 29, 1897. Decided December 20, 1897.

ON APPLICATION for leave to file the petition of the Tampa Suburban Railroad Company for a writ of certiorari directed to the Circuit Court of the United States for the Southern District of Florida to remove the proceedings in a suit brought by the Central Trust Company of New York, plaintiff, against the Consumers' Electric Light & Street Railroad Company of Tampa and the Tampa Suburban Railroad Company, for the foreclosure of a mortgage executed by the Consumers' Company to the Central Trust Company to secure its bonds upon the property of the last-named company, including its street railways, franchises, and leases, and its rights under a lease from the Tampa Suburban Railway Company, the certiorari being asked in order to review certain orders made by the circuit judge in the state of Ohio on the ground of his want of jurisdiction, etc. *Leave denied.*

Statement by Mr. Chief Justice **Fuller:**

The Consumers' Electric Light & Street Railroad Company of Tampa executed a mortgage to the Central Trust Company of New York July 1, 1895, to secure an issue of bonds amounting to $350,000 upon all the property of the company, including its street railways, franchises, and leases, and, among other things, all its rights under a lease from the Tampa Suburban Railroad Company, made or to be made, and covering all the property of the latter.

On July 22, 1897, the Trust Company presented its bill of complaint against the consumers and suburban companies for the foreclosure of its mortgage on an alleged default in the payment of interest due July 1, 1897, to one of
584 the circuit judges *for the fifth judicial circuit, at the town of Wadsworth, in the state of Ohio, and made application thereon for the appointment of a receiver. It was admitted that this application was made *ex parte*, but claimed that one Chapin, president of the companies, consented thereto. The circuit judge thereupon, on that day, granted an order taking jurisdiction; directing that cause be shown at Tampa, in the state of Florida, August 4, 1897, why a receiver should not be appointed; and in the meantime restraining defendants from interfering with or disposing of the mortgaged property. This order was transmitted to be entered as of July 22, 1897, in the circuit court for the southern district of Florida, and was so entered, and the bill filed as of that date. Notice was then given to defendants that, on the bill of complaint and the affidavit of Chester W. Chapin, complainant would apply to said judge of the circuit court "at his chambers at Wadsworth, Medina county, Ohio, on the 3d day of August, 1897, for an order appointing a temporary receiver." On that day counsel for the trust company and counsel for defendants appeared before the circuit judge at Wadsworth, Ohio; but counsel for the suburban company objected to the jurisdiction and authority of the circuit judge to make or enter any order or decree outside the territorial limits of the fifth judicial circuit of the United States, in which the suit was pending. These objections were overruled and an amendment and supplement to the bill of complaint was then presented to the circuit judge, together with a number of affidavits on behalf of complainant, to which the suburban company objected, on various grounds, which objections were overruled. Thereupon the suburban company filed an answer to the original bill of complaint and certain affidavits and documents. Argument was then had and an order signed by the circuit judge at Wadsworth, Ohio, on the 3d day of August, 1897, which, after appointing Chester W. Chapin receiver, and directing him to take immediate possession "of all and singular the property above described, wherever situated and found, and to continue the operation of the railway and plant of the defendant companies and conduct systematically their business in the *same manner as at present, [585 and discharge all the public duties obligatory upon the defendants or either of them;" thus continued:

"Each and every of the officers, directors, agents, and employees of the said defendants or either of them are hereby required and commanded forthwith, upon demand of the said receiver or his duly authorized agent, to turn over and deliver to the said receiver or his duly constituted representative all the property of the defendant companies above mentioned, and all books of accounts, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys, and other property in his or their hands or under his or their control, and each and every of such directors, officers, agents, and employees are hereby commanded and required to obey and conform to such orders as may be given to them from time to time by said receiver or his duly constituted representative in conducting the operation of the said property and in discharging his duty as receiver, and each and every of such officers, directors, agents, and employees of the defendant companies or either of them are hereby enjoined from interfering in any manner whatever with the possession or management of any part of the property over which

NOTE.—*As to certiorari in the United States courts,* —see note to Clark v. Hackett, 17: 69.

As to certiorari to review quashing of appeal from conviction, see note to Grand Rapids v. Braudy (Mich.) 32 L. R. A. 116.

the receiver is hereby appointed, or from interfering in any way to prevent the discharge of the duties of such receiver."

The receiver was then authorized by the order to operate the street railway system and other property, with the usual provisions in that regard, being required to give bond to be approved by the clerk of the court or by a judge thereof, conditioned for the proper discharge of his duties. The order concluded: "And it is further ordered that the original and supplemental bills in this cause, and all exhibits, affidavits, and other papers filed therein, be transferred to and filed in the clerk's office, at Tampa, Florida, at which place all process shall be returnable."

This order was transmitted by the circuit judge by letter from Wadsworth, Ohio, under date August 4, 1897, to the clerk of the circuit court at Jacksonville, with directions to file it, which letter informed the clerk that the circuit **586**] judge *had sent by express to him "supplemental bill and numerous affidavits offered by counsel, which, on receipt, also file, of same date as order appointing receiver. Attached to the order appointing receiver I have appended an order directing the original bill and all the affidavits and exhibits filed to be transferred to the clerk's office at Tampa."

The Tampa Suburban Railroad Company presented its petition to this court for writ of certiorari directed to the circuit court for the southern district of Florida to remove the proceedings in question for review, and on the application to file the petition, a rule to show cause was granted, to which return has been made.

The petition set forth in detail the matters above stated, in brief, with others, and insisted that the orders made by the circuit judge in the state of Ohio were void for want of jurisdiction; that the mortgage of the consumers' company was invalid for not having been properly executed, as required by the statutes of Florida; that foreclosure was prematurely sought because the default in the payment of interest had not been continued for sixty days, contended to be a condition provided in the mortgage; that the original bill and exhibits were not before the circuit judge when the order of August 3d was granted; that the circuit judge improperly considered the amended bill and accompanying affidavits when notice thereof had not been given; that the restraining order was not limited in duration; and that there was no proof of danger of irreparable damage by delay. It was admitted that on the 22d of July and until and long after the 3d of August, the district judge for the southern district of Florida and both circuit judges and the circuit justice were absent from the fifth judicial circuit, and petitioner charged that it had filed in the circuit court for the southern district of Florida motions to discharge, annul, and set aside the orders of July 22d and August 3d; but that the motions had remained undisposed of up to October 9th, when the petition was verified, because there was no judge of the United States courts within that circuit who had authority to hear and determine the same.

Messrs. **Noah Brooks Kent Pettingill** and *Thomas Mitchell Shackelford* for petitioner.

Messrs. **Adrian H. Joline** and *Henry W. Calhoun* for respondent.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By § 716 of the Revised Statutes it is provided that: "The Supreme Court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." This undoubtedly authorized the issue of writs of certiorari in all proper cases. *American Construction Company* v. *Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 380 [37: 486, 489].

In the case of *Chetwood*, 165 U. S. 443, 461 [41: 782, 788], we allowed the writ to bring up for review certain final orders of the circuit court which interfered with causes pending in this court; and the question of the issue of the writ by this court in the exercise of its inherent general powers, under the Constitution, did not arise.

By this application the review of two interlocutory orders is sought, the one, a preliminary restraining order, and the other appointing a receiver and continuing the injunction in aid of the receivership, on the ground that both these orders were void for want of power in the circuit judge to grant them outside of his circuit.

That this presents a question of grave importance is obvious, but it is objected that the application cannot be entertained because the appellate jurisdiction of this court can only be exercised in respect of final judgments or decrees, and, also, because there is another adequate remedy. We need not consider the first of these objections, as the second is sufficient to dispose of the application.

When sought as between private persons, the general rule *is that the writ of certiorari, [**588** such as asked here, will be granted or denied, in the sound discretion of the court, on special cause or ground shown; and will be refused where there is a plain and equally adequate remedy by appeal or otherwise.

By the 7th section of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517), as amended by the act of February 18, 1895 (28 Stat. at L. 666, chap. 96), it is provided: "That where, upon a hearing in equity in a district court or a circuit court, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction to the circuit court of appeals."

The suit in which the orders complained of were entered is one in which an appeal from a final decree might be taken to the circuit court of appeals, and this even though the question of the jurisdiction of the circuit court was involved. *United States* v. *Jahn*, 155 U. S. 109 [39: 87]. An appeal to the circuit court of ap

peals might therefore have been taken from these orders or from an order refusing to set them aside and dissolve the injunction. We are not called on to say that an appeal would lie from an order simply appointing a receiver, but where the order also grants an injunction, the appeal provided for may be taken, and carries up the entire order, and the case may, indeed, on occasion, be considered and decided on its merits. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518 [41: 810].

The application for leave to file this petition must therefore be denied; but we must not be understood as intimating an opinion that a circuit judge has power to grant injunctions, appoint receivers, or enter orders or decrees, *in invitum*, outside of his circuit.

Leave denied.

MICHIGAN LAND & LUMBER COMPANY, LIMITED, *Plff. in Err.*,
v.
CHARLES A. RUST, Survivor, etc.

(See S.C. Reporter's ed. 589-604.)

Patent, when necessary to confer legal title to lands—power of the land department—acceptance by state—act of March 3, 1857.

1. When an act of Congress grants lands, and the granting act specifically provides for the issue of a patent, the rule is that the legal title remains in the government until the issue of the patent.
2. The power of the Land Department to inquire into the extent and validity of rights claimed against the government does not cease until the legal title has passed.
3. An acceptance by a state officer charged under an act of Congress with the duty of so doing, of resurveys of land granted to the state as within the authority of the Land Department, makes the adjustment of the grant upon the basis of such resurveys final and conclusive.
4. The confirmation by the act of Congress of March 3, 1857, which is a general act reaching to all the states, of the selection of swamp and overflowed lands "heretofore reported to the commissioner of the General Land Office," cannot be construed as intended to put an end to all further inquiry in the Land Department, nor to oust that department of jurisdiction to inquire into and correct any frauds and mistakes in the list previously approved and certified, nor to make such list a finality and an absolute transfer of the equitable title.

[No. 57.]

Argued October 25, 26, 1897. Decided December 13, 1897.

IN ERROR to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the Eastern District of Michigan in favor of defendants, in an action of ejectment brought by the Michigan Land & Lumber Company, Limited, plaintiff, against Charles A. Rust *et al.*, to recover possession of the undivided half of lands in Clare county, Michigan. *Affirmed.*

See same case below, 31 U. S. App. 731.

Statement by Mr. Justice **Brewer**:

This was an action of ejectment commenced in the circuit court of the United States for the eastern district of Michigan on February 11, 1888. On November 28, 1892, the case came on for trial before the court and a jury. At the close of the testimony the jury, under the instructions of the court, returned a verdict for defendants. On May 7, 1895, this judgment was affirmed by the court of appeals (31 U. S. App. 731), and to review such judgment the case was brought here *on [590 writ of error. The land in dispute is situated in Clare county, being the S.E. ¼ of S. E. ¼ of section 20; N.W. ¼ of S. W. ¼ of section 21; N.W. ¼ of S.E. ¼ of section 22; N.W. ¼ of N.W. ¼ of section 28; N. ½ of S. W. ¼ of section 29; N. ½ of N.E. ¼ of section 35, township 18, range 3 W.; and E. ½ of S.W. ¼ of section 1, township 18, range 4 W., and amounting to 400 acres, the undivided half of which only was claimed by plaintiff.

The contention of the plaintiff, generally speaking, is that this was swamp land, and granted to the state of Michigan by the act of Congress of date September 28, 1850, granting swamp lands to the several states (9 Stat. at L. 519, chap. 84); that it was included in a list of such lands in the Ionia land district, approved by the Secretary of the Interior and forwarded to the Governor of Michigan on January 13, 1854; that the act of March 3, 1857 (11 Stat. at L. 251, chap. 117), confirmed the action of the Secretary of the Interior, and thereby passed the title to the state of Michigan, by which state it was, on October 14, 1887, conveyed to plaintiff's grantor.

The defendants, on the other hand, contend that the original surveys of the public lands in the state of Michigan were erroneous; that, at the instance of the state, Congress ordered resurveys, which resurveys were carried on from the years 1842 to 1857; that, while it is true this land was by the original surveys classed as swamp land and included in the Ionia land district list approved and certified to the state of Michigan, the resurveys showed that it was not land of that description; that a new list for that district, not including this land, was in 1886 made out and certified to the state; that such new list was accepted by the state as correct, and a patent for the lands described therein issued to and received by it; that after all this had taken place and in 1870 the land in question was sold by the officers of the United States at auction after public

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NOTE.—*That patents for land may be set aside for fraud*, see note to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands, how construed, see note to Watts v. Lindsey, 5: 423.

As to land grants to railroads, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

As to public lands when interest rests; entry; homestead; pre-emption; notice of claim; certificates of entry; proofs of settlement; oath of pre-emptor; transfer of claim,—see note to Close v. Stuyvesant (Ill.) 3 L. R. A. 161.

As to surveys; meander lines,—see note to Stoner v. Rice (Ind.) 6 L. R. A. 387.

As to statutes legalizing invalid grants, see note to Erskine v. Nelson County (N. D.) 27 L. R. A. 696.

advertisement; and that patents were duly issued upon such sale, under which patents the defendants claim title.

Messrs. **A. B. Browne, Frank E. Robson,** *A. T. Britton*, and *J. W. Champlin* for plaintiff in error.

Messrs. **Benton Hanchett** and **Ashley Pond** for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

This case involves questions of the power of the Land Department over the matter of the identification of the particular lands passing under the swamp land act of 1850, of the finality of the action of the Secretary of the Interior in approving and certifying to the governor of the state a list of such lands, and of the effect of the confirmatory act of 1857. There is no testimony showing what was in fact the condition of the land, whether swamp or not, at the time of the passage of the act of 1850, and the case turns wholly upon the documentary evidence.

The act of 1850 made a grant *in præsenti;* in other words, the title then passed to all lands which at that date were swamp lands, and the only matters thereafter to be considered were those of identification. *Hannibal & St. J. Railroad Co.* v. *Smith*, 76 U. S. 9 Wall. 95 [19:599]; *French* v. *Fyan*, 93 U. S. 169 [23: 812]; *Martin* v. *Marks*, 97 U. S. 345 [24:940]; *Rice* v. *Sioux City & St. P. Railroad Company*, 110 U. S. 695 [28:289]; *Wright* v. *Roseberry*, 121 U. S. 488 [30:1039]; *Tubbs* v. *Wilhoit*, 138 U. S. 134 [34:887]. But while the act operated as a grant *in præsenti*, the determination of what lands were swamp lands was intrusted to the Secretary of the Interior. Section 2 contains this provision:

"That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the state of Arkansas, and, at the request of said governor, cause a patent to be issued to the state therefor; and on that patent the fee simple to said lands shall vest in said state of Arkansas, subject to the disposal of the legislature thereof."

592] *It may be remarked in passing that while the 1st and 2d sections refer specially to the state of Arkansas, § 4 of the act makes it applicable to all the states. It is true that in the 1st section Congress defines the lands granted as "swamp and overflowed lands, made unfit thereby for cultivation;" and § 3, referring to the lists and plats ordered by § 2 to be made out by the Secretary of the Interior, contains this further specification as to the character of the lands granted:

"That in making out a list and plats of the lands aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said lists and plats; but when a greater part of a subdivision is not of the character, the whole of it shall be excluded therefrom."

But while Congress thus defined what is intended to grant as swamp and overflowed lands it intrusted, as appears from § 2, the identification of those lands to the Secretary of the Interior.

It will be perceived that the act contemplated the issue of a patent as the means of transferring the legal title. In *Rogers Locomotive Mach. Works* v. *American Emigrant Company*, 164 U. S. 559, 574 [41: 552, 558], it was said, speaking in refereuce to this matter, and after a full review of the previous authorities: "When he [that is, the Secretary of the Interior] made such identificatiou, then, and not before, the state was entitled to a patent, and 'on such patent' the fee-simple title vested in the state. The state's title was at the outset an inchoate one, and did not become perfect, as the date of the act, until a patent was issued."

Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the Land Department of the government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. *Strother* v. *Lucas*, 37 U. S. 12 Pet. 410, 454 [9:1137, 1154]; *Grignon's Lessee* v. *Astor*, 43 U. S. 2 How. 319 [11:285]; *Chouteau* v. *Eckhart*, 43 U. S. 2 How. 344–372 [11:293–304]; *Glasgow* v. *Hortiz*, 66 U. S. 1 Black, 595 [17:110]; *Langdeau* v. *Hanes*, 88 U. S. 21 Wall. 521 [22:606]; *Ryan* v. *Carter*, 93 U. S. 78 [23: 807]. Sometimes *a [593 certification of a list of lands to the grantee is declared to be operative to transfer such title (Rev. Stat. § 2449; *Frasher* v. *O'Connor*, 115 U. S. 102 [29: 311]), but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent (*Bagnell* v. *Broderick*, 38 U. S. 13 Pet. 426–450 [10:235–242]); and while so remaining the grant is in process of administration, and the jurisdiction of the Land Department is not lost.

It is, of course, not pretended that when an equitable title has passed the Land Department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. *Cornelius* v. *Kessel*, 128 U. S. 456 [22: 482]; *Orchard* v. *Alexander*, 157 U. S. 372–383 [39: 737–741]; *Parsons* v. *Venzke*, 164 U. S. 89 [41:360]. In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed. "A warrant and survey authorize the proprietor of them to demand the legal title, but do not, in themselves, constitute a legal title. Until the consummation of the title by a grant, the person who acquires an equity holds a right subject to examination." *Miller* v. *Kerr*, 20 U. S. 7 Wheat. 1, 6 [5: 381, 382]. After the issue of the patent the matter becomes subject to inquiry only in the courts and by judicial proceedings. *Stone* v. *United States*, 69 U. S. 2 Wall. 525, 535 [17: 765, 767]; *Moore* v. *Robbins*, 96 U. S. 530 [24: 848]; *United States* v. *Schurz*, 102 U. S. 378–396 [26: 167–172]; *Bicknell* v. *Comstock*, 113 U. S. 149, 151 [28: 962, 963]; *Iron Silver Mining Co.* v. *Camp-*

bell, 135 U. S. 286 [34: 155]; *Williams* v. *United States*, 138 U. S. 514 [34: 1026]. This jurisdiction of the department has been maintained in cases of pre-emption where the entire purchase money has been paid and a receiver's final certificate issued. *Orchard* v. *Alexander*, 157 U. S. 372 [39: 737], and cases cited in the opinion; *Parsons* v. *Venzke*, 164 U. S. 89 [41: 360].

In *Knight* v. *United States Land Association*, 142 U. S. 161 [35: 974], is a full discussion by Mr. Justice Lamar of the power of the Secretary of the Interior over proceedings in respect to 594] the *disposition of public lands, and on page 178 [35: 980] it is said, as illustrative of the scope of that power: "For example, if, when a patent is about to issue, the secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to ask the Attorney General to take measures to annul." And, again, on page 181 [35: 981] is this language: "The secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands." See also *Orchard* v. *Alexander*, 157 U. S. 372, 381, 382 [39: 737, 741]; *Warner Valley Stock Company* v. *Smith*, 165 U. S. 28, 34 [41: 621, 624]. This jurisdiction extends to the ordering of new surveys whenever in the judgment of the department there has been error or fraud in those already made. *Cragin* v. *Powell*, 128 U. S. 691 [32: 566]. In *Tubbs* v. *Wilhoit*, 138 U. S. 134, 143 [34: 887, 890], the court quoted with approval this passage from a letter of the Secretary of the Interior: "There can be no doubt but that under the act of July 4, 1836, reorganizing the General Land Office, the commissioner has general supervision over all surveys, and that authority is exercised whenever error or fraud is alleged on the part of the surveyor general." And in *New Orleans* v. *Paine*, 147 U. S. 261 [37: 162], the question was presented as to the power of the department to order a new survey, and on page 266 [37: 163] the rule was thus stated: "If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by 595] himself, *or his successor, as are the interlocutory decrees of a court open to review upon the final hearing." So, notwithstanding that a survey had been made and that such survey indicated that the land in controversy was swamp land, and, therefore, passing under the act of 1850 to the state of Michigan, it was within the power of the Land Department, at any time prior to the issue of a patent, of its own motion, to order a resurvey, and correct by that any mistakes in the prior survey.

But in this case it is not necessary to rely alone on the general power vested in the Land Department, for as early as 1842 the attention of the legislature of Michigan was called to the fact that there had been errors in the surveys of public lands within the state, and a resolution was passed by it in these words:

"Whereas, it has been satisfactorily made to appear to this legislature that large districts of lands lying within the limits of the state of Michigan have been returned by some of the deputy United States surveyors to the General Land Office as surveyed, where no surveys whatever have been made, or where the surveys have been so imperfectly done as to be utterly valueless; and whereas, the United States surveyor general of this land district has caused the lands so represented as surveyed to be offered for sale, to the very great injury of the state of Michigan and the citizens thereof; therefore,

"*Be it resolved by the Senate and House of Representatives of the State of Michigan*, That the President of the United States be requested to cause the subdivisions of the following townships of land, situate within the state of Michigan, and which have been represented to have been surveyed, but which have either not been surveyed or have been so imperfectly surveyed that said work is valueless, to be surveyed at as early a day as may be consistent, *viz.*:

. . . . . .

"*Resolved*, That the governor be requested to transmit the foregoing preamble and resolution to the President of the United States." [Mich. Laws 1842, No. 8.]

A letter inclosing a copy of this resolution was forwarded to the Commissioner of the General Land Office, and by him *referred [596 to the President, who indorsed it as follows: "Let the matter be referred to the surveyor general, with instructions as indicated, and let the governor of Michigan be informed of the measures to be adopted." Thereupon proceedings for new surveys were taken by the Land Department, of which fact the governor of the state was duly informed. It is true that in the resolutions of the Michigan legislature eighty-one townships were specifically named, and that the land in controversy was not included within those townships, but it appears that on the strength of the information thus furnished the Land Department proceeded to make new surveys of other lands than those specifically mentioned by the legislature, and the attention of Congress having been called to the matter, it, from 1845 to 1856 inclusive made appropriations for correcting surveys in the state of Michigan. 5 Stat. at L. 762; 9 Stat. at L. 95, 365, 530, 611, 612; 10 Stat. at L. 204, 565, 660; 11 Stat. at L. 86. The last three appropriations were made after the sending of the approved list for the Ionia land district to the governor on January 13, 1854.

It may be noticed here, in passing, that in the adjustment of the swamp land grant for the state of Michigan the Land Department did not include in one list all the swamp lands within the state, but made out several lists, apparently one at least for each land district.

Not only was there general knowledge on the part of the authorities of the state, as of those at Washington, of the existence of errors and mistakes in the original surveys of public lands in the state of Michigan, but also was there particular information as to supposed errors in the surveys of the land in controversy. After the passage of the act of 1850 the Commissioner of the General Land Office instructed the surveyor general of the **597]** state of Michigan to examine the *field notes of the surveys on file in his office and report therefrom a list of the lands which were swamp or overflowed. From time to time the surveyor general forwarded to the Land Department lists in accordance with these instructions. On March 29, 1852, he forwarded a list containing the land in question, and in the letter accompanying is found this language: "The districts reported by Judge Burt and Hlram Burnham to be fraudulent are embraced in this list and marked 'F'," and in that list the district containing the land in controversy is marked with the letter "F," so that upon the records of the General Land Office was to be found information that the survey of this particular land was reported to be erroneous, and as such was likely to be included in resurveys then pending. The report of the commissioner of the state land office to the legislature of the state, for the year ending November 30, 1856, contains this statement: "Patents are now received for all these lands in the state except those situate in the Ionla land district, comprising about 1,200,000 acres, and for these we are assured the patents will soon be forwarded, the making of which have been delayed in consequence of extensive resurveys by the general government, which, in some instances, changes the amount and character of the land." And again, after speaking of the application for the purchase of particular tracts, he says they have been denied, because "no valid sale could be made until after a compliance with the law requiring advertisement of a public offering to be published in each county of the state; and such public sale or offering has not been deemed advisable until after the title of the state to the grant should be wholly confirmed by the issue of the patents, and the numerous corrections and restatements of the lists necessary to be previously made by the department at Washington." And still again: "It is well known that many tracts, and sometimes almost entire sections, are now considered as among the best of farming lands, or extensively covered with pine and other valuable timber."

Upon the resurveys the land in controversy was shown not to be swamp and overflowed land, and lists conforming to these new surveys were duly approved and certified by the **598]*** Secretary of the Interior and forwarded to the governor of the state of Michigan; the receipt of such lists was acknowledged and a request made for patents for the lands described therein, and patents were issued and accepted conveying such lands.

These facts indicate very clearly an adjustment of the grant upon the basis of the resurveys. Undoubtedly the beneficiary of such a grant is interested in its adjustment and may properly be heard before the officers of the grantor in determining what lands are embraced within it, and any assent by the grantee to a determination made by the officers of the grantor as to the lands passing within the grant would be binding upon it. In this case the grant was for the benefit of the state of Michigan, but in the act of 1850 making the grant, Congress, as it had a right to do, clearly indicated the officer of the state, to wit, the governor, whose action in the premises should be the action of the grantee. Under these circumstances, it being known that there were errors in the surveys, and the legislature of the state having requested action to be taken to correct these errors, and resurveys having been undertaken and while they were being prosecuted for the purpose of correcting such errors, a list of lands, which by the original surveys appeared to be swamp and overflowed, was made out and forwarded to the governor. Upon the records of the Land Department the original survey of the district containing the land in controversy was at that time challenged as fraudulent. After the list containing this land had been forwarded to the governor and his request for a patent returned to the Land Department, a patent was issued not including this land. Subsequently the resurveys were finished and according to them this land was excluded from the grant. Thereupon a new and corrected list containing the lands, which by the resurveys were shown to be swamp and overflowed, was made out, approved by the Secretary of the Interior, and forwarded to the governor. Upon its receipt the governor requested patents to be issued, and patents were issued conveying the lands specified therein. This clearly shows an acceptance by the officer of the state, charged under the act of Congress with the duty of so doing, of the resurveys as within the authority *of the Land Department, and makes the **[599** adjustment of the grant upon the basis of such resurveys final and conclusive. The act of the state in accepting the new and corrected survey as the basis of adjustment is tantamount to a waiver of any claims under the prior and erroneous survey, for it cannot be that a grantee accepting a patent for lands which according to a final and correct survey are shown to be within the terms of the grant can thereafter be heard to say, Notwithstanding I have taken all the lands shown to belong to me by this correct survey, I also claim lands which by a prior and erroneous, if not fraudulent, survey, appeared to pass under the grant. He cannot in that way enlarge the scope of the grant, and after taking lands which are finally determined to pass under the grant say, I also insist upon lands which upon such final survey are shown not to be within the grant, simply because under a prior erroneous survey they appeared to be within its terms.

We come now to consider the effect of the act of March 3, 1857 (11 Stat. at L. 251, chap. 117), which provided:

"That the selection of swamp and overflowed lands granted to the several states by the act of Congress . . . heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall re-

main vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States, be and the same are hereby confirmed, and shall be approved and patented to the said several states, in conformity with the provisions of the act aforesaid, as soon as may be practicable after the passage of this law: *Provided, however*, That nothing in this act contained shall interfere with the provisions of the act of Congress entitled 'An Act for the Relief of Purchasers and Locators of Swamp and Overflowed Lands,' approved March 2, 1855, which shall be and is hereby continued in force, and extended to all entries and locations of lands claimed as swamp lands made since its passage."

It is contended by the plaintiff that the purpose and effect of this act were to confirm to the state of Michigan the title to all lands marked on the approved and certified list of **600**] *January 13, 1854, as swamp and overflowed lands, and to direct the issue of a patent or patents therefor. Whatever question might have existed, were it not for this act, as to whether any of the lands marked on such lists were swamp and overflowed lands, and whatever authority there might otherwise be in the Land Department to make corrections, Congress, which had full power over the matter, by it in terms granted to the state these lands; such action by Congress was a finality; thereafter no inquiry could be made as to the character of the lands; no correction of the list; and the full equitable title passed to the state, beyond the possibility of challenge. It is insisted that Congress must have known of the alleged irregularities in the surveys; known of the approval by the Secretary of the Interior of this list; that it had been forwarded to the governor; that the governor had accepted and requested the issue of patents; and with this knowledge passed this act, intending thereby to remove all question as to the character of the lands, to put an end to the necessity for any further examination, and to make this list the single and absolute evidence of the lands it was granting to the state of Michigan. There would be force in this contention if the act of 1850 contained simply a grant to the state of Michigan, and there were but a single list of swamp lands in that state. It might then well be said that this act was passed with reference solely to the conditions existing in respect to this attempted selection of swamp and overflowed lands in that state, but the act of 1850 was a grant to all the states, and the act of 1857 must, therefore, be construed as applicable to the conditions existing in all of the states. It is contended by the defendants that it applies only to those states in which the state authorities had attempted to make selections of swamp and overflowed lands within their limits, and had communicated such selections to the Land Department, and that its purpose was simply to confirm to the states lists which constituted selections made by them, and with reference to which the Secretary of the Interior had delayed and neglected to act; and they refer to the opinion of this court in *Tubbs* v. *Wilhoit*, *supra*, in which (p. 137 [34: 888]) it is said:

601] *"In consequence of the delays in certifying the lists and the inconveniences which followed, the legislatures of several states, in which such lands existed, undertook to identify the lands and dispose of them, and for that purpose passed various acts for their survey and sale and the issue of patents to purchasers. The conflicts which thus arose between parties claiming under the state and parties claiming directly from the United States led to various acts of Congress for the relief of purchasers and locators of swamp and overflowed lands. Act of March 2, 1855 (10 Stat. at L. 634, chap. 147); Act of March 3, 1857 (11 Stat. at L. 251, chap. 117)."

This argument is entitled to consideration because the word "selection" applies more naturally to the action of the grantee in reporting to the Land Department the lands which it claims, than to the action of the land officers in identifying from the field notes what are and what are not swamp and overflowed lands. The term "selection" is not an apt word to describe the identification of certain lands according to evidence presented of their character. But we need not rest on this. Conceding that the statute applies, not merely to those cases in which affirmative action had been taken by the states, but also to those in which without any such action the only proceedings had been those in the Land Department of the United States, still we think that it cannot be held that this act is to be construed as expressing a purpose to make the list in this case, approved and certified to the state, a finality as to the lands passing under the grant and an absolute transfer of the equitable title.

In order to fully understand the matter attention must be called to the act of 1850. That granted, as has been seen, swamp and overflowed lands, and directed the Secretary of the Interior, as soon as practicable, to make an accurate list and plats of such lands and transmit the same to the governor, and thereafter, at his request, cause a patent to be issued. The manner in which the secretary should discharge this duty, the evidence that should be required by him as to the character of the lands, were not prescribed by the act; the matter was left to his discretion. The secretary sent out *instructions to the sur- **602** veyor general of the state of Michigan to make lists of the unsold swamp lands, as shown by the field notes on file in his office. From these instructions we quote this passage: "The only reliable data in your possession, from which these lists can be made out, are the field notes of the surveys on file in your office, and if the authorities of the state are willing to adopt these as the basis of those lists, you will so regard them; if not, and those authorities furnish you satisfactory evidence that any lands are of the character embraced by the grant, you will so report them." On receipt of a letter containing notice of this from the surveyor general the governor replied that he did not have authority to incur any expense in the matter, and afterwards referred it by message to the legislature, which body by act passed June 28, 1851 (Laws of Michigan 1851, p. 322), adopted the surveys on file in the surveyor general's office as the basis of adjustment. The effect of this legislative action was not

to make an erroneous survey conclusive nor to preclude the Land Department from the exercise of its unquestioned jurisdiction to correct surveys, but simply to accept the field notes finally approved as the evidence of the lands passing under the grant, leaving to the Land Department to make any needed corrections in the surveys and field notes. In other states different action was taken by the state authorities, as appears from the opinion of this court in *Tubbs* v. *Wilhoit*, *supra*. Now, the obvious purpose of this act of 1857 was to ratify and confirm the various steps taken by the Secretary of the Interior in the selection of swamp and overflowed lands. It was general in its terms, reaching to all the states and the different modes by which identification of the swamp and overflowed lands had been attempted to be accomplished. It cannot fairly be construed as intending to put an end to all further inquiry in the Land Department, nor to oust that department of jurisdiction to inquire into and correct any frauds or mistakes, but was a general ratification and confirmation of the methods pursued. It cannot be supposed that Congress intended by this act to condone all frauds, to prevent the correction of errors or mistakes, to take every-
603] *thing as it then appeared on the records of the Land Department, and, forbidding any further inquiry, declare that lands which by such records, through error or fraud, appeared to be swamp and overflowed, should be granted to the state. It was not an act to enlarge the grant of 1850. It was not an act to oust the Land Department of its ordinary jurisdiction to inquire into and ascertain what were swamp and overflowed lands, but was an act confirming and ratifying the methods thus far pursued. Congress must have been aware of the fact that there were charges of fraud or mistake in reference to the surveys in the state of Michigan. It had appropriated large sums for resurveys. They had partially been made, and mistakes, if not frauds, had been found. It does not appear that such charges existed in reference to the surveys in other states; at any rate, it is not to be presumed that all surveys in all the states were fraudulent or erroneous, and it would require very clear and direct language before the intent could be imputed to Congress to ignore the existence of alleged frauds and errors in the one state and to confirm titles to lands in that state based upon such fraudulent or erroneous surveys, and thereby enlarge, perhaps, very materially, the amount of the grant to such state. The language of the act does not compel any such conclusion as to the intent of Congress.

The decision in *Martin* v. *Marks*, 97 U. S. 345 [24: 940], does not conflict with this construction of the act of 1857. It is true this language is found in the opinion: "After the passage of that act the Land Department had no right to set aside the selections." But in that case there was no question of the power of the Land Department to correct errors or mistakes. The plaintiff relied on a list made by the surveyor general of Louisiana of swamp and overflowed lands, which list, containing the land in dispute, had been forwarded to the General Land Office, and there filed. It did not appear that this list had been formally approved by the Secretary of the Interior, as contemplated by the act of 1850. The defendant relied on a patent from the United States, issued long thereafter. It was held that the act of 1857 dispensed with the formal approval by the Secretary of the Interior, and confirmed the list made *and filed with the Com- **[604** missioner of the General Land Office. And in view of that fact, and as no question had been made in the Land Department of the correctness of the survey, it was adjudged that the equitable title of the state to the land was perfect. So, in this case, if there had been no challenge of the original surveys, no attempt at a resurvey or to correct errors or mistakes, and there had been simply a lack of the formal approval of the list by the Secretary of the Interior, that case would have compelled an adjudication that the full equitable title had passed to the state of Michigan, and would have invalidated the patent subsequently issued by the United States directly to the parties under whom the defendants claim. But that is far from deciding that all power in the Land Department to inquire into frauds or errors in the surveys was taken away and all frauds upon the government in such surveys condoned. It was merely a decision that as the identification by the surveyor general of the land as swamp land had not been challenged for fraud or mistake, it was binding on the question of title, and the approval by the Secretary of the Interior and the issue of the patent were simply ministerial acts. See also *Blanc* v. *Lafayette*, 52 U. S. 11 How. 104 [13: 623].

We see no error in the judgment of the Court of Appeals, and it is therefore affirmed.

NORTHERN PACIFIC RAILROAD COMPANY and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, Receivers of the Northern Pacific Railroad Company, *Appts.*,

v.

MUSSER-SAUNTRY LAND, LOGGING, & MANUFACTURING COMPANY and Chicago, St. Paul, Minneapolis, & Omaha Railway Company.

(See S. C. Reporter's ed. 604-611.)

Withdrawal of land from railroad grant.

A withdrawal of lands within indemnity limits made in aid of an earlier land grant to a railroad

NOTE.—*That patents for land may be set aside for fraud*, see note to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands, how construed, see note to Watts v. Lindsey, 5: 423.

As to land grants to railroads, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

As to public lands when interest rests; entry; homestead; pre emption; notice of claim; certificates of entry; proofs of settlement; oath of pre-emptor; transfer of claim,—see note to Close v. Stuyvesant (Ill.) 3 L. R. A. 161.

As to surveys; meander lines,—see note to Stoner v. Rice (Ind.) 6 L. R. A. 387.

As to statutes legalizing invalid grants, see note to Erskine v. Nelson County (N. D.) 27 L. R. A. 696.

company, prior to the filing of a map of definite location by a company having a later grant which is expressly limited to lands "not reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights," operates to except the withdrawn lands from the scope of such later grant.

[No. 121.]

Argued November 30 and December 1, 1897.
Decided December 20, 1897.

APPEAL from a decree of the United States Circuit Court of Appeals for the Seventh Circuit affirming the decree of the Circuit Court of the United States for the Western District of Wisconsin dismissing a suit in equity brought by the Northern Pacific Railroad Company against the Musser Sauntry Land, Logging, & Manufacturing Company, to restrain the issue of patents of certain lands to the defendants and to quiet plaintiff's title thereto. *Affirmed.*

See same case below, 34 U. S. App. 66.

Statement by Mr. Justice **Brewer:**

The facts in this case are as follows: On June 3, 1856, Congress made a grant to the state of Wisconsin to aid in the construction of a railroad of every alternate section of land designated by odd numbers, for six sections in width, on each side of the line, with the right to select indemnity within 15 mile limits. 11 Stat. at. L. 20, chap. 43. The line of this road was definitely fixed September 20, 1858. This grant was enlarged by the act of May 5, 1864 (13 Stat. at L. 66, chap. 80), to one of ten alternate sections on each side per mile with indemnity limits extended to 20 miles from the line of the road. The Chicago, St. Paul, Minneapolis, & Omaha Railway Company, one of the defendants herein, became the beneficiary of this grant. The road was afterwards constructed, and the lands in controversy are more than 15 but less than 20 miles from the line of definite location and construction. In March, 1866, the lands within the indemnity limits named in the act of 1864 were by the Secretary of the Interior withdrawn from sale and notice thereof given to the local land officers. This withdrawal remained unrescinded and unaltered until 1889. In 1883 the defendant railway company selected the lands in controversy in lieu of lands lost in its place limits. These selections were approved by the local land officers and transmitted to the Commissioner of the General Land Office for his approval. In the same year the state of Wisconsin issued patents for the lands to that company, which thereafter sold and conveyed them to the grantor of its codefendant, the land, logging, and manufacturing company. On a readjust-

606] ment *of the land grant the railway company's title failed and thereafter the grantee of the railway company purchased them, pursuant to the act of March 3, 1887 (24 Stat. at L. 557, chap. 376).

On the other hand, the Northern Pacific Railroad Company, plaintiff and appellant, on July 2, 1864 (13 Stat. at L. 365, 367, chap. 217), received a grant from Congress. The 3d section of the act making this grant contains this description of the lands granted:

"Every alternate section of public land to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre emption or other claims of rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof."

On July 30, 1870, plaintiff fixed the general route of its road and filed plats thereof with the Secretary of the Interior. On August 18, 1870, a withdrawal of the lands within 20 miles of this route was ordered in aid of the grant. On July 6, 1882, plaintiff definitely fixed that portion of its line opposite these lands. They are within the limits of the above-mentioned withdrawal, and also within the place limits of plaintiff's grant, as those limits were adjusted and fixed according to the map of definite location. Relying upon the title acquired by this grant, and the proceedings had thereunder, as above described, the plaintiff filed its bill on May 3, 1893, in the circuit court of the United States for the western district of Wisconsin, to restrain the issue of patents to the manufacturing company, and to quiet its own title. A demurrer to this bill was in May, 1894, sustained, and a decree entered *dismissing the bill. On appeal to the [**607** court of appeals for the seventh circuit this decree was affirmed (34 U. S. App. 66), and thereupon the plaintiff brought the case to this court for review.

Mr. **C. W. Bunn** for appellants.
Mr. **Thomas Wilson** for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

But a single question is presented in this case, and that is whether the withdrawal from sale by the Land Department in March, 1866, of lands within the indemnity limits of the grant of 1856 and 1864 exempted such lands from the operation of the grant to the plaintiff. It will be perceived that the grant in aid of the defendant railway company was prior in date to that to the plaintiff, and that before the time of the filing of plaintiff's maps of general route and definite location the lands were withdrawn for the benefit of the defendant. The grant to the plaintiff was only of lands to which the United States had "full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed."

The withdrawal by the secretary in aid of the grant to the state of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the

land officers of the government under the general land laws. The act of the secretary was in effect a reservation. *Wolcott* v. *Des Moines Nav. & R. Co.* 72 U. S. 5 Wall. 681, [18: 689]; *Wolsey* v. *Chapman*, 101 U. S. 755 [25: 915], and cases cited in the opinion; *Hamblin* v. *Western Land Company*, 147 U. S. 531 [37: 267], and cases cited in the opinion. It has also been held that such a withdrawal is effective against claims arising under subsequent railroad land grants. *St. Paul & Pacific Railroad Company* v. *Northern Pacific Railroad Company*, 139 U. S. 1, 17, 18 [35: 77, 84]; *Wisconsin Central Railroad Company* v. *Forsythe*, 159 U. S. 46, 54 [40: 71, 74]; *Spencer* v. *McDougal*, 159 U. S. 62 [40: 76].

608] *While it is true that the intent of Congress in respect to a land grant is to be determined by a consideration of all the provisions of the statute, and that the word "reserved" may not always be held to include lands withdrawn for the purpose of supplying possible deficiencies in some prior land grant, yet, as that is the ordinary scope of the word, if any narrower or different meaning is to be attributed to it in this grant the reasons therefor must be clear. The use of a word which has generally received a certain construction raises a presumption that Congress used it in this grant with that meaning, and it devolves on the one claiming any other construction to show sufficient reasons for ascribing to Congress an intent to use it in such sense. It is said that the phraseology of the various congressional grants is different, and therefore each one must be considered by itself. This, in a general way, may be admitted, but at the same time the frequent use of a certain word in a particular sense is, to say the least, very persuasive that it was used in a like sense in this grant.

But beyond the significance of the word "reserved," alone, there are other words in the act which, taken in connection with it, make it clear that these lands do not fall within the grant. "Otherwise appropriated" is one term of description, and evidently when the withdrawal was made in 1866 it was an appropriation of these lands so far as might be necessary for satisfying that particular grant. It is true it was not a final appropriation or an absolute passage of title to the state or the railway company, for that was contingent upon things thereafter to happen, first, the construction of the road, and, second, the necessity of resorting to those lands for supplying deficiencies in the lands in place; still it was an appropriation for the purpose of supplying any such deficiencies. Again, in the description, are the words, "free from preemption or other claims or rights." Certainly, after this withdrawal, the Wisconsin Company had the right, if its necessities required by reason of a failure of lands in place, to come into the indemnity limits and select these lands. Can it be said that they were free from such right when the very purpose of the withdrawal

609]*was to make possible the exercise of the right? But the language is not simply "free from rights," but "free from claims," and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term, and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road. *Northern Pacific Railroad Company* v. *Sanders*, 166 U. S. 620 [41: 1139]. And such is the general rule in respect to railroad land grants.

Leavenworth, L. & G. Railroad Company v. *United States*, 92 U. S. 733 [23: 634], furnishes an apt illustration. In that case the granting act contained this provision: "That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act." And it was contended that an Indian reservation was not excepted from the grant because the lands were not reserved to the United States. Upon this the court said (pp. 741–746 [23:637–639]): "Congress cannot be supposed to have thereby intended to include land previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of it was not necessary, because the policy which dictated them confined them to land which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts. . . . Every tract set apart for special uses is reserved to the government, to enable it to enforce them. There is no difference, in this respect, whether it be appropriated for Indian or for other purposes." See also *Newhall* v. *Sanger*, 92 U. S. 761 [23:769], in which it was provided that the grant "shall not defeat or impair any preemption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler;" and it was held that the lands within the boundary of an alleged Mexican or Spanish *grant which was [**610** *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands were not within the grant to the company. In *United States* v. *Southern Pacific Railroad Company*, 146 U. S. 570, 606 [36:1091, 1101], it was said: "Indeed, the intent of Congress in all railroad land grants, as has been understood and declared by this court again and again, is that such grant shall operate at a fixed time, and shall take only such lands as at that time are public lands.

There is no force in the contention that this construction might operate to defeat the entire grant to the plaintiff. At the time of the passage of the act of 1864 only in the vicinity of the proposed eastern and western termini were there any settlements. The great bulk of the territory through which the road was to pass was almost entirely unoccupied. Congress, fixing the time for commencing and for finishing the work within two and twelve years, respectively (§ 8), contemplated promptness in the construction of the road, intending thereby to open this large unoccupied territory to settlement. In view of the road's traversing a comparative wilderness it made a grant of enormous extent. Within the un-

occupied territory thus to be traversed there were few settlers and few, if any, land grants. It knew, therefore, that if the company proceeded promptly, as required, it would find within its place limits nearly the full amount of its grant. It must be presumed that Congress acted and would act in good faith, and, of course, there could be no intent to deplete this grant to plaintiff by subsequent legislation in respect to land grants. On the other hand, it must be noticed that the grant to the state of Wisconsin to aid in the construction of the road of the defendant railway company was prior to that to the plaintiff, and also that prior thereto the defendant had filed its map of definite location. In passing the act of July 2, 1894, it is therefore reasonable to suppose that Congress had in mind its earlier grant, and did not intend that it should be diminished in any manner thereby, but meant that the defendant railway company should receive either within its place or indemnity limits the full amount of its lands. This, doubtless, was one of the considerations which made the grant to the Northern Pacific of so large an extent.

611] *It may be well in concluding this opinion to again note the fact, already mentioned, that the withdrawal here considered was one in favor of an earlier grant. It may be that a different rule would obtain in case it was in favor of a later grant. As to place lands, it is settled that, in case of conflict, the title depends on the dates of the grants, and not on the times of the filing of the maps of definite location. In other words, the earlier grant has the higher right. No scramble as to the matter of location avails either road, and it may be that the same thought would operate to uphold the title to the place lands of an earlier as against a withdrawal in favor of a later grant. Neither is it intended to question the rule that the title to indemnity lands dates from selection and not from the grant. All that we here hold is, that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant and made prior to the filing of the map of definite location by a company having a later grant,—the latter having such words of exception and limitation as are found in the grant to the plaintiff—it operates to except the withdrawn lands from the scope of such later grant.

We see no error in the record, and the decree of the Court of Appeals is affirmed.

JOHN M. WILSON and Others, the Commission to Select the Land for Rock Creek Park, *Appts.*,

v.

AVARILLA LAMBERT and Others.

(See S. C. Reporter's ed. 611-618.)

Injunction against assessment—public park—special benefits—Rock Creek Park act—injunction against another court.

1. An injunction against a special assessment under an unconstitutional statute may be granted to a property owner, as the remedy at law is not plain and adequate.
2. Special assessments on property in the District of Columbia for a public park in that District, for the benefit and enjoyment of the people of the United States, are not unconstitutional as a deprivation of property without due process of law, or because the expense should be defrayed out of the funds of the entire nation.
3. There is no solid ground of distinction between a public park and highways or other works of public improvement, as proper subjects for the application of the rule of assessment for special benefits.
4. The Rock Creek Park act, authorizing the establishment of a public park in the District of Columbia, is not invalid for want of conformity to constitutional principles.
5. An injunction against proceedings under a constitutional statute in another court competent to construe the statute and decide every question that may arise will not be granted.

[No. 164.]

Argued December 13, 14, 1897. Decided January 3, 1898.

APPEAL from a decree of the Court of Appeals of the District of Columbia affirming the decree of the Supreme Court of that District in favor of Avarilla Lambert *et al.*, plaintiffs, against William P. Craighill *et al.*, the commission under the Rock Creek Park act, restraining the said commission from assessing lands of the plaintiffs for the cost and expenses of locating and improving the Rock Creek Park. *Reversed*, and cause remanded with directions to reverse the decree of the Supreme Court of the District of Columbia and to remand the cause to that court with directions to dismiss the complaint.

See same case below, 8 App. D. C. 185.

Statement by Mr. Justice **Shiras**:

In January, 1895, Mary Van Riswick, widow, and Avarilla Lambert, and Martina Carr, children and heirs of John Van Riswick, deceased, filed a bill of complaint in the supreme court of the District of Columbia against the commission under the Rock Creek Park act of September 27, 1890 (26 Stat. at L. 492, chap. 1001), seeking to restrain the said commission from assessing lands of the complainants for any portion of the cost and expenses of locating and improving the Rock Creek Park, for the alleged reason that the 6th section of the said act, under which the commission was acting in proposing to make such assessment, was unconstitutional and void.

The cause was so proceeded in that, on September 30, 1895, the supreme court of the District rendered a final decree as prayed for in the bill. From that decree an appeal was taken to the court of appeals of the District of Columbia, and by that court, on March 17, 1896, the decree of the supreme court of the District was affirmed. The cause was then brought to this court on appeal.

Mr. **John K. Richards**, Solicitor General, for appellants.

†The record title of this case is *Craighill et al.*, v. *Lambert et al.*

NOTE.—*As to injunction to restrain collection of illegal taxes; general doctrine against; foundation of jurisdiction; practical operation of principles: (a) recognized heads; (b) mere illegality; irregularity, etc.;*

Messrs. **Tallmadge A. Lambert** and **John B. Henderson** for appellees.

Mr. Justice **Shiras** delivered the opinion of the court:

Courts of equity undoubtedly have jurisdiction to hear the complaints of those who assert that their lands are about to be assessed and subjected to liens by a board or commission acting in pursuance of the provisions of a statute which has been enacted under the forms of law, but which is unconstitutional, and therefore does not avail to confer the powers [613] sought to be exercised. **Dows* v. *Chicago*, 78 U. S. 11 Wall. 108 [20: 65]; *Union Pac. Railway* v. *Cheyenne*, 113 U. S. 513 [28: 1098]; *Ogden City* v. *Armstrong*, 168 U. S. 224, [*ante*, 444]; 2 Dill. Mun. Corp. 4th ed. § 922.

Accordingly if, in the present case, the 6th section of the act of September 27, 1890, entitled "An Act Authorizing the Establishment of a Public Park in the District of Columbia," and upon which the defendants rely for their authority to act, is, indeed, unconstitutional and void, for all or any of the reasons urged against it, we think that the complainants are entitled to a remedy by a direct proceeding in a court of equity. For the reasons mentioned in the cases above cited and in numerous others, the remedy at law could not be regarded as plain and adequate.

The validity of the section in question has been heretofore considered and determined by this court in the case of *Shoemaker* v. *United States*, 147 U. S. 282 [37: 170]. The objections which in that case were ably but ineffectually urged were, in the main, those of which we now hear. It is true, however, that the question there arose incidentally and by way of argument. Persons whose property was made liable to assessment for special benefits were not ostensible parties to the cause; nor was the question raised by any special assignment. Hence this court, though undoubtedly called upon to consider the validity of the act as a whole, and in all its parts and sections, did not deem it necessary to discuss the validity of the 6th section at any length. In view, however, of the fact that we are now confronted with a specific arraignment of the 6th section, and of the further fact that the courts below, in able opinions, have held that the section is fatally defective in form and substance, we have felt constrained to carefully reconsider the question.

It is obvious, and we understand it to be conceded, that neither the act, nor this particular part of it, can be assailed because the subject-matter is outside of the power of Congress. But, while the general power to legislate exclusively for the District of Columbia is not disputed, nor the competency of Congress, in the exercise of that power, to establish a public park, it is contended that, under the limitation upon that *power contained [614] in the 5th Amendment, protecting the citizen from being deprived of life, liberty, or property without due process of law, Congress, when erecting a work which is expressly declared to be perpetually dedicated to the use and enjoyment of the people of the United States, should defray the cost thereof out of the funds of the entire nation. It is further contended in the brief of the appellees that a tax for raising a fund for such a purpose to be valid ought to be levied and apportioned as a direct tax among the several states, according to their respective numbers. This latter proposition, however, was not approved by the courts below, and we need not discuss it. 8 App. D. C. 185.

The reasoning upon which those courts proceeded seems to have been that, upon general principles of constitutional law, when the works, whose cost is to be defrayed by taxation, are public, the public alone should pay for them, and the present case is compared to one where, upon the erection of a courthouse or postoffice, the private property of individuals adjacent to such structure should be specially taxed for the supposed greater convenience enjoyed of access thereto.

Upon a final analysis this proposition will be found to resolve itself into a denial of the validity of special assessments in any case where the work in question is undertaken by the public authorities, without the express assent or desire of the property holders. The effort made to distinguish between streets and highways as constituting proper subjects of taxation for special benefits, and public parks as matters of such a general nature as not to justify special assessment, does not appear to us to be successful. Legislation of this character, both in respect to its justice and its constitutional validity, has been thoroughly discussed by the judicial tribunals of nearly every state in the Union. We shall briefly notice a few of the leading cases.

By a statute of 1875 a board of park commissioners were authorized to locate and lay out within the city of Boston a public park, to take such lands as the board should deem desirable therefor, and to assess upon any real estate in Boston *which, in the opinion of the [615] board, should receive any benefit or advantage from such locating and laying out, beyond the general advantages to all real estate in the city, "a proportional share of the expense of such location and laying out." The board purchased a large tract of flats, over part of which the tide flowed, the rest being marsh, and proceeded to lay out avenues and to fill them with gravel; and when but a small part of the area was filled, and none of the avenues were completed, passed an order declaring

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(c) adequate remedy at law; (d) necessity of payment, etc., of tax due; relief granted: (a) multiplicity of suits; (b) irreparable injury; (c) inadequate legal remedy; (d) cloud upon title; special state doctrines; fraud; personal tax; estoppel; set-off,—see note to Odlin v. Woodruff (Fla.) 22 L. R. A. 699.

As to parks; estoppel of city against claiming,—see note to Reuter v. Lawe (Wis.) 34 L. R. A. 733.

As to right to extend subway in public garden, see note to Prince v. Crocker (Mass.) 32 L. R. A. 610.

As to public improvements: due process in assessment of,—see notes to Hayes v. Douglas County (Wis.) 31 L. R. A. 213, and Violett v. Alexandria (Va.) 31 L. R. A. 382.

As to taxes, see note to Sargent v. Tuttle (Conn.) 32 L. R. A. 822.

As to special tax on land in levee district, see note to Reelfoot Lake Levee Dist. v. Dawson (Tenn.) 34 L. R. A. 725.

that they had taken, and did thereby take and create, a public park, certain land, being in fact that already purchased, and also passed a further order reciting that, whereas by the previous order a park was located and laid out, they laid an assessment upon certain lands benefited thereby. It was held by the supreme judicial court of Massachusetts, on a petition for a writ of certiorari, by the owners of estates so assessed, to quash the assessment, that the park was laid out within the statute, and that the court could not say, as matter of law, that the estates of the petitioners had not been benefited by what had been done at the time the assessment was made *Dwight Foster and Others* v. *Board of Park Commissioners of the City of Boston*, 133 Mass. 321; *Holt* v. *City of Somerville*, 127 Mass. 408.

In 1834, in pursuance of authority given by statute, the common council of the city of Albany directed the opening of a public square in that city. It was held by the supreme court of the state of New York that the taking the grounds of individuals in a city, to convert into a public square, is taking property for public use as much so as if such grounds were converted into a street; and the fact of the damages being assessed upon the owners of adjoining property, instead of being levied as a general tax upon the city, is no evidence that the property is not taken for public use. In the opinion it was said by Chief Justice Savage:

"The second reason assigned against the constitutionality of these proceedings is, that the purposes for which the property is thus taken are not public, because the benefit is limited to and the expense assessed upon a few individuals. Private property is taken for public use when it is appropriated to the common [616] *use of the public at large. A stronger instance cannot be given than that of a lot of an individual in a city converted into a street; the former owner has no longer any interest in or control over the property, but it becomes the property of the public at large, and under the control of the public authorities. A public square depends on the same principle; it is for public use, whether it is intended to be traveled upon or not. The mode of compensation for such property is not important; it was formerly out of the public purse; but there is no injustice in requiring those individuals to make the compensation who receive from the improvement an equivalent and more, in the enhanced value of their own adjacent property; and whether the number is large or small does not affect the question." [*Owners of Ground* v. *Albany*] 15 Wend. 374.

So, in 1871 it was held by the court of appeals of New York, in the case of the erection of a public park in the city of Brooklyn, that lands taken for such a purpose are taken for a public use, and the right to assess benefits upon adjacent property was assumed as unquestionable. *The Brooklyn Park Comrs.* v. *Armstrong*, 45 N. Y. 234 [6 Am. Rep. 70]; *Re Central Park Comrs.* 63 Barb. 282; [*Re New York*] 99 N. Y. 569. The validity of laws authorizing the condemnation of lands for the purpose of public parks has been affirmed by the supreme court of Illinois (*The People* v. *Williams*, 51 Ill. 63; *Cook* v. *South Park Comrs.* 61 Ill. 115; *West Chicago Park Comrs.* v. *Western Union Tel. Co.* 103 Ill. 33); and by the supreme court of Pennsylvania (*Mercer* v. *Pittsburgh, Ft. W. & C. R. R. Co.* 36 Pa. 99); and by the supreme court of Missouri (*County Court of St. Louis County* v. *Griswold*, 58 Mo. 175). Numerous other cases to the same effect will be found collected in 2 Dill. Mun. Corp. 4th ed. § 643.

That the act dedicates and sets apart this park "for the benefit and enjoyment of the people of the United States" does not, as we think, make it so far a work *sui generis* as to take it out of the range of the principles of the foregoing cases. The residents and property holders of the District of Columbia must be regarded as coming within the class of beneficiaries; *and, so far from being injured [617] by the declaration that the park shall also have a national character, it is apparent that thereby the welfare of the inhabitants of the District will be promoted. Whatever tends to increase the attractiveness of the city of Washington, as a place of permanent or temporary residence, will operate to enhance the value of the private property situated therein or adjacent thereto.

If, then, there be no solid ground of distinction between other works of public improvement and the public park designed by this legislation, as proper subjects for the application of the rule of assessment for special benefits, it will not be necessary for us to enter at large upon the subject apart from that supposed distinction. That has been so recently and so fully discussed by this court in the case of *Bauman* v. *Ross*, 167 U. S. 548 [42: 270], that nothing remains to be added. It may be proper to observe that the decision in that case was not announced till after the judgment in the courts below in the present case had been entered.

Having reached the conclusion, then, that the 6th section of the Rock Creek Park act is not invalid for want of conformity to constitutional principles, we think it follows that the decrees of the courts below should be reversed, and the bill of complaint be dismissed.

The other objections, so forcibly dwelt on, are all questions of construction and administration, and should be permitted to arise and be determined in the regular procedure of the court to which Congress has assigned the duty of carrying the provisions of the act into effect. It may turn out that the practical difficulties anticipated may disappear when dealt with by that court, to which power is given to "hear and determine all matters connected with said assessment, and to revise, correct, amend, and conform said assessment, in whole or in part, or order a new assessment." It does not yet appear that these appellees will, when final action shall have been taken, have any substantial grounds of complaint. The difficulties of construing the act are not necessarily in the act itself, but in its application to the subject-matter. Its provisions are somewhat vague and obscure; and it is possible that further legislation *may be found requisite to carry out [618] the intentions of Congress. But such questions are not now before us for determination. Should errors supervene in the administration

of the act, parties affected will have redress by appeal.

We adopt the observation made in the dissenting opinion in the court of appeals: "There can be no reason or propriety in appealing to a court of equity to restain proceedings that are being regularly conducted in other courts, competent to construe the statutes under which they act, and to decide every question that may arise in the course of the proceeding. To allow litigations to be thus diverted tends to the multiplication of litigation and the production of unnecessary delay and expense, to say nothing of the unnecessary vexation to parties."

The decree of the Court of Appeals is reversed; and the cause is remanded with directions to said court to reverse the decree of the supreme court of the District of Columbia and to remand the cause to that court with directions to dismiss the bill of complaint.

J. B. SHEPARD, *Plff. in Err.*,
v.
FRANK ADAMS, Receiver of the Commercial Bank of Denver.

(See S. C. Reporter's ed. 618-627.)

Jurisdiction by service of process—rule of Federal court need not strictly conform to state practice.

1. A question whether or not jurisdiction has been acquired by a proper service of process is one which involves the jurisdiction of the court, within the meaning of the act of Congress of March 3, 1891, § 5, providing for an appeal from the district court directly to the Supreme Court of the United States when the jurisdiction of the former court is involved.

2. A rule of the district court of the United States for the service of process need not strictly conform to state statutes on the subject, but the court may legitimately exercise a discretion as to the conformity; nor need such rule be altered in strict subserviency to changes in the state statute.

[No 134.]

Submitted December 2, 1897. Decided January 3, 1898.

IN ERROR to the District Court of the United States for the District of Colorado to review a judgment of that court in favor of the plaintiff Frank Adams, receiver, etc., against the defendant J. B. Shepard for the amount of a promissory note. *Affirmed.*

Statement by Mr. Justice **Shiras:**

This was an action brought in the district court of the United States for the district of Colorado, by Frank Adams, receiver of the Commercial National Bank of Denver, against J. B. Shepard on a promissory note, dated June 7, 1893, wherein said Shepard promised to pay to the said bank, thirty days after date, the sum of $20,000.

A writ of summons, in the form prescribed by the rule of that court, was sued out against the said defendant on the 24th day of August, 1895, whereby he was required to appear and demur or answer to the complaint filed in said action in said court within ten days (exclusive of the day of service), after the summons should be served on him, if such summons should be made within the county of Arapahoe, otherwise within forty days from the day of service.

On August 27, 1895, the deputy marshal made return of said writ as served that day on the defendant at Denver, county of Arapahoe.

Within ten days after the service of said summons, to wit, on the 4th day of September, 1895, the defendant, by his attorneys, specially appeared and moved the court to quash the summons for the following reasons:

"First. Said summons is not such a summons as is provided for by the statutes of Colorado. The said summons is made returnable and requires the defendant to appear and answer in this action in this court within ten days from the day of the service of said summons, instead of thirty days, as provided by the statutes of Colorado.

"Second. The copy of said summons served upon said *defendant is not certified to as a [620 true copy by the clerk of this honorable court."

Thereafter, to wit, on the 4th day of January, 1896, the court after hearing argument of counsel, overruled said motion, and the defendant electing to stand by said motion, rendered judgment in favor of the plaintiff and against the defendant, according to the prayer of the complaint.

A bill of exceptions was signed and a writ of error allowed to the Supreme Court of the United States.

It appears by the bill of exceptions, that, on March 17, 1877 (Code 1877, chap. 3), the general assembly of the state of Colorado passed an act entitled "An Act Providing a System of Procedure in Civil Actions in the Courts of Justice of the State of Colorado," which act contained the following provisions:

"Civil actions in the district courts and county courts shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought and the issuing of a summons therein; provided, that after the filing of the complaint a defendant in the action may enter his appearance therein, personally or by attorney, which appearance shall be equivalent to personal service of the summons upon him."

"The time in which the summons shall require the defendant to answer the complaint shall be as follows: 1st. If the defendant is served within the county in which the action is brought, ten days. 2d. If the defendant is served out of the county, but in the district in

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NOTE.—*As to what questions the United States Supreme Court will review on writ of error; bill of exceptions,*—see note to Parks v. Turner, 13: 883.

As to service on officer who is also plaintiff or agent for plaintiff, see note to George v. American Ginning Co. (S. C.) 32 L. R. A. 764.

As to service on officers of defunct corporation, see note to Parker v. Bethel Hotel Co. (Tenn.) 31 L. R. A. 706.

As to service on agent in union depot, see note to Hilary v. Great Northern R. Co. (Minn.) 32 L. R. A. 448.

which the action is brought, twenty days. 3d. For all other cases, forty days."

The summons in this cause was issued and made returnable under and in pursuance of a general rule of the district court of the United States for the district of Colorado, adopted on October 10, 1877, which is in the following terms:

"Actions at law shall be commenced by filing a complaint with the clerk, upon which a summons shall be issued, directed to the defendant, requiring him to appear and demur or answer to the complaint within ten days from the day of service, if such service shall be made within the county from which the summons was issued, and within forty days from the day of service if such service shall be made
621]elsewhere in the district. *Except as provided in these rules and in the laws of the United States, the summons and the pleadings, and proceedings in the action shall be as prescribed in the laws of the state."

It further appears that the general assembly of the state of Colorado passed an act on April 7, 1887, repealing the above provisions in the act of 1877, and enacting as follows:

"Civil actions shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, or by the service of a summons.

"The complaint must be filed within ten days after the summons is issued, or the action may be dismissed without notice, and in such case the court may, in its discretion, if it shall be of the opinion that the action was vexatiously commenced, tax a reasonable attorney's fee as costs in favor of defendant, to be recovered of plaintiff or his attorneys."

It also appears that the said general assembly, on April 19, 1889, passed an act, since then and now in force, containing the following provision:

"Section 84 of an act entitled 'An Act to Provide a Code of Procedure in Civil Actions for Courts of Record in the State of Colorado, and to Repeal all Acts Inconsistent Therewith,' approved April 7, 1887, is hereby amended to read as follows:

"The summons shall state the parties to the action, the state, county, and court in which it is brought, and require the defendant to appear and answer the complaint within twenty days after the service of the summons, if served in the county in which the action is brought; or if served out of such county or by publication, within thirty days after the service of the summons, exclusive of the day of service, or that judgment by default will be taken against him according to the prayer of the complaint, and shall briefly state the sum of money or other relief demanded in the action; but the summons shall not be considered void or erroneous on account of an insufficient statement of the relief demanded, unless the same is manifestly misleading. If a copy of the complaint be not served with the summons, or if the service be made out of the state, ten
622]*days additional to the time specified in the summons shall be allowed for appearance and answer, but the form of the summons shall be the same in all cases."

Messrs. **T. J. O'Donnell** and *Doud & Fowler* for plaintiff in error.

Messrs. **J. S. Thomas, W. H. Bryant,** and *H. H. Lee* for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

This case is brought here, under § 5 of the act of March 3, 1891, as one involving a question of the jurisdiction of the district court of the United States for the district of Colorado; and the first contention we have to meet is that of the defendant in error, that the case is not really within the meaning of that section of said act, but presents only the case of an alleged error in the judgment of the district court, redress for which should have been sought in the circuit court of appeals. It is said that the question of whether or not the district court acquired jurisdiction by a proper service of process is not one which involves the jurisdiction of the court, within the meaning of that term as used in the act; and the case of *Smith* v. *McKay*, 161 U. S. 355 [40: 731], is cited as sustaining such a view.

In the case referred to, the respective parties were duly in court and the subject-matter of the controversy was within the jurisdiction of the court; but it was claimed by the defendant that the plaintiff, instead of asserting his right by a bill in equity, should have proceeded by an action at law, which afforded an adequate remedy. The court below was of opinion that the plaintiff was not wrong in seeking his remedy in equity. Thereupon the defendant brought the case here directly, contending that the case involved the question of the jurisdiction of the circuit court, within the meaning of § 5 of the act of March 3, 1891. But it was held here that the court, in deciding that the plaintiff's remedy was in equity and not at law, was in the lawful exercise of its jurisdiction, and that, if the court was wrong *in so deciding, it was an error for [
623 which the defendant should have sought his remedy in the circuit court of appeals.

The present case differs from *Smith* v. *McKay* in the essential feature that the contention is that the court below never acquired jurisdiction at all over the defendant by a valid service of process. In such a case there would be an entire want of jurisdiction, and a judgment rendered without jurisdiction can be reviewed on a writ of error directly sued out to this court.

The case, then, being properly before us, we must next consider whether the court below erred in assuming and exercising jurisdiction in the cause by rendering a final judgment against the defendant.

It is contended that the defendant had not been brought within the jurisdiction of the court by a proper writ of summons, and that the defendant, having duly asserted an objection, the judgment entered is void.

It is not denied that the writ in question was in conformity with the existing rule of the district court of the United States, regulating the service of process, but it is claimed that the rule and proceedings thereunder are invalid because they did not conform to the provisions

of the act of the general assembly of Colorado, providing a system of procedure in civil actions in the courts of justice of that state.

The proposition is based on the supposed meaning and effect of the act of Congress of June 1, 1872, as found in § 914 of the Revised Statutes, in the following terms: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

This section is construed by the plaintiff in error as constituting a peremptory order or direction to the district and circuit courts to make their rules regulating the terms and service [624] of their writs to strictly conform to the provisions of the state statutes regulating such matters.

Waiving any inquiry whether it is competent for a private party, duly served with process in pursuance of the directions of an existing general rule of a court of the United States, to bring into question the validity of such a rule, we think that upon a reasonable construction of § 914 and of cognate sections, presently to be mentioned, the validity of the summons and judgment in the present case can be sustained. It is obvious that a strict and literal conformity by the United States courts to the state provisions regulating procedure is practically impossible, or, at least, not without overturning and disarranging the settled practice in the Federal courts.

The state Code of Colorado provides that civil actions shall be commenced by the issuing of a summons or the filing of a complaint; that the summons may be issued by the clerk of the court or by the plaintiff's attorney; it may be signed by the plaintiff's attorney; it may be served by a private person not a party to the suit. All writs and process issuing from a Federal court must be under the seal of the court and signed by the clerk, and bear teste of the judge of the court from which they issue. § 911, Rev. Stat. The process and writs must be served by the marshal or by his regularly appointed deputies. §§ 787, 788, Rev. Stat.

The very section (914) relied on by the plaintiff in error takes notice of the impossibility of an entire adoption of state modes of proceeding, by providing that conformity is only required "as near as may be."

Section 915, Revised Statutes, provides that in common-law cases in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are provided by the laws of the state in which such court is held; and that such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process.

Section 916, Revised Statutes, provides that [625] the party recovering a judgment in any common-law cause, in any district or circuit court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided by laws of the state in which the court is held, or by any such laws hereafter enacted, which may be adopted by general rules of such circuit or district court; and that such courts may, from time to time by general rules, adopt such state laws as may hereafter be in force in each state in relation to remedies upon judgments, as aforesaid, by execution or otherwise.

Section 918, Revised Statutes, provides that "the several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

We think it is sufficiently made to appear, by these citations from the statutes, that while it was the purpose of Congress to bring about a general uniformity in Federal and state proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of remedies provided by state legislation, yet that it was also the intention to reach such uniformity often largely through the discretion of the Federal courts, exercised in the form of general rules, adopted from time to time, and so regulating their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.

In *Nudd* v. *Burrows, Assignee*, 91 U. S. 426, [23: 286], it was sought to interpret the act of June 1, 1872 (§ 914, Revised Statutes), as bringing the Federal judges, when charging a jury in Illinois within the practice act of that state, directing that the court, in charging the jury, shall instruct them only as to the law of the case, and give no instructions unless reduced to writing. But this court held that the statute was not intended to have such an appli- [626] cation, and that the course of the court, in charging juries, was not within the act.

In *Indianapolis & St. L. R. R. Co.* v. *Horst*, 93 U. S. 291 [23: 898], a similar view was taken, and it was held that, in respect to submitting interrogatories to the jury and to entertaining motions for a new trial, the circuit court of the United States was not, by reason of the provisions of the act of June 1, 1872, constrained to follow a state law regulating those matters; and it was said: "The conformity is required to be 'as near as may be'—not as near as may be *possible*, or as near as may be *practicable*. This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes, which, in their judgment, would

unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals."

To the same effect is *Re Chateaugay Ore & Iron Co.* 128 U. S. 544 [32: 508], where it was held that the practice and rules of the state court do not apply to proceedings taken in a circuit court of the United States for the purpose of reviewing in this court a judgment of such circuit court; and that such rules and practice, embracing the preparation, perfection, settling and signing, of a bill of exceptions, are not within the "practice, pleadings, and forms and modes of proceeding" which are required by § 914 of the Revised Statutes to conform "as near as may be" to those existing at the time in like causes in the courts of record of the state.

In *Southern Pacific Company* v. *Denton*, 146 U. S. 202 [36: 942], the subject and the cases were reviewed at some length, and it was held that a statute of a state which makes an appearance in behalf of a defendant, although in terms limited to the purpose of objecting to the jurisdiction of the court, a waiver of immunity from jurisdiction by reason of nonresidence, is not applicable to actions in a circuit court of the United States held within the state, under Revised Statutes, § 914. *Luxton* v. *North River Bridge Co.* 147 U. S. 337 [37: 194]; *Lincoln* v. *Power*, 151 U. S. 436 [38: 224].

627] *The general rule, under which was issued the summons by which the plaintiff in error was brought into court, was adopted by the district court of the United States for the district of Colorado on October 10, 1877, and it was in substantial conformity with the statute of Colorado then in force. Several changes in the laws of Colorado, regulating forms of procedure and the times given for defendants to appear to writs of summons, have been since enacted, but the district court has not seen fit to alter its rules, from time to time, in subserviency to such changes. We have a right to presume that *the discretion of the district court was legitimately exercised in both adopting and maintaining the rule in question; and its judgment is accordingly affirmed.*

Mr. Justice **White** and Mr. Justice **Peckham** dissent.

HIGHLAND AVENUE & BELT RAILROAD COMPANY, *Appt.*,
v.
COLUMBIAN EQUIPMENT COMPANY.

(See S. C. Reporter's ed. 627-632.)

Order appointing receiver, when not appealable.

An interlocutory order appointing a receiver is not appealable as an order granting an injunction, merely because it contains a direction of a mandatory character to the receiver to take, and to the defendant, its officers, directors, agents, and employees to surrender possession of and deliver, the property in their hands to the receiver.

[No. 427.]

Submitted November 29, 1897. Decided January 3, 1898.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Fifth Circuit certifying to this court a question upon which instructions are asked in an action by the Columbian Equipment Company, plaintiff, against the Highland Avenue & Belt Railroad Company as to the appealability of an order granted in such action. Question answered in the negative.

See same case below, 74 Fed. Rep. 920.

Statement by Mr. Justice **Brewer:**

The facts in this case are as follows: On April 5, 1897, upon a bill duly filed by the Columbian Equipment Company, an interlocutory order was entered in the circuit court of the United States for the northern district of Alabama, appointing Phillip Campbell receiver of the property of the Highland Avenue & Belt Railroad Company. Such order, besides the *mere matter of appointment and a [**628** description of the property, contained the following provisions:

"The said receiver is hereby authorized and directed to take immediate possession of all and singular the property above-described, wherever situated or found, and to continue systematically, in the same manner as at present, the business and occupation of carrying passengers and freight and the discharge of all the duties obligatory upon the said company.

"And the said Highland Avenue & Belt Railroad Company and each and every of its officers, directors, agents, and employees are hereby required and commanded forthwith to turn over and deliver to such receiver, or his duly constituted representative, any and all notes, accounts, money, or other property in his or their hands, or under his or their control.

"Said receiver is hereby fully authorized to continue the business and operate the railway of said company and manage all its property at his discretion in such manner as will, in his judgment, produce the most satisfactory results consistent with the discharge of the public duties imposed on said company, and to collect and receive all income therefrom and all debts due said company of every kind, and for such purpose he is hereby invested with full power at his discretion to employ and discharge and fix the compensation of all such officers, counsel, managers, agents, and employees as may be required for the proper discharge of the duties of his trust.

"Said receiver is hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in his judgment to the proper protection of the property and trusts vested in him, and likewise defend all actions instituted against him as receiver, and also to appear in and conduct the prosecution or defense of any and all suits or proceed-

NOTE.—*As to receivers of railroads; eligibility of president,*—see note to State, St. Louis K. & S. R. Co., v. Wear (Mo.) 33 L. R. A. 341.

As to stockholder's liability as part of assets of, see note to Cushing v. Perot (Pa.) 34 L. R. A. 737.

As to pursuing funds to receiver's hands, see note to Standard Oil Co. v. Hawkins (C. C. A. 7th C.) 33 L. R. A. 739.

As to attachment of property of, in violation of injunction, see note to Farmers' Loan & T. Co. v. Bankers' & M. Teleg. Co. (N. Y.) 31 L. R. A. 403.

ings now pending in any court against said company, the prosecution or defense of which will, in the judgment of said receiver, be necessary and proper for the protection of the property and rights placed in his charge, and for the interests of the creditors and stockholders of said company.

"Said receiver is hereby required to give bonds in the sum of $10,000, with personal se-
629]curity, or the security of *some responsible guaranty and indemnity company satisfactory to the clerk of this court, for the faithful discharge of his duties, and is also required to make and file full reports in this court quarterly.

"And the court reserves the right, by orders hereinafter to be made, to direct and control the payments of all supplies, materials, and other claims, and in all respects to regulate and control the conduct of said receiver."

The railroad company appealed from this order to the circuit court of appeals for the fifth circuit, which court, on June 16, 1897, certified to this court the following question: "The question upon which instructions are desired and respectfully asked is, Was the decree appointing Campbell receiver, above referred to, susceptible of being appealed from on the ground that the said order embraced within its terms an injunction or the necessary equivalent of an injunction?"

Messrs. **Alexander T. London** and **Samuel A. Putman** for appellant.

Messrs. **John F. Martin** and **Henry D. Hotchkiss** for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

Is an interlocutory order appointing a receiver appealable from the circuit court to the circuit court of appeals? And if such an order, standing alone, be not appealable, does it become so by the incorporation into it of a direction to the defendant, its officers, directors, agents, and employees, to turn over and deliver to the receiver the property in their hands? These questions must be determined by a consideration of § 7 of the act of March 3, 1891, creating circuit courts of appeal (26 Stat. at L. 826, chap. 517), as amended February 18, 1895 (28 Stat. at L. 666, chap. 96). That section provides:

"That where, upon a hearing in equity in a district court, or a circuit court, an injunction
630]shall be granted, continued, *refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction to the circuit court of appeals: Provided, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal: And provided further, That the court below may in its discretion require, as a condition of the appeal, an additional injunction bond."

Under this section it has been decided that when an appeal is taken from an interlocutory order or decree granting or dissolving an injunction the whole of such interlocutory order or decree is before the court of appeals for review, and not simply that part which grants or dissolves the injunction, and that on the hearing in the court of appeals that court may consider and decide the case upon its merits. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518 [41: 810]; *Re The Tampa Suburban Railroad Company*, 168 U. S. 583 [*ante*, 589]. But each of those cases proceeded upon the fact that there was a distinct order granting, continuing, or dissolving an injunction. In the case at bar there is no such order. It is true, following the order of appointment, there is a direction to the defendant, it officers, directors, and agents, to turn over to Campbell the property of which he is appointed receiver, but that is only incidental and ancillary to the receivership. This is obvious, for if the court subsequently entered an order, in terms setting aside only the appointment of the receiver, all the other parts of the original order would immediately and without specific mention disappear and cease to have any force. Indeed, the mere appointment of a receiver carries with it the duty on his part of taking possession, and the further duty of those in possession of yielding such possession. So that while as a part of an *order appointing a receiver [**631**] there is something in the nature of a mandatory injunction, that is, a command to the receiver to take and to the defendant to surrender possession, yet such command is not technically and strictly an order of injunction.

The last proviso in the section emphasizes this distinction: "The court below may in its discretion require, as a condition of the appeal, an additional injunction bond." The bond is described. It is not a bond to secure against injuries which may result if a receiver is wrongfully appointed or discharged, but is technically an injunction bond; that is, a bond to answer for damages in case of a wrongful order either granting, continuing, or vacating an injunction. Receivership implies possession, and if no bond can be required to guard against loss from taking or surrendering possession it is difficult to perceive the significance of an additional injunction bond in a receivership case. The question is not, whether, included in an order appointing a receiver, there may not be, either express or implied, some directions of a mandatory character, something in the nature of an injunction, but whether Congress in this legislation provided for appeals in cases other than those in which an injunction, technically speaking, is either the sole or a principal part of the order or decree. Orders granting injunctions and orders appointing receivers are, in the common understanding of the profession, entirely independent. The distinction between the two is clearly recognized in the text-books and in the reports. We have separate treatises on injunctions and on receivers. The separation between them is one which runs through the law, and while it is true that the mandatory features, which, either expressly or by impli-

cation, attend orders appointing receivers, are sometimes made the matter of discussion in treatises on receivers, or the subject of comment in decisions concerning receivers, yet the distinction is never forgotten. Familiar as it must be assumed to have been with this generally recognized distinction, Congress, if it had intended that appeals should be allowed from orders appointing receivers as from orders in respect to injunctions, would doubtless have expressly named such orders. Its omission [632] of the one and the mention *of the other is a clear declaration that only one should be the subject of appeal and the other not. And it would savor of judicial legislation to hold that, although Congress has not authorized appeals from orders appointing receivers, the mere fact that in such an order there is a direction of a mandatory character, either express or implied, in respect to taking possession, makes it appealable, as an order granting an injunction.

For these reasons we are of opinion that *the question should be answered in the negative*, and it will be so certified to the court of appeals.

WILLIAM R. HALL, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 632-640.)

Stealing by a postal employee—immaterial averment.

1. The stealing by a postal employee of the contents of a test or decoy letter in the lawful possession of the postoffice department is a violation of the latter part of U. S. Rev. Stat. § 5467, whether or not the letter was intended to be conveyed by mail or delivered by a letter carrier.
2. An immaterial averment that the letter was intended to be delivered by a letter carrier, in an indictment which contains in addition all necessary allegations to charge an offense under the latter part of U. S. Rev. Stat. § 5467, need not be proved in order to sustain a conviction.

[No. 312.]

Argued November 29, 1897. Decided January 3, 1898.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment convicting William R. Hall of the offense of embezzling and stealing a letter and its contents from the postoffice department. *Affirmed.*

See same case below, 76 Fed. Rep. 566.

The facts are stated in the opinion.

Mr. **Arthur C. Butts** for plaintiff in error.

Mr. **James E. Boyd,** Assistant Attorney General, for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

The defendant was indicted in the circuit court of the United States for the southern district of New York in October, 1896, for embezzling and stealing a certain letter and its contents, described in the indictment, containing money. The indictment was under § 5467, Revised Statutes, which is set out in the margin.† The defendant was employed in a department of the postal service as a clerk at *station F, a branch postoffice of the [634 United States in the city of New York.

The indictment contained three counts. The first and second counts charged that the defendant wilfully embezzled, etc., the letter, which was intended to be delivered by a letter carrier. These counts were drawn with reference to the first clause in the statute above referred to. The third count is under the second clause of the statute, and alleged that the defendant, "being then and there employed in a department of the postal service of the United States, to wit, as clerk at station F, a branch postoffice of the United States, in the said city of New York, did unlawfully, wilfully, and feloniously steal, take, and carry away a certain United States treasury note of the denomination and value of $1, and three silver certificates of the United States, each of the denomination and value of $1, the said treasury note and the said silver certificates then and there being the money and property of one Joseph E. Jacobs, and the same treasury note and the same silver certificates were then and there feloniously stolen and taken, as aforesaid, by the said William R. Hall from and out of a certain letter which then and there had come into his possession in his capacity as such clerk, as aforesaid, and by virtue

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NOTE.—*As to presumption that letter mailed was received*, see note to Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 32 L. R. A. 473.

As to registration of letter, see note to Ross v. Hawkeye Ins. Co. (Iowa) 34 L. R. A. 466.

† Sec. 5467. Any person employed in any department of the postal service who shall secrete, embezzle, or destroy any letter, packet, bag, or mail of letters intrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail carrier, mail messenger, route agent, letter carrier, or other person employed in any department of the postal service, or forwarded through or delivered from any postoffice or branch postoffice established by authority of the Postmaster General, and which shall contain any note, bond, draft, check, warrant, revenue stamp, postage stamp, stamped envelope, postal card, money order, certificate of stock, or other pecuniary obligation or security of the government, or of any officer or fiscal agent thereof, of any description whatever; any bank note, bank post bill, bill of exchange, or note of assignment of stock in the funds; any letter of attorney for receiving annuities or dividends, selling stock in the funds, or collecting the interest thereof; any letter of credit, note, bond, warrant, draft, bill, promissory note, covenant, contract, or agreement whatsoever, for or relating to the payment of money, or the delivery of any article of value, or the performance of any act, matter, or thing; any receipt, release, acquittance, or discharge of or from any debt, covenant, or demand, or any part thereof; any copy of the record of any judgment or decree in any court of law or chancery or any execution which may have issued thereon; any copy of any other record, or any other article of value, or writing representing the same; any such person who shall steal or take any of the things aforesaid out of any letter, packet, bag, or mail of letters which shall have come into his possession, either in the regular course of his official duties or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, shall be punishable by imprisonment at hard labor for not less than one year nor more than five years.

of his said office and employment, and the said letter was directed in the tenor following—that is to say: 'Mrs. Susan Metcalf, No. 346 E. 24th St., New York City, N. Y.,' *and the same was then intended to be delivered by a letter carrier*, and had not then been delivered to the party to whom the same was directed," against, etc.

The defendant was arraigned, pleaded not guilty, and was subsequently tried at a term of the United States circuit court for the southern district of New York, and convicted and sentenced to imprisonment at hard labor in the King's county penitentiary for the term of two years.

635] *Upon the trial, after the evidence had been given on the part of the prosecution and the government had rested its case, the counsel for the defendant asked the court to direct the jury to acquit the defendant upon several grounds: (1) That the evidence failed to prove the crime charged in the indictment; (2) that a material allegation to be proved by the government was the fact that the letter, described in the indictment and alleged to have been secreted, destroyed, and embezzled and its contents stolen by the defendant, was intended to be delivered by a letter carrier, while the uncontradicted evidence showed that such letter was not intended to be delivered by a letter carrier, and therefore a material allegation in the indictment was not only not proved but was absolutely disproved; (3) that there was a fatal variance between the indictment and the proofs offered to sustain it by the government, and the defendant should therefore be acquitted.

The motion to direct an acquittal was denied by the court and the defendant duly excepted. The defendant sued out a writ of error from this court to review the judgment of conviction, and the validity of the exception to the refusal of the court to direct the jury to acquit is the sole question now before us.

After his conviction the defendant moved in arrest of judgment and for a new trial. The judgment was arrested on the first two counts, and the motion for a new trial was denied. We take a statement of the facts proved upon the trial, from the opinion delivered by the learned judge in denying that motion, as we think the statement contains all that is material for the consideration of the case, and that it is a correct summary of the evidence in the particulars mentioned. It is as follows:

"The evidence showed that the government detectives prepared a special delivery letter designed as a test or decoy letter, containing marked bills, and delivered it bearing a special delivery stamp to the night clerk in charge of branch station F of the postoffice in this city. The defendant was not a letter carrier, but a clerk employed at that office, whose duty it was to take charge of special delivery letters, enter them **636**] *in a book kept for that purpose, and then place them in course of transmission. The letter in question was addressed to Mrs. Susan Metcalf, a fictitious person, 346 E. 24th street, New York city, a fictitious number. The letter was placed by the night clerk with other letters upon the table where such letters were usually placed, and the defendant entering the office not long after, took this letter, along with the others on the same table, removed them to his desk, and properly entered the other letters, but did not enter this letter. On leaving the office not long after, the omission to enter the letter having been observed, he was arrested, and the money contents of the letter, marked and identified by the officers, were found upon his person. The officers testified upon cross-examination that the address was a fictitious one; that the letter was designed as a test letter, and that they 'did not intend that the letter should be delivered to Mrs. Susan Metcalf, or to that address,' and that 'it could not be delivered to that person at that address.'"

The question now before us is whether the evidence is sufficient to sustain this conviction under the third count of the indictment. We think it is. Section 5467, Revised Statutes, describes two distinct offenses; the first clause of the section is directed against any person employed in any department of the postal service who secretes, embezzles, etc., any letter intrusted to him or which shall come into his possession, and which was intended to be conveyed by mail or carried or delivered by any mail carrier, mail messenger, route agent, letter carrier, or other person employed in any department of the postal service, or forwarded through or delivered from any postoffice or branch postoffice established by the authority of the Postmaster General, and which shall contain any note, etc. This is one of the offenses set forth in that section. The other offense set forth in the same section does not in terms provide that the letter must have been intended to have been conveyed by mail or carried or delivered by any mail carrier, letter carrier, etc., but it provides that "any such person" (meaning thereby any person employed in any department of the postal service as described in the first part of the section) "who *shall steal or take any of the things afore [**637** said out of any letter, packet, bag, or mail of letters which shall have come into his possession, either in the regular course of his official duties or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, shall be punishable by imprisonment at hard labor for not less than one year nor more than five years."

A test or "decoy" letter comes within the statute. *Goode* v. *United States*, 159 U. S. 663 [40: 297]; *Montgomery* v. *United States*, 162 U. S. 410 [40: 1020].

Although the section provides the same punishment for all the various acts set forth therein, yet the section itself clearly describes two different classes of offenses. *United States* v. *Wight*, 38 Fed. Rep. 106. The proof would not show a violation of the first part of the section unless it appeared that the letter intrusted to the person employed in the postal service, or which came into his possession, was one which was intended to be conveyed by mail or carried or delivered by a mail carrier, mail messenger, route agent, letter carrier, or other person employed in any department of the postal service, or that it was forwarded through or delivered as stated in the section. Whether the proof here does not show that the letter in question was such a

letter, it is not now necessary to say, because the judgment was arrested upon the first two counts covering that clause of the section. Although a motion in arrest of judgment cannot properly be made upon the ground that the evidence is insufficient to prove the case under the indictment, or under any particular count thereof, because such motion is confined to matters appearing upon the face of the record itself (1 Archb. Crim. Pl. & Pr. 7th Am. ed. 671, and notes), yet, as the motion was entertained and judgment was actually arrested upon the first two counts, those counts are not now in question.

The other clause of the section provides for a distinct offense, and under that it is not necessary to aver that the letter was intended to be conveyed by mail or delivered by a letter carrier, etc., as provided in the first clause, and it covers the case of any person employed in [638] any department of the postal service* who steals or takes any of the things, already described in the section, out of any letter, etc., which shall have come into his possession either in the regular course of his official duties or in any other manner whatever, provided the same shall not have been delivered to the party to whom it is directed. We think this is entirely plain. *United States* v. *Wight*, 38 Fed. Rep. 106.

We think the indictment must show under this clause—and this third count does show—that the letter, the contents of which were stolen by the person employed in the postal service, was one which had come in some way or manner under the jurisdiction and into the possession of the postoffice department; for the statute does not refer to letters in regard to which that department has not and was not intended to have any concern or any duty to perform, such as letters which have not been deposited or left in any manner in any postoffice or street letter box, or given to a carrier or other agent of the department, and which remain entirely outside of that department, and where the stealing of such letters or their contents at that time is not of Federal cognizance. The evidence shows that this letter was within the possession and jurisdiction of the department, in the branch postoffice in New York, and that while undelivered to the party to whom it was addressed, its contents were stolen by defendant, who was a person in the postal service. Such stealing comes within the statute. That it was a test or decoy letter is immaterial, as already shown. If the letter be within the lawful possession of the postoffice department, the stealing of the contents of such letter by a postal employee is a violation of the latter part of the section of the statute. This letter was thus within the jurisdiction and possession of the department, and the defendant then stole its contents.

It is urged, however, that the conviction cannot be sustained under this third count because it contains, in addition to the particular allegations necessary to bring the act within the latter part of the section, an allegation that the letter, the contents of which were stolen, was intended to be delivered by a letter carrier. This fact forms no part of the offense mentioned* in the second clause of the section [639] in question, and it was therefore unnecessary to allege it. As the third count does contain such an averment, the counsel for the defendant argues that it became necessary to prove the fact thus averred, and, as it was (he argues) unproved, the defendant should have been acquitted by direction of the court. The result of such a holding would be to say that where an indictment contained all the necessary averments to constitute an offense created by the statute, if an averment wholly unnecessary and entirely immaterial be added, the prosecution must fail unless it prove such unnecessary averment, although proving every fact constituting the offense provided by the statute. We are of opinion that it was not incumbent upon the prosecution to prove this averment in order to sustain a conviction under this count.

Without this averment the third count contains every fact necessary to be proved in order to constitute an offense under the second clause of the statute, and the evidence in the case is sufficient to authorize the defendant's conviction upon that count. The character of the offense, as provided by statute, is not changed by this unnecessary averment, nor is the sufficiency of the evidence to sustain a conviction under the third count at all impaired if it be assumed that it did not show that the letter was intended to be delivered by a letter carrier. This is unlike a case where an unnecessary amount of description of an article to be identified by the description is contained in the indictment. Under those circumstances, it has been sometimes held that the description must be proved as laid, because it went to the identification of the article described. Nor is it like the case of an indictment for perjury or one for a libel where the sworn statement alleged to be false or the article alleged to be libelous must be proved substantially as averred in the indictment. In such cases the matter set forth constitutes the offense and must be proved accordingly. But here every necessary fact is averred and proof sufficient to sustain a conviction has been given in regard to each fact. Because the pleader unnecessarily made an averment of a totally immaterial fact, the government was not therefore* bound [640] to prove it in order to sustain a conviction. For this reason there was no fatal variance between the offense set forth in the indictment and the proof. *Montgomery* v. *United States*, and *Goode* v. *United States*, *supra*.

The judgment of conviction must be affirmed.

GEORGE J. CROSSLEY (Petitioner on Behalf of Salter D. Worden) and Salter D. Worden, *Appts.*,

v.

STATE OF CALIFORNIA and Charles Aull, Warden of the State Prison of the State of California.

(See S. C. Reporter's ed. 640 642).

Error in murder trial—jurisdiction of state court.

1. Error in submitting to the jury only the question of murder in the first degree, while the evidence is sufficient at the most to convict of murder in the second degree, does not constitute such a jurisdictional defect in a conviction for murder in the first degree as to sustain the issuing a writ of habeas corpus by the United States circuit court.

2. Jurisdiction of a state court of a prosecution for the murder of an engineer, committed by derailing a railroad train, is not precluded by the fact that the train was exclusively engaged in transporting the mail of the United States, and that the derailment was an obstruction of the mail and a restraint of interstate commerce.

[No. 470.]

Submitted December 14, 1897. Decided January 3, 1898.

APPEAL from an order of the Circuit Court of the United States for the Northern District of California denying an application for a writ of habeas corpus in a criminal case in which Salter D. Worden was convicted of the crime of murder in the first degree in the Superior Court of the County of Yolo, in the State of California. *Order affirmed.*

See same case below, *People* v. *Worden*, 113 Cal. 569.

The facts are stated in the opinion.

No brief filed by counsel for appellants.

Messrs. **W. F. Fitzgerald,** Attorney General of California, and **W. H. Anderson,** Assistant Attorney General of California, for appellees.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Worden was convicted in the superior court of the county of Yolo, California, of the crime of murder in the first degree, and sentenced to be hanged. The supreme court of Califor-**641**] nia *affirmed the judgment. *People* v. *Worden*, 113 Cal. 569.

Being in custody, awaiting execution, an application for the writ of habeas corpus was made on behalf of Worden to the circuit court of the United States for the northern district of California, the application denied, and the petition dismissed. The case was then brought to this court.

Two grounds were relied on as justifying the issue of the writ:

First. That there was no evidence that Worden was guilty of murder in the first degree; that the evidence showed, or tended to show, that he was guilty, at most, of murder in the second degree; and that the trial court only submitted to the jury the question as to whether or not he was guilty of murder in the first degree. This was matter of error, and with its disposition by the highest tribunal of the state, it was not within the province of the circuit court to interfere. Nor can the writ of habeas corpus be made use of as a writ of error.

Second. That the state courts had no jurisdiction because Worden was convicted of the murder of one Clark, committed by derailing a train of which Clark was the engineer; that this was a special train "exclusively engaged in the carrying or transportation of the mail of the United States;" that the effect of the derailment "constituted an obstruction or stopping of the transmission of the United States mail, and was a restraint and retarding of the interstate commerce of the United States;" that he therefore was guilty, if at all, of offenses against the laws of the United States (§§ 5440, 3995, Revised Statutes; act July 2, 1890, 26 Stat. at L. 209, chap 647); and that any offense committed by him was solely cognizable in the courts of the United States.

But it is settled law that the same act may constitute an offense against the United States and against a state, subjecting the guilty party to punishment under the laws of each government; and may embrace two or more offenses *Cross* v. *North Carolina*, 132 U. S. 131 [33: 287], and cases cited. And see *Teal* v. *Felton*, 37 U. S. 12 How. 284, 292 [9: 990, 993].

*There is no statute of the United States [**642** under which Worden could, on the alleged facts, have been prosecuted for murder in the courts of the United States. He was convicted of that crime in the administration of the laws of California (Penal Code, Cal., §§ 187, 188, 189; §§ 17, 587); and the conviction has been sustained by the highest court of the state

As indicating that the prosecution was in the ordinary course, the language of that court in the opinion delivered on affirming the judgment may not improperly be quoted. Among other things the court said: "The charge fully informed the jury that an intent to take human life is a necessary element of murder in the first degree. They were told that in order to convict the appellant of murder in the first degree they must be convinced beyond a reasonable doubt that the appellant, either personally or in concert with others, killed the deceased with malice aforethought by some kind of wilful, deliberate, and premeditated killing, and that 'in order to constitute murder in the first degree, the intent to kill must be the result of deliberate premeditation.' This principle was given to the jury in various forms; and it is beyond question that the evidence abundantly warranted the jury in finding the appellant guilty of murder in the first degree—murder of a most

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NOTE.—*As to interstate commerce; regulation of; power of Congress, how far exclusive,*—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

As to habeas corpus to contest constitutionality of statute, see note to *Ex parte* Smith (Mo.) 33 L. R. A. 606.

For error in consolidating indictments, see note to Howard v. United States (C. C. A. 6th C.) 34 L. R. A. 509.

On commitment for trial by court without jurisdiction, see note to *Ex parte* Lacy (Va.) 31 L. R. A. 822.

aggravated and shocking character. There was an unnecessary allusion to the fact that the derailment of a train is a felony; but that in no way changed the general nature of the charge." 113 Cal. 576.

No ground existed on which the circuit court could have held these proceedings void, and *the writ was properly denied.*

Order affirmed.

WILLIAM W. CONDE and John C. Streeter, *Plffs. in Err.*,
v.
ANSON E. YORK and Wallace W. Starkweather.

(See S. C. Reporter's ed. 642-651.)

Federal question.

A decision of a state court that an assignment of a portion of a claim against the United States, to secure the cost of material furnished to a government contractor, amounts merely to security, and that it creates equities which are superior to those of other transferees in the fund, after the United States has paid it over and has no further concern in the matter, does not present a Federal question.

[No. 143.]

Argued December 6, 1897. Decided January 3, 1898.

IN ERROR to the Supreme Court of the State of New York to review a judgment of that court affirming the judgment of the General Term of the Supreme Court which affirmed a judgment of the Circuit Court of that state in favor of Anson E. York *et al.*, plaintiffs, against William W. Conde *et al.*, defendants, for the recovery of a portion of a fund received by the defendants, which portion of the fund was assigned to the plaintiffs. *Dismissed.*

See same case below, 147 N. Y. 486.

Statement by Mr. Chief Justice **Fuller:**

In September, 1889, Witherby and Gaffney entered into a contract with the government of the United States to construct certain buildings at Sackett's Harbor, New York. Thereafter they purchased from York and Starkweather lumber and materials, which were used in the construction of the buildings, and on March 27, 1890, were indebted on account of these materials in the sum of more than $3,000. Being so indebted, Witherby and Gaffney on that date executed and delivered to York and Starkweather an instrument in writing, as follows:

"Whereas we have a contract with the United States government for the construction of buildings and officers' quarters at Madison Barracks, Sackett's Harbor, Jefferson County, New York.

"And whereas we are indebted to York & Starkweather, of Watertown, New York, in the sum of $3,000 and more on account of materials furnished us by them that were used in said buildings and quarters.

"And whereas there will be due and payable to us on account of our work, etc., from the government considerable sums of money before and on the completion of our said work.

"Now, therefore, of the moneys due and to become due us from the said government, we do hereby for value received assign and transfer to said York & Starkweather the sum of $3,000, and do hereby authorize, empower, request, and direct Lieutenant J. E. Macklin, R. Q. M. Eleventh Infantry, U. S. A., through whom payments are made for such construction, to pay to said York & Starkweather on our account for such construction the full sum of $3,000, as follows: First, $500 from the next estimate and payment due or to become due us, and the sum of $2,500 on the completion of said work by us, and when the balance *of our contract with the government [644 becomes due and payable to us."

On the 7th of April, Witherby and Gaffney paid York and Starkweather $500, but no further payment was made by them. On May 15, 1890, Lieutenant Macklin, the disbursing agent of the United States government at Sackett's Harbor, gave a draft on the treasury to the amount of $4,400 to Witherby and Gaffney, which was turned over by them on that day to Conde and Streeter. Before Conde and Streeter received this draft, they had been fully notified of the paper delivered to York and Starkweather, and while the draft was in their hands, York and Starkweather demanded $2,500 thereof from them, which they refused to pay, or any part thereof. Conde and Streeter asserted a prior right to the draft and moneys in question by virtue of an alleged oral agreement with Witherby and Gaffney to secure the payment of certain notes upon which they were liable as indorsers and for individual claims they held against them. Conde was one of the sureties on Witherby and Gaffney's bond to the government, and it seems to be conceded that Witherby and Gaffney obtained the money on Conde and Streeter's accommodation indorsements for the purpose of enabling them to carry on the work under the contract. Conde and Streeter applied the money to pay notes to the amount of $3,200 which they had indorsed, and individual claims to the amount of $600, and about $600 was returned to Witherby and Gaffney.

April 16, 1890, Witherby and Gaffney executed to Conde and Streeter an agreement by which they promised to pay off and discharge from the money to be received by them from the government certain notes indorsed by Conde and Streeter and certain individual indebtedness held by them against Witherby and Gaffney. On April 18th Witherby and Gaffney made a written assignment to Conde and Streeter of sufficient of the money in question to pay the notes and claims mentioned, in these words:

"That there may be no misunderstanding about the intention of the foregoing agreement, we hereby assign for value *received to [645 John C. Streeter and Wm. W. Conde sufficient

NOTE.—*As to claims against United States: assignment.*—see note to Lopez v. United States (Ct. Cl.) 2 L. R. A. 571.

As to limitation of time to present claims, see note to Waddell v. United States (Ct. Cl.) 7 L. R. A. 861.

of the moneys coming to us from Lieut. Macklin, R. Q. M., to pay the claims as specified in the aforegoing agreement."

York and Starkweather brought suit against Conde and Streeter in the supreme court of New York for the county of Jefferson. Two defenses were set up by Conde and Streeter, the second of which was "that the money, claim, and property, claimed by the plaintiffs in this action to have been assigned to them by Witherby & Gaffney at the time of the pretended assignment thereof, constituted and was a claim against the United States government which had not been allowed, or the amount due thereon ascertained, or the warrant issued for the payment thereof, and that the pretended assignment thereof does not recite the warrant for payment issued by the United States, and is not acknowledged by the person making the same before an officer having authority to take acknowledgments of deeds, and is not certified by such officer; and that said pretended assignment is in violation of the laws of the United States and of the state of New York, and that the plaintiffs never derived any interest in the said contract with the United States by virtue of the said pretended assignment or otherwise, and are not the real parties in interest in this action, and ought not therefore to maintain the same: that said Witherby & Gaffney never transferred any interest in the said contract to the said plaintiffs."

The trial resulted in a verdict in favor of York and Starkweather, upon which judgment was entered, which was affirmed by the general term, and that judgment affirmed by the court of appeals. *York* v. *Conde*, 147 N. Y. 486. A writ of error was then allowed from this court.

Mr. **Elon R. Brown** for plaintiffs in error.
Mr. **Henry Purcell** for defendants in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Plaintiffs in error contended in the courts below that they were entitled to the fund in ques-**646**] tion by virtue of an oral *transfer prior to the assignment to defendants in error, and of the writings executed subsequently thereto; and that defendants in error acquired no right to the fund by their assignment because such assignment was in violation of § 3477 of the Revised Statutes of the United States. But they did not claim that they acquired any right or title to the fund by reason of that section, nor was its validity questioned in any way.

In delivering the opinion of the court of appeals of New York, its able and experienced chief judge said:

"The claim set up by the defendants in their answer, that prior to the assignment to the plaintiffs Witherby & Gaffney had verbally assigned to them the money to become due on the contract, as security for their indorsements, was tried before the jury and found against them and need not be further considered. There can be no doubt that under the general rule of law prevailing in this state the plaintiffs, under the assignment of March 27, 1890, acquired an equitable, if not a legal, title to the money payable on the contract of Witherby & Gaffney with the government to the extent of $3,000, and that the defendants, having acquired possession of the draft for the final payment on the contract, by delivery from Witherby & Gaffney, to secure an antecedent liability, on being notified of the claim of the plaintiffs, held the draft and the fund it represented as trustee of the plaintiffs, to the extent of their claim. *Field* v. *Mayor, etc., of New York*, 6 N. Y. 179 [57 Am. Dec. 435]; *Devlin* v. *Mayor, etc., of New York*, 63 N. Y. 8. "But the contention is that the plaintiffs took nothing under the assignment to them, because, as is claimed, the transaction was void under § 3477 of the Revised Statutes of the United States, to which reference has been made. That section is as follows: 'All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed *in the presence of at least [**647** two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.' This section has been considered in several cases by the Supreme Court of the United States. If that court has construed the section so as to determine the point involved in this case we should deem it our duty to follow its decision. The judgment we shall render will not, we suppose, be subject to review by the Supreme Court. We do not question the validity of the section in question, nor will our decision affect any right of the defendants based thereon. Their right, if any, rests upon the transfer of the draft after it came to the hands of Witherby & Gaffney. They seek to defeat the right of the plaintiffs under their prior assignment of a portion of the fund, and invoke § 3477 to establish that the assignment was void and conferred no right. But on a question of statutory construction of an act of Congress which has been determined by the Supreme Court of the United States, subsequently arising in this court, we should feel bound to adopt and follow the construction of that tribunal on the prineiple of comity, although in a case where the ultimate jurisdiction is vested in this court."

Many decisions of this court in respect of § 3477 were then considered, and the conclusion reached that the section had been so construed as to permit transfers made in the legitimate course of business, in good faith, to se-

cure an honest debt, while they might be disregarded by the government, to be sustained as between the parties so far as to enable the transferees, after the government had paid over the money to its contractors, to enforce **648**]them against the latter, or those *taking with notice. The court held, in effect, that such was the transaction in the case at har, and that the transfer to York and Starkweather was simply to secure them for material actually used by the contractors in performing their contract with the government, and amounted to nothing more than the giving of security, and not to the assignment of a claim to be enforced against the government. The United States had, in due course, paid over the money to the contractors, and between them there was no dispute; nor had the United States any concern in the question as to which of the rival claimants was entitled to the fund, the proper distribution of which depended on the equities between them. What the New York courts determined was that the equities of York and Starkweather were superior to those of Conde and Streeter, and judgment went accordingly.

In order to give this court jurisdiction to review the judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be a title or right of the plaintiff in error, and not of a third person only; and the statute or authority must be directly in issue. In this case the controversy was merely as to which of the claimants had the superior equity in the fund; the statute was only collaterally involved; and plaintiffs in error asserted no right to the money based upon it.

In *Aldrich* v. *Ætna Ins. Company*, 75 U. S. 8 Wall. 491 [19: 473], the question was whether the mortgage of a vessel, properly recorded under an act of Congress, gave a better lien than an attachment issued under a state statute, and the decision by the state court was that it did not. The construction of the act of Congress and its force and effect as it respected the mortgage security under which defendants claimed a right or title paramount to that of the attachment creditor was necessarily directly involved, and a proper case for review existed.

In *Railroads* v. *Richmond* [*Dubuque & S. C. R. Co.* v. *Richmond*] 82 U. S. 15 Wall. 3 [21: 118], in a suit on a contract defendants set up that the contract had been rendered void and of no force and effect by provisions of the Constitution of the United States and of **649**] certain acts of Congress, and *the decision of the supreme court of Iowa was adverse to that defense. The case being brought here, a motion to dismiss the writ of error was denied.

In each of these cases the defense was rested upon a title or right of defendants specially claimed under the Constitution or laws of the United States and, being adversely disposed of, jurisdiction obtained.

Here no such contention was put forward. The materials of plaintiffs below had gone into the buildings, while, on the credit of defendants, money had been raised for their construction. Both held written agreements, from the same source, for the money when paid over, but that of defendants below was subsequent in date to the other. Neither asserted any right under § 3477.

In *Walworth* v. *Kneeland*, 56 U. S. 15 How. 348 [14: 724], it was ruled, where a case was decided in a state court against a party who was ordered to convey certain land, and he brought the case up to this court on the ground that the contract for the conveyance of the land was contrary to the laws of the United States, that this was not enough to give jurisdiction to this court under the 25th section of the judiciary act. The state court decided against him on the ground that the opposite party was innocent of all design to contravene the laws of the United States. Mr. Chief Justice Taney, however, said: "But if it had been otherwise, and the state court had committed so gross an error as to say that a contract, forbidden by an act of Congress, or against its policy, was not fraudulent and void, and that it might be enforced in a court of justice, it would not follow that this writ of error could be maintained. In order to bring himself within the 25th section of the act of 1789 he must show that he claimed some right, some interest, which the law recognizes and protects, and which was denied to him in the state court. But this act of Congress certainly gives him no right to protection from the consequences of a contract made in violation of law. Such a contract, it is true, would not be enforced against him in a court of justice; not on account of his own rights and merits, but from the want of merits and good conscience in the *party asking the aid of the court. **[650** But to support this writ of error, he must claim a right which, if well founded, he would be able to assert in a court of justice, upon its own merits, and by its own strength. No such right is claimed in the answer of the plaintiff in error. . . . Neither can the writ of error be supported on the ground that Walworth was unable to purchase, at $1.25 per acre, another portion of the land mentioned in the contracts, in consequence of its subsequent cession by the United States to the territory of Wisconsin. Whether that cession, and the enhanced price at which it was held, absolved him from the obligation of performing any part of the contract, depended altogether upon its construction. The rights of the parties did not depend on the act of Congress making the cession, but upon the contract into which they had entered. And the construction of that agreement, and the rights and obligations of the parties under it, were questions exclusively for the state court; and over its decree in this respect this court has no control."

In *Jersey City and Bergen City Railroad Company* v. *Morgan*, 160 U. S. 288 [40: 430], in an action brought in a state court against a railroad company for ejecting the plaintiff from a car, the defense was that a silver coin offered by him in payment of his fare was so abraded as to be no longer legal tender, and that defense was overruled. And a writ of error having been sued out by the railroad company from this court to review the judgment thereupon rendered against it, we held that the writ could not be maintained. It was there said: "The claim which defendant now

states it relied on is that the coin in question was not legal tender under the laws of the United States. This, however, is only a denial of the claim by plaintiff that the coin was such, and as, upon the facts determined by the verdict, the state courts so adjudged, the decision was in favor of and not against the right thus claimed under the laws of the United States, if such a right could be treated as involved on this record, and this court has no jurisdiction to review it. *Missouri* v. *Andriano*, 138 U. S. 496 [34: 1012], and cases cited. And, although denying plaintiff's 651]claim, defendant did *not pretend to set up any right it had under any statute of the United States in reference to the effect of the reduction in weight of silver coin by natural abrasion."

Writ of error dismissed.

EDWIN H. McHENRY *et al.*
v.
LORE ALFORD *et al.*

(See S. C. Reporter's ed. 651-673.)

Questions certified—when not sufficient—distinct proposition of law—Dakota act of 1883—railroad lands, when not taxable—proper classification—payment of percentage of earnings—time of payment—valid act—power of territorial legislature—equitable relief.

1. The question whether the circuit court has jurisdiction to hear and decide the case is not sufficiently specific to be certified to this court, as no single question of law is plainly raised therein, where the record only shows that the case was removed by one defendant from the state court to the circuit court, and neither party raised any question of jurisdiction in the circuit court, and no hint is given as to what, if any, objection exists.
2. The question whether the lands described in the complaint were subject to taxation under the laws of a territory by reason of the facts stated in the complaint respecting the title is not one which can be certified to this court, as it is not a distinct point or proposition of law, where neither the particular condition of the title nor the objection raised is stated.
3. The question whether the appellants are entitled to equitable relief by reason of any of the alleged irregularities or defects in the mode of assessment is not one which can be certified, as it contains no plain statement of a distinct proposition of law, where the alleged irregularities are various, each of which might be a separable question of law.
4. Dakota Laws 1883, chap. 99, exempts from taxation in any other manner than as provided therein lands granted to aid in the construction of the Northern Pacific Railroad by the act of July 2, 1864, which are outside of its right of way and not used in its business as a common carrier.
5. The meaning of said Dakota statute is to render the railroad company and all its property, land grants as well as right of way, free from the payment of all taxes, excepting the amount and in the manner described in the act.
6. Lands granted to aid in the construction of the Northern Pacific Railroad by the act of Congress of July 2, 1864, which are outside of its right of way and are not used in its business as a common carrier, are in a materially different condition from lands absolutely owned by an individual, so as to justify a classification thereof for taxation by a different method and upon different lines than the lands of individuals.
7. A payment of the percentage of the gross earnings of such railroad company for the year 1888 under Dak. act 1883, which by the act of 1889 is made a condition of the acceptance of the terms of that act, operates to discharge all claims for taxes assessed under any law for that year.
8. The question of time in the payment of taxes is one which may be waived by the public authorities, and an objection to delay is, in law and in fact, waived by the receipt and retention of the money.
9. Dak. act 1883, providing for the taxation of railroads by a percentage of gross earnings in lieu of all other taxes, does not violate the organic act creating that territory, which prohibits discrimination in taxation, nor does such act violate the 14th constitutional amendment.
10. Although Dak. act 1883 exempts from taxation in any other manner than as provided by that act, lands granted to aid in the construction of said railroad which are outside of the right of way and not used in its business as a common carrier, yet such act is not void in whole or in part as transgressing the limitations placed upon the power of the territorial legislature.
11. The payment of the percentage of the gross earnings for the year 1888, as alleged in the complaint to have been made, is sufficient to entitle the complainant to the equitable relief sought.

[No. 139.]

Argued December 2, 3, 1897. Decided January 3, 1898.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit certifying certain questions for decision by this court in an action in equity brought by Edwin H. McHenry *et al.*, receivers of the Northern Pacific Railroad Company, against Lore Alford *et al.*, for the purpose of obtaining a decree that certain assessments under state authority and deeds executed

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NOTE.—*As to exemption from taxation; whether a contract or not; not implied,*—see note to Tucker v. Ferguson, 22: 805.

As to sale of lands for taxes; strict compliance with statute necessary,—see note to Williams v. Peyton, 4: 518.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

Definiteness of question to be certified; whole case must not be sent up; whole case cannot be split up into distinct points; importance of questions; point of difference; question not general; question not abstract; question to be perfectly stated; question of fact not to be involved; necessary facts to be stated as to sufficiency of evidence or indictment; as to demurrer; what will be considered questions held proper; Illinois decisions; Iowa decisions; New Jersey decisions; Texas decisions; Wyoming decisions; criminal cases; tax cases,—see note to Waco Water & Light Co. v. Waco (Tex.) 31 L. R. A. 892.

As to power of state legislature to exempt from taxation, see note to Hogg v. Mackay (Or.) 19 L. R. A. 77.

As to taxes on land, to whom assessed, see note to Van Osdell v. Champion (Wis.) 27 L. R. A. 778.

As to taxes on railroads, see note to Cass County v. Chicago, B. & Q. R. Co. (Neb.) 2 L. R. A. 128.

by virtue of such assessment were void and clouds upon the title to the lands alleged to be owned by said railroad company. The first, second, and sixth questions are not answered. The third and fifth questions answered in the affirmative, the fourth question answered in the negative.

Statement by Mr. Justice **Peckham**:

This case comes here on a certificate from the United States circuit court of appeals for the eighth circuit, and that court certifies several questions concerning which it desires the instruction of this court for the proper decision of the cause. These questions are founded, among other papers, upon the bill of complaint which forms part of the record herein. It appears that the bill was filed by the complainants' predecessors (who were receivers of the property of the Northern Pacific Railroad Company) on the 22d day of March, 1894, in the district court of the fourth judicial district of North Dakota, sitting for the county of Richland in that state. It was filed, among other things, for the purpose of obtaining a decree adjudging that certain alleged and pretended and attempted assessments, under state authority, were null and void, and that all certificates and deeds executed by virtue of such assessments were void and constituted clouds upon the title to the lands described therein, and which were alleged to be owned by the corporation of which the plaintiffs were receivers. Some of the individual defendants named in the bill were alleged to have purchased at a tax sale under the assessments separate portions of the property of the company situated in Richland county, and to have received certificates or deeds from the county officials purporting to convey to each of them certain portions of such property. Upon a petition of one of the individual defendants named Sumner R. Clark, alleging diverse citi-
653] zenship between the parties *and the existence of a separate controversy between the petitioner and the complainants, a removal of the cause to the United States circuit court for the district of North Dakota was prayed for, and on the 5th of September, 1894, the court granted the petition and made an order for the removal of the cause. Upon a trial of the issues joined in the case, the circuit court of the United States for the district of North Dakota dismissed the complainants' bill, and the complainants thereupon appealed to the United States circuit court of appeals for the eighth circuit.

It appears from the complainants' bill that the Northern Pacific Railroad Company was a corporation created and existing by virtue of an act of Congress, approved July 2, 1864, (13 Stat. at L. 365, chap. 217), entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route." The 3d section of that act, for the purpose of aiding in the construction of a railroad and telegraph line to the Pacific coast, granted to the railroad company, its successors and assigns, certain portions of the public lands, as mentioned in the section. Pursuant to the provisions of the act, and prior to the year 1888, the company had definitely fixed the line of its railroad, and prior to that year had constructed and put in operation a continuous line of railroad and telegraph, extending from the waters of Lake Superior westerly and through the territory of North Dakota to the waters of Puget sound; and prior to and during the year 1888 many thousand acres of land in North Dakota were owned by the railroad company, under the land grant above mentioned, although patents for a portion of the same were not issued until June 24, 1893, and, for another portion, not until June 18, 1894. (No question is made by the complainants herein that the lands owned by the company were not taxable in 1888 on account of the fact that the company had not then received patents from the United States therefor.)

On the 31st of May, 1870, Congress adopted a resolution authorizing the company to issue bonds for the construction of its road, and to secure the same by mortgages on its property *of all kinds and description, real, per- [**654**
sonal, and mixed, including its franchises as a corporation. Under that resolution the company executed, at different times, several mortgages to secure the payment of 100,000,000 or more of bonds issued to aid in the construction of the road, and these mortgages covered all the property of the company, including the lands granted to it by the United States under the act of 1864.

In 1893 the company was insolvent and unable to meet the interest upon its bonds or to pay its other indebtedness, and in that year suits were duly commenced against it by creditors to recover the amount of its indebtedness, and also, by the trustee mortgagee to foreclose the mortgages, in which suit receivers were appointed, and the complainants are their successors.

On March 9, 1883 (Laws 1883, chap. 99, p. 211), the legislature of the territory enacted a statute entitled "An Act to Provide for the Levy and Collection of Taxes upon Railroad Property of Railroad Companies in This Territory," the 1st and 5th sections of which are set forth in the margin.† This act was repealed by chapter 105 of the Laws of 1889.

*Subsequently, and on the 7th day of [**655**

Act of 1883.

†Sec. 1. Percentage of gross earnings to be paid in lieu of other taxes.—In lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this territory, or upon the equipment, appurtenances, or appendages thereof, or upon any other property situated in this territory, belonging to the corporation owning or operating such railroads, or upon the capital stock or business transaction of such railroad company, there shall hereafter be paid into the treasury of this territory a percentage of all the gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated within this territory, as hereinafter stated, that is to say: Every such railroad corporation or person operating a railroad in this territory shall pay to said treasurer each year for the first five years after said railroad shall be or shall have been operated in whole or in part, two (2) per cent of such gross earnings; and for and in each and every year after the expiration of the said five years, three (3) per cent of the said gross earnings; and the payment of such per cent annually as aforesaid shall be and is in full of all taxation and assessments whatever upon the property aforesaid. The said payments shall be made, one half (½) on or before the 15th day of February, and one half (½) on

March, 1889, the legislature of the territory passed another act, entitled "An Act for the Levy and Collection of Taxes upon Property of Railroad Companies in This Territory."

Section 7 of the act of 1889 is set forth in the margin.†

656] *The Northern Pacific Railroad Company, within thirty days after the passage of the act of 1889, duly accepted its provisions, and within thirty days from that date paid into the treasury of the territory the entire amount of taxes and interest theretofore claimed by the territory as due and remaining unpaid to it from the company on local and interstate earnings under the act of 1883, excepting that the second half of the sum due from the company to the territory for the taxes of 1888, according to the provisions of the act of 1883, was not paid to and received by the treasurer of the territory until August 15, 1889. The whole tax for 1888, under the act of 1883, amounted to nearly $ 00,000, while for all the years in which the company was in arrear under the act of 1883 (including the year 1888) the amount paid was nearly $200,000.

In the year 1888 the usual proceedings were taken by the officials of Richland county to assess all the property in the county under the **657]** general assessment laws of the territory,* and in such assessment the land grant lands of the railroad company were included (regardless of the act of 1883), and thereafter in due course, the taxes thus levied not having been paid by the company, the treasurer of the county on the 4th day of November, 1889, attempted and pretended to sell many parcels of land belonging to the railroad company and being in the county already mentioned, for the purpose of collecting the taxes unpaid thereon, and no redemptions of the lands having been made, the county treasurer executed to the persons who purchased the lands or their assignees, some of whom are defendants in this suit, deeds purporting to convey the lands so sold to such persons, and these deeds are alleged to be invalid, but still a cloud upon the title of the company to the lands described therein.

The bill also sets forth a great many different alleged errors, irregularities, and omissions on the part of the taxing authorities in taking proceedings to levy the taxes, by reason of which, as alleged, the taxation of the property of the company was illegal and the deeds were null and void.

A joint and several demurrer and answer to the bill was served upon the part of the defendants, taking issue upon some of the allegations of fact in the bill and demurring to other parts thereof, but a sufficient statement of the case has already been made to lead to a proper understanding of the questions hereinafter discussed.

Mr. **C. W. Bunn** for appellants.
Mr. **Edgar W. Camp** for appellees.

Mr. Justice **Peckham** delivered the opinion of the court:

The learned circuit court of appeals has certified to this court six questions, concerning

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or before the 15th day of August, in each year, and, for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company; an abstract whereof shall be furnished by said company to the treasurer of this territory on or before the first (1st) day of February in each year; the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of said company, and for the purpose of ascertaining the truth of such affidavits and the correctness of such abstracts, full power is hereby vested in the governor of this territory, or any other person appointed by law, to examine under oath the officers and employees of said company, or other persons, and if any person so examined by the governor or other authorized persons shall knowingly or wilfully swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for the purpose of securing to the territory the payment of the aforesaid per centums, it is hereby declared that the territory shall have a lien upon the railroad of said company and upon all property, estate, and effects of said company whatsoever, personal, real, or mixed. And the lien hereby secured to the territory shall have and take precedence of all demands, decrees, and judgments against said company.

SEC. 5. Lands subject to taxation.—The lands of any railroad company shall become subject to taxation in the same manner as other similar property, as soon as the same are sold, leased, or contracted to be sold or leased; and on or before the 1st day of April of each year each railroad company having lands within this territory shall return to the county clerk of each county full and complete lists, verified by the affidavits of some officer of the company having knowledge of the facts, of all lands of such company situated in such county, sold or contracted to be sold or leased during the year ending the last day of December preceding, and the list furnished on or before the 1st day of April, A. D. 1883, in compliance with the terms of this section, shall include a complete list of all lands sold or leased, or contracted to be sold or leased, prior to the last day of December, A. D. 1882.

Act of 1889.

†**SEC. 7.** Any railroad company which at the date of the passage of this act owns or is engaged in operating any line or lines of railroad in this territory may, at any time within thirty days after the passage of this act, by resolution of its board of directors, attested by its secretary, and filed with the secretary of the territory, accept and become subject to the provisions of this act, and provided that any railroad company which is now in arrears in the payment of taxes assessed under chapter 99 of the laws of 1883, shall, within thirty days after the passage of this act, pay into the territorial treasury the full amount of the taxes and interest due under the assessments under said law of 1883 before they can avail themselves of the provisions of this act, by accepting its terms, including taxes on both territorial and interstate earnings. It is further expressly provided that any company failing to strictly comply with the provisions of this act within the term herein provided shall be immediately subject to assessment and taxation in the manner provided for the assessment and the taxation of the property of individuals of this territory, and said taxes shall be collected in the same manner as is now provided in cases of the property of individuals. Any company which has not complied with the provisions of chapter 99 of the Session Laws of 1883 by paying all taxes claimed on gross earnings, both territorial and interstate, or by filing an account of gross earnings, both territorial and interstate, shall prepare and file such account in the manner therein provided within thirty days from the passage hereof, and pay one half of the entire amount due under the agreement and acceptance herein referred to, for the current year, and also the entire amount of taxes heretofore claimed by the territory on local and interstate earnings of such companies, but remaining unpaid at the time of filing said account, and within thirty days after the passage of this act, or the same shall not apply to such company or companies. The balance of said taxes due for the current year shall be paid to the territorial treasurer on or before the 15th day of August, 1889.

which it desires the instruction of this court for a proper decision of the cause. The following are the questions so certified:

658]*"1. Has the United States circuit court for the district of North Dakota jurisdiction to hear and decide said case?

"2. Were or were not the lands described in the bill of complaint subject to taxation under the laws of the territory of Dakota in the year 1888 by reason of the facts stated in the bill of complaint respecting the condition of the title thereof?

"3. Was it the purpose of chapter 99 of the Laws of Dakota for 1883 to exempt from taxation lands granted to aid in the construction of the Northern Pacific Railroad by the act of July 2, 1864, which are outside of its right of way and are not shown to be used in its business as a common carrier?

"4. If such was the purpose of the act was the act void in whole or in part as transgressing the limitations placed upon the power of the territorial legislature?

"5. Conceding that the purpose of chapter 99 of the laws of 1883 was to exempt, among other things, the land grant of the Northern Pacific Railroad Company, and that said law is valid, are the payments of the percentage of the gross earnings for the year 1888, alleged in the bill to have been made, sufficient to entitle the complainant to the equitable relief sought?

"6. Conceding the lands in controversy to have been subject to taxation for the year 1888, were the appellants, by reason of any of the alleged irregularities or defects in the mode of assessment, entitled to equitable relief without first offering to pay the taxes properly chargeable against said lands?"

Of these questions, we think we ought to answer only the third, fourth, and fifth. The first, second, and sixth come within our rulings in the cases of *Jewell* v. *Knight*, 123 U. S. 426 [31: 190]; *Fire Insurance Association* v. *Wickham*, 128 U. S. 426 [32: 503]; *Maynard* v. *Hecht*, 151 U. S. 324 [38: 179]; *Graver* v. *Faurot*, 162 U. S. 435 [40: 1030]; *Cross* v. *Evans*, 167 U. S. 60 [42: 77]; and *United States* v. *Union Pacific Railway Company* (decided December 13, 1897,—not yet reported).

In the case last cited, in speaking of the rules which govern the certification provided for in §§ 5 and 6 of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517), the chief 659] justice repeated *those rules as derived from prior decisions, and said that "each question had to be a distinct point or proposition of law, clearly stated, so that it could be distinctly answered without regard to the other issues of law in the case; to be a question of law only, and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case; and could not embrace the whole case, even where its decision turned upon matter of law only, and even though it was split up in the form of questions."

Guided by these rules, we find that the first question does not comply with their requirements. No single question of law is plainly raised therein. The record only shows that the case was commenced in a state court, and was removed, upon the petition of one of the individual defendants, into the circuit court of the United States for the district of North Dakota. Neither party (so far as appears from the record) raised any question of jurisdiction in the circuit court to hear and determine the whole case. Whether there is some defect supposed to exist in the petition for removal, or whether the controversy was or was not a separable one, or whether the citizenship of the different parties was not sufficiently alleged or did not sufficiently appear; whether the petition was filed in the proper time, or the bond was sufficient in form, or the approval of the court was or was not sufficient,—all these questions are possible subjects of inquiry in order to answer the general question submitted to us. We should not be asked to grope our way through the papers submitted and examine every objection that imagination could raise, with no hint as to what, if any, objection is really supposed to exist. Some of the above-enumerated possible objections could not in any event be answered in the present state of the record, which does not contain all the facts necessary to be known in their consideration. If the whole case were here upon writ of error or appeal, we should have to look into any question of jurisdiction, whether raised or not, but we are not obliged to do so when questions only are certified to us, unless presented in proper form.

*The second question we regard as [660 equally objectionable. The question certified is not a distinct point or proposition of law clearly stated so that it can be definitely answered without regard to other issues of law or fact in the case. What is the particular condition of the title to the lands which raises the doubt as to their being subject to taxation and induces the certification of the whole question to this court? This is not stated, and we are left to discover any or all possible objections by reading the bill and then conjecturing what the particular objection may really be.

What might otherwise have been considered as an objection, regard being had to the decision of this court in *Northern P. Railroad Co.* v. *Traill County* [*Northern P. R. Co.* v. *Rockne*], 115 U. S. 600 [29: 477], would seem to have been rendered of no force by the act of Congress of 1886 (24 Stat. at L. 143, chap. 264), providing for taxation of railroad grant lands. The question of law arising from the condition of the title is neither plainly stated nor is the condition itself clearly presented.

The sixth question, for the same reasons, cannot be answered. There is no plain statement of a distinct proposition of law. We are left to read the whole of that part of the bill alleging many different facts said to constitute various and separate irregularities, each of which might be a separate and distinct question of law, but all of which are joined together in an inseparable mass.

Questions of the character of the three thus described are not within the meaning of the act of 1891, and certifying them confers no jurisdiction upon this court to answer them.

We come then to the consideration of the third, fourth, and fifth questions, and we will proceed to answer them.

The wording of the third question may at first sight render its meaning somewhat ob-

secure. We are asked whether it was "the purpose of chapter 99 of the Laws of Dakota of 1883 to *exempt* from taxation lands granted to aid in the construction of the Northern Pacific Railroad by the act of July 2, 1864, which are outside of its right of way, and are not shown to be used in its business as a com-
661]mon carrier?" We should *answer No, it was not the intention to exempt from but to change the mode of taxation.

This court, in *Northern Pacific Railroad Co.* v. *Clark*, 153 U. S. 252, at page 271 [38: 706, 713], in speaking of the act of 1889, which in this particular (that of substituting an assessment upon gross earnings) is similar in substance to the act of 1883, said that the act did not *exempt* the property of the railroad company from taxation, but that it merely substituted one method of taxation for another upon the terms and conditions specified.

But we take the true meaning of the question to be whether the act exempts from taxation the lands granted to aid in the construction of the railroad company in any other manner than as provided for in that act. Thus interpreting the meaning of the question, we are of opinion it should be answered in the affirmative.

The language of the act in its 1st section seems to be so plain as to be beyond the necessity of construction. The act says that the payments therein provided for are "in lieu of any and all other taxes upon any railroads, except railroads operated by horse power, within this territory, or upon the equipment, appurtenances, or appendages thereof, or upon any other property situated in this territory belonging to the corporation owning or operating such railroads, or upon the capital stock or business transactions of such railroad company." These payments are also said to be "in full of any and all other taxation and assessments whatever upon the property aforesaid."

In addition to this plain language, the act, for the purpose of securing the payment of the taxes as provided, gives to the territory a lien upon the railroad of the company and upon all its property, estate, and effects whatsoever, personal, real, or mixed. This provision for a lien upon all property of the company, together with the provision of § 5, that "the lands of any railroad company shall become subject to taxation in the same manner as other similar property as soon as the same are sold, leased, or contracted to be sold or leased," is additional proof to conclusively show that the lands
662]while owned *by the company and not leased, etc., shall not be taxed other than as they are taxed by the act and through the payment of the percentages on the gross earnings, as provided for therein. The principle that exemption from taxation must be clearly shown, and that it generally applies (if at all) only to property used in the business of the company claiming the exemption, is acknowledged and assented to. The case of *Ford* v. *Delta & P. Land Company*, 164 U. S. 662 [41: 590], is an illustration of the principle, but it does not here apply. The language of this act is clear and absolute. It is also not the case of an exemption from taxation but the substitution of one method for another. The land here in question is, in addition, closely connected with the business of the company. We shall show this more at length hereafter.

The learned counsel for the defendants argues that if the payment of the percentage of the earnings under this act was intended to be in lieu of the land tax, then a part at least of the payment would have been divided among the counties according to the value of the granted lands unsold within such counties, because, as he says, it is a well-known fact that many counties of North Dakota contain large tracts of land owned by this company but do not contain a mile of the line of its road, and under the provisions of this law a county thus situated received no part of the gross-earnings tax. But this argument goes only to the alleged injustice of the appropriation of the tax when paid, and not to its extent or character.

Under the act of 1889 it is admitted that the legislature intended the exemption of lands like these in controversy from any taxation other than the indirect kind arising from the taxation of gross earnings, because under that act a part of the proceeds of the tax was divided among the counties according to the acreage of the unsold granted lands, even where no portion of the railroad was contained in such county. But the language of the exemption above described is substantially the same in both acts. The later act simply makes an appropriation of the proceeds of the tax somewhat different from that of the earlier one. The exemption was the same in each and founded upon the same language. *While [663 the later act, perhaps recogizing the injustice in bestowing no portion of the tax collected upon those counties through which the road did not run, although lands of the company were therein situated, altered the disposition and appropriated a portion to the counties in which some of the lands were situated, yet no difference as to the intention of the legislature to exempt all the lands can be properly based upon this alteration. The exemption of the lands from a tax other than as therein provided for is based upon the same language in each act, and is perfectly plain in both.

It is also seen that by the act of 1879 (Session Laws of Dakota, chap. 46, p. 122) a system of taxation of certain specified property of railroad companies by a tax on their gross earnings was provided for, and the tax thus collected was stated in the act to be "in lieu of all other taxation . . . of the roadbed, right of way, stations or depot grounds, tracks, rolling stock, water stations," etc., "used in or incident to the operation of such railroad."

This act by reason of the tax on the gross earnings limits the freedom from taxation to the road bed, as above stated, and property "used in or incident to the operation of such railroad." The act also provides that "all property of railroads not above enumerated, subject to taxation, shall be treated in all respects, in regard to assessment and equalization, the same as similar property belonging to individuals, whether said lands are derived from the general government or from other sources."

The difference between the language of the act in 1879 and that of 1883 is most marked. Instead of enumerating the particular property

which is to be regarded as exempt from other taxation by reason of the tax on gross earnings, and providing for the taxation of the rest of the property of the railroad the same as similar property of the individual, as in the case in the act of 1879, the act of 1883 says the tax is in lieu of any and all other taxes upon any railroad within the territory or upon the equipment or upon any other property situated in the territory.

664] *Does not this different language import, clearly and plainly, a different intention?

We are unable to think of any language of plainer meaning than that used in this statute, and there can be no doubt, as it seems to us, that its meaning is to render the railroad company and all its property, land grants as well as right of way, free from the payment of all taxes, excepting of the amount and in the manner described in the act.

This same question was argued in the supreme court of the state, and decided by it in 1892, in accordance with the views we have above expressed. *Northern Pacific Railroad Company* v. *Barnes*, 2 N. D. 310. It was afterwards decided in another way in *Northern P. Railroad Company* v. *McGinnis*, 4 N. D. 494, somewhat upon the theory that as it was a Federal question the court would follow the decision to that effect by a Federal court. [*Northern P. R. Co.* v. *Walker*] 47 Fed. Rep. 681.

We are not embarrassed by these conflicting decisions, and we have no difficulty in answering the third question in the affirmative.

We come now to the fourth question which involves, among other things, the construction of one of the sections of the organic act creating the territory of Dakota (Laws 1861, 12 Stat. at L. 239, at 241, chap. 86, § 6), the material portion of which relating to the authority of the territorial legislature provides that no law "shall be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed." The same provision in substance is found in § 1925, Revised Statutes, relating to the legislative assemblies of Colorado, Dakota, and Wyoming.

It is argued by counsel that although under this provision of the organic law the territorial legislature could generally select the subjects of taxation, and could classify property for that purpose, and that these different classes of property could be valued or taxed by different methods, that nevertheless the act of 1883, under consideration, is in excess of the lawful exercise of any of the powers granted under the

665] organic act, *notwithstanding that act in the section above alluded to provided that "the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act." There must be some solid ground for making a distinct classification of property, and such ground does not exist, as is contended, by reason of any of the facts herein mentioned.

Viewing the character, condition, and use of these lands, it is said to be plain that they are simply "property owned by a railroad," and not "railroad property," as described in the title to the act of 1883, and that the two are not equivalent terms; that although railroad property might be taxed in a special method and at a special rate, yet by the term "railroad property" is simply meant property necessary for use in the usual daily conduct of the business of the company as a common carrier by rail, and that any lands outside of that use, although owned by a railroad company, could not be classified and taxed in any different manner from land owned by an individual, otherwise such classification would be purely arbitrary, and the taxation in that way would be illegal; that no earnings arise from these lands which are assessed under the act, because the earnings upon which the tax is assessed are by the terms of the act restricted to "the gross earnings . . . arising from the operating of such railroad," and such earnings are not created by, nor do they arise from, nor are they in any way connected with, these lands, which are therefore not taxed at all under this act, and no justification for their special classification for purposes of taxation can on that account be found.

All these various statements are made in the course of the main and general argument that these lands cannot be taxed under an act like that of 1883, because there is no sound distinction between such lands owned by the company and ordinary lands owned absolutely by an individual.

We do not concur in the accuracy of the description as to the condition of these lands, and we are not, therefore, impressed with the force of the argument based upon it. The lands are *not purely and simply owned or held [666 for sale or other disposition for profit, and in no way connected with the use or operation of the railroad, and in regard to them the company is not a landed proprietor, on the same footing with any other proprietor of lands, and it is not correct to say that these lands do not substantially, though indirectly, contribute towards the gross earnings of the railroad company, as provided in the act of 1883, nor can it be admitted that in merely taxing the gross earnings arising from the operation of the road these lands are not taxed at all. The lands are closely connected with the railroad and with its operation, and they are not in the same condition as a subject for taxation as are the lands of an individual. While we agree that property of the same kind and under the same condition and used for the same purpose cannot be divided into different classes for purposes of taxation and taxed by a different rule simply because it belongs to different owners, yet, where the situation and the possible use and the present condition of the ownership of lands are wholly different, such as they are in this case from ordinary ownership, a classification is not arbitrary nor unreasonable which places such lands outside the class of lands owned in the ordinary way by individuals.

Although the act here provides for the taxation of the gross earnings arising from the operation of the road, the phrase means earnings which arise because of its operation. The road is in operation, and the earnings which it is thereby enabled to make are to be taxed. Property which the company owns.

and which has enabled and continues to enable it to operate its road, is part of the property from which the earnings arise by reason of such operation, and is within the meaning of the act. These lands are of this description. Although they are not taxed directly, yet the same is true of the right of way, the roadbed, the engines, cars, and water tanks, all of which are confessedly "railroad property," without which the road could not be operated. In substance, it must be said that without the existence of all the various pieces of property just enumerated, gross earnings would be quite impossible. It is also true in re-
667]gard to these lands. It is *not a question of what might under other circumstances have been their condition with relation to the railroad. We must take the circumstances that actually did exist at the time this act was passed for the purpose of determining this question. And, looking at those facts, we see that unquestionably these lands have indirectly contributed to the gross earnings derived from operating the road, and that such earnings have arisen and been made possible by reason of the lands. They have not only aided in making these gross earnings possible, but they have formed, and do still form, a material factor in the combination of circumstances contributing to the construction of the railroad, to its operation, and to its earnings.

They originally formed a part of the public domain, and were granted by Congress for the purpose of aiding in the construction of this railroad to the Pacific coast, and were given to and accepted by the company, subject to the conditions named in the 8th section of the act. When the lands finally became the property of the company they were impressed with a trust in favor of the government, as representing the public, that they should be used for the purpose for which they were granted, and the company was not even allowed to mortgage or create any lien upon them in any way except by the consent of the Congress of the United States. Act July 2, 1864 (13 Stat. at L. 365, at page 370, § 10).

Subsequently it was found that the road could not be built under the conditions at first imposed, and Congress therefore, in 1870, authorized the company to issue bonds for the construction of its road and to secure the same by mortgage. Under such authority, mortgages were thereafter made to secure bonds for more than $100,000,000, the proceeds of which were used in building the road. These lands have, therefore, actually and directly contributed in a large measure and have formed a most potent factor towards building the road and enabling it to be operated and to earn moneys by reason of such operation. How can it be correctly said that they are not in any way taxed by a tax on the gross earnings of the road arising from its operation when the road
668]could *only be constructed and operated by reason (among others) of the moneys raised upon the security of these very lands? The present insolvency of the railroad company shows that the lands must form a most important item in the ability of the company or its successors to continue the operation of the road and make any earnings whatever.

If it be assumed that after the lands became the property of the company it was at that moment no more restricted in their sale than any other corporation organized to buy and sell real estate, and that it had the entire right to sell, or not to sell, or to mortgage to whom and at what price it might obtain, and that it owned the land like an individual, still the question is presented as to what was the actual condition of affairs when the act of 1883 was passed. At that time these lands were so closely connected with the railroad, its construction and operation, as in effect to be part and parcel thereof; they stood as security for millions of bonds issued to secure the construction and operation of the road, and upon these facts the reason and justification for a classification, such as was made in that act, are plainly apparent. At that time totally different circumstances than those which surround an individual in the absolute ownership of his property existed in relation to these lands. As they made the gross earnings possible, it cannot be said, with the least regard to the fact, that those earnings did not in part issue out of the lands upon the same principle that they partly issued out of the right of way, the roadbed, track, engines, cars, tanks, and other confessedly "railroad property," There is no difference in principle between the two classes of property so far as this question is concerned. Then, too, the road of the company runs through the whole state, hundreds of miles; it owns thousands upon thousands of acres therein, granted it for the purposes stated, and these lands it has accordingly pledged to redeem its bonds issued as mentioned. Its building was a work of national importance, and it was built for use by the government, as well as for other purposes. Surely all these various facts justify a classification of such an entity for taxation by a different method and upon different lines than the *individual, [669 and the lands thus situated and owned are in a materially different condition from lands absolutely owned by an individual.

It is said this reasoning, while it might be applicable to the Northern Pacific Railroad Company, would not be applicable to many other railroads which had no land grants, or which were not situated as is the company in question, and that as the law is in its terms general, and applies to all roads, this company cannot obtain its benefit without showing that it is a valid provision in regard to all railroad property. But if the property of this company is so situated and the facts regarding it are so materially different from other real estate as to fulfil the conditions upon which a general classification may be proper, we think the company could avail itself of the act even if some other companies could not.

Many cases are cited, in the brief of counsel, from the different states, having provisions in their Constitutions somewhat similar to those found in the organic act of Dakota, and in which states it has been held that the legislature is not confined to taxation in precisely the same method for all classes of property, but that it has power to classify and to provide different methods of taxation of the property so classified. The particular facts arose in, and the cases are cited from, Wisconsin, Iowa, Kansas, Louisiana, Michigan, New

Jersey, Pennsylvania, Mississippi, Missouri, and Illinois. They are cited in the margin.†

670] *Upon a full consideration of the subject, we are persuaded that there is nothing in any provision of the act of 1883 for the taxation of the gross earnings which violates the letter or the spirit of the organic act.

Objection is also made to the act of 1883 on the ground that it is in violation of the commerce clause of the Federal Constitution in that by its terms taxes are laid upon earnings arising from the transportation of persons and property between different states, etc. In other words that the tax is not confined to earnings which arise from the transaction of its business wholly within the state. It is said that the case of *State Tax on Railway Gross Receipts* [*Philadelphia & R. R. Co.* v. *Pennsylvania*], 82 U. S. 15 Wall. 284 [21: 164], holding that the imposition of taxes upon gross receipts of railway companies was not illegal, although the gross receipts were made up in part of freights received from the transportation of merchandise from one state to another or through one state into another, has been overruled by the subsequent cases in this court, among which are those of *Fargo* v. *Michigan* [*Fargo* v. *Stevens*], 121 U. S. 230, 244 [30: 888, 894, 1 Inters. Com. Rep. 51]; *Philadelphia & S. Mail Steamship Company* v. *Pennsylvania*, 122 U. S. 326 [30: 1200, 1 Inters. Com. Rep. 308], and it is claimed that the case is not brought under that of *Maine* v. *Grand Trunk Railway Company*, 142 U. S. 217 [35: 994, 3 Inters. Com. Rep. 807], in that there is no provision for ascertaining the amount of gross earnings derived from interstate commerce, and for the taxation of the balance only.

A perusal of the 1st section of the act does not render it at all clear that there was intended to be a tax of any portion of the gross earnings of the corporation which arose from interstate commerce. The language of the act which declares that the tax should be paid into the treasury of the territory upon a percentage of all gross earnings of the corporation owning or operating such railroad "arising from the operating of such railroad as shall be situated within the territory," gives great reason to doubt the correctness of the construction which would levy the tax upon the earnings derived from interstate commerce. But there is great force in the claim that the act is not subject to the objections mentioned in the above

671] *cases reported in 121 and 122 U. S. and the cases therein referred to. In those cases there was a distinct tax upon the gross earnings without reference to any other tax and not in substitution or in lieu of another tax, while in this case the act plainly substitutes a different method of taxation upon the property of a railroad company. It is a tax upon the lands and all the other property of the company, but instead of placing a valuation upon the lands and other property, and apportioning a certain amount upon such valuation directly, as was the old method, a new one is established of taking a percentage upon the gross earnings as a fair substitute for the former taxes upon all the lands and property of the company, and when it is said, as it is in this act, that the tax collected by this method shall be in lieu of all other taxes whatever, it would seem that it might be claimed with great plausibility that a tax levied under such circumstances and by such methods was not in reality a tax upon the gross earnings, but was a tax upon the lands and other property of the company, and that the method adopted of arriving at the sum which the company should pay as taxes upon its property was by taking a percentage of its gross earnings.

We do not think it necessary, however, to decide this question, because we are of opinion that, by the act of 1889, the legislature proffered the company a compromise as to the taxes claimed to be due and the company accepted the same. Construing the act of 1883 as we do, and as meaning to exempt the company from the payment of all other taxes than those therein named, upon all its property of every name and nature, we find that in 1889 this company had been in default in the payment of its taxes under the act of 1883 for the years 1886, 1887, and 1888. It owed nearly $200,000 in taxes for those years under that act. The taxing authorities of the county of Richland had also assumed to tax the lands of the company for the year 1888 in the same way as if owned by individuals, but the tax as thus assessed had not been paid by the company. In this state of affairs the act of 1889 was passed, the effect of which was to say to the company, if you will pay all the taxes that are due under the act of 1883, you may then accept and come in under *the provisions of [**672**] this act. And there is in addition to this offer a clear and necessary implication from the language used in the act, that if the company would pay those taxes in full which were thus in arrear such payment would operate as a discharge of all claims for taxes, including those claims made by virtue of the proceedings to tax the lands of the company under the general law. It certainly is not possible to believe that the legislature intended to make it a condition for the acceptance of the act of 1889 by the company that it should not only pay all the taxes which were provided for under the act of 1883 (and which by the terms of that act were in full of all other taxation), and for the payment of which the company might be in default, and yet and in addition should still be liable to pay the taxes as assessed in Richland county under the general law. We cannot suppose the legislature intended to compel the payment of taxes twice, and therefore the language of the act of 1889, providing for the

†Wisconsin Central R. R. Company v. Taylor County, 52 Wis. 37; Griswold College v. State, 46 Iowa, 275 [26 Am. Rep. 138]; Missouri River, Ft. S. & G. Railroad Company v. Morris, 7 Kan. 210; Francis v. Atchison, T. & S. F. Railroad Company, 19 Kan. 303; Louisiana State Lottery Company v. New Orleans, 24 La. Ann. 66; New Orleans v. Kaufman, 29 La. Ann. 283 [29 Am. Rep. 328]; New Orleans v. Davidson, 30 La. Ann. 554; New Orleans v. Fourchy, 30 La. Ann. 910; People, St. Mary's Falls Ship Canal Co., v. The Auditor General, 7 Mich. 84; Youngblood v. Sexton, 32 Mich. 406 [20 Am. Rep. 654]; State, Vail's Executors, v. Runyon [State, Vanatta, v. Runyon], 41 N. J. L. 98; Kittanning Coal Company v. Commonwealth, 79 Pa. 100; Mississippi Mills v. Cook, 56 Miss. 40; Crow v. State, 14 Mo. 237; Hamilton v. St. Louis County Court, 15 Mo. 3; State v. North, 27 Mo. 464, 483; Illinois Central Railroad Company v. McLean County, 17 Ill. 291; State v. Crittenden County Ct. 19 Ark. 360; St. Louis, I. M. & S. Railroad Company v. Berry, 41 Ark. 509; Arkansas Midland Railway Company v. Berry, 44 Ark. 17.

payment of all taxes in arrear under the act of 1888 as a condition for the acceptance of the act of 1889, implied that such payment should also be in full of all other claims for taxes assessed for the same years. Such a condition and proposition were entirely within the power of the legislature to impose and make, and when the proposition was accepted and the condition performed by the payment of money into the treasury of the territory, all claim for taxes under any general law levied directly upon the lands necessarily fell with such payment and acceptance. This implied release of the taxes for the year 1888, which the authorities had assumed to levy under the general law, and not under the provisions of the act of 1883, arises from the language of the act of 1889, and is just as strong and just as clear as if it had been stated in so many words in that act. That which arises by plain and clear implication from the language used in an act is as much a part of the act as if the implication had been embodied in so many words.

It may be said that the money should have been paid, if at all, within thirty days after the passage of the act. Possibly, if the payment had not been made within that time and the **673]** *company subsequently had offered to pay it, the money might have been refused by the authorities of the territory, as not paid in time. But the question of the time of payment was one which might be waived by the public authorities, and the objection was in law and in fact waived by the receipt and retention of the money.

The other objection made to the act of 1883, that it violates the 14th Amendment, we think untenable under the views we have above expressed.

Basing our opinion upon the facts of this case, we would say that for the reasons herein stated the company can avail itself of the payment of the taxes under the act of 1883 as a full payment of the taxes for the year 1888, and we formally answer the fourth question in the negative.

The next and fifth question we answer in the affirmative. The payments made by the railroad company for the year 1888, as set forth in the bill, embraced the whole amount of taxes due from the defendant for that year (as well as others) under the act of 1883. Even if not paid at the exact time provided for in the statute, the failure to so pay might, as we have already stated, be waived by the public authorities, and when the moneys were in fact paid to and received by the officers of the territory and went into its treasury, and never have been returned or tendered back, we think there was an effectual waiver of any objection which might possibly have been urged that the payment was not in time.

To sum up, therefore, *we do not answer the first, second, and sixth questions. The answers to the third, fourth, and fifth we make as above stated*, and they will be so certified.

RAFAEL MARIA DEL CASTILLO, [674
Plff. in Err.,
v.
WALTER L. McCONNICO, John H. Lang, Horace C. Reese, and William H. Fitzpatrick.

(See S. C. Reporter's ed. 674-685.)

Federal question—right of plaintiff in error—state question—sale of land for taxes—error in assessment—due process of law.

1. A Federal question is not presented to this court for review, although decided by the state court, if questions of a purely state character were passed upon by that court, which are sufficient to sustain its decree, wholly independent of the Federal question.
2. Because a state statute might be construed so as to cause it to violate the Constitution is not sufficient to raise a Federal question, but the right of the plaintiff in error is limited to the inquiry whether, in the case presented, the statute is so applied as to deprive him of property without due process of law.
3. The decision of a state court that an advertisement of the sale of land for taxes was sufficient under the state statute involves purely a state question, which this court accepts and follows.
4. Thirty days' publication required by the state law of a sale of land for taxes is sufficient notice to constitute due process of law; and the mere fact that there was added to the name of a male person in the advertisement the words "or her estate and heirs" did not destroy the efficacy of the advertisement, or render it legally inoperative.
5. The use of an initial, instead of the first name, of a person in an assessment roll, does not make the assessment void for want of due process of law, where the law provides for describing the property as well as naming the owner, when known, on the roll, and also fixes a time for examination and correction, of which notice is given by a general publication calling upon all persons having property subject to taxation to come forward and ask for such corrections as they desire to have made.
6. The decision by a state court that a particular formality is or is not essential under a state statute presents no Federal question, if the statute as thus construed is sufficient to provide due process of law.

[No. 48.]

Argued October 19, 20, 1897. Decided January 3, 1898.

NOTE.—*As to direct taxes*, see notes to Scholey v. Rew, 23: 99.

As to sale of land for taxes; strict compliance with statute necessary,—see note to William v. Peyton, 4: 518.

As to due process of law, what constitutes, see note to People v. O'Brien (N. Y.) 2 L. R. A. 258.

As to adoption by Federal courts of remedies created by state statute; preservation of equity jurisdiction; enlargement of equitable remedies; limitation or enlargement of equity powers; extending legal remedies; limiting equitable jurisdiction,—see note to Leighton v. Young (C. C. A. 8th C.) 18 L. R. A. 266.

As to effect of decision of state courts in Federal courts; rule of property; questions of general or commercial law; effect of state decisions in other states; Federal questions,—see note to Forepaugh v. Delaware, L. & W. R. Co. (Pa.) 5 L. R. A. 508.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment of that court affirming the judgment of the Civil District Court of the Parish of New Orleans in favor of the defendants, Walter L McConnico *et al.*, in an action brought in said Civil District Court by Rafael Maria del Castillo, plaintiff, to recover land in the city of New Orleans. *Dismissed*, for want of jurisdiction.

See same case below, 47 La. Ann. 1473.

The facts are stated in the opinion.

Messrs. **William Winans Wall,** *John Watt*, and *James L. Bradford* for plaintiff in error.

Messrs. **J. Zach Spearing,** *Richard Henry Lea*, and *Thomas H. Thorpe* for defendants in error.

Mr. Justice **White** delivered the opinion of the court:

The plaintiff in error, who was plaintiff in the trial court and appellant in the supreme court of Louisiana, prosecutes this writ of error to the judgment of the supreme court of Louisiana, affirming a decision of the trial court. This suit was commenced in the civil district 675] court of the parish of Orleans *to recover a square of ground situated in the city of New Orleans, the proceeding being known under the Louisiana Code as a petitory action. La. C. P. art. 43 *et seq.* The petition alleged the ownership by the plaintiff of the square of ground, and averred that the defendant McConnico was in possession and claiming title thereto. It alleged that the source from which the defendant asserted his title to have been deraigned was a tax sale made by a state tax collector in November, 1885, to enforce delinquent state taxes for the years 1876, 1877, and 1878, at which sale Orloff Lake was the purchaser. It was averred that Lake sold the property thus bought by him, in December, 1885, to one Lallance, who, in January, 1891, sold it to Lang; that he in turn sold, in February, 1892, to Fitzpatrick and Reese, each in equal undivided proportions, and that each of them in 1893 and 1894 respectively conveyed their undivided interest to the defendant McConnico. The petition charged that the tax sale, upon which the title of the defendant rested, was absolutely void; because, although the property belonged to the petitioner, whose name was Rafael Maria del Castillo, the taxes thereon for the years 1876, 1877, and 1878, to enforce the payment of which the tax sale had been made, were assessed in the name of R. Castillo. It was also alleged that the tax sale was void because, in the advertisement which preceded it and which was made by the Louisiana law a prerequisite to a valid sale, the property was described as belonging to Rafael Maria del Castillo, or her estate and heirs; that, as petitioner was a male person, the adding to the name the words "or her estate and heirs" caused the advertisement to be nothing worth and the sale thereunder to be null. The various acts of sale in the chain of title, from Lake, the purchaser, at the tax sale, to the defendant McConnico, were referred to in the petition, which prayed that not only the tax sale, but all these various transfers between the several parties, be declared to be void and the petitioner be recognized as the owner of the property and entitled to the possession thereof.

McConnico, the defendant, by answer asserted the validity of his title and called his vendor in warranty, who in turn by *answer [676 became a defendant in the cause, set up the validity of his title and called his vendor in warranty, and so on down to and including Lallance, the transferee from Lake who bought at the tax sale. All the defendants who were called in warranty averred that they were purchasers in good faith for adequate value, one alleging that after contracting to buy the property from his vendor he became doubtful about the validity of the tax sale, and had declined to carry out his contract, and that in a suit brought against him to compel compliance, a final decree had passed between himself and his vendor adjudging the title to be valid and compelling him to become the purchaser under his agreement, the price paid being the full value of the property. Another of the defendants averred that after his purchase of the property, finding that it had been forfeited to the state of Louisiana for taxes due by Castillo subsequent to the years to enforce which the tax sale had been made, he had paid the sum of the taxes, and thus held the property, not only under the tax sale, but under the title which the state of Louisiana had acquired by forfeiting the property, and which inured to his benefit in consequence of his having made the redemption. One of the defendants, McConnico, specifically pleaded by way of exception the conclusive presumptions created by act No. 82 of 1884, as debarring the court from considering the errors in the assessment and sale which were alleged in the petition. Two of the other defendants, reserving the defenses set up in their respective answers, excepted on the ground of no cause of action. The act No. 82 of 1884, which was necessarily pleaded by McConnico's exception and the consideration of which was also presented by the exceptions of no cause of action filed by the two other defendants, was substantially as follows: It made it the duty of the tax collectors to advertise for sale at public auction "all property on which there remained unpaid taxes due to the state prior to December 1, 1879." It provided for thirty days' advertisement, and directed the tax collectors, where property was bought at a tax sale, to make a deed thereof to the purchaser, and the deed thus to be made, the statute said, "shall be prima facie evidence *of the following facts: 1st. That the[677 property conveyed was subject to taxation; 2d. that none of the taxes for which said property was offered were paid, *and said deed shall be conclusive evidence* of the following facts: 1st. That the property was assessed according to law; 2d. that the taxes were levied according to law; 3d. that the property was advertised according to law; 4th. that the property was adjudicated and sold as stated in said deed; and, 5th. that all the prerequisites of the law were complied with by all the officers from the assessment up to and including the execution and registry of the deed to said purchaser; and duly certified copies of said deeds shall be full proof without further evidence of all contained therein." Louisiana Acts of 1884, p. 104.

The trial court heard the exceptions separately from the merits, and overruled them. The case was subsequently tried and judgment was rendered in favor of the defendants rejecting the demand of the plaintiff. This judgment was, on appeal, affirmed by the supreme court of the state of Louisiana. *Castillo* v. *McConnico*, 47 La. Ann. 1473. The court in its opinion, which is a part of the record in this cause (*Egan* v. *Hart*, 165 U. S. 188, 189 [41: 680]), after deciding that the tax sale in question was authorized by the state statute, said:

"It is urged on behalf of plaintiff that the property was not properly assessed for the taxes prior to 1879, because the assessment was in the name of R. Castillo instead of Rafael Maria del Castillo. We are relieved of the necessity of passing on the question of the sufficiency of this assessment. The act of 1884 makes the deed conclusive of the sufficiency of the assessment of the property sold under it. The question of the competency of this legislation in this respect has been before this court on repeated occasions. The argument now addressed to us against the constitutionality and interpretation of the act must be viewed as directed against a series of decisions of this court. To those decisions we must adhere and hold the act precludes the inquiry. *Re Orloff Lake*, 40 La. Ann. 142; *Re Douglass*, 41 La. Ann. 765; *Breaux* v. *Negrotto, Jr.*, 43 La. Ann. 430 *et seq.*"

678] *Referring to the thirty days' advertisement which preceded the tax sale, the court said: "In this case the advertisement gave the full name of plaintiff, adding his estate or heirs, and in our view the advertisement conformed to the requirement of the act."

The defendant in error asserts that we have no jurisdiction to review the decision of the state court because no Federal question appears by the record to have been raised either in the trial court or in the supreme court of Louisiana and because no question of that nature was decided in either of these courts, or if a Federal controversy was passed upon by the supreme court of the state, the decree of that court is sufficiently sustained, apart from any Federal question which may have been referred to in the opinion. To the contrary, the plaintiff in error contends that a Federal question was necessarily involved in and was passed on by the decision below, and that the issue so determined was there duly presented for consideration. The first of these propositions is thus evolved. The defects asserted to exist in the tax assessment and sale were, it is claimed, so radical in their nature that they would, if they had been considered, have caused the assessment and sale to amount to a denial of due process of law under the 14th Amendment to the Constitution of the United States. From this premise is deduced the conclusion that the action of the state supreme court in refusing to consider the proof as to the existence of the defects was equivalent to taking property without due process of law. In other words, the argument is that the decision below, in effect, held that by virtue of the presumption engendered by the Louisiana act of 1884, and arising from the tax collector's deed, the plaintiff was estopped from claiming his property, even although there had been no assessment and no sale at all. Whilst it is conceded that the Federal question which is thus asserted to be necessarily involved in and embraced by the decision of the supreme court of Louisiana does not appear to have been raised on the record either in the trial court or the supreme court, this fact is claimed to be immaterial. The system of practice prevailing in Louisiana, it is argued, *rendered it impossible to place **[679** the Federal question on the record in the strict sense of the word, and caused it to be possible only to present such issue by means of the brief of counsel filed in the supreme court of the state before the hearing. This brief, duly certified by the clerk of the supreme court of the state of Louisiana, has been presented, and it is argued that, in view of the system of practice obtaining in the state of Louisiana, this court may look to the brief as a legitimate source of information, and *Stewart* v. *Kahn*, 78 U. S. 11 Wall. 493 [20: 176], is relied on as supporting this proposition.

To decide the issue as to jurisdiction, we will at the outset ascertain whether a Federal question was necessarily involved in the decision of the state supreme court. Even though it be that a Federal controversy was decided, nevertheless if the questions of a purely state character, upon which the supreme court of Louisiana passed, are completely adequate to sustain the decree by that court, rendered wholly independent of the Federal question, it will result that no Federal issue is presented for review. *Egan* v. *Hart*, 165 U. S. 188, 191 [41: 680]; *Powell* v. *Brunswick County Supers.* 150 U. S. 441 [37: 1137], and authorities referred to in both of the foregoing cases. And if this conclusion be reached it will be unnecessary to consider whether, under the practice which prevails in Louisiana, the Federal question could have been presented in any other mode than by brief of counsel, and whether this fact would authorize this court to go beyond the technical record and look to such brief to aid in determining whether the Federal issue was duly set up and claimed.

Because the court below applied the statutory presumption of correctness arising from the tax collector's deed, and refused to consider the alleged defects in the assessment and sale, it does not follow that if the presumption had not been applied and the alleged imperfections in the assessment had been given their full weight, that want of due process of law would have resulted from maintaining the sufficiency of the assessment and from upholding the validity of the tax sale. It follows that, in order to ascertain whether a Federal question was necessarily involved in the decision of the lower court, we are compelled to determine whether *the vices asserted to exist in the as- **[680** sessment and sale were of such a nature as to cause the enforcement of the assessment and sale to deprive the plaintiff in error of his property without due process of law. The contention advanced in argument on this subject is much broader than the case justifies; thus, it is said, the state statute directs that from a tax collector's deed a conclusive presumption of a previous assessment shall be de-

duced, hence the statute in terms is repugnant to the 14th Amendment since it takes property under a tax sale, although no assessment whatever had ever been levied on the property so taken. But, as thus stated, the proposition presents a purely moot question. The plaintiff in error has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case which he presents the effect of applying the statute is to deprive him of his property without due process of law.

We come, then, to consider whether the alleged defects in the assessment and in the advertisement were of such a nature as to cause the enforcement of the one and the upholding of the other to so operate as to deprive the plaintiff of his property without due process of law. The error in the advertisement was that, although the publication gave the full name Rafael Maria del Castillo, it was accompanied with the addition "or her estate and heirs," and the alleged defect in the assessment was that the property was assessed in the name of R. Castillo, when the real name of the owner was Rafael Maria del Castillo. The decision of the state court that the advertisement was sufficient under the Louisiana statute involved purely a state question, which we accept and follow. Conceding that a sale to enforce taxes made without notice, actual or constructive, would be a want of due process of law, it is yet obvious that the publication for thirty days required by the state law was sufficient notice to constitute due process of law, and that the mere fact that there was affixed to the name inserted in the advertisement the words "or her estate and heirs" did not destroy the efficacy of the advertisement, and did [681] not *cause it to be, in legal contemplation, no notice whatever. The contrary proposition could only be supported upon the theory that, although a complete description of the property and the full name of the owner were inserted in the advertisement, the mere addition of the words referred to were so calculated to deceive and mislead as to render the notice legally inoperative. But such assumption would be to the last degree technical and unreasonable, and cannot be indulged in.

We dismiss, then, from view the alleged defects in the advertisement, and will consider the assessment. In doing so we will take notice of, and give full effect to, the fact that the name placed on the assessment roll was R. Castillo instead of Rafael Maria del Castillo, which was the full name of the owner of the property assessed. Although the law of Louisiana under which the assessments in question were made provided for the placing of the name of the owner on the assessment roll where such name was known, it also directed that the property assessed should be described in the assessment roll. The statutes, moreover, expressly fixed a time when the assessment rolls should be exposed for examination and correction, and furnished ample opportunity, not only for revision as to valuation, but also for judicial correction of any legal error which might be asserted to exist in the assessment. The notice required by the statute to be given of the opening of the assessment rolls for inspection and revision was not addressed to each particular person assessed, but was afforded by a general publication, calling upon all persons having property subject to taxation to come forward and ask for such correction as they desired to have made. Louisiana Acts, Extra Session of 1877, pp. 154, 155; Louisiana Acts of 1871, p. 118. Beyond peradventure, this statute afforded both constructive and actual notice of the making of the assessment, and ample opportunity to any property owner to correct or resist the same if he deemed himself injured thereby. It cannot be doubted that in the exercise of its taxing power the state of Louisiana could have directed that the property subject to its taxing authority should be assessed without any reference *whatever to the name of the owner, [682] that is to say, by any such description and method as would have been legally adequate to convey either actual or constructive notice to the owner. As said in *Witherspoon* v. *Duncan*, 71 U. S. 4 Wall. 217 [18:339]: "It is not the province of this court to interfere with the policy of the revenue laws of the states, nor with the interpretation given to them by their courts. Arkansas has the right to determine the manner of levying and collecting taxes, and can declare that the particular tract of land shall be chargeable with the taxes, no matter who is the owner, or in whose name it is assessed and advertised, and that an erroneous assessment does not vitiate a sale for taxes."

The claim, then, is that the assessment in question did not constitute due process of law within the 14th Amendment because of error in the name of the owner, although the assessment would have been due process if under the state law it had not been required to mention the name of the owner, that is to say, that the assessment is repugnant to the Constitution of the United States, because of the lesser when it would not have been in conflict with the Constitution for the greater omission. This deduction demonstrates the error of the proposition relied on, and it cannot be escaped by saying that although the state had the power, without violating due process of law, to dispense with the name, nevertheless where the state statute has directed the use of a name in making an assessment, a defective giving thereof renders the assessment wholly void and a want of due process of law. This argument is answered by *Williams* v. *Supervisors of Albany County*, 122 U. S. 154 [30:1088], where, in considering the power of a state as to the assessment and collection of taxes, speaking through Mr. Justice Field, it was said:

"The mode in which the property shall be appraised, by whom its appraisement shall be made, the time within which it shall be done, what certificate of their action shall be furnished, and when parties shall be heard for the correction of errors, are matters resting in its discretion. Where directions upon the subject might originally have been dispensed with, or executed at another time, irregularities arising from neglect *to follow them may [683] be remedied by the legislature, unless its action in this respect is restrained by constitutional provisions prohibiting retrospective legislation. It is only necessary, therefore, in any case, to

consider whether the assessment could have been ordered originally without requiring the proceedings, the omission or defective performance of which is complained of, or without requiring them within the time designated. If they were not essential to any valid assessment, and therefore might have been omitted or performed at another time, their omission or defective performance may be cured by the same authority which directed them, provided, always, that intervening rights are not impaired."

The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the 14th Amendment, and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative nor coterminous. The first, due process of law, must be found in the state statute, and cannot be departed from without violating the Constitution of the United States. The other depends on the lawmaking power of the state, and, as it is solely the result of such authority, may vary or change as the legislative will of the state sees fit to ordain. It follows that, to determine the existence of the one, due process of law is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the state statute, is a state question within the final jurisdiction of courts of last resort of the several states. When, then, a state court decides that a particular formality was or was not essential under the state statute, such decision presents no Federal question, providing always the statute as thus construed does not violate the Constitution of the United States, by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the state interpretation of its own law is controlling and decisive. This distinction is pointed out by the decisions of **694**]this court. **Pittsburg, Cincinnati C. & St. L. Railway Company* v. *Backus*, 154 U.S. 421, [38:1032]; *Kentucky Railroad Tax Cases*, 115 U. S. 322 [29:414]; *Davidson* v. *New Orleans*, 96 U. S. 97 [24:616].

Bearing the foregoing elementary principle in mind, we will briefly notice the adjudicated cases upon which the plaintiff in error relies.

The authorities referred to tending to establish that where the law requires an assessment to contain the name, the omission of the name renders the assessment void, are inapposite to the question under consideration. We are not here concerned with the meaning of the Louisiana statutes, or whether we would hold as an original proposition, were we construing them, that a defect in the name of the person assessed would not be a material variance. The supreme court of the state of Louisiana has construed the statutes of that state otherwise. The issue which we are to determine is not what interpretation should be given to the statutes of the state of Louisiana, but whether, accepting the meaning affixed to the statutes of that state by the court of last resort of the state, their provisions as so interpreted are repugnant to the Constitution of the United States, because not affording due process of law. The previous adjudications of the supreme court of Louisiana referred to by that court in its opinion and upon which it rested its decree in this case, in effect held that under the Louisiana law a mistake in the name did not render the assessment void, and therefore that the conclusive presumption engendered by the Louisiana act of 1884 was not intended and did not make valid a wholly void assessment. Because in a case decided subsequently to the one now under review the supreme court of the state of Louisiana has held that an assessment in the name of a person deceased rendered such assessment wholly void, it does not follow that the court thereby departed from the ruling which it had made in this case, and which had been by it rested upon a line of decisions declared by it to have conclusively settled the law of Louisiana on the subject, and which, in effect, it announced had become a rule of property in that state. The case of *Marx* v. *Hanthorn*, 148 U. S. 172 [37:410], in no way conflicts with the foregoing considerations. That case came to this *court[**685** on appeal from a circuit court of the United States, and its decision involved ascertaining the meaning of the tax laws of the state as interpreted by the court of last resort thereof. In performing this duty the court adopted and followed the construction given to the tax laws of the state by the supreme court of the state whence the case came.

There is a claim asserted in argument that as a particular section of the act of 1884 provided that the sum of the bid at a tax sale should be paid into the state treasury, therefore it is clearly unconstitutional, since in a case where the bid exceeded the taxes the surplus money of the owner would go into the state treasury without provision for its repayment. But this is a mere abstract contention, since the fact is that the sum bid at the tax sale in question was less than the amount of the taxes assessed against the property.

Dismissed for want of jurisdiction.

PENN MUTUAL LIFE INSURANCE COMPANY *et al.*, *Appts.*,
v.
CITY OF AUSTIN *et al.*

(See S. C. Reporter's ed. 685-701.)

Jurisdiction of this court—city ordinances, when violate Constitution—unfounded claim—laches—upon what founded—five years' delay.

1. Under the act of 1851, creating the circuit courts

NOTE.—*As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws*,—see notes to Jackson, Hart, v. Lamphire, 7: 679, and Commercial Bank v. Buckingham, 12: 169.

As to doctrine of laches, see note to Middletown v. Newport Hospital (R. I.) 1 L. R. A. 191.

As to implied exceptions in statute of limitations, see note to Shellenberger v. Ransom (Neb.) 25 L. R. A. 561.

As to loss of cause of action by lapse of time pending suit, see note to McAfee v. Reynolds (Ind.) 18 L. R. A. 211.

As to provision as to enactment of ordinance, see note to Swift v. People, Ferris Wheel Co., (Ill.) 33 L. R. A. 470.

of appeals, this court has jurisdiction of an appeal directly to this court from a final judgment of the United States circuit court where it is claimed in the complaint that certain ordinances of a city and a state statute impaired the obligation of a contract, and were therefore in contravention of the United States Constitution.

2. City ordinances are the equivalent of laws of the state within the meaning of the provision giving jurisdiction to this court of an appeal from a circuit court, in a case in which the law of the state is claimed to violate the Constitution of the United States.

3. The fact that a claim of the violation of the Constitution of the United States by state law is not well founded does not preclude the jurisdiction of this court on appeal from a circuit court of the United States.

4. Equity may withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time, even though the laches are not pleaded or the bill demurred to.

5. Equitable powers will not be exerted to save a person from the consequences of his own neglect after the position of the parties has so changed that equitable relief cannot be afforded without doing injustice or destroying or impairing the intervening rights of third parties.

6. Laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced,—an inequity founded upon some change in the condition or relations of the property or parties.

7. Five years' delay in taking steps to contest the validity of an ordinance for the construction of public works will preclude relief, where in the meantime the city has incurred great expense in the work and has sold bonds therefor.

[No. 44.]

Argued April 23, 1897. Decided January 3, 1898.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Texas sustaining a demurrer to the complaint and dismissing for want of equity a suit brought by the Penn Mutual Life Insurance Company *et al.*, plaintiffs, against the city of Austin *et al.*, defendants, to obtain a decree that a city ordinance and contract for supplying the city of Austin with water, etc., are in full force and effect and that the contract is valid and that said city must perform the same, and for an injunction restraining said city and its council, etc., from constructing a new system of waterworks, etc. *Affirmed as modified.*

Statement by Mr. Justice **White:**

The court below sustained a demurrer to and dismissed for want of equity the bill of the complainants, by which, as citizens of the states of Pennsylvania, Maryland, and New York, respectively, they impleaded the defendants, the one a municipal corporation created by a law of the state of Texas, and its mayor and board of public works, citizens of the state of Texas, and the other a corporation organized under the authority of the general laws of the state of Texas regulating the formation of corporations, also a citizen of that state.

The bill which was filed on January 8, 1895, alleged in substance as follows: That the city of Austin was in 1892 a municipal corporation, and that for many years its inhabitants and the city itself for municipal purposes had been supplied with water by a corporation known as the City Water Company; that in 1882, in consequence of the growth of the city, both for the health of the people of the city, the safety of its property, and the development of its manufacturing industries, a larger supply of water was absolutely needed, and that the taxpayers presented a petition to the city authorities asking that an arrangement by contract or otherwise be at once made to afford the augmented water supply which was essential; that the municipality, being fully empowered by its charter to supply water, and being authorized by the general laws of the state of Texas to make a contract for so doing, on the 13th day of April, 1882, did enter into a contract with the City Water Company to the end that a more copious supply of water should be furnished; that this contract gave to the company the right to furnish water for twenty years, with the privilege on the part of the city of buying at the end of ten years, or at any time on giving one year's notice, the waterworks which *the contract required the company to [687 erect; that the contract fixed a reasonable price to be paid for the use of water to be furnished by the water company, provided for the establishment of a given number of hydrants for the use of the city, and stipulated a rental therefor; that it imposed upon the corporation obligations of the most onerous character, compelling it to erect a large and costly plant, to lay extensive mains and pipes, and to extend them at any time during the life of the contract wherever the city might direct, and exacted that the company should add new hydrants for municipal uses as the city might require, giving to the water company as compensation in addition to the rentals to be paid by the city for hydrants, as above stated, a commutation of municipal taxation.

The bill averred that the contract was in all respects advantageous to the city and beneficial to its inhabitants, and was indeed as to each and every obligation contained therein or resulting therefrom reasonable and just; that the city at the time the contract was entered into was not in a position to itself erect the works without inordinately increasing its burden of taxation, and that the contract contemplated that the water company should obtain the money to erect the works by issuing its negotiable bonds, since there was therein contained a stipulation that the money to become due for the rentals of the hydrants should be paid by the city to the trustee of any bonds which might be issued by the water company, so as to guarantee the prompt payment of the interest on any such bonds; that the water company, on the faith of the contract, issued to the Farmers' Loan & Trust Company its negotiable bonds for $250,000, secured them by mortgage upon all its property, present and prospective, and with the sum thus realized and other available resources, with integrity and fidelity and in complete compliance with every obligation resting on it, erected the desired waterworks plant, which afforded the desired supply of water; that of the bonds thus issued to the Farmers' Loan & Trust Company, $100,000 in amount were bought for more than their face value in open

market by the Penn Mutual Life Insurance
688] Company, one of the *complainants. The bill moreover alleged that, in March, 1883, after the plant had been constructed and many miles of mains had been laid, the city, by ordinance duly enacted, accepted the work, and declared that the water company had fully performed its obligations. That subsequent to this date, the city directed a very large extension of the mains and pipes to be made, which was promptly executed by the water company with money obtained from an additional issue of bonds on the Farmers' Loan & Trust Company amounting to $100,000, $10,000 of which Jacob Tome, another of the complainants, bought for full value in open market.

The bill then alleged that in 1884 the city of Austin contracted with a corporation known as the Austin Electric Light Company to build and carry on a plant required to light that city, and that this corporation issued its bonds to carry out its corporate purposes to the extent of $25,000. That in June, 1887, all the plant rights, privileges, franchises, and obligations of this electric-light company, as well as those of the water company, were, with the consent and approval of the city of Austin, transferred to a corporation known as the Austin Water, Light, & Power Company, a Texas corporation having corporate capacity both to undertake the duty of supplying water and of furnishing light to the city of Austin; that, in consequence of its assumption of all the obligations of both the aforementioned companies, the Austin Water, Light, & Power Company was required by the city to make considerable additions to its water mains, and in order to obtain the capital to execute these directions of the city, that company issued to the Farmers' Loan & Trust Company of New York $750,000 of bonds, secured by mortgage upon all its property, $375,000 of these bonds being reserved to pay the outstanding bonds (that is, the $250,000 first issued of the water company, the $100,000 second issue and the $25,000 issue by the Austin Electric Light Company), and the remaining $375,000 being negotiated in open market for full value, the proceeds being expended in complying with the city's direction, and that $50,000 of these last bonds were purchased in open market for full value by Ogden
689]and Robert Goelet, *the last-named complainants. The bill averred that the waterworks thus originally established and extended were in every respect entirely adequate to supply every want, not only of all the inhabitants of the city of Austin, but of the municipality, and that in each and every particular the municipality was as advantageously placed with respect to a water supply as it could have been under any condition or circumstance whatever.

The bill then alleged that, despite the existence of the contract, and the entire justness and fairness of each and every obligation and stipulation therein contained, and without any just reason therefor, the city of Austin, on the 31st day of March, 1890, passed an ordinance entitled "An Ordinance Ordering an Election to Obtain the Consent of the Property Tax Paying Qualified Voters of the City of Austin, to the Extension by the City Council of the Bonded Indebtedness of the City of Austin for the Purposes of Constructing a System of Waterworks and Furnishing Lights for the City of Austin." That this ordinance provided that an election should be held on the 5th day of May, 1890, to obtain the consent of the taxpayers for an increase of the bonded indebtedness of the city to the amount of $1,400,000 for the purpose of obtaining money to erect a system of waterworks and an electric-light plant for lighting the city; that on the 5th of May, 1890, the election was held, as provided, and the taxpayers gave their assent to the proposition submitted by the ordinance, and that the city council thereafter declared the election to have been carried, and that the power to issue bonds had been sanctioned; that on July 21, 1890, the city passed an ordinance authorizing the increased issue of $1,400,000 of bonds, providing for the levy and collection each year, as long as the bonds should be outstanding, of a tax to aid in paying the same. This ordinance directed that the bonds on their face should not only contain a statement of the objects for which they were issued, but should also show that their payment was secured by all the sums to be collected for the use of the water to be furnished by the new plant, and the ordinance moreover contained a provision guaranteeing that the rates to be charged for the water to be furnished *should [690 be so regulated that their product would equal the sum of the interest on the bonds, and a sinking fund to provide for the retirement of the principal thereof. The money to be realized from the sale of the bonds was required to be set apart in a distinct fund, to be warranted for from time to time in payment of the work as it progressed. The character of the work to be done was moreover fixed by an ordinance which empowered the board of public works to construct waterworks by means of a dam across the Colorado river at a designated point, in accordance with the plans of a civil engineer who was named therein.

It was alleged that as the purpose and necessary effect of the foregoing action of the city was to impair the contract rights of the Austin Water, Light, & Power Company held by it as the assignee of the two original companies, the ordinances passed by the city and each and everything subsequently done thereunder was void because repugnant to the Constitution of the United States. The bill moreover averred that in April, 1891, the legislature of the state of Texas passed an act giving a new charter to the city of Austin, which contained an express grant of power to that city to construct for its own use a waterworks plant, and that the sole object of this new charter was to sanction the action of the municipality previously taken, and therefore the act in question was also void under the Constitution of the United States, because it impaired the previous contract rights of the Austin Water, Light, & Power Company.

It was averred that the board of public works had "already expended a large sum of money in the construction of a dam across the Colorado river," and "are now actually laying water pipe in and along the streets of the city of Austin, and it is the avowed intention of the said city to press the construction of said rival system of waterworks to a speedy completion, and upon the completion of the

same to discontinue the taking of water from the said water company, and to refuse to perform any obligation resting upon the said city as embraced in the said contract with the said city water company." It was alleged that the 691] tax provided by the ordinance *which authorized the building of the new waterworks had been levied for the years 1893 and 1894, and that the property of the Austin Water, Light, & Power Company had been assessed for this tax, and that the property of the company was thus being levied upon for a tax to be used for the purpose of erecting the new works which were intended to take the place of its plant, and thereby to destroy its contract rights. Although the bill was filed by the complainants in virtue of their rights as holders and owners of the bonds issued or assumed by the Austin Water, Light, & Power Company as aforesaid, it contained no averment that either the bondholders, who were complainants, or any others, had at any previous time requested the trustee to take any action so as to prevent the accomplishment of the violation of the contract rights of the corporation and its bondholders, which it was alleged had inevitably arisen from the action of the city originating in 1890. The bill, however, contained the following averments:

"That as soon as the said city of Austin announced its intention of constructing a rival system of waterworks, and before anything was done in pursuance thereof, the said M. D. Mathers, president of the Austin Water, Light, & Power Company, on behalf of the said water company and these bondholders, remonstrated with the said mayor and city council, and requested them and urged them not to violate the said contract, or to take any steps to depreciate the value of the property of the said water company, but to exercise the right which the said city has to purchase the said works at their appraised value; and the said bondholders have continued, ever since that time, to remonstrate with the said city of Austin and the officers thereof, but that the said city has entirely disregarded the said remonstrances and requests, and has openly repudiated all liability under the said contract."

And further the bill alleged:

"That your orators and the other bondholders of the said water company have repeatedly applied to the said Austin Water, Light, & Power Company, and its president and board of directors, and requested them to institute proceedings 692] *to protect the property of the said water company, and the rights therein of the said bondholders; but that the said water company has failed to comply with the request of your orators and said bondholders. But the said Austin Water, Light, & Power Company, and the officers thereof, by reason of the contract relations existing between the said city of Austin and the said company, fear that the consequences of any such litigation instituted by the said Water Company would be exceedingly disastrous and would precipitate adverse and hostile action by the said city of Austin."

The relief asked by the bill is thus stated in the prayer thereof:

"That your orators may have the decree of your honorable court, adjudging and decreeing that the said ordinance and contract, so accepted and acted upon by all the parties, are in full force and effect, and that the said contract is a valid and subsisting contract, binding upon the said city as well as upon the said water company and upon the said bondholders, and that the said city must abide by and perform the same, and that until its purchase of the said existing waterworks, in the manner and upon the terms set forth in the said contract, and that the said city of Austin, its mayor and city council and board of public works, have no right or power to construct a river waterworks system to, in any way, interfere with the rights of the said Austin Water, Light, & Power Company, and that it is unlawful and inequitable for the said city of Austin to levy and collect the tax upon the property of the said Austin Water, Light, & Power Company to be expended in the unlawful and inequitable manner hereinbefore alleged, in the construction of a rival system of waterworks; and that a writ of injunction may issue out of this honorable court restraining the said city of Austin, its mayor and city council and board of public works, and its other officers, servants, agents, and employees, from taking a supply of water from any other source and from proceeding in constructing and maintaining a new and distinct system of waterworks, and from taking and appropriating to its own use, except in the manner provided in said contract, any portion of the said works* so constructed at 693] its instance and for its benefit with money furnished upon the faith of its obligation by the said Austin Water, Light, & Power Company and the said bondholders, that your orators may have such other and further relief as the case may, in equity, require and as to this honorable court may seem proper."

The demurrer which the lower court sustained, besides asserting that the bill disclosed no cause for equitable relief, rested upon seven grounds, which may be reduced to six, substantially as follows: 1st. Because by the Constitution of the state of Texas the contract made by the city of Austin with the water company was void. 2d. Because the contract was beyond the power of the corporation as defined in its charter and as limited by the general laws of the state of Texas. 3d. Because the commutation of taxation granted to the water company was in its essence but an exemption, and the city was without power, under the Constitution of the state of Texas, to grant it. 4th. Because even if an exclusive right was given to the water company, such grant under the Constitution and laws of the state of Texas was subject to alteration, amendment, or repeal by the legislature which had exercised such reserved power. 5th. Because the granting of any exclusive rights was forbidden by the Constitution which was in force at the time the alleged contract was made. 6th. Because even if the complainants had any contract rights, and if there had been an impairment thereof, full and adequate remedy was afforded by an action at law, and there was, hence, no reason for the interposition of a court of equity.

Messrs. **Skipwith Wilmer, D. T. Watson,** and *Samuel B. Huey* for appellants.

Mr. **S. R. Fisher** for appellees.

Mr. Justice White delivered the opinion of the court:

The jurisdiction of this court to review the decree of the trial court is denied, the contention being that if an appeal *from the decision of the trial court was desired, it should have been had in the circuit court of appeals and cannot be here obtained. 694]

By the 5th section of the act of March 3, 1891, creating the circuit court of appeals (26 Stat. at L. 826, chap. 517), jurisdiction is conferred upon this court to review by direct appeal any final judgment rendered by the circuit court "in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States." There can be no doubt that the case at bar comes within this provision. The complainants in their bill in express terms predicated their right to the relief sought upon the averment that certain ordinances adopted by the municipal authorities of the city of Austin, and an act of the legislature of the state of Texas referred to in the bill, impaired the obligations of the contract which the bill alleged had been entered into with the complainants by the city of Austin, and that both the law of the state of Texas and the city ordinances were in contravention of the Constitution of the United States. No language could more plainly bring a case within the letter of a statute than do these allegations of the bill bring this case within the law of 1891.

Not only were the averments of the bill as to the invalidity of the state law adequate, but so also were the allegations as to the nullity of the city ordinances. These ordinances were but the exercise by the city of a legislative power which it assumed had been delegated to it by the state, and were, therefore, in legal intendment the equivalent of laws enacted by the state itself. *City Railroad Co.* v. *Citizens' Street Railway Co.* 166 U. S. 557 [41: 1114], and cases there cited. The argument by which it is sought to support the contention that a right to review the case by direct appeal does not exist, not only disregards the letter of the statute, but is unsound in reason. It says that the right to the direct appeal can alone rest on the proposition, "that the Constitution or a law of the state of Texas conflicts with appellant's contract, and contravenes the Federal Constitution; in other words, it must affirmatively appear upon the face 695]of the complainant's *bill that there was involved in this case a Federal question, the determination of which was essential to a correct decision of the case." But the words of the statute which empower this court to review directly the action of the circuit court are that such power shall exist wherever it is claimed on the record that a law of a state is in contravention of the Federal Constitution. Of course, the claim must be real and colorable, not fictitious and fraudulent. The contention here made, however, is, not that the bill, without color of right, alleges that the state law and city ordinances violate the Constitution of the United States, but that such claim as alleged in the bill is legally unsound. The argument, then, in effect, is that the right to direct appeal to this court does not exist where it is claimed that a state law violates the Constitution of the United States, unless the claim be well founded. But it cannot be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case. The authorities referred to as supporting the position indicate that the argument is the result of a confusion of thought, and that it arises from confounding the power of this court to review on a writ of error the action of a state court with the power exercised by this court under the act of 1891, to review by direct appeal the final action of the circuit court where, on the face of the record, it appears that the claim was made that the statute of a state contravened the Constitution of the United States. These classes of jurisdiction are distinct in their nature, and are embraced in different statutory provisions. Having jurisdiction of the cause, there exists the power to consider every question arising on the record. *Horner* v. *United States*, 143 U. S. 571 [36: 267].

Conceding without deciding, the legality and binding force of the contract as averred in the bill, and that the obligations which it created were materially impaired, not only by a law of the state of Texas, but also by the ordinances passed by the city, and the execution of such ordinances, all as alleged; conceding, moreover, without so deciding, that the Austin Water, Light, & Power Company was the successor in law of the original corporations, and hence responsible for all their obligations *and entitled to all their rights; 696]

and, further, conceding that the complainants as bondholders have the capacity to assert the impairment of the contract made by the city of Austin with the City Water Company, it yet becomes at the outset necessary to decide whether, granting, *arguendo*, all these propositions, the complainants are entitled to the relief which they seek, that is to say, whether they can be heard to invoke the interposition of a court of equity. As a prerequisite to the solution of this question, it is necessary to determine precisely the remedy which it is the purpose of the bill to obtain in order to redress the wrongs which it alleged to exist. Whilst the prayer of the bill asks that the validity of the contract be recognized, and whilst it also prays that the legality of the communication of taxation created by the city ordinance be decreed, these prayers are made but the foundation or premise for the real relief which the bill invokes; that is, the exercise of the power to enjoin in order thereby to perpetually restrain the city of Austin from completing the waterworks, by it commenced, and from levying on the property of the Austin Water, Light, & Power Company any taxation to be used to complete the new waterworks. The preliminary inquiry, therefore, is whether the complainants have so exercised their rights as to entitle them to prevent the city from completing the waterworks.

In *Speidel* v. *Henrici*, 120 U. S. 377, 387 [30: 718, 719], the court said, speaking through Mr. Justice Gray:

"Independently of any statute of limitations,

courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. 'A court of equity,' said Lord Camden, 'has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced; and therefore from the beginning of this jurisdiction there was always a limitation to suits in this court.'"

697] *In *Galliher* v. *Cadwell*, 145 U. S. 368, 371 [36: 738, 739], speaking through Mr. Justice Brewer, it was said:

"The question of laches turns not simply upon the number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during that lapse of years. The cases are many in which this defense has been invoked and considered. It is true that by reason of their differences of fact no one case becomes an existing precedent for another, yet a uniform principle pervades them all."

In *Hammond* v. *Hopkins*, 143 U. S. 224, 250 [36: 134, 145], through Mr. Chief Justice Fuller, the court said:

"No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred."

In *Willard* v. *Woods*, 164 U. S. 502, 524 [41. 531, 540], the court said:

"But the recognized doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for a reasonable length of time may be applied in the discretion of the court, even though the laches are not pleaded or the bill demurred to. *Sullivan* v. *Portland and Kennebec R. R. Co.* 94 U. S. 806, 811 [24: 324, 326]; *Lansdale* v. *Smith*, 106 U. S. 391, 394 [27·219, 220]; *Badger* v. *Badger*, 69 U. S. 2 Wall. 87, 95 [17: 836, 839].

In *Lane & Bodley Co.* v. *Locke*, 150 U. S. 193 [37: 1049], and *Mackall* v. *Cassilear*, 137 U. S. 566 [34: 779], it was held that the mere assertion of a claim, unaccompanied with any act to give effect to the asserted right, could not avail to keep alive a right which would otherwise be precluded because of laches. Indeed, the principle by which a court of equity declines to exert its powers to relieve one who has been guilty of laches as expressed in the foregoing decisions has been applied by this court in so many cases besides those above referred to as to render the doctrine elementary.

698] * *Whitney* v. *Fox*, 166 U. S. 637, 647, 648 [41: 1145, 1148, 1149]; *Gildersleeve* v. *New Mexico Mining Co.* 161 U. S. 573, 582 [40: 812, 815]; *Abraham* v. *Ordway*, 158 U. S. 416, 423 [39: 1036, 1040]; *Ware* v. *Galveston City Co.* 146 U. S. 102, 116 [36: 904, 910]; *Foster* v. *Mansfield, Coldwater & L. M. Railroad Co.* 146 U. S. 88, 102 [36: 902, 904]; *Galliher* v. *Cadwell*, *supra* where the earlier cases are fully reviewed; *Hoyt* v. *Latham*, 143 U. S. 553 [36: 259]; *Hanna* v. *Moulton*, 138 U. S. 486, 495 [34: 1032, 1037]; *Richards* v. *Mackall*, 124 U. S. 183, 188 [31: 396, 400].

The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words, where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect. The adjudicated cases, as said in *Galliher* v. *Cadwell*, *supra*, 372 [36: 740], "proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that, because of the change in condition of relations during this period of delay, it would be an injustice to the latter to permit him now to assert them." The requirement of diligence, and the loss of the right to invoke the arm of a court of equity in case of laches, is particularly applicable where the subject-matter of the controversy is a public work. In a case of this nature, where a public expenditure has been made, or a public work undertaken, and where one having full opportunity to prevent its accomplishment has stood by and seen the public work proceed, a court of equity will more readily consider laches. The equitable doctrine in this regard is somewhat analogous to the legal rule which holds that where one who has the title in fee to real estate, although he has not been compensated, "remains inactive and permits them [a railway company] to go on and expend large sums in the work, he will be *estopped **[699** from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages." *Roberts* v. *The Northern Pacific Railroad Co.* 158 U. S. 11 [39: 877], and authorities there cited. As said in *Galliher* v. *Cadwell*, *supra*, 373 [36: 740]: "But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relation of the property or the parties."

Do the facts in the case before us bring it within the rule of laches as expounded in the foregoing authorities? The rights of the water company, under its contract, were created long prior to the year 1890. Before that year the waterworks plant was constructed and from it the inhabitants of the city of Austin were being supplied with water. The violation of the contract relied upon as impairing its obligations originated in 1890. The first step was the passage of an ordinance submit-

ing to the voters of the city of Austin the proposition whether the bonded debt of the municipality should be increased by the issue of $1,400,000 of negotiable bonds, the proceeds arising from the sale of such bonds to be used in erecting the new waterworks. There was nothing clandestine in the conduct of the municipality, since its action was dependent on a municipal election. The holding of the municipal election followed, and, after it had taken place, occurred the passage of the ordinance, directing the issue of the new bonds, providing that they were to be secured by the water rates to be collected from the new waterworks which were to be constructed. From the time of the submission to the vote, and of the ordinances issuing the bonds and directing the work to be done, all in 1890, until this bill was filed in 1895, no legal steps whatever appear by the bill to have been taken to prevent the consummation of the wrong which the bill alleges was necessarily to result from the action of the municipal authorities. During all this period it does not appear from the bill that the trustee representing the bondholders was ever 700] *called upon by them to take any steps whatever to protect their interest. It cannot be said that the bondholders were ignorant of the action and purposes of the city of Austin, since the bill avers that, conscious of the fact that their rights were to be impaired by the action of the city, they repeatedly called upon the Austin Water, Light, & Power Company to take action on the subject, but that that corporation refused so to do, and that the bondholders continued to object to the proposed action of the city without doing anything whatever to protect their legal rights. The bill alleges the issue by the municipal authorities of the series of bonds provided for, since it says, in referring to the tax levied upon the property of the Austin Water, Light, & Power Company, that for the purpose "of providing for the interest and sinking fund on the bonds of the said city of Austin, issued for said purpose [that is, the new waterworks], the said city of Austin has levied a tax." The exact amount of the new bonds which have been issued is not specifically set out in the bill, but it is inferable from the allegations, to which we have just referred, that the whole series has been issued by the city, since the bill alleges that the taxation has been levied for the purpose of paying the bonds provided by the ordinance. Moreover, that either the whole or a large portion of the bonds have been issued is plainly deducible from other averments in the bill. The ordinance, which is an exhibit to the bill, provides that to pay for the work proposed the bonds should be discounted from time to time as required by the necessities of the situation, that the proceeds arising from their sale should be put to a special fund, and be warranted against by the proper city officer to pay for the work. And the bill avers that the city at great expense has nearly completed a costly dam across the Colorado river as a part of the work provided. The bill therefore presents a case where there has arisen during the existence of the delay a material change in the situation of the parties, and besides is one where rights of third parties have intervened. It cannot be said, under the case made by the bill, that the power of a court of equity can be exerted to forbid *the finishing of [701 the waterworks structure, which the bill alleges has been largely completed, without seriously impairing the rights of the bondholders under the ordinances in question. One of the methods of payment stipulated, as we have seen, for these bonds was the revenue to be derived from the new waterworks, and of course no such revenues can ever result if the waterworks are never to be finished. It is certain, then, that if the completion of the new waterworks be restrained by an injunction, that the interest of the new bondholders will be seriously affected, and that this result will be brought about by a decree of a court of equity rendered in the enforcement of asserted rights of complainants, who, if they had taken timely action, could have adequately protected themselves from injury without resulting wrong to the rights of many other persons.

It being clear under such circumstances that the complainants were not entitled to the relief which they sought, it of course follows that the court below did not err in sustaining the demurrer and dismissing the bill for want of equity. We think, however, that the dismissal should have been without prejudice, and *the decree below is therefore modified in that particular*, and, as so modified, it is affirmed.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1897.

Vol. 169.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1897,

AND REPORTED HEREIN,

VOL. 169,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 169 U. S.	Title.	Here in.
1–3	Stuart v. Hayden	
	Gruetter v. Stuart	639
3–6	" "	640
6–8	" "	641
8–11	" "	642
11–14	" "	643
14–15	" "	644
16–17	United States v. Passavant	644
17–20	" "	645
20–23	" "	646
23–26	" "	647
26	" "	648
26–28	Hetzel v. Baltimore & O. R. Co.	648
28–30	" " "	649
30–33	" " "	650
33–36	" " "	651
36–39	" " "	652
39–41	*Re* Boardman	653
41–44	"	654
44	"	655
45–47	Dakota Bldg. & L. Asso. v. Price	655
47–50	" " "	656
50–53	" " "	657
53–55	" " "	658
55	Williams v. Paine	658
55–57	" "	659
57–60	" "	660
60	" "	661
60–63	" "	662
63–66	" "	663
66–69	" "	664
69–72	" "	665
72–75	" "	666
75–78	" "	667
78–80	" "	668
81–83	Holder v. Aultman	669
83–86	" "	670
86–89	" "	671
89–91	" "	672
91–92	" "	673
92–94	Powers v. Chesapeake & O. R. Co.	673
94–97	" " "	674
97–99	" " "	675
99–102	" " "	676
102–103	" " "	677
103–105	Union Mut. L. Ins. Co. v. Kirchoff	677
105–107	" " "	678
107–108	" " "	679
108–111	Union Mut. L. Ins. Co. v. Kirchoff	680
111–114	" " "	681
114–115	" " "	682
115–116	Wetmore v. Rymer	682
116–119	" "	683
119–122	" "	684
122–125	" "	685
125–128	" "	686
128–131	Richardson v. Louisville & N. R. Co.	687
131–132	" " "	688
133	Chicago, M. & St. P. R. Co. v. Solan	688
133–134	" " "	689
134–135	" " "	690
135–136	" " "	691
136–138	" " "	692
139–142	Ritter v. Mutual L. Ins. Co.	693
142–145	" " "	694
145–147	" " "	695
147–150	" " "	696
150–153	" " "	697
153–156	" " "	698
156–159	" " "	699
159–160	" " "	700
161	Benjamin v. New Orleans	700
161–162	" "	701
162–164	" "	702
165	Cessna v. United States	702
165–167	" "	703
167–170	" "	704
170–173	" "	705
173–176	" "	706
176–179	" "	707
179–182	" "	708
182–185	" "	709
185–187	" "	710
188–189	" "	711
189	Baker v. Cummings	711
189–190	" "	712
190–192	" "	713
192–195	" "	714
195–198	" "	715
198–201	" "	716
201–203	" "	717
203–206	" "	718
206–209	" "	719
209	" "	720

Off. Rep. 169 U. S.	Title.	Here in.
209–211	United States v. Klumpp	720
211–214	" "	721
214–217	" "	722
217	" "	723
218–220	Barrett v. United States (No. 1)	723
220–223	" " "	724
223–226	" " "	725
226–228	" " "	726
228–231	" " "	727
231	Barrett v. United States (No. 2)	727
231–233	" " "	728
234	Lewis v. Kengla	728
234–237	" "	729
237	" "	730
237–239	Wetzel v. Minnesota Ry. Transfer Co.	730
239	" " "	731
239–242	" " "	732
242	" " "	733
242–245	Dull v. Blackman	733
245–248	" "	734
248	" "	735
249–250	United States v. Louisville	735
250–253	" "	736
253–255	" "	737
255–256	Logan County v. United States	737
256–259	" "	738
259–262	" "	739
262–263	" "	740
264	Thomas v. Gay	
	Gay v. Thomas	740
264–266	" "	741
266–269	" "	742
269–272	" "	743
272–275	" "	744
275–278	" "	745
278–281	" "	746
281–284	" "	747
284	" "	748
284–286	Baker v. Grice	748
286–289	" "	749
289–292	" "	750
292–294	" "	751
294	Baker v. Austin	751
294	Baker v. Hawkins	751
294	Baker v. Finley	751
295–296	Willis v. Eastern Trust & B. Co.	752
296–298	" " "	753
299–300	" " "	755
300–303	" " "	756
303–306	" " "	757
306–309	" " "	758
309–311	" " "	759
311	Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.	759
312–313	" " "	760
313–316	" " "	761
316	" " "	762
316–318	United States v. Garlinger	762
318–321	" "	763
321–323	" "	764
323–324	Payne v. Robertson	764
324–327	" "	765
327–330	" "	766
330	" "	767
331–332	United States v. Eaton	767
332–335	" "	768
335–338	" "	769
338–340	" "	770
340–343	" "	771
343–346	United States v. Eaton	772
346–349	" "	773
349–352	" "	774
352	" "	775
353–354	Beley v. Naphtaly	775
354–357	" "	776
357–360	" "	777
360–363	" "	778
363–365	" "	779
365	Smith v. Naphtaly	779
365	" "	780
366–368	Holden v. Hardy	780
368	" "	781
380–382	" "	787
382–385	" "	788
385–388	" "	789
388–391	" "	790
391–394	" "	791
394–397	" "	792
397–398	" "	793
398	Smithsonian Institution v. Meech	793
399	" " "	794
399–400	" " "	795
400–403	" " "	796
404–406	" " "	797
406–409	" " "	798
409–412	" " "	799
412–415	" " "	800
415	" " "	801
416–418	Brown v. Marion Nat. Bank	801
418–421	" " "	802
421–423	Savings & L. Soc. v. Multnomah County	803
423–426	" " "	804
426–429	" " "	805
429–432	" " "	806
432–434	Central Nat. Bank v. Stevens	807
434–437	" " "	808
437–440	" " "	809
440–443	" " "	810
443–446	" " "	811
446–449	" " "	812
449–452	" " "	813
452–455	" " "	814
455	" " "	815
455–458	" " "	816
458–461	" " "	817
461–464	" " "	818
464 465	" " "	819
466	Smyth v. Ames	
	Smyth v. Smith	
	Smyth v. Higginson	819
469–471	" "	835
471–473	" "	836
473–476	" "	837
476–517	" "	838
517–520	" "	839
520–523	" "	840
523–525	" "	841
525–528	" "	842
528–531	" "	843
532–534	" "	844
534–537	" "	845
537–539	" "	846
539–542	" "	847
542–545	" "	848
545–548	" "	849
548–550	" "	850
551	Merritt v. Bowdoin College	850
551–554	" " "	851

Off. Rep. 169 U. S.	Title.	Here in.
554–556	Merritt v. Bowdoin College	852
556–557	" " "	853
557	Backus v. Fort Street Union Depot Co.	853
558–559	" " "	854
559–560	" " "	855
560–562	" " "	856
562–565	" " "	857
565–568	" " "	858
568–571	" " "	859
571–574	" " "	860
574–577	" " "	861
577–580	" " "	862
580–582	" " "	863
582–585	" " "	864
585	" " "	865
586	Wilson v. North Carolina	865
586	" "	866
586–587	" "	867
587–588	" "	868
588–591	" "	869
591–594	" "	870
594–597	" "	871
597–600	" "	872
600	" "	873
600	Wilson v. North Carolina	873
600–602	United States, Bernardin, v. Butterworth	873
602–605	" " "	874
605–606	" " "	875
606–607	McCormick Harvesting Mach. Co. v. Aultman McCormick Harvesting Mach. Co. v. Aultman-Miller Co.	875
607–610	" "	876
610–612	" "	877
613	Missouri, K. & T. R. Co. v. Haber	878
615–618	" " "	879
618–620	" " "	880
620–623	" " "	881
623–626	" " "	882
626–629	" " "	883
629–632	Missouri, K. & T. R. Co. v. Haber	884
632–635	" " "	885
635–638	" " "	886
638–641	" " "	887
641–643	" " "	888
643–644	" " "	889
644–646	Louisville & N. R. Co. v. Behlmer	889
646–648	" " "	890
649	United States v. Wong Kim Ark	890
649–651	" " "	891
651–654	" " "	892
654–657	" " "	893
657–659	" " "	894
659–662	" " "	895
662–665	" " "	896
665–668	" " "	897
668–671	" " "	898
671–674	" " "	899
674–677	" " "	900
677–680	" " "	901
680–682	" " "	902
682–685	" " "	903
685–688	" " "	904
688–691	" " "	905
691–694	" " "	906
694–697	" " "	907
697–700	" " "	908
700–702	" " "	909
702–705	" " "	910
705–708	" " "	911
708–711	" " "	912
711–714	" " "	913
714–717	" " "	914
717–720	" " "	915
720–723	" " "	916
723–726	" " "	917
726–728	" " "	918
728–731	" " "	919
731–732	" " "	920
733	Memorandum Cases	1207
738	" "	1218

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1897.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

1] AMBROSE P. S. STUART, *Appt.*,
v.
KENT K. HAYDEN, Receiver of the Capital National Bank of Lincoln, Nebraska, August T. Gruetter, and Charles F. Joers.

AUGUST T. GRUETTER and Charles F. Joers, *Appts.*,
v.
AMBROSE P. S. STUART and Kent K. Hayden, Receiver of the Capital National Bank of Lincoln, Nebraska.

(See S. C. Reporter's ed. 1-15.)

Liability of stockholder of national bank—facts found by lower courts—remedy by rescission.

1. A transfer of shares of stock in an insolvent national bank, with intent to escape individual liability as a stockholder, made by one who has knowledge of the insolvency of the bank, or at least of facts which reasonably justify a belief of its existing or impending insolvency, will not relieve him from his liability under U. S. Rev. Stat. § 5151.

2. Ultimate facts found by the circuit court, and also by the circuit court of appeals, to be established by the evidence, will be accepted by this court unless they clearly appear to be wrong.

3. An action to recover damages for fraudulent misrepresentations of the value of property at the time of a trade is in effect an action for part of the purchase price, and, while it is pending, constitutes an election to ratify the trade, so as to preclude the remedy by rescission.

[Nos. 151, 160.]

Argued December 9, 10, 1897. Decided January 10, 1898.

APPEALS from a decree of the United States Circuit Court of Appeals for the Eighth Circuit reversing the decree of the Circuit Court of the United States for the District of Nebraska and decreeing a certain transfer of stock of the Capital National Bank of Lincoln from Ambrose P. S. Stuart to August T. Gruetter and Charles F. Joers to be fraudulent and voidable as to the receiver of the Bank and that the receiver recover of Stuart an assessment made by him, etc., in an action brought by Kent K. Hayden, receiver of said bank, against said Stuart *et al.*, to recover an assessment upon said stock, etc. Decree of court of appeals affirmed, but without prejudice to the prosecution of any claim that Gruetter and Joers may have against Stuart arising out of the transactions.

See same case below, 36 U. S. App. 462.

The facts are stated in the opinion.

Mr. **C. C. Flansburg** for Ambrose P. S. Stuart.

Messrs. **G. M. Lambertson,** *Amasa Cobb, A. E. Harvey,* and *F. M. Hall* for Kent K. Hayden, Receiver.

Mr. **John H. Ames** for Gruetter & Joers.

Mr. Justice **Harlan** delivered the opinion of the court:

On the 6th day of February, 1893, the Controller of the Curreney appointed a receiver of the Capital National Bank of Lincoln, Nebraska, which had a nominal capital of $300,000. The bank had shortly before suspended business, and upon due examination had been found to be insolvent.

Subsequently, June 10, 1893, that officer—having first determined that in order to pay the debts of the bank it was necessary to enforce the individual liability of shareholders as prescribed in §§ 5151 and 5234 of the Revised Statutes—made an assessment for $300,000, to be paid by shareholders equally and ratably on or before July 10, 1893. Of this assessment and requisition Stuart had proper notice.

*In execution of this order the receiver [3 brought the present action against Stuart.

Stuart became the owner of one hundred shares of the stock of the Capital National

NOTE.—*That the Supreme Court will not review the discretionary action of the court below,* see note to Barrow v. Hill, 14: 48.

As to transferring equitable title to shares of bank stock, see note to Leyson v. Davis (Mont.) 31 L. R. A. 629.

Bank in 1884 and of fifty additional shares in 1886. Substantially from the time of becoming a shareholder he was one of the directors of the bank, and a member of its finance committee, and acted in both capacities until about December 16, 1892. On the last-named day, Gruetter & Joers, dealers in furniture at Lincoln, sold to Stuart certain real property in that city for $67,500, upon which there was at the time a mortgage for $30,000 bearing interest at the rate of 6 per cent per annum. The terms of the contract were that Stuart should assume the mortgage debt, deliver to Gruetter & Joers his stock in the Capital National Bank as of the value of $18,000, meet the taxes on the property which then amounted to $250, and pay the balance of the price in cash; Gruetter & Joers to take a lease of the real estate for ten years, at $6,000 per year. At the time of this agreement, Stuart paid $1,000 to bind the bargain. On the 22d day of December, 1892, Gruetter & Joers made their deed to Stuart for the real estate; and Stuart delivered to them his certificates of shares of stock, having signed the blank forms of powers of attorney indorsed thereon, and paid the balance of the agreed price in cash, the taxes on the property, and the interest that had accrued on the mortgage.

On the 3d day of January, 1893, the certificates of stock, with the blank powers of attorney indorsed thereon, were returned to the bank, and new certificates were issued to Gruetter & Joers.

The bank closed its doors within less than three weeks after the stock was transferred on its books to Gruetter & Joers, its total assets being about $900,000, and total liabilities $1,463,013.17. Its bills receivable on hand were $519,600, of which $58,596.82 were good, $141,393.27 were doubtful, and $319,611.90 were worthless. Its bills receivable not on hand amounted to $141,000, of which only $10,000 were worth anything.

4] *The original bill was against Stuart alone. But a demurrer for want of parties having been sustained, an amended bill was filed against Stuart, Gruetter, and Joers.

The amended bill alleged in substance that, at the time of the transaction between Stuart and Gruetter & Joers, the former was fully advised of the failing condition and insolvency of the bank, and transferred his stock to them in anticipation of its early failure and the necessary enforcement of the liability of shareholders for the benefit of creditors, and with the intent to evade such liability and to defraud the creditors of the bank. The relief sought was a decree setting aside the transfers of stock, and adjudging that Stuart was liable as a shareholder of the bank under the assessment made by the Controller of the Currency. It was further alleged by the receiver that Gruetter & Joers were, at the time of the transfer to them of Stuart's stock, pecuniarily irresponsible persons, from whom the amount of such assessment upon each share of the stock so owned and held by Stuart could not be made by legal process or otherwise.

Stuart in his answer insisted that the sale to Gruetter & Joers was an ordinary business transaction, and denied that he had, at the time of his purchase from Gruetter & Joers, any knowledge whatever of the condition of the bank, or that he knew that the bank was then insolvent, or that he expected it to fail; that, on the contrary, he believed it to be perfectly solvent, sold and transferred his stock without any thought of the enforcement of his liability as a shareholder, and without any intention to evade such liability or to defraud the bank's creditors.

Gruetter and Joers answered, and averred that Stuart made the transfer of stock to them with full knowledge of the failing condition and insolvency of the bank, in anticipation of its approaching suspension, and with the intent to defraud the bank, its depositors and creditors, of the security afforded to such depositors and creditors, by law, and render it impossible to enforce his liability as a shareholder; also, that Stuart, with the knowledge and intent stated, represented and warranted to them that the bank was in a safe and solvent *condition, and that its stock was reasonably [5 worth $125 per share, or $18,000 in all. They also filed a cross bill against the receiver and Stuart in which the relief sought was a decree declaring the transfer of the stock standing in the name of Stuart to be fraudulent and void as against them, as well as against the receiver and the creditors of the bank, and adjudging that Stuart make full restitution to them of the amount at which such stock was received on the contract for the purchase of the real property sold and conveyed to him.

The decree in the circuit court recited—though not in the form of a finding of facts—that on and prior to January 3, 1893, Stuart was the owner of and had standing in his name upon the books of the bank the shares of stock above mentioned; that on or about December 16, 1892, and for more than eight years prior to that date, he was a member of the board of directors and of the finance committee of the bank; that on both of the above dates he had knowledge of its then existing insolvency; that at the time of the transfer of the stock he represented to Gruetter and Joers that the bank was in a solvent and prosperous condition, and that such representation was made for the purpose of inducing them to purchase the stock, and of evading and escaping his liability as a shareholder for an assessment thereon. It was then ordered, adjudged, and decreed that the sale, assignment, and transfer of the one hundred and fifty shares of stock of the Capital National Bank was wholly void as against the receiver and Gruetter and Joers; that the sale, assignment, and transfer be set aside, canceled, and held for naught; that the stock be reinstated upon the books of the bank in the name of Stuart, who was declared to be the holder and owner thereof; that Stuart, within twenty days from the date of the decree, pay to the receiver the full amount of the assessment against the stock, and that the receiver recover from him the sum of $15,000, together with interest at the rate of 7 per cent per annum, from the 10th day of July, 1893, being in the aggregate the sum of sixteen thousand, eight hundred and seventy-five and $\frac{49}{100}$ dollars; that Stuart, *within [6 twenty days from the date of the decree, make full restitution and payment to Gruetter and Joers of the amount of the purchase price of the

stock, to wit, the sum of $18,000, together with interest thereon at the rate of 7 per cent per annum, from the 3d day of January, 1893, being in the aggregate the sum of $20,905; that Gruetter and Joers be relieved from all liability to the receiver for and on account of any assessment on the stock, and in case Stuart neglected to pay each of the aforesaid sums of money, together with the costs of the suit, to be taxed by the clerk, that execution should issue therefor.

Upon appeal to the circuit court of appeals the decree was reversed, without cost to either party, and the cause was remanded with instructions to enter a decree declaring the transfer of stock from Stuart to Gruetter and Joers to be fraudulent and voidable as to the receiver of the bank; that the receiver recover of Stuart the assessment made upon him, with costs; and that Gruetter and Joers were not entitled to relief against Stuart in this suit, and their cross bill should be dismissed with costs to Stuart. 36 U. S. App. 462. In the opinion of that court it is stated that the evidence justified the conclusion reached by the circuit court as to the facts.

From the decree of the circuit court of appeals the present appeals have been prosecuted.

The shares of the capital stock of a national bank are transferable on its books in such manner as may be prescribed by the by-laws or articles of the association, and everyone becoming a shareholder by such transfer succeeds, in proportion to his shares, to all the rights and liabilities of the prior holder. Rev. Stat. § 5139.

It is also provided by statute that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Rev. Stat. § 5151.

7] *The principal inquiry in this case is whether Stuart transferred his stock to Gruetter & Joers in order to escape the liability imposed by statute upon shareholders of national banking associations. His contention is that if the transfer was absolute and to persons who were at the time solvent and able to respond to an assessment upon the shares, the motive with which the transfer was made is of no consequence.

This construction of the statute seems to find some support in the general language used in a few cases. But it will be found upon examination that those cases were dealt with upon the basis that the facts therein showed not only an intent upon the part of the shareholder to escape liability by transferring his stock, but that the transfer was either colorable or to a person who was financially irresponsible at the time of such transfer. There is no case in which this court has held that the intent with which the shareholder got rid of his stock was of no consequence; certainly, no case in which the intent was held to be immaterial, when coupled with knowledge or reasonable belief upon the part of the transferrer that the bank was insolvent or in a failing condition.

In *Germania National Bank* v. *Case*, 99 U. S. 628, 631, 632 [25: 448-450], this court, speaking by Mr. Justice Strong, said that while a shareholder of the stock of a corporation had, generally, a right to transfer his shares, and thereby disconnect himself from the corporation, and from responsibility on account of it, there were limits to that right; that it is not every transfer that releases a stockholder from his responsibility as such; and that "a transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he remains still liable." And in *Pauly* v. *State Loan & Trust Company*, 165 U. S. 606, 619 [41: 844, 849], where the previous cases in this court were reviewed, it was held to have been established that "if the real owner of the shares [of a national banking association] transfers them to another person, or causes them to be placed on the books of the association in the name of another person, with the intent simply to evade the responsibility imposed by § 5151 on shareholders of national banking *associations, such owner may be [8 treated, for the purposes of that section, as a shareholder, and liable as therein prescribed."

The safety of a national banking association, so far as its creditors are concerned, depends largely upon the security given by the statutory provision entitling creditors to look to the individual liability of shareholders, including the liability of the estates and funds in the hands of executors, guardians, and trustees holding shares of national bank stock. § 5152. One who holds such shares—the bank being at the time insolvent—cannot escape the individual liability imposed by the statute by transferring his stock with intent simply to avoid that liability, knowing or having reason to believe, at the time of the transfer on the books of the bank (*Richmond* v. *Irons*, 121 U. S. 27, 58 [30: 864, 874]), that it is insolvent or about to fail. A transfer with such intent and under such circumstances is a fraud upon the creditors of the bank, and may be treated by the receiver as inoperative between the transferrer and himself, and the former held liable as a shareholder without reference to the financial condition of the transferee. The right of creditors of a national bank to look to the individual liability of shareholders, to the extent indicated by the statute, for its contracts, debts, and engagements, attaches when the bank becomes insolvent, and the shareholder cannot, by transferring his stock, require creditors to surrender this security as to him, and compel the receiver and creditors to look to the person to whom his stock has been transferred. This court has said that "the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that

the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholders." *Richmond* v. *Irons*, 121 U. S. 27, 55, 56 [30: 864, 873, 874]. If the bank be solvent 9] *at the time of the transfer, that is, able to meet its existing contracts, debts, and engagements, the motive with which the transfer is made is, of course, immaterial. But if the bank be insolvent, the receiver may, at least, without suing the transferee and litigating the question of his liability, look to those shareholders who, knowing or having reason to know, at the time, that the bank was insolvent, got rid of their stock in order to escape the individual liability to which the statute subjected them. Whether—the bank being in fact insolvent—the transferrer is liable to be treated as a shareholder, in respect of its existing contracts, debts, and engagements, if he believed in good faith, at the time of transfer, that the bank was solvent, is a question which, in the view we take of the present case, need not be discussed; although he may be so treated even when acting in good faith, if the transfer is to one who is financially irresponsible.

The intent with which an act was done may be proved by the declarations of the party concerned, or by facts and circumstances from which the existence of the intent may be reasonably inferred.

Stuart, both in his answer, and as a witness in his own behalf, denies that the sale of his stock was with the view of escaping his liability as a shareholder. He states, also, that it was an ordinary business transaction, and so far from knowing at the time that the bank was insolvent, he believed it to be solvent and able to meet its liabilities of every kind.

But the contention of the receiver was sustained by the proof in the cause. It was in evidence that Stuart, for some time previous to the sale of his stock, had been dissatisfied with the conduct of Mosher, the president of the bank. In addition to the latter's duties as president he was in enterprises that required much attention and which must have interfered with the proper supervision of the affairs of the bank. He was connected with a manufacturing company, an insurance company, and a gas company; was interested in a company engaged in the making of staves in Arkansas; was in the skating rink business, and also in the baseball business. In addition, he had a 10] penitentiary contract, *and was a legislative lobbyist. All this was well known to Stuart when he sold his stock to Gruetter & Joers. Before that transaction, he had received an "intimation" that the next general dividend would be passed. He also had information that a large amount of the bank's money was "locked up" in real estate, and invested in worthless securities. And he was in a position to ascertain, with at least reasonable certainty, the condition of the bank at or before the sale of his stock to Gruetter & Joers. As a director he signed each of the reports made to the Controller of the Currency of the condition of the bank at the close of business on September 25, 1891, December 2, 1891, March 1, 1892, May 17, 1892, and September 30, 1892. He did not sign the report of December 9, 1892. In addition his membership of the finance committee of the bank gave him peculiar facilities to ascertain how the bank's money was being used by its president. And that he had information that made him somewhat uneasy about the condition of the bank, and its management by Mosher, is shown by his own testimony as well as by his declarations to witnesses, whose intelligence and truthfulness are not impeached by anything in the record, except the denial by Stuart that he said just what those witnesses testified that he did say. Nor is this negatived by the circumstance that Stuart and his wife had each $1,250 on deposit in the bank at the time its doors were closed. That may be accounted for by the fact, admitted by him, that he did not expect the bank to fail so soon.

When the bank failed, Mrs. King, the wife of Dr. S. H. King, had $26,105.80 on deposit there. The first intimation she received of the failure was a statement in a morning paper that the bank had closed its doors. She hurried to the residence of Stuart to ascertain what was the matter with the bank. Her account of the interview with him was as follows: "I told him the Doctor had sent me there for him to tell me about the bank, what the condition had been, and if there was anything wrong, and he sat down, and in his good, quiet way told me he did not like the way the bank had been doing for a long time. He said he did not like their going into the *Western Manufacturing [11 Company business, and he said he had a talk with Mr. Mosher about it, and he said he did not like the Arkansas business, and I asked him what that was, and he said it was a stave business, and he said he did not know of any loss of money in it, but he did not like it, and he said from that they went into the skating-rink business, and he said then he felt mad, and he said this is not banking, and I told them so, and then he said, when they went into the baseball business, I said it must be stopped; that we must stop that and do a banking business, and not run after these outside affairs, and, as near as I can give it, he said they were mad, but he told them if they did not stop that kind of business he would get out. *Q.* Who do you mean by them? *A.* Mosher and Outcalt [the cashier]; and he said one of them swore very badly and used bad language, and he said particularly Mosher, and at this time I said that the Doctor has gone to see Mosher about it, and he said if he has not gone you tell him to go to Outcalt, because he can get the truth out of Outcalt better than Mosher. And I said, Professor, [Stuart] what is the condition of the bank? Why is it closed? He says, I have known for quite a while that they had some bad debts, such as very poor paper there, amounting to about $136,000, and he says, I did not like the way they were doing. They could not do outside business and that too, and I did not like it. And, of course, anybody who knows Professor Stuart knows that would not be the way of his doing business, and he said he was in hopes they would tide it over, and he said they had some very poor paper, and he spoke of some land in a different county, and at that Mrs. Stuart came in, and he says you know I have sold out—which I had not known—and he said, well, he had traded his stock

for the Gruetter building a short time before. At this juncture Mrs. Stuart came into the room, and she says, 'It don't let you out from being responsible, does it? How long has it been?' Oh, no, he says, and then he spoke about the board of directors."

Being asked to state any further conversation she had with Stuart the same morning in reference to the bank and its condition, the witness proceeded: "He went on and told me 12]*about it, he said he had not liked the management of the bank, and felt anxious about it, and I asked him how long, and he said a long time; and he went on and repeated again what he said before about going off into side business and said he did not like their not being able to declare a dividend, and I asked him this question. I asked him why the bank was not closed in the condition it was, and asked him if he did not know that the bank's capital was impaired, and he said that it was; still he did not know, he said, about having the bank closed. And I asked if the bank had been closed we could have gotten something out of the bank, and he said he was in hopes they could tide it over, and Mrs. Stuart says, Professor, you did not expect this so soon."

Henry Gerner, a witness for the plaintiff, and a stockholder in the bank, stated that he had a conversation with Stuart before the failure of the bank as to the sale of his stock to Gruetter & Joers. Being asked to state that conversation, he said:

"Well, one afternoon I met the Professor, which was an almost daily occurrence, if I did not see him in the bank I met him on the street, and we passed the compliments of the day and some remarks, and one day in one of our conversations and talks he told me that he was contemplating making a real-estate deal. I said 'yes,' 'yes;' he says he had a proposition made him to purchase the Gruetter block down here, and it was a trade, and he said if he made the trade at all, it would be trading his bank stock and some money and assuming their liabilities, their obligations, a mortgage on the building for $30,000. I told him I thought it was rather an exorbitant price for the property; that I did not consider the building worth any such money, to which he responded that they were going to make a very good lease; they would take it for ten years—a ten years' lease on the premises at a rental of $6,000 a year. I told him I did not think it was possible for those men in the business to pay any such rent, it was too risky. Well, the Professor replied, we have to take some risk. Well, I said, I should rather, if I was in your place hold my stock and my interest in the bank. I think it is 13]better or *safer. He said he did not like the way they were doing business, he did not like the style, and a large share of the bank's capital was tied up in real estate and there was no prospect of dividends, and he preferred to do his own business and manage his own affairs. That is all there was to that conversation. *Q.* Did you have any subsequent conversation with him about the matter? *A.* Well, yes. I guess it was after he made the trade, either he told me about it or I took occasion to remark, I see you made that trade, Professor. Yes, he says, I did; he says, as I told you before I don't like Mosher and Outcalt's ways of doing business, and I shall prefer to manage my own affairs hereafter. *Q.* Did he, in any conversation you had with him, say anything about the amount of the capital stock of the bank that was tied up in real estate? *A.* Yes, some 130 or 140 thousand dollars, about 140,000 he said was tied up. *Q.* Do you remember about the time when the last dividend of the bank was returned? *A.* It was a dividend of 4 per cent declared in July, 1892; that is the last dividend I was credited with. *Q.* Did you have any talk with the respondent, A. P. S. Stuart, as to whether a dividend would be returned the 1st of January, 1893, or for the close of the year 1892? *A.* Well, only this, the Professor told me that in all probability there would be no dividend declared in January, owing to the fact that a large amount of the bank's capital was tied up in real estate, and until the amount was reduced and property converted into cash the bank could not pay any dividend."

His cross-examination was as follows: "*Q.* You say, Mr. Gerner, that he said he did not like the way that Mosher and Outcalt did the business. Did he give you in detail the management of that business he objected to, or was that the sum total of his remarks, that he did not like the way they did business? *A.* He says, oh, yes, he made comments on Mosher's being in so many things and having so many irons in the fire and paying too much attention to outside matters. As to Outcalt, I do not know whether the Professor made any comments on his conduct or not. *Q.* And the reason he gave you at that time for getting out was because he wanted *to manage his own[14 business, and he did not like the way they managed the business? *A.* He did not like the way they conducted the business."

Without referring to other facts and circumstances disclosed by the record, it is sufficient to say that the circuit court was justified by the evidence in finding that Stuart, with knowledge of the insolvency of the bank, or at all events with such knowledge of facts as reasonably justified the belief that insolvency existed or was impending, sold and transferred his stock with the intent to escape the individual liability which the statute imposed upon shareholders of national banks for their contracts, debts, and engagements. And the bank having been, in fact, insolvent at the time of the transfer of his stock—which fact is not disputed—he remained, notwithstanding such transfer, and as between the receiver and himself, a shareholder, subject to the individual liability imposed by § 5151. We will add, that as the circuit court and the circuit court of appeals agreed as to what were the ultimate facts established by the evidence, this court should accept their view as to the facts unless it clearly appeared that they erred as to the effect of the evidence. *Morewood* v. *Enequist*, 64 U. S. 23 How. 491 [16: 516]; *The Ship Marcellus* [*Baxter* v. *Camp*], 66 U. S. 1 Black, 414, 417 [17: 217, 218]; *Dravo* v. *Fabel*, 132 U. S. 487, 490 [33: 421, 422]; *Compania de Navigacion la Flecha* v. *Brauer*, 168 U. S. 104, 123 [*ante*, 398, 406].

In reference to the appeal by Gruetter & Joers but little need be said. The circuit court of appeals correctly held that the cross bill of Gruetter & Joers attempted to bring into this

suit a new and independent controversy, in which the receiver of the bank had no interest, and which could be determined upon facts not material to the issue between the original plaintiff and Stuart. The circuit court of appeals also held the cross suit to be objectionable upon additional and, we think, entirely sufficient grounds. Judge Sanborn, speaking for that court, said: "The supposed cross bill utterly fails to state a case for rescission, because it does not show that Gruetter & Joers ever returned to Stuart the $19,500 in cash which they received from this trade, or that they 15]ever released Stuart *from his agreement to pay the mortgage of $30,000 upon the property they conveyed. They could not rescind this trade and recover back that which they gave in exchange, or any part of it, while they retained at least $49,500 in value that they had received from it. The proof, if it were possible, is more fatal to them than the pleading. The record discloses the fact that they made their election and chose to affirmatively ratify this transaction more than a year before they filed this bill for its rescission. It shows that on January 23, 1893, they brought an action at law against Stuart in one of the courts in the state of Nebraska to recover of him damages to the amount of $18,000 for his fraudulent misrepresentation of the value of this stock at the time of the trade. This was in effect an action for a part of the purchase price of the real estate which they had conveyed, although it was in form an action for deceit. It could be brought and maintained on the ground that the sale or trade of the real estate was valid and its title was vested in Stuart, and on no other theory. That suit is still pending. It was a distinct and affirmative ratification of the transfer of this stock and the conveyance of the real estate, after full knowledge of all the facts, and it barred Gruetter & Joers of all right to rescind the trade thereafter. The result is that all that portion of the decree which grants to Gruetter & Joers any relief against the appellant Stuart was wrong."

The decree of the Court of Appeals is affirmed, but without prejudice to the prosecution of any claim that Gruetter & Joers may have against Stuart arising out of the transactions between them. Affirmed.

16] UNITED STATES, *Appts.*,
v.
FREDERICK S. PASSAVANT *et al.*, Composing the Firm of Passavant & Co.

(See S. C. Reporter's ed. 16-26.)

Board of general appraisers—estimate of dutiable value—market value.

1. In proceedings brought before the board of general appraisers by protests, under the act of June 10, 1890, § 14, to review the collector's decisions upon the entries of imported merchandise, the board has jurisdiction to inquire into and impeach the dutiable valuations reported to the collector by the appraiser upon which the collector assessed the rate of duty to which the merchandise was subject.
2. A German duty which is a tax by the German government on merchandise sold by the manufacturers thereof for consumption or sale in German markets, but is remitted when the merchandise is purchased in bond, or consigned while in bond for exportation, may be lawfully included by the appraiser in his estimate of dutiable value under the act of June 10, 1890.
3. The laws of this country in the assessment of duties proceed upon the market value in the exporting country, and not upon that market value less such remission or amelioration as that country chooses to allow in accordance with its own views of public policy.

[No. 129.]

Argued December 1, 1897. Decided January 3, 1898.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit certifying certain questions for the decision of this court in an action brought by the United States in the Circuit Court of the United States for the Southern District of New York, which court affirmed the decision of the board of general appraisers reversing the decision of the collector as to the dutiable valuation upon imported merchandise. *Questions answered in the affirmative.*

Statement by Mr. Chief Justice **Fuller:**

This case came to this court on the following certificate from the United States circuit court of appeals for the second circuit:

"A judgment or decree of the circuit court of the United States for the southern district of New York having been made and entered on the 30th day of January, 1895, by which it was ordered, adjudged, and decreed that there is no error in certain proceedings before the board of United States general appraisers in this cause and that their decision therein be, and the same hereby is, in all things affirmed; and an appeal having been taken from said judgment or decree to this court by the above-named appellants, and the cause having come on for hearing and argument in this court, certain questions of law arose concerning which this court desires the instructions of the Supreme Court of the United States for the proper decision of said cause.

"The facts from which said questions arise are herewith submitted and certified as follows:

"1. Certain merchandise, consisting of cotton velvets, was imported from the empire of Germany into the port of New *York by[17 the appellees in various steamers between May 22, 1891, and March 13, 1892, and was entered at the customhouse and appraised by the appraiser.

"2. The merchandise was originally imported into Germany in the gray, and was subjected to processes of dyeing and finishing, and was put in bond in that country.

"3. The collector classified the merchandise for duty under paragraph 350 of the tariff act

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect,—see note to Greely v. Thompson, 13: 397.

of October 1, 1890, at 20 per cent ad valorem and 14 cents per square yard, and assessed the said rates of duty upon the dutiable value of the merchandise decided by the appraiser and reported by him to the collector.

"4. The merchandise was of a description provided for *eo nomine* in said paragraph 350, and was properly classified for duty under that section.

"5. The invoices stated certain prices as the net invoice value of this merchandise. The invoices stated also certain additional sums, under the heading 'German duty.'

"6. This German duty is a tax which is imposed by the German government on the merchandise when it is sold by the manufacturers thereof for consumption or sale in the markets of Germany, but when the merchandise is purchased in bond, or consigned while in bond, for exportation to a foreign country, this duty is remitted by the German government, and is called 'bonification of tax,' as distinguished from being refunded as a rebate.

"7. This German duty or tax is the amount of the duty levied by the German tariff upon the goods when consumed in Germany. It is collected when the finished product goes into consumption in Germany, but is remitted when the finished product is sold in bond for exportation.

"8. The merchandise can be purchased in bond for exportation in the principal markets of Germany at the net invoice price and without paying the so-called German duty. The merchandise involved in this action was so purchased for exportation.

"9. In estimating and appraising the actual market value and wholesale price of such mer-[18]chandise at the time of exportation *to the United States in the principal markets of the country from whence imported, the appraiser decided that the dutiable value of such merchandise equalled the sums of the net invoice value and the German duty added together, and reported to the collector this decision as to the dutiable value of the merchandise appraised.

"10. In estimating this dutiable value the local appraiser added as an element of dutiable value to the net invoice value these amounts specified in the invoices and entries under the name of 'German duty.' Such amounts had been included by the importers in their entries under duress, to avoid threatened penalties under the law.

"11. The importers did not call for any reappraisement of the merchandise, but within ten days after the liquidation by the collector of each entry, and the assessment by him of the rates of duty aforesaid upon the dutiable valuation so reported to him by the appraiser, filed protests under § 14 of the act of June 10, 1890, against the decisions of the collector, of which the following protest is one, to which the others are similar:

[Here followed the protest.]

"12. The board of United States general appraisers, acting upon said protests, reversed the decisions of the collector on the ground that the so-called German duty was not a lawful element of dutiable value.

"13. Thereupon the collector applied to the circuit court of the United States for the southern district of New York by petition praying for review of said decision by the board pursuant to § 15 of the act of June 10, 1890, and the said circuit court upon said petition ordered the board of United States general appraisers to return to the circuit court the record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decision thereon, and the said board of general appraisers thereafter made such return; and the circuit court affirmed the decision of the board as aforesaid.

"14. It is admitted that Frederick S. Passavant, Karl Kotzenberg, William Sandhagen, Heinrich Meyer, Arthur W. *Watson, and [19] Oscar Passavant, the importers, are the persons composing the firm of Passavant & Company.

"Upon the foregoing facts, this court, for the proper decision of said cause, desires instruction upon the questions of law following:

"(1) In proceedings brought before the board of general appraisers by protests, under section fourteen (14) of the act of June 10, 1890, to review the collector's decisions upon the entries in this case, had the board jurisdiction to inquire into and impeach the dutiable valuation so reported to the collector by the appraiser, as above stated, and upon which the collector assessed the rate of duty to which the merchandise was lawfully subject?

"(2) If the first question is answered in the affirmative, was the 'German duty' lawfully included by the appraiser in his estimate of dutiable value?"

Mr. **John K. Richards,** Solicitor General, for appellant.

Mr. **Edwin B. Smith** for appellees.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The 13th section of the customs administrative act of June 10, 1890 (26 Stat. at L. 131, chap. 407), relates solely to the appraisement of imported merchandise, and declares that the decision of the board of general appraisers, when invoked as provided, "shall be final and conclusive as to the dutiable value of such merchandise," and directs the collector to ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise, and the dutiable cost and charges thereon.

Section 14 provides that the decision of the collector as to the "rate and amount of duties, . . . including all dutiable cost and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive," unless the importer protests and appeals to *the board of general [20] appraisers. This section clearly allows and provides for an appeal by the importer from the decision of the collector, as to both rate and amount of duties, as well as dutiable costs and charges, and as to all fees and exactions.

By § 15 it is provided that "if the . . . importer, . . . or the collector . . . shall be dissatisfied with the decision of the board of general appraisers, as provided for in § 14 of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they or

either of them, may . . . apply to the circuit court . . . for a review of the questions of law and fact involved in such decision."

In *United States* v. *Klingenburg*, 153 U. S. 93, 102 [38: 647, 650], it was said by Mr. Justice Jackson, speaking for the court: "The right of review by the circuit court is coextensive with the right of appeal to the board as to all matters except the dutiable value of the imported merchandise, as to which the decision of the board of general appraisers is by § 13 made conclusive. Now, by § 14 of the act, if the decision of the collector imposes an excessive amount of duties, under an improper construction of the law, the importer may take an appeal to the board of general appraisers, whose decision on such questions is not made conclusive as it is in respect to the dutiable value of the merchandise, and, not being conclusive, it is subject to review under the express provisions of § 15."

The purpose of § 13 is to afford the importer or collector the right to call for a reappraisement by a general appraiser or a board of general appraisers, to review the decision of the local appraiser or a general appraiser as to the correct amount of the dutiable value of the merchandise, and is distinct and separate from the remedy by protest.

Under § 7 the collector is to determine for himself the question of what is the invoice value of the goods, and, in doing this, he may add such charges as he considers to be dutiable, but his decision in this respect is not in the nature of an appraisement, and may be attacked [21] by protest. And *while the general rule is that the valuation is conclusive upon all parties, nevertheless the appraisement is subject to be impeached where the appraiser or collector has proceeded on a wrong principle contrary to law or has transcended the powers conferred by statute. *Oberteuffer* v. *Robertson*, 116 U. S. 499 [29: 706]; *Badger* v. *Cusimano*, 130 U. S. 39 [32: 851]; *Robertson* v. *Frank Brothers Co.* 132 U. S. 17 [33: 236]; *Erhardt* v. *Schroeder*, 155 U. S. 124 [39: 94]; *Muser* v. *Magone*, 155 U. S. 240 [39: 135].

These decisions were made under prior similar legislation as to the finality of the appraisement, and when an action against the collector was provided by § 3011 of the Revised Statutes as the remedy for an illegal exaction of duties. Section 3011 was repealed by the act of June 10, 1890, and in *Schoenfeld* v. *Hendricks*, 152 U. S. 691 [38: 601], it was held that such an action could not be maintained, as it was not authorized by statute, and would not lie at common law because the money was required to be paid into the treasury by § 3010, so that the importers were remitted to the remedies provided in the latter act. Whether the dutiable value in this case was erroneously increased by the unauthorized addition of an independent item to the market value, as asserted by the importers, was a question of law, and properly carried to the board of general appraisers by protest and appeal.

We think that § 14 furnishes the means of redress for illegal action, and that the board of general appraisers has the same power under this section to inquire into the legality of an assessment as it has under § 13 to see whether or not the valuation is excessive or insufficient through an error of judgment.

The first question must, therefore, be answered in the affirmative.

By § 19 of the act it is provided "that whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities, at the time *of ex- [22] portation to the United States, in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale, including the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States."

By § 10 it is made the duty of the appraisers "by all reasonable ways and means in his or their power to ascertain, estimate, and appraise (any invoice or affidavit thereto or statement of cost, or of cost of production to the contrary notwithstanding) the actual market value and wholesale price of the merchandise at the time of exportation to the United States, in the principal markets of the country whence the same has been imported, and the number of yards, parcels, or quantities, and actual market value or wholesale price of every of them, as the case may require."

Was the action of the appraiser lawful in treating the so-called German duty as an element of value in determining the actual market value or wholesale price of these cotton velvets, at the time of exportation, in the principal markets of Germany?

What was to be ascertained was the actual market value or wholesale price of the merchandise as bought and sold in usual wholesale quantities at the time of exportation, in the principal markets of the country from whence imported. This market value or price was the price in Germany and not the price after leaving that country, and the act does not contemplate two prices or two market values.

The certificate of facts states that the German duty is imposed on merchandise when "sold by the manufacturers thereof for consumption or sale in the markets of Germany;" and "is collected when the finished product goes into consumption in Germany." As the tax accrues when the manufacturer sells, his wholesale price includes it, and the purchaser who buys these cotton velvets in wholesale quantities in the German markets pays a price covering the tax, *and that is the price for [23] the merchandise when bought and sold in those markets.

Doubtless, to encourage exportation and the introduction of German goods into other markets, the German government could remit, or refund the tax, pay a bonus, or allow a drawback.

And it is found that in respect to these goods when "purchased in bond, or consigned

while in bond, for exportation to a foreign country, this duty is remitted by the German government, and is called 'bonification of tax,' as distinguished from being refunded as a rebate." The use of the word "bonification" does not change the character of this remission. It is a special advantage extended by the government in aid of manufacturers and trade, having the same effect as a bonus or drawback. To use one of the definitions of drawback, it is "a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all."

But the laws of this country in the assessment of duties proceed upon the market value in the exporting country and not upon that market value less such remission or amelioration as the country chooses to allow in accordance with its own views of public policy.

Muser v. *Magone*, 155 U. S. 240 [39: 135], is quite in point. In that case the appraisement was attacked on the ground that certain items or elements of value had been illegally added to and included in the dutiable value. The imported goods were cotton embroideries. The cloth was purchased in the gray by the importers at Manchester; sent to St. Gall, Switzerland, where the embroideries were finished; and thence exported to the United States. The importers owned the plant at St. Gall. The entered value of the goods was raised by the appraisers, and the importers protested for the reasons that commissions and nondutiable charges had been illegally included in the market value; that the goods should have been appraised at their actual market value when in the gray, adding the cost of finishing and laundering them; and on other grounds; the protest being particularly **24**]directed to the*alleged illegality of the valuation because one of the constituent elements of the value as found was illegally included. The appraisement was held conclusive in the absence of fraud, and this court, among other things, said:

"The question was not whether through the special advantages which Muser Brothers enjoyed the actual cost to them may have been less than what was decided to be the actual dutiable value of their goods, for the latter was determined by the general market value and wholesale price of all goods of the same description. . . . The issue made by the protest was that the valuation was illegal because including certain specified incidental expenses (one or more of them), as for designs, salary of buyer, clerk hire, rent, interest, and percentage on aggregate cost. Upon the theory of an ascertainable market value at St. Gall, these were matters to be considered and in a sense included, but not in the sense of substantive items independent of market value added thereto to make dutiable value. . . . The course of business at St. Gall in respect of these embroideries was peculiar, and to reach a result, in estimating the value, required the consideration of many elements making up the amount which actually represented the pecuniary basis of transactions. How these various elements impressed the general appraiser, and what grounds influenced or controlled his mental processes, were matters in respect of which he could not be interrogated, since his decision, when approved by the collector, was final and could not be reviewed and the verdict of a jury substituted. . . . The adjudication was of true market value and did not consist in taking market value and adding the cost and charges specified in § 2907 in order to get at dutiable value." *United States* v. *Kenworthy*, 28 U. S. App. 450.

As the question in this case was what was the general market value and wholesale price of cotton velvets, as bought and sold in the principal markets of Germany, the fact that the German duty was not in fact paid on such goods when exported is immaterial. Exoneration from its payment was a mere special advantage extended by the German government, *as we have said, in promotion of manu- [**25** factures and commerce. The appraiser found, as matter of fact, that the market value in Germany was equal to the invoice price plus the home duty, but he did not therefore include that item as a substantive item independent of the market value, and add it thereto to make dutiable value, though in ascertaining the market value in Germany he properly recognized the fact that that duty formed part of the purchase price in the markets of that country.

The second question must also be answered in the affirmative.

The answers indicated above will be so certified.

Mr. Justice **Brown** dissenting:

I concur in the opinion of the court that the first question requires an affirmative answer, but I think that the second question should be answered in the negative. In estimating the dutiable value of goods the collector added to the net invoice value what is known as the German duty, which was never paid, and which formed no part of the "market value or wholesale price" of these goods. It does not appear what proportion of this class of goods was imported into Germany for exportation, as distinguished from those imported for consumption, but it clearly appears that there were two entirely distinct and separate prices: one of which was paid for the goods for exportation, and the other for consumption. It seems a great hardship that the defendants, Passavant & Company, should be charged with a price which they did not pay and which was no part of the value of the goods as they were purchased by them in Germany. If there be, in fact, two wholesale prices for these goods in the same markets, I know of no reason why the collector should not recognize this fact and charge the importer with that one of the wholesale prices which he actually paid, and for which others under the same circumstances could obtain the goods.

The construction given to the statute by the court is unnecessary, *and the effect is to[**26** increase the cost of the article to the consumer by adding to the price the amount of a tax in fact not paid by the importer. For aught that appears in this record, the sales for exportation may have been ten times as great as those for domestic consumption, and we do not understand why the prices realized in the lat-

ter sales should be arbitrarily selected by the government as the actual market value or wholesale price of the articles.

I am authorized to state that Mr. Justice **Peckham** concurs in this dissent.

MARGARET HETZEL, to the Use of Theodore Bacon, Trustee, *Plff. in Err.*,
v.
BALTIMORE & OHIO RAILROAD COMPANY.

(See S. C. Reporter's ed. 26-39.)

Sufficiency of declaration—erroneous instruction—unnecessary recital—rights in an alley—damages for occupation of a street—amount of damages.

1. Damages to any part of the land may be recovered under a declaration claiming for injuries to an entire original lot which was in fact divided into sublots, all owned by the plaintiff.
2. An instruction that the testimony shows that plaintiff undertook to sell land as a whole is error as implying that it was not put on the market for sale except as a whole, where there is evidence that it was offered in parcels or as a whole, and, indeed, "in any way."
3. An unnecessary recital that plaintiff had been prevented from selling land, made in a declaration for injuries thereto, does not restrict the recovery to damages for the prevention of any particular sale.
4. Alleys which, by provisions of a deed of partition, are to be under the control of all the owners of property thereon, and not closed unless by common consent, may be closed by one who becomes the owner of all the lots thereon.
5. Damages equivalent to the injury done may be recovered for an inexcusable and persistent occupation and use of a public street in violation of law and in disregard of the rights of the owner of the adjacent property.
6. Absolute certainty as to the damages sustained need not be shown, but all that the law requires is that such damages be allowed as in the judgment of fair men directly and naturally result from the injury for which suit is brought.

[No. 110.]

Argued November 9, 1897. Decided January 3, 1898.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment of that court affirming the judgment of the Supreme Court of that District in favor of the plaintiff, Margaret Hetzel, to the use, etc., for nominal damages, without costs, in an action brought against the Baltimore & Ohio Railroad Company, defendant, for the unlawful obstruction of a street in the city of Washington. *Reversed*, and cause remanded with directions for a new trial, and for further proceedings.

See same case below, 7 App. D. C. 529.

The facts are stated in the opinion.

Messrs. **Walter D. Davidge** and **Frank W. Hackett** for plaintiff in error.

Messrs. **George E. Hamilton** and *M. J. Colbert* for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought by the plaintiff in error to recover damages alleged to have been sustained in consequence of the unlawful obstruction by the defendant in error of D street in the city of Washington.

The jury having been instructed that the plaintiff could not recover anything more than nominal damages returned a verdict for 1 cent; and for that amount judgment was entered in her favor, but without costs. And that judgment was affirmed in the court of appeals of the District.

The declaration alleged that the plaintiff was seised in fee of a certain lot of land on the corner of D and North Capitol streets in the city of Washington, "being lot numbered 1 in square 630," and that the defendant on the 24th day of April, 1873, and thereafter at divers other times, had wrongfully, unlawfully, and injuriously obstructed that street, by placing thereon freight cars, in large numbers, and suffering the same to remain unreasonably long; by loading and unloading freight in the street; by using the street for the general purposes of a freight yard; by blocking the way with wagons and carts for the loading and unloading of freight—the result being that the plaintiff, as well as the public, was prevented from passing and repassing on D street, and more particularly from using that portion of it on which plaintiff's lot abuts to gain access to or exit from her land; and that the defendant still obstructs the street in the manner stated, whereby it has "materially and seriously diminished the value of said land and prevented the plaintiff from selling the same, though she tried so to do."

*The plaintiff brought a suit in April, [28 1873, to recover damages for this obstruction, and obtained a judgment, which was paid. The present suit covers the period of three years from April, 1873. The declaration in the two suits was the same, except that in the present action the declaration contains the additional words "and prevented the plaintiff from selling the same, though she tried so to do."

In the present action the defendant pleaded: 1. Not guilty. 2. That the plaintiff's alleged cause of action did not accrue within three years before the institution of this suit. 3. That the plaintiff ought not to have or maintain her suit, because at a former term of the court she recovered judgment against the defendant in the sum of $843.86 in a suit at law for the same identical cause of action, which judgment was satisfied. Upon these pleas issue was joined in the usual form.

The bill of exceptions states that it was undisputed that the plaintiff owned unimproved land at the corner of D street northwest and North Capitol street in the city of Washington; that along the side of her premises, about where the sidewalk would be, the defendant maintained and used a railroad track for receiving and delivering freight; that the track stopped on D street, being a siding; that the street was occupied by freight cars on the track, and carts were backed against the cars, so that access to the plaintiff's premises on the street was destroyed.

It was conceded that the track was main-

tained on the street without authority of law.

At the trial below the plaintiff testified that she owned the entire lot numbered 1, in square 630; was joint owner with Judge Wylie in some 28,000 feet, but became sole owner in 1872; had not used the land since January, 1870, it being impossible to get upon it; had tried to sell it, but without success, persons wishing to buy saying that the position of the railroad rendered it useless to them; that there was no access to the land on D street except on foot, that the occupancy of the street by freight cars and the loading and unloading of freight was continuous during the entire period 29] covered by *the present suit; that during this period she made every possible effort to sell the land, having instructed real estate agents to sell or get an offer for purchase. She testified that the property was directed to be sold in any way that the agents could sell it, "to sell it or lease it or in any way to get people to build upon it;" and that she authorized its sale as one lot, but "never confined them to selling the whole." On cross-examination she said: "Of course, I gave them the whole lot to sell, but I did not forbid them to sell any part, and my instructions were to make some disposition of it, so that it could be utilized in some way; to lease it or sell it, in whole or in part, or in any way. I always told them I wanted to sell or lease the whole or any part of it, in order to get buildings put up on the front of it."

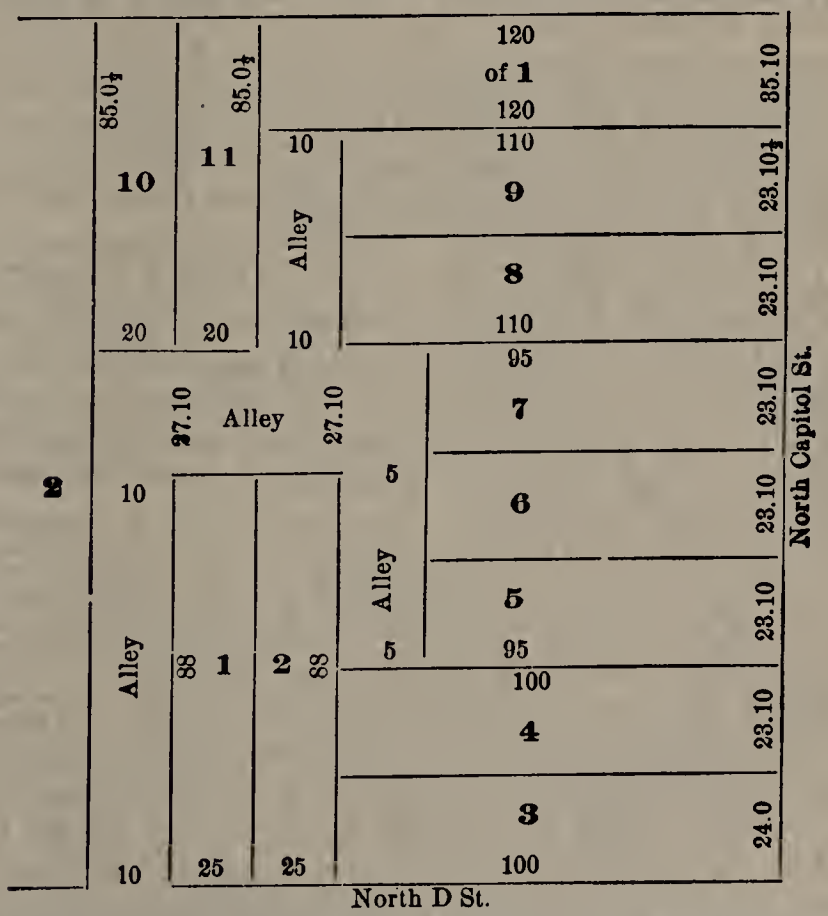
The plaintiff introduced the testimony of certain real-estate agents who had been authorized to sell the property, to the effect that the street was obstructed, that they took persons there to buy, who objected to purchasing because of the D street track; that they could readily have sold the lot for a certain price per foot, but for the obstruction of the track. She also produced the evidence "of experts as to the value of the land with the D-street track there and with that track removed."

It further appeared that an offer made for a part of the lot on the corner of D street was declined by the plaintiff because she did not choose to sell off a part, and two persons who had been authorized as agents to sell the property testified that they were instructed to sell lot one as an entirety, and were not permitted to sell in parcels.

The defendant put in evidence the record of conveyances disclosing the title, and tending to prove that the plaintiff and Judge Wylie had owned as tenants in common since 1855 all of original lot 1 except 35 feet 10 inches by a depth of 120 feet, which the latter owned in severalty; and that in December, 1871, they subdivided their holding into lots numbered from 1 to 11, with alleys, according to a plat dated January, 1872, which was put in evidence.

The plat here referred to was as follows:

30]*



Upon this plat were recorded the following words: "This is to certify that we have subdivided that part of lot 1 in square No. 630, owned jointly by us, into the lots as laid down in the above plat as lots 1 to 11, both inclusive, with the alleys for their accommodation, which alleys are exclusively for the sole benefit and use of said lots."

At the time of this subdivision Judge Wylie and the plaintiff executed a deed of partition which gave sublots 1 to 5 inclusive in severalty to the plaintiff and sublots from 6 to 11 inclusive to Judge Wylie in severalty, but did not convey the fee in the alleys. In January, 1872, Wylie conveyed to Tyler, and Tyler to the plaintiff, sublots 6 to 11 and that portion of original lot 1 (35 feet 10 inches front) just mentioned as not having been held by plaintiff and Wylie in common, but did not convey the alleys as such. Those deeds read: "Lots 6, 7, 8, 9, 10, and 11 being subdi-
31] visions of lot 1, in square *No. 630, on the ground plan of said city, according to the metes and bounds, covenants and conditions set forth and described in the deed of partition, dated December 28, 1871, entered into by and between Andrew Wylie and Mary C., his wife, and the said Margaret Hetzel, and recorded with plat of subdivision annexed thereto; . . . also all that part of said lot 1 in said square No. 630, at the northeast corner thereof, fronting on North Capitol street 35 feet and 10 inches by a depth of 120 feet, together with all the improvements, ways, easements, rights, privileges, and appurtenances to the same belonging or in any wise appertaining, and all the remainders, reversions, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever, whether at law or in equity, of the said party of the first part of, in, to, or out of the said piece or parcel of land and premises."

The partition deed above referred to contained the following among other clauses: "And the said parties Andrew Wylie and Margaret Hetzel do and each of them doth hereby mutually covenant and agree to and with each other as follows: That the said Margaret Hetzel, her heirs and assigns, shall have the right to erect any structure or building from lot number 1 on D street north over or across the alley entering from that street on condition that an open space of 10 feet in width and 12 feet in height shall at all times be kept clear for ingress and egress for the use of the other lots in the rear bounding on the alleys and area as designated in said plan. Also that the said Andrew Wylie, his heirs and assigns, being owner or owners of lots 8, 9, and 11 in said plan, and of the abovementioned part of said lot 1 in said square not embraced in this partition, but owned at present by the said Wylie as his own individual property, fronting 35½ feet on North Capitol street by 120 in depth, may at any time in their discretion close the 10-foot alley running northward from the main area in the rear of lots 8 and 9. Also that the owner or owners of lots 4 and 5 shall have the like privi-
32]lege to close the 5-foot *alley along the rear of lot 5 and part of lot 6 so far as the main area aforesaid. Also that all these alleys and area shall be private and to be under the control of all owners of property touching thereon, and, except as hereinbefore otherwise provided, shall never be closed unless by common consent, and the owners thereof and of each of said lots shall at all times contribute their and each of their joint and equitable proportions of all proper and necessary charges for paving the said alleys and area, and keeping the same in proper condition by means of drains, sewers, or otherwise, and the same are to be for the exclusive use of said owners. And the parties hereto have annexed to this deed and made it part of the same for illustration and reference a copy of the aforesaid plan of their subdivision. In testimony whereof," etc.

The railroad company also introduced testimony tending to prove that since 1872 the property had been assessed for taxes and that taxes were paid upon it as subdivided into lots from 1 to 11.

This is substantially all the evidence set forth in the bill of exceptions.

The plaintiff presented several requests for instruction, among which were the following:

"The jury are instructed that if they shall find that the property in question was rendered unsalable by reason of the alleged nuisance, and, further, that the plaintiff in good faith was trying to sell it, an allowable method for them to estimate the measure of damages is to ascertain what the plaintiff might have obtained for the property with the obstruction there and what she might have obtained for it with the obstruction removed, and allow her the legal rate of interest—that is, 6 per cent—on the difference for so long a period, not exceeding three years, as the jury shall be satisfied that she was so continuing her efforts to sell it.

"If you shall find for the plaintiff, then, having ascertained a sum you think would, on the 24th day of April, 1876, have compensated the plaintiff, you are allowed in your discretion to add interest, not exceeding 6 per cent, upon that sum from that date, provided that you shall think that such sum without *interest is not a fair compensa [**33**
tion for all the loss you find that the plaintiff has sustained.

"If the jury shall find that the defendant so obstructed the access to and egress from the plaintiff's land that she could not use the same as such property is generally used, then the jury are at liberty to allow such damages as they shall find have resulted from the act of the defendant, irrespective of any attempt made by the plaintiff to sell the same."

Each of these instructions was refused, and to that action of the court the plaintiff at the time duly excepted.

Thereupon, the bill of exceptions states, "the court instructed the jury that the plaintiff offered her property for sale as a whole, and undertook to sell it as lot 1; that the action was for damages for her not being able to sell lot 1; that the testimony showed that even if she had received an offer for lot 1 she could not consummate the sale, because she did not own the fee in the alleys. This being so, and the defendant's counsel conceding that the structure was illegal, the court instructed the jury that the plaintiff could not recover any thing more than nominal damages, and thereupon instructed the jury to find for the plaintiff for 1 cent damages, which was done."

1. In the opinion of the court of appeals it is said that there was not a particle of evidence in the record as to the salable or rental value of the land without reference to the existence of the nuisance complained of, and that such

facts were essential to be ascertained in order to furnish a basis for estimating the damages. It is clear, however, that there was evidence before the jury "as to the value of the land with the D-street track thereon and with that track removed." It is so expressly stated in the bill of exceptions. The amounts given by the witnesses when testifying as to value were not set out in the bill of exceptions for the reason, we infer, that the real contest was as to questions of law arising upon the instructions asked by the plaintiff and the ruling of the court that the plaintiff could recover only nominal damages. The bill of exceptions was evidently prepared with reference to those questions. It must therefore be assumed, upon 34] the *record, that there was evidence as to value upon which the plaintiff was entitled to go to the jury, unless she was precluded by some principle of law from recovering anything more than nominal damages.

2. The court of appeals [7 App. D. C. 529], after observing that the instructions asked by the plaintiff were founded upon the assumption of injury to her in respect of all the lots contained in the subdivision of original lot 1, and did not propound any proper or exact rule for estimating damages, said: "But, apart from all this, the evidence upon which the prayers were founded showed a state of case quite different from that set out in the declaration. It is not upon the evidence alone, but upon the pleadings and the evidence applicable to the pleadings, that the plaintiff can in any case recover, and the one must consist with the other. The declaration here, as we have seen, proceeds as for an injury to the entire original lot, without any reference or respect to the subdivision of that lot, and that the lots made of the subdivision are separate and distinct parcels of ground, fully recognized and provided for by law; and entirely ignores the fact that the plaintiff never was in reality seised in severalty of the original lot 1, as it existed before the subdivision, and as declared upon in the declaration. The proof produced by the defendant, showing how lot 1 was originally held, and how it had been subdivided and partitioned, and how title to all the lots was acquired by the plaintiff, and their relation to each other and the streets upon which they abut, entirely negatives and refutes the case presented in the declaration, and the right of the plaintiff to recover thereon."

Undoubtedly, the declaration claims damages for the injury done to the entire original lot numbered 1 in square 630. It appears that when this action was brought the plaintiff owned all the sublots which, with the alleys as marked on the plat of 1872, constituted original lot 1. If the railroad company, by its illegal use of D street, had done injury to the land, or any part thereof within the exterior boundaries of original lot 1, we are unable to see why damages might not be recovered 35] in this action *with respect to such part as, in fact, the plaintiff owned, although she may have claimed to own more than belonged to her. In estimating the damages, the jury could take into consideration the subdivision of original lot 1, and eliminate from their calculation any sublot belonging to the plaintiff that was not damaged in salable or rental value by the nuisance in question. So, if the plaintiff did not own the alleys marked on the plat, that fact could be given proper weight in estimating the damages she was entitled to recover; that is, if damages were claimed in respect of more land than belonged to the plaintiff, the recovery could have been limited to injury done to the part that she did own.

3. The jury were instructed that the testimony showed that the plaintiff offered her property for sale as a whole, and undertook to sell it as a whole. This was error, for the instruction implied that the plaintiff had not put her property on the market except as a whole; whereas the bill of exceptions shows that while there was evidence tending to prove that she wished or preferred to sell it as a whole, there was also evidence that the plaintiff authorized her land to be sold in parcels or as a whole, indeed, "in any way."

4. The jury were also erroneously instructed that the action was for damages by reason of the plaintiff not being able to sell lot 1, and that, according to the testimony, "if she received an offer for lot 1 she could not consummate the sale because she did not own the fee in the alleys." In the first place, the action was for damages for the injury done to the value of the plaintiff's land, and the unnecessary recital in the declaration that she had tried to sell did not convert the action into one only for damages for not being able to consummate a particular sale. If the salable or rental value of the land was substantially or materially diminished by the defendant's illegal use of D street, she would be entitled to recover without proving that, on a specific occasion, she tried to sell, but failed to effect a sale. In the second place, the plaintiff's right to damages for material injury done to the land owned by her would not have been defeated even if it were true that she did not own the fee in the alleys. If the *alleys had 36] been dedicated to public use, so as to be beyond the control of those owning the abutting lots, plaintiff would nevertheless have been entitled to recover in this action for any substantial diminution in the value of her land, or of any part thereof, arising from the nuisance in question. Apart from this, we do not perceive why she might not have passed, by deed, the fee of the ground marked on the plat as alleys. By the Revised Statutes of the District of Columbia it is provided that "the ways, alleys, or passages, laid out or expressed on any plat or subdivision, shall be and remain to the public, *or* subject to the uses declared by the person making such subdivision, at all times under the same police regulations as the alleys laid off by the Commissioners on division with the original proprietors." D. C. Rev. Stat. § 480. What were the uses, in respect of these alleys, as declared by the persons who made the subdivision of lot 1? Upon the plat of the subdivision it is declared that the alleys "are exclusively for the sole benefit and use of said lots." And the deed of partition between Wylie and Hetzel expressly provides that "all these alleys and area shall be private and to be under the control of all owners of property thereon;" that except as provided they "shall never be closed unless by common consent," and that "the same are to

be for the exclusive use of said owners." Now, when the plaintiff became the owner of all the sublots of original lot 1, is it to be doubted that she could have closed the alleys altogether and have conveyed a good title to all the land constituting the original lot 1? If this be so, it was error to instruct the jury that she could not have made a good title in fee to the entire original lot as one body of land, including the alleys on which the respective sublots abutted.

5. It results from what has been said that the trial court erred in instructing the jury that the plaintiff could recover nothing more than nominal damages. In our opinion, she was entitled to recover such damages as were equivalent to the injury done to her by the defendant's inexcusable and persistent occupation and use of a public street in violation of law and in disregard of her rights as an owner of ad-[37] jacent property. *At the trial of the first case brought by the plaintiff against the railroad company on account of this nuisance, Judge Hagner instructed the jury that they might ascertain from the evidence what, in the absence of the D-street track, would be the fair value of the property in its unimproved condition during the time covered by the declaration; and if they found that the property during that period remained in that condition by reason of the track maintained and used by the defendant, then they might allow such sum as was equal to 6 per cent interest on such value, if they believed that the loss of revenue was caused wholly by the track, or a lesser sum proportionate to the effect which the maintenance and use of the track had in causing the lot to lie unproductive. This was substantially the proposition of law embodied in one of the instructions asked by the plaintiff.

What was the plaintiff's land reasonably worth, during the period covered by the declaration, if D street had not been occupied and used by the railroad company in the manner disclosed by the evidence? In the absence of the defendant's track was there a reasonable certainty that it could have been used or sold? If so, for what purpose could it have been profitably used, or for what sum could it have been sold? Was it reasonably certain that neither the original lot nor any sublot could have been used or sold while the street was obstructed by the defendant's track? These were all proper inquiries by the jury in determining what damages were equivalent to, or would fairly compensate the plaintiff for, the injury done.

Of course, in such inquiries, absolute certainty as to the damages sustained is in many cases impossible. All that the law requires is that such damages be allowed as, in the judgment of fair men, directly and naturally resulted from the injury for which suit is brought. This is the rule which obtains in civil actions for damages. They have their foundation in the idea of just compensation for wrongs done. In *United States Trust Company* v. *O'Brien*, 143 N. Y. 284, 287-289—which was an action for damages for the breach of certain covenants contained in a lease—Mr. Justice Peckham, *speaking for the[38] court of appeals of New York, when a member of that court, said: "It is clear, and so it has been held in many cases, that the rule of damages should not depend upon the form of the action. In all civil actions the law gives or endeavors to give a just indemnity for the wrong which has been done the plaintiff, and whether the act was of the kind designated as a tort or one consisting of a breach of a contract is on the question of damages an irrelevant inquiry. As was said by Rapallo, J., in *Baker* v. *Drake*, 53 N. Y. 211, 220 [13 Am. Rep. 507], the inquiry is What is an adequate indemnity to the party injured, and the answer cannot be affected by the form of the action in which he seeks his remedy." Again: "In using the words 'uncertain, speculative, and contingent,' for the purpose of excluding that kind of damage, it is not meant to assert that the loss sustained must be proved with the certainty of a mathematical demonstration to have been the necessary result of the breach of covenant by defendant. The plaintiff is not bound to show to a certainty that excludes the possibility of doubt that the loss to him resulted from the action of the defendant in violating his agreement. In many cases such proof cannot be given and yet there might be a reasonable certainty founded upon inferences legitimately and properly deducible from the evidence that the plaintiff's loss was not only in fact occasioned by the defendant's violation of his covenant, but that such loss was the natural and proximate result of such violation. Certainty to reasonable intent is necessary, and the meaning of that language is that the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract and was a probable and direct result thereof. Such a result would be regarded as having been within the contemplation of the parties and as being the natural accompaniment and the proximate result of the violation of the contract. . . . The proof may sometimes be rather difficult upon the question whether the damage was the just and proximate result of the breach of the covenant. In such case it does not *come with very good grace from the[39] defendant to insist upon the most specific and certain proof as to the cause and amount of the damage when he has himself been guilty of a most inexcusable violation of the covenants which were inserted for the very purpose of preventing the result which has come about."

We are of opinion that the court of appeals erred in affirming the judgment of the supreme court of the District.

The judgment is reversed, and the cause is remanded, with directions for a new trial in the supreme court of the District and for further proceedings consistent with this opinion.

In the Matter of the Application of LOUIS P. BOARDMAN on Behalf of William Henry Theodore Durrant for a Writ of Habeas Corpus.

(See S. C. Reporter's ed. 39-44.)

Habeas corpus, when denied—refusal of appeal—denial of stay—mandate of this court—Federal question.

1. A writ of habeas corpus must be denied if it is apparent that the only result of its issue would be the remanding of the prisoner to custody.
2. The action of the circuit court of the United States in refusing to grant an appeal in a habeas corpus case in favor of a prisoner under judgment of a state court cannot be revised on application to the Supreme Court of the United States for such a writ.
3. Error of a state court in denying a stay of execution in a capital case because of a pending appeal to a Federal court is not ground for setting the prisoner at liberty on a writ of habeas corpus, when that judgment has been superseded by the supreme court of the state, and further proceedings have been taken in the state courts.
4. If a state court, after judgment here, proceeds before our mandate of affirmance issues, its action, though not to be commended, is not void.
5. A determination by a state court that judgment of conviction in a capital case shall not be stayed, notwithstanding the pendency of an appeal which is alleged to present Federal questions, will not be interfered with by this court on a writ of habeas corpus.

[Original.]

Submitted January 7, 1898. Decided January 7, 1898.

APPLICATION made on behalf of William Henry Theodore Durrant, held in custody by the warden of the state's prison at San Quentin, California, for execution under sentence of death, for leave to file a petition for a writ of habeas corpus. *Denied.*

See same case below, 116 Cal. 179.

The facts are stated in the opinion.

Mr. **Louis P. Boardman** for petitioner.

There were no printed papers in this case.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Application was made on behalf of Durrant, held in custody by the warden of the state's prison at San Quentin, California, for execution to-day, under sentence of death, for leave to file a petition for the writ of habeas corpus.

The petition in support of general allegations that Durrant was confined under proceedings in contravention of the Constitution and laws of the United States, set forth, *in hæc verba*, two petitions for the writ presented on Durrant's behalf to the circuit court of the United States for the ninth circuit and northern district of California, on November 11, and December 31, 1897, respectively; and the action of that court in respect thereof.

The averments of these petitions must be considered in the light of §§ 1227 and 1243 of the Penal Code of California, which read as follows:

"Sec. 1227. If for any reason a judgment of death has not been executed, and it remains in force, the court in which the conviction was had, on the application of the district attorney [of the county in which the conviction is had], must order the defendant to be brought before it, or if he is at large, a warrant for his apprehension may be issued. Upon the defendant being brought before the court, it must inquire into the facts, and if no legal reasons exist against the execution of the judgment, must make an order that [the warden of the state prison to whom] the sheriff [is directed to deliver the defendant shall] execute the judgment at a specified time. The sheriff must execute the judgment accordingly."

"Sec. 1243. An appeal to the supreme court from a judgment of conviction stays the execution of the judgment in all capital cases, and in all other cases, upon filing with the clerk of the court in which the conviction was had a certificate of the judge of such court, or of a justice of the supreme court, *that in his [41 opinion there is probable cause for the appeal, but not otherwise."

It was alleged in the petition of November 11 that theretofore Durrant had been found guilty of murder in the first degree in the superior court of the city and county of San Francisco; that judgment had been rendered on the verdict, and he had been sentenced to death; that an appeal had been taken from that judgment to the supreme court of California, and the judgment affirmed. See [116 Cal. 179], 48 Pac. 75.

That on April 10, 1897, the superior court rendered a second judgment against Durrant, from which he took an appeal to the state supreme court, raising Federal questions thereon, and that that appeal was still pending and undetermined.

That on June 2, 1897, application had been made by Durrant to said circuit court of the United States for a writ of habeas corpus, which application was denied, and from that order an appeal was duly taken and perfected to the Supreme Court of the United States, but that no mandate showing the determination of that appeal had been filed in the circuit court, yet, nevertheless, judgment was entered by the superior court November 10, sentencing Durrant to be executed Friday, November 12, though that court was without authentic or official information that said appeal had been considered or determined in the Supreme Court of the United States. Hence it was charged that the judgment of the superior court of November 10 was null and void; and also because of the pendency of the appeal from the alleged judgment of April 10, 1897.

It was further averred that the circuit court on the 11th of November denied the writ and dismissed the petition; that from this order petitioner prayed an appeal, presenting a notice of appeal, assignment of errors, citation, and bond for costs; and that the circuit court re-

NOTE.—*As to jurisdiction of United States courts*, see notes to *Re* Reinitz (C. C. S. D. N. Y.) 4 L. R. A. 236; and State, Cochran, v. Winters (Kan.) 10 L. R. A. 616.

As to province and office of writ of habeas corpus; when may be used,—see note to Blythe v. Denver & R. G. R. Co. (Colo.) 11 L. R. A. 615.

As to presumption of innocence in habeas corpus proceedings, see note to State v. Jones (N. C.) 22 L. R. A. 678.

fused to allow an appeal, or to permit the papers to be filed, and neither of its judges would approve the bond, nor sign the citation.

The petition of December 31 reiterated in substance the allegations of the previous appli-
42] cation, and insisted that by *reason thereof an appeal from the final order of the circuit court of November 11 was actually pending in the Supreme Court of the United States, and suspended further proceedings against Durrant, but that, nevertheless, the superior court on December 15, 1897, though without authority and contrary to the Constitution and laws of the United States, entered an order directing the execution of Durrant on January 7, 1898; that from this order Durrant had prosecuted an appeal to the supreme court of California, which was still pending and undetermined; and that the judge of the superior court and the justices of the supreme court had refused to grant a certificate of probable cause, so that the proceedings below were not stayed by said appeal.

That Federal questions had been raised before the superior court and that the disposition thereof was brought under review by the appeal to the supreme court, and that if the order of December 15 were carried into effect, petitioner would be deprived of the right to prosecute a writ of error from the Supreme Court of the United States to the final judgment of the supreme court of California in respect of such Federal questions; as was true also of the appeal from the judgment of April 10, 1897.

Some other matters were put forward in the petitions, but these were not insisted on at the bar, and were so evidently destitute of merit as to require no observations.

The contention here practically rested on these grounds:

First. That the judgment of the superior court on the 10th of November was void because the mandate of this court on the appeal from the final order of the circuit court of June 2 had not been sent down; and that although the circuit court denied an appeal from its final order refusing the writ and dismissing the petition of November 11, still the appeal should be regarded as duly perfected, and that for that reason, or because the circuit court could not arbitrarily defeat such appeal, petitioner was entitled though the interposition of this court by the issue of the writ applied for to be placed in the same position as if the appeal had been granted.

Second. That as the appeals from the judg-
43] ments of *April 10 and of December 15 involved Federal questions and were still pending in the state supreme court, the execution of the sentence in accordance with the state statutes would deprive petitioner of the right, privilege, and immunity of suing out writs of error from this court to revise the final judgments of that court when entered on those appeals.

The rule was laid down in *Spies* v. *Illinois*, [*Re Spies*], 123 U. S. 131 [31: 80], that when application is made to this court for the allowance of a writ of error to the highest court of a state, the writ will not be allowed if it appear from the face of the record that the decision of the Federal question which is complained of was so clearly right as not to require argument. And the same rule governs an application to us for the writ of habeas corpus, which must be denied if it be apparent that the only result, if the writ were issued, would be the remanding of the petitioner to custody, for the object of the writ is to ascertain whether the prisoner applying for it can legally be detained, and it is the duty of the court, justice, or judge granting the writ, on hearing, "to dispose of the party as law and justice may require." Rev. Stat. § 761; *Iasigi* v. *Van De Carr*, 166 U. S. 391 [41:1045]; *Ekiu* v. *United States*, 142 U. S. 651 [35:1146].

The action of the circuit court in refusing to grant the appeal from its final order of the 11th of November, on the petition then presented, and in declining to entertain the petition of December 31, cannot be revised on this application, and the inquiry really is whether these petitions furnish any ground for the conclusion that if the writ were granted the prisoner's detention would be found illegal.

As it appears on the face of the record that the judgment of November 10 was superseded, and that petitioner is held for execution under the judgment of December 15, it manifestly follows that we could not enlarge the prisoner as unlawfully detained on the ground that if the circuit court had allowed an appeal from its final order of November 11, further proceedings below would have been sta ed until that appeal was disposed of.

Nor could we hold that that final order was erroneous because the judgment of November 10 was entered in the *absence of our man-
44] date on the affirmance of the final order of the circuit court of June 2, 1897. The judgment of this court affirming that order was rendered, as we know from our own records, November 8 (See 168 U. S. 705 [42: ——] mem.), and we have decided that if the state court after judgment here proceeds before our mandate issues, its action, though not to be commended, is not void. *Re Jugiro* [*Jugiro* v. *Brush*], 140 U. S. 291 [35:510].

In this instance the state trial court did so proceed, but, in the due and orderly administration of justice, its judgment was superseded by the supreme court of the state, which, it is proper to note, granted the certificate of probable cause on the principal ground that the lower court could not exercise jurisdiction to fix a day for the execution of sentence against defendant in the absence of authentic and official evidence of the disposal of the appeal to this court. *People* v. *Durrant*, 50 Pac. 1070.

In respect of the alleged abridgment of petitioner's privilege or immunity to sue out writs of error from this court to revise the final judgments of the state supreme court on appeals therein pending, and particularly the appeal from the judgment of the superior court of December 15, which, it was argued, raised Federal questions, it is sufficient to say that it was for the trial judge or the supreme court of California to determine whether or not the judgments complained of should be stayed or superseded, and with such determination it is not our province through this writ to interfere, nor do the statutory provisions in that behalf, in themselves, involve any infraction of the Constitution or laws of the United States.

Kohl v. *Lehlback*, 160 U. S. 293 [40:432]; *Bergemann* v. *Backer*, 157 U. S. 655 [39:845]; *Andrews* v. *Swartz*, 156 U. S. 272 [39:422].

All the averments in the papers, as well as a petition for a writ of error, which had been previously presented to some of our number and denied, as was admitted, and the suggestions urged at the bar, have been duly considered, with the result that the court is unanimously of opinion that if the writ should be awarded it would be its duty on the return thereto to remand the petitioner. *The application is therefore denied.*

45] BUILDING & LOAN ASSOCIATION OF DAKOTA, *Appt.*,
v.
M. S. PRICE *et al.*

(See S. C. Reporter's ed. 45-55.)

Jurisdictional amount—inference.

1. The matter in dispute on foreclosure of a building and loan association mortgage securing a bond for $4,000, by which the obligor, who has bid $2,000 premium for an advancement of $2,000, agrees to pay $4,000 in nine years, with interest on $2,000 at 6 per cent, or, instead of this payment, to pay such interest and also $24 per month as monthly dues on forty shares of stock until each share is paid up to the value of $100, and then surrender said stock,—cannot be assumed for the purpose of jurisdiction, after some payments of dues have been made, to be merely $2,000 money loaned with interest thereon, less payments made thereon, on the ground that the agreement for monthly dues was only another name for interest, where the amount claimed in the complaint to be due is $2,800, together with some interest.
2. The inference cannot be indulged, on the question of jurisdictional amount, that said scheme is a mere cover to conceal an usurious exaction of interest for the loan of a sum of money not exceeding in any event $2,000.

[No. 158.]

Submitted December 9, 1897. Decided January 10, 1898.

APPEAL from a judgment of the Circuit Court of the United States for the Northern District of Texas sustaining a demurrer and dismissing a suit for want of jurisdiction brought by the Building & Loan Association of Dakota against M. S. Price *et al.*, for the foreclosure of a mortgage. *Reversed*, and case remanded with directions for further proceedings.

The facts are stated in the opinion.

Messrs. **J. H. Hauser** and *C. W. Starling* for appellant.

Messrs. **W. S. Simkins** and *T. E. Conn* for appellees.

NOTE.—*Jurisdiction of United States Supreme Court dependent on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy,*—see note to Gordon v. Ogden, 7: 592.

Mr. Justice **Peckham** delivered the opinion of the court:

The appellants herein commenced this action against the defendants in the circuit court of the United States for the northern district of Texas, the complaint in which was filed on the 3d of October, 1895. The defendants demurred on the ground that the court had no jurisdiction of the several subject-matters set forth in the complaint, one of the objections being that the matter in dispute did not exceed $2,000, exclusive of interest and costs.

The cause was heard in the circuit court, the demurrer was sustained, and the bill dismissed with costs and without prejudice, for want of jurisdiction of the subject-matter in controversy. The complainant appealed to this court, which appeal was allowed and granted solely upon the question of the jurisdiction of the circuit court, and that question alone has *been certified. Whether the bill shows [46 facts sufficient to invoke the consideration of a court of equity is not such a question of jurisdiction as is referred to in the judiciary act of March 3, 1891, and we have therefore no concern with that question. 26 Stat. at L. 826, chap. 517, § 5; *Smith* v. *McKay*, 161 U. S. 355 [40: 731].

The decision of the only question before us depends upon whether the allegations contained in the bill of complaint show the matter in dispute to be of sufficient value to give the circuit court jurisdiction.

The appellant was incorporated under the laws of the state of South Dakota, and has its principal place of business in the city of Aberdeen, in that state. The action was brought for the purpose of recovering the amount of an alleged debt, damages, and costs against the defendants Price, Rothschild, and Miller, and for a decree of foreclosure against the defendants H. M. Price and W. B. Luna, under a certain mortgage and vendor's lien on the premises described therein.

The bill alleges, among other things, that on the 1st of January, 1890, one Jacob Rothschild applied for membership in the complainant's association and subscribed for forty shares of its capital stock, which application was accepted, and on that day a certificate for forty shares of the capital stock was issued and delivered to him, and he paid the application or subscription fee due thereon, and the stock was accepted and received by him upon the terms and conditions therein set forth, and he thereupon became a member of the association and the holder and owner of forty shares of its capital stock.

The bill then proceeds as follows:

"3d. Your orator further shows that on or about the said 1st day of January, 1890, the said Jacob Rothschild, being then and there a stockholder in your orator and entitled under the rules, regulations, and by-laws to make application for an advancement on his said stock, made his application to your orator for an advancement of $2,000 in anticipation of the maturity value of his said forty shares of stock, and in competition with other bidders for the funds of your *orator bid as a premium [47 for the privilege of obtaining such advancement the sum of $50 per share and offered as security for the continued payment *for* the month-

ly dues on said forty shares of stock and the interest on said advancement the real estate hereinafter described; and your orator further shows that said application and bid were made in accordance with the rules, regulations, and by-laws of said association, and were duly accepted and approved by your orator's board of directors, and the advancement applied for was duly made, and the amount due thereon was duly paid to the said Jacob Rothschild; that said advancement was made by your orator on the faith and in the expectation that the said Rothschild would, according to his agreement, continue the monthly payment on his said forty shares of stock until such stock should have become fully matured and of the value of $100 per share.

"4th. Your orator further shows that on or about the 1st day of February, 1890, the said Jacob Rothschild and the defendant, Bertha Rothschild, for and in consideration of the advancement so made and for the purpose of securing the continued payment of the monthly dues on said stock, made, executed, and delivered to your orator, and thereby promised and agreed to comply with the terms of a bond, of which the following is substantially a copy:

'Know all men by these presents, that Jacob Rothschild and Bertha Rothschild, his wife, of the county of Dallas, and state of Texas, are held and firmly bound unto the Building & Loan Association of Dakota, in the city of Aberdeen, and state of South Dakota, in the sum of four thousand ($4,000) dollars, lawful money of the United States of America, to be paid to the said association, its certain attorney, successors, or assigns, at its home office in Aberdeen, South Dakota, to which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, firmly by these presents.

'Sealed with our seals, and dated at Aberdeen, South Dakota, this 1st day of February, 1890. 48]* 'The condition of this obligation is such that, whereas, said Jacob Rothschild has bid, in accordance with the by-laws of said association, the sum of two thousand ($2,000) dollars, as and for a premium for the advancement to him by said association of $2,000, by way of anticipation of the value, at their maturity, of forty shares of the capital stock of said association, now owned by said Jacob Rothschild and, whereas said association has this day advanced to said Jacob Rothschild the sum of $2,000, in consideration of said premium, and by way of said anticipation:

'Now, therefore, if the above-bounden Jacob Rothschild and Bertha Rothschild, their heirs, executors, and administrators, or any of them, shall well and truly pay or cause to be paid unto the said association, its certain attorney, successors, or assigns, at its home office, on or before nine years from date hereof, the just sum of $4,000 as aforesaid, together with interest on $2,000, at the rate of 6 per cent per annum, from the 1st day of February, A. D. 1890, until paid, payable monthly in advance; or shall well and truly pay, or cause to be paid, unto said association, its certain attorney, successor, or assigns, at its said home office, the sum of twenty-four and $\frac{00}{100}$ dollars on the 1st day of each and every month hereafter, as and for the monthly dues on said forty shares of capital stock of said association now owned by the said Jacob Rothschild, and by him hereby sold, assigned, transferred, and set over to said association as security for the faithful performance of this bond, and shall also well and truly pay, or cause to be paid, all instalments of interest aforesaid, and all fines which become due on the said stock, without any fraud or further delay, until said stock becomes fully paid in and of the value of $100 per share, and shall then surrender said stock to said association; then, and in either of such cases, the above obligation to be void, otherwise of full force and virtue.

'Provided, however, and it is hereby expressly agreed, that if, at any time, default shall be made in the payment of said interest, or the said monthly dues on said stock, for the space *of six months after the same, or any[49 part thereof, shall have become due, or if the taxes and assessments on the property mortgaged to secure the faithful performance of this bond be not paid when due, or if the insurance policy or policies on the said mortgaged property be allowed to expire without renewal, then, and in either or any such case, the whole principal sum aforesaid shall, at the election of said association, its successors or assigns, immediately thereupon become due and payable, and the sum of $4,000, less whatever sum has been paid said association, as and for the monthly dues on said forty shares of said capital stock, at the time of said default, may be enforced and recovered at once as liquidatad damages, together with and in addition to, all interest and fines then due, and all costs and disbursements, including said taxes, insurance, and assessments, which have been paid by said association, anything hereinbefore contained to the contrary notwithstanding.

'Jacob Rothschild. [Seal.]
'Bertha Rothschild. [Seal.]

'Signed, sealed, and delivered in presence of—

'W. L. Hall.
'C. S. Crysler.'

"5th. Your orator would further show that, on the 1st day of February, 1890, the said Jacob Rothschild and the defendant Bertha Rothschild, in order to better secure your orator for the money advanced by your orator as aforesaid and in all their agreements, obligations, and contract as aforesaid, made, executed, and delivered to your orator their certain mortgage or deed of trust, with power of sale, in which Charles S. Crysler was made trustee on the following described tract or lot of land, situated in the city of Dallas, county of Dallas, and state of Texas, and more particularly described as follows:

(Here follows description of property.)

"6th. Your orator would further show that it is recited in said deed of trust, among other things, that the said Jacob Rothschild is a member of the Building & Loan Association *of[50 Dakota, and is the owner of forty shares of the capital stock thereof, the monthly payments of which amount to $24; and it is further recited that said deed of trust is given for the purpose of securing the aforesaid bond, the nature of which bond is fully set forth in said deed of trust.

"7th. Your orator would further show that it is stipulated in said deed of trust that if the said defendants shall well and truly pay or cause to be paid the sum of $4,000, together with the interest above specified, within the time and in the manner as in said bond specified, or shall pay or cause to be paid, at the home office of said association, the instalments of interest as they become due on said stock, until said stock becomes fully paid in and of the value of $100 per share, and before any of said instalments of interest or monthly payments shall have been past due for a period of sixty (60) days, and shall then surrender said stock to said association in payment of said bond, and shall pay the taxes and assessments and shall keep and perform all and every of the conditions of said bond, then this deed shall be void and the property hereinbefore conveyed shall be released at the cost of the parties executing the said bond, but otherwise to continue in full force and effect; but if default be made in the payment of said sum or sums of money or any instalment of interest thereon or of any monthly payment of stock for the period of sixty (60) days after the same shall be due or any part of either or in the payment of taxes at the time or times specified for payment or in any condition in said deed of trust contained, then or in either or any such case the whole principal sum or sums secured by this trust deed and the interest thereon accrued up to the time —such default shall, at the election of your orator, its successors or assigns, or its or their agent, become thereupon due and payable immediately upon said default. Whereupon the trustee in said trust deed is authorized and empowered to sell said premises in accordance with the stipulations contained in said instrument, and with the proceeds of said sale to pay the expenses of sale and all sums of money due by the terms of said bond so in default, with all interest due thereon, and all taxes, if any, due to said association.

51] *"8th. Your orator further shows that said forty shares of stock have not been withdrawn, nor have they matured or become of the par value of $100 per share; that subsequent to the execution, delivery, and record of the aforesaid deed of trust the said Jacob Rothschild and Bertha Rothschild conveyed the aforesaid premises to the defendant Sophia Miller, who, as a part of the purchase price for said premises, assumed and agreed to pay the said bond in the sum of $4,000, secured by the aforesaid deed of trust lien, retaining a vendor's lien in said deed of conveyance to secure the payment of the aforesaid sum of $4,000; that subsequently the said Sophia Miller conveyed said premises in like manner to the defendant M. S. Price as her separate property, who, and as a part of the purchase price therefor, assumed or agreed to pay said bond secured by said deed of trust lien, said Sophia Miller retaining a vendor's lien for the payment thereof and for the payment of the other portions of the purchase money, by virtue of which she may claim some interest in the aforesaid premises; that W. B. Luna also claims some interest in the aforesaid premises, which interest, if any, is subsequent and inferior to that of your orators.

"Your orator further alleges that it is now the owner and holder of the said bond and deed of trust. Your orator further shows that the said defendants have not paid said principal sum of $4,000, nor any part thereof; that the said defendants have not continually paid the monthly dues on said forty shares of stock, nor the monthly instalments of interest as provided in said bond, but that defendants have paid no part of said dues or interest except the sum of twelve hundred dollars ($1,200) as and for the said monthly dues for the month of February, 1890, to and including the month of March, 1894, and the further sum of $500 as and for the interest, as in said bond provided, for the month of February, 1890, to and including the month of March, 1894.

"Your orator further shows that default has been made in the payment of the monthly dues on said forty shares of stock and the monthly instalments of interest on *said advance- [52 ment; that more than six months have elapsed since the first monthly instalment of interest and dues so in default became due and payable, and your orator elects to declare the whole sum named in and secured by said bond and deed of trust to be immediately due and payable.

"9th Your orator further shows that there is now due and owing your orator from Bertha Rothschild, Sophia Miller, H. M. and M. S. Price, under, and by virtue of the terms of said bond the sum of four thousand dollars ($4,000), less the sum of twelve hundred dollars ($1,200), paid to your orator as the monthly dues on said forty shares of capital stock at the time of the aforesaid default, aggregating $2,800, together with and in addition to interest on $2,000 at the rate of 6 per cent per annum, from April 1, 1894."

The complainant then prays for a decree against defendants for the amount of the above-named debt, damages, and costs, and for a decree of foreclosure of the mortgage above set forth.

We think upon the face of this pleading the matter in dispute exceeds the amount of $2,000 exclusive of interest and costs. 25 Stat. at L. 433, chap. 866.

The by-laws of the complainant are not made a part of the bill and they cannot be referred to for the purpose of aiding or marring the pleading itself. In truth, they are not in the record, and we are ignorant of their contents, except as some matters set forth in the bill are alleged to be in conformity with certain of their provisions. Nor can the inference be indulged, on a question of jurisdictional amount, that the whole scheme is a mere cover to conceal a usurious exaction of interest for the loan of a sum of money not exceeding in any event $2,000. No such legal inference arises from the fact stated in the bill. On the contrary, it appears on the face of the bill that the company was duly incorporated by legislative act; that Rothschild, the original owner of the stock, applied for membership in the company, subscribed for forty shares thereof, and promised to pay for it in the manner stated. We cannot assume, as a matter of legal *inference, [53 that the circumstances set forth in the bill constitute a cover for usury, and we must take those allegations as they are made and assume their truth for the purpose of our decision.

The bill shows an application to complainant for an advance of $2,000 in anticipation of

the maturity value of the shares of stock owned by Rothschild; that the application was granted and the advance applied for duly made and the amount paid to Rothschild, and that it was made on the faith and in the expectation that he would, according to his agreement, continue the monthly payments on his stock until it became fully matured and of the value of $100 per share. The bond given as part security for the repayment of this advance contains distinct contracts. The obligor agreed to pay in nine years from the date thereof $4,000, and interest on $2,000 at 6 per cent from February, 1890, until paid, the interest being payable monthly in advance; or, instead of this payment, he agreed to pay $24 on the first of every month at the home office of the company as monthly dues, being at the rate of 60 cents per month on each share, there being forty shares of stock, and he agreed to continue these payments until the stock became fully paid up and of the value of $100 per share, when he was to surrender it to the company, and he agreed also to pay the interest as stated above.

We cannot assume, as against the allegations contained in the bill, that the payment of these monthly dues upon the contract was pursuant to an agreement to pay interest on the loan, and that such payment was merely another name for interest. It is alleged to be separate and distinct from that, and it is set up as a material portion of the obligation of the borrower who, by subscribing for the shares and being accepted, etc., thereby became a shareholder and entitled to dividends and profits coming to the shares he held. Upon default in either of these distinct obligations, to pay interest and to also pay his monthly dues, the whole sum at the option of the association became due less whatever sum had been paid it as the monthly dues at the time the default might be enforced. The bill here shows that there had been a de-
54] fault *for six months, and that there was due from defendants at commencement of suit the sum of $4,000 less the sum of $1,200 of monthly dues which had been paid up to and including March, 1894, leaving due the sum of $2,800, together with and in addition to the interest on $2,000, at the rate of 6 per cent per annum, from April, 1894.

The matter in dispute, therefore, is not merely $2,000 money loaned, together with the interest on that sum, but the claim on the part of the complainant is for the payment of the principal sum above stated, which exceeds the sum of $2,000, exclusive of interest and costs. All these facts are admitted by the demurrer.

The nature of this association is not very clearly set forth in the bill, but it is probably not materially different from those which have been incorporated to a great extent in many different states, and referred to generally in Endlich in his work on Building Associations.

A question somewhat similar to this has been decided in *Richard* v. *Southwestern Building & Loan Association*, 21 So. 643, 49 La. Ann. 481, where it was held that a loan of this nature was not to be treated as usurious, for the reason that the payments supposed to constitute the usury were by the terms of the contract made upon the stock debt and not upon the loan. To the same effect is *Equitable Building & Loan Association* v. *Vance* [49 S. C. 482], 27 S. E 274, supreme court of South Carolina, May, 1897.

The stock is not, as is claimed by counsel for appellee, a mere fiction. It is issued, it is to be assumed on this appeal, in accordance with the provisions of the charter of the complainant, and the owners of it are entitled to share in the profits of the corporation, which it is supposed it will be enabled to make during its existence, and his position of shareholder is entirely separate from his position of borrower from the company.

Without determining any of these questions on the merits, we think the matter in dispute was within the jurisdiction of the circuit court, and we therefore reverse the *judgment [55 dismissing the bill, and remand the case to the circuit court with directions to take such further proceedings as may be in conformity with this opinion.

Reversed.

FANNIE P. WILLIAMS *et al.*, *Appts.*,
v.
JOHN W. PAINE *et al.*

(See S. C. Reporter's ed. 55–80.)

Maryland laws – conveyance by married woman —power of attorney—13 Stat. at L. 531—continuance of agency—power of attorney, when not revoked by war—estoppel—agreement to convey—deed by attorney—curing defective conveyance—possession necessary.

1. Under the laws of Maryland in force in the District of Columbia in 1859, it was then competent for a married woman outside of the district to execute, with her husband, a sufficient power of attorney to convey her lands therein, if acknowledged by her in the manner a deed of her lands was required to be acknowledged.
2. When the power is given to a married woman by law to convey directly, she can by the same ceremonies authorize another to do the act for her.
3. A married woman having power to convey lands directly by a conveyance in which the husband joins and which she privately acknowledges has the power to execute a power of attorney in the same mode, to authorize a conveyance by an agent.
4. A legislative recognition of the right of a married woman to make a power of attorney is made by the act of Congress to quiet titles (13 Stat. at L. 531) which provides that such powers of attor-

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NOTE.—*As to power of attorney; revoked by death or insanity of principal or agent; when irrevocable,* —see note to Hunt v. Rousmanier, 5: 589.

As to property rights; estoppel of married woman, —see note to Wadkins v. Watson (Tex.) 22 L. R. A. 779.

As to injunction against sale of wife's property, see note to Parsons v. Hartman (Or.) 30 L. R. A. 112, 113.

As to validity of deed from wife to husband, in equity, see note to Rioo v. Brandenstein (Cal.) 20 L. R. A. 702.

As to deed to married woman, see note to Central Land Co. v. Laidley (W. Va.) 3 L. R. A. 826.

As to agent's power to use property of his principal for payment of his own debt; on sale of property; on collections; pledging property,—see note to Gerard v. McCormick (N. Y.) 14 L. R. A. 234.

ney shall be effectual in case they shall have been acknowledged in a way that would be sufficient for a deed of conveyance.

5. Where it is the manifest interest of the principal that the agency, constituted before the war, should continue, the assent of the principal will be presumed.

6. A power of attorney was not revoked by the breaking out of war and the fact that the makers went within the Confederate lines, where it authorized the sale of vacant, unimproved land in the city of Washington subject to burdensome taxes, and it appears to have been to the interest of all parties that it should be sold.

7. A married woman, or her heirs after her death, will be estopped from claiming that her power of attorney had been revoked before it had been acted upon, if she receives her share of the proceeds of a sale by her attorney, with full knowledge of the circumstances.

8. An instrument using words of conveyance *in præsenti* will be considered as an agreement to convey, and not a conveyance, if from the whole instrument it is manifest that further conveyance was contemplated by the parties.

9. A deed executed by an attorney in fact, who annexes his power of attorney thereto, is not to be deemed a mere contract for a conveyance, rather than a conveyance itself, merely because it contains his agreement that his principals shall execute a proper deed of conveyance as soon as convenient.

10. Instruments made by parties who intended to convey and thought they had conveyed, but had not complied with the requisites necessary to make the conveyance in all things effective, are within the act of Congress curing defective conveyances.

11. Parties who subsequently came into possession of land in the District of Columbia are within the protection of the act of Congress to quiet titles (13 Stat. at L. 531) by which defective instruments are cured "in favor of parties in actual possession claiming under and through such deeds."

[No. 114.]

Argued November 29, 30, 1897. Decided January 10, 1898.

APPEAL from a judgment of the Court of Appeals of the District of Columbia affirming the decree of the Supreme Court of that District dismissing a suit brought by Fannie T. Williams *et al.*, plaintiffs, against John W. Paine *et al.*, defendants, for the partition of land in the city of Washington. *Affirmed.*

See same case below, 23 Wash. L. Rep. 626, 7 App. D. C. 116.

Statement by Mr. Justice **Peckham:**

The appellants herein brought this suit in the supreme court of the District of Columbia **56**]for the purpose of obtaining *partition of certain lands in the city of Washington, known as square 53 of the ground plan of that city.

Upon the trial it appeared that the common source of title was one George W. Peter, who, in January, 1837, conveyed the premises to Henry Huntt and Benjamin Ogle Tayloe as tenants in common. Mr. Huntt died in 1838 intestate, leaving two daughters, Fannie and Mary, and a son named George Gibson Huntt, to whom his undivided interest in these lands descended. Fannie married an officer in the United States Army named Gibson, and Mary married an officer in that army named Robert Ransom, Jr. In May, 1859, Lieutenant Ransom was stationed at Carlisle Barracks in Pennsylvania, and at that time he and his wife executed and acknowledged a power of attorney to the brother of Mrs. Ransom, to convey their interest in the land, the material part of which power reads as follows:

Know all men by these presents, whereas Lieut. Robert Ransom, Jr., of the United States Army, and Mary his wife, in right of the said Mary, are seised in fee simple as tenants in common with the sister and brother of the said Mary, to wit, Fanny Huntt and George Gibson Huntt, and with B. O. Tayloe, of certain lots of ground in the city of Washington in the District of Columbia, which are described as follows: [Describing among others the lots in question.] To provide for the contingency of our absence we, the said Robert Ransom, Jr., and Mary my wife, do by these presents constitute and appoint and in our place put and depute the said George Gibson Huntt, of Washington city aforesaid, to be our true and lawful attorney in fact for us, and in our name, place, and stead to control, manage, grant, bargain, and sell, and in that event convey all our right, title, and interest in and to the said lots and square of ground or any part or parts thereof, or to join in and for us and in our name to sign any proceedings in partition of the said lots and square, or to appear for us in court for that purpose; and in regard to the said real estate to do, execute, and perform every act and thing necessary to be done as fully and amply as we might or could do if personally present, *and we do hereby rat-[**57**
ify and confirm all and whatsoever our said attorney in fact may legally do in the premises.

In witness whereof we, the said parties to these presents, have hereunto set our hands and seals this 23d day of May, A. D. 1859.

Witnesses present:

S. H. Graham. R. Ransom, Jr. [Seal.]
A. L. Sponsler. M. H. Ransom. [Seal.]

This paper was duly acknowledged by both Lieutenant Ransom and his wife, the latter of whom made the acknowledgment necessary to be made in the District of Columbia in order to convey real estate by a married woman.

The acknowledgment and the certificate thereof are full and complete, and taken and certified by a proper officer.

The premises in question at that time were vacant lots. Soon after the execution of this power of attorney, Lieutenant Ransom was ordered away, and, with his wife, he left the station at Carlisle Barracks and went to Fort Lyon in the western country. He was a native of one of the southern states, and when the war broke out he resigned his commission in the army and entered the Confederate service, and at the conclusion of the war he had risen in that service to the rank of general. Mrs. Ransom's brother, George Gibson Huntt, to whom the power of attorney above mentioned was given, remained in the old army. At the conclusion of the war General Ransom returned with his wife to his native state, North Carolina, where she died in February,

1881, leaving a number of children who are complainants herein. He remained in that state until his death in January, 1892.

During the continuance of the war, the children of the deceased Mr. Huntt became anxious to sell their interest in the premises in question, as the land was still vacant and unimproved, and a source of expense in the way of the payment of taxes. It was more particularly on account of Mrs. Ransom that the sale was desired, in order to aid her as far as possible by turning her interest in the lands into money. Negotiations for the sale of the prop-
58] erty were therefore commenced *some time in 1864 through a real-estate agent employed by Mr. Walter S. Cox, a distant relative of the parties and then a practising lawyer at the bar of the District, now one of the justices of the supreme court thereof. These negotiations resulted in the sale of all their interest in the property to Mr. Tayloe, the owner of the other half interest therein, and deeds were duly given therefor by Mrs. Gibson and Mr. Huntt to Mr. Tayloe, and on the 29th of November, 1864, Mr. Huntt, assuming to act under the power of attorney already mentioned, executed, acknowledged, and delivered to Mr. Benjamin O. Tayloe a paper which reads as follows:

Know all men by these presents, that I, George Gibson Huntt, by virtue of the annexed power of attorney to me from Robert Ransom, Jr., and Mary Ransom, his wife, and for and in consideration of the sum of eight hundred and thirty-three $\frac{33}{100}$ dollars to me in hand paid by Benjamin Ogle Tayloe, of the city of Washington in the District of Columbia, the receipt of which is hereby acknowledged, have bargained and sold to said B. O. Tayloe, his heirs and assigns, all the right, title, and estate of them, the said Robert Ransom, Jr., and Mary Ransom, being one undivided third part of, in, and to those pieces of ground in the city of Washington aforesaid, known and described as lots Nos. 1 and 3 in square No. 5, lot No. 10 in square No. 14, lots Nos. 5 and 9 in square No. 17, lots Nos. 3 and 4 in square No. 28, lot No. 3 in square No. 30, and the whole of square No. 53, with the improvements and appurtenances; and I hereby further agree in behalf of said Robert and Mary Ransom, that they shall and will, as soon as convenient, make and execute a proper deed of conveyance of said premises to said Benj'n O. Tayloe, in fee simple.

In testimony whereof I have hereunto set my hand and seal this 29th day of November, A. D. 1864.

George Gibson Huntt. [Seal.]
(Stamp, $1. G. G. H. Jan. 4th, '65.)
Witness: W. Kline.

This paper was acknowledged by Huntt be-
59] fore officers different *from those before whom proof of the power of attorney was made. It was also and on the 14th day of January, 1865, recorded in the proper land records office in the District of Columbia, together with the power of attorney already referred to.

The purchase price of the lands was paid to Mr. Cox, who promptly paid over her share to Mrs. Gibson, and also included in such payment the share belonging to Mrs. Ransom, and Mrs. Gibson duly paid over Mrs. Ransom's share to her or expended the same for her benefit and with her approval. This was done prior to the close of the war, while Mrs. Ransom was within the lines of the southern army with her husband, and Mrs. Gibson was in one of the northern states.

After the death of Mr. Tayloe, which occurred in 1868, one of his daughters, Julia Tayloe, in November, 1870, succeeded, under proceedings in partition, to all the interest of her father in the premises. She married in 1865 the defendant, John W. Paine, and the other three defendants are the children of such marriage. From the time of the division of the estate of Mrs. Paine's father, Mr. Tayloe, which took place in 1870, his daughter, Mrs. Paine, claimed to be the owner of the property, and was in possession thereof, renting it, through her husband and his agents, for a coal yard and for other purposes, and paying the taxes upon the same up to the time of her death in 1872, since which time her husband has been in possession, claiming the right as tenant by the courtesy, and his three children claim title in fee, subject to the life estate of their father.

Prior to the filing of this bill Mr. Paine had expended large sums of money in building twenty-two dwelling houses on the property at a cost of about $125,000, and has received the rents of such houses and paid the taxes on the property, the whole property being now estimated to be worth about $250,000. The sum at which the property was sold in 1864 was a fair price for the same and the best that could be secured after earnest efforts made to sell it.

After the death of Robert Ransom and his wife this bill was filed by their children, and the relief sought is to have *the paper exe [60
cuted by Mrs. Ransom's brother, George Gibson Huntt, under the power of attorney given by her husband and herself, declared null and void as a cloud upon the title of the complainants in this property, and the bill then asks that the right of the complainants to a one-sixth (Mrs. Ransom's alleged) interest in the land in fee as tenants in common with the defendants may be established against all the defendants, as well the life tenant as the reversioners, and the land partitioned accordingly.

Upon these facts the supreme court of the District of Columbia dismissed the bill with costs, and its judgment to that effect having been affirmed by the court of appeals of the District (7 App. D. C. 116, 23 Wash. L. Rep. 626), the case is now here upon the complainants' appeal from that judgment of affirmance.

Mr. **Franklin H. Mackey**, for appellants:

A married woman could not, prior to 1869 (when the married woman's act was passed), convey real estate in this District by power of attorney.

Holladay v. *Daily*, 86 U. S. 19 Wall. 606 (22: 187); *Sumner* v. *Conant*, 10 Vt. 9; *Mott* v. *Smith*, 16 Cal. 533; *Agricultural Bank* v. *Rice*, 45 U. S. 4 How. 225 (11: 949); *Rhea* v. *Rhenner*, 26 U. S. 1 Pet. 105 (7: 72).

A power of attorney by a married woman authorizing a third person to convey her real estate could always be made by her if she held her estate (as she might do) with an unqualified power to dispose of it. In that class of cases a married woman has the right and power just as if she were a *feme sole* to appoint an attorney for the purpose of selling and conveying her estate.

Adams, Eq. 45; Pom. Eq. Jur. § 1104.

The power of attorney was revoked by the war.

Story, Agency, §§ 481–484; *New York L. Ins. Co.* v. *Davis*, 95 U. S. 429 (24: 454); *United States* v. *Lapène*, 84 U. S. 17 Wall 601 (21: 693), 9 Ct. Cl. 31; *Hanger* v. *Abbott*, 73 U. S. 6 Wall. 532 (18: 939); *United States* v. *Grossmayer*, 76 U. S. 9 Wall. 72 (19: 627); *Washington University* v. *Finch*, 85 U. S. 18 Wall. 106 (21: 818); *Griswold* v. *Waddington*, 16 Johns. 438.

This rule does not apply in cases where the creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the debt, because the payment to such creditor or his agent could in no respect be construed into the violation of the duties imposed by the state of war upon the debtor.

Sands v. *New York L. Ins. Co.* 50 N. Y. 626, 10 Am. Rep. 535; *Manhattan L. Ins. Co.* v. *Warwick*, 20 Gratt. 614, 3 Am. Rep. 218; *Buchanan* v. *Curry*, 19 Johns. 137, 10 Am. Dec. 200; *Conn* v. *Penn*, Pet. C. C. 496; *Denniston* v. *Imbrie*, 3 Wash. C. C. 396.

The instrument executed by George Gibson Huntt was not a conveyance but a contract of sale, and passed no title.

Jackson, Shipley, v. *Moncrief*, 5 Wend. 26; *Gray* v. *Packer*, 4 Watts & S. 18; *Ogden* v. *Brown*, 33 Pa. 249; *Phillips* v. *Swank*, 120 Pa. 76.

Being a contract of sale and not a "deed for the conveyance of land," its defects were not cured by the act of 1865.

The receipt of the purchase money by Mrs. Ransom created no equitable estoppel in her or her heirs to claim the land.

Glidden v. *Strupler*, 52 Pa. 400; *Drury* v. *Foster*, 69 U. S. 2 Wall. 34 (17: 782); *Oglesby Coal Co.* v. *Pasco*, 79 Ill. 164; *Agricultural Bank* v. *Rice*, 45 U. S. 4 How. 225, 242 (11: 949, 957).

A married woman is not estopped to set up her title to real estate for which she has made a void deed, notwithstanding she has received the purchase money, unless she has been guilty of some fraudulent representation.

Patterson v. *Lawrence*, 90 Ill. 174, 32 Am. App. 22; *Drake* v. *Glover*, 30 Ala. 382; *Connolly* v. *Branstler*, 3 Bush, 702, 96 Am. Dec. 278; Bigelow, Estoppel, 3d ed. 513; *Carpenter* v. *Carpenter*, 25 N. J. Eq. 194.

Messrs. **Calderon Carlisle** and **William G. Johnson**, for appellees:

The power of attorney and execution thereof by George Gibson Huntt are valid and passed the legal estate of complainants' mother.

Story, Agency, § 6; 3 Washb. Real Prop. 232, 233; *Elliott* v. *Osborn*, 1 Harr. & McH. 146; *Williams* v. *Paine*, 7 App. D. C. 116, 135, 138.

The act of March 3, 1865, cured any defect in the power of attorney.

Osborn v. *Nicholson*, 80 U. S. 13 Wall. 662, (20: 696); *Randall* v. *Krieger*, 90 U. S. 23 Wall. 137 (23: 124).

The instrument executed by George Gibson Huntt is within the relief of the statute.

The war had no effect on the power of attorney in this cause, either to revoke or suspend it.

Masterson v. *Howard*, 85 U. S. 18 Wall. 105 (21: 766); *Willard* v. *Willard*, 145 U. S. 120 (36: 645); *McVeigh* v. *United States*, 78 U. S. 11 Wall. 267 (20: 82); *Washington University* v. *Finch*, 85 U. S. 18 Wall. 111 (21: 821); *Kershaw* v. *Kelsey*, 100 Mass. 561, 1 Am. Rep. 142, 97 Am. Dec. 124; *Conrad* v. *Waples*, 96 U. S. 290 (24: 724).

There is nothing in the municipal law of the United States which forbids the transaction shown in this case.

United States v. *Lee*, 106 U. S. 196 (27: 171); *Bennett* v. *Hunter*, 76 U. S. 9 Wall. 337 (19: 676); *Tracey* v. *Irwin*, 85 U. S. 18 Wall. 549 (21: 786); *Atwood* v. *Weems*, 99 U. S. 183 (25: 471).

The war suspended the remedy by suit on the contract; but it is not unlawful voluntarily to pay debts or perform contracts to alien enemies, if the payment be made or the duty be performed in our country.

Buchanan v. *Curry*, 19 Johns. 137–141, 10 Am. Dec. 200.

If the contract can be carried into execution, notwithstanding the war, without conflicting with the obligation of allegiance to either party, it will neither be dissolved nor suspended.

Manhattan L. Ins. Co. v. *Warwick*, 20 Gratt. 630, 3 Am. Rep. 218; *Ward* v. *Smith*, 74 U. S. 7 Wall. 452, 453 (19: 210).

Much slighter evidence than is contained in this record has been held by this court to establish a ratification.

Lyon v. *Pollock*, 99 U. S. 673 (25: 267).

The claim here is founded wholly upon a supposed legal infirmity in a conveyance, and the maker of that instrument asks relief from it upon no equitable grounds whatever. It is in just such cases that this court has denied relief.

Chilton v. *Lyons*, 67 U. S. 2 Black, 460 (17: 305); *Canal Bank* v. *Partee*, 99 U. S 325 (25: 390); *Bein* v. *Heath*, 47 U. S. 6 How. 228 (12: 416); *Bedford* v. *Burton*, 106 U. S. 338 (27: 112); *Gridley* v. *Wynant*, 64 U. S. 23 How. 500 (16: 411); *Gridley* v. *Westbrook*, 64 U. S. 23 How. 503 (16: 412).

Mr. Justice **Peckham** delivered the opinion of the court:

The questions in this case grow out of the execution of the power of attorney by Lieutenant Ransom and his wife while at Carlisle Barracks, Pennsylvania, in 1859.

It is claimed on the part of appellants: (1) That the power of attorney given by Mrs. Ransom, a married woman (jointly with her husband) could not operate as a valid authority to the attorney named therein to convey her real estate, because a married woman could not convey real estate by a power of attorney; (2) that the power of attorney was revoked by the war; (3) that the paper executed by the attorney in fact pursuant to the power of attor-

ney was not a conveyance, and did not pass the title of Mrs. Ransom to Mr. Tayloe; (4) that these difficulties were not cured by the act 61] of Congress entitled "An Act to *Quiet Titles in Favor of Parties in Actual Possession of Lands Situated in the District of Columbia" (13 Stat. at L. 531, chap. 110), as that act only applied to instruments conveying lands and to parties who were in actual possession at the time when the act was passed, and the paper executed by the attorney was not a conveyance, and when the act was passed the premises in question were vacant; (5) that the purchase price for her interest in that land was never received by Mrs. Ransom, and her heirs are not estopped from setting up the invalidity of the alleged contract of sale or conveyance upon any equitable grounds.

The 1st section of the above act is set out in the margin.†

62] *Very careful and well-considered opinions have been delivered in the case, both in the supreme court and in the court of appeals of the District, in which these various questions are discussed. The supreme court held that the two papers (the power of attorney and the instrument executed in pursuance thereof) were so far valid as to be subject only to such objections and defects of form of execution and acknowledgment as could be cured by legislation, and these defects were cured by the act of Congress; that this statute was constitutional, and that the power of attorney was not revoked by the war, but was in full force and valid when the deed by the attorney was executed. The court also thought the defense which had been set up, that the complainants were at the commencement of the suit and thereafter out of possession and their title denied by the defendants, who were *in actu- [63 al and full possession, was an answer to the bill for partition even if there had been no other defense proved. The bill was therefore dismissed.

The court of appeals, while discussing somewhat the defense that complainants were out of possession, did not decide the case upon that ground, but held that the power of attorney (properly acknowledged by Mrs. Ransom, as above stated) duly conferred upon the attorney in fact the legal power to convey Mrs. Ransom's interest in the land; that the war did not revoke the power; that the paper executed and delivered by the attorney in fact was not a conveyance, but only a contract for the sale and conveyance of the land; that the act of Congress did not apply to such a paper; and, lastly, that the contract of sale was within the scope of the power of attorney, and vested in the purchaser an equitable interest or estate which, upon general equitable principles, a court of equity would not devest out of the vendee in the absence of fraud, and, no fraud being alleged or shown, and the purchase money having been received by Mrs. Ransom, equity would not set aside the sale. We will now state the conclusions to which we have come regarding these questions:

And, first, as to the question whether the power of attorney executed by Lieutenant Ransom and wife to George Gibson Huntt authorized and enabled the attorney to bargain and sell and convey, or contract to convey by deed of bargain and sale, the property therein mentioned. We think it did.

Under the laws of Maryland, which were in

†Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all deeds heretofore recorded in the land records of the District of Columbia, which have been executed and acknowledged by *femes covert* (their husbands having signed and sealed the same) for conveying any real estate, or interest therein, situated in said District; and all acknowledgments of deeds heretofore recorded, as aforesaid, which have been made by *femes covert* (whether they have executed the deed or not) for the purpose of releasing their claims to dower in the lands described therein, situated as aforesaid, in which acknowledgments the form prescribed by law has not been followed; and all deeds heretofore recorded, as aforesaid, which have been executed and acknowledged by an attorney in fact, duly appointed for conveying real estate situated in said District; and all deeds heretofore recorded, as aforesaid, executed, and acknowledged, or only acknowledged by such attorney in fact, for conveying real estate situated in said District, as to which the acknowledgment was made before officers different from those before whom proof of the power of attorney was made, and as to which the power of attorney was proved before only one justice of the peace; and all deeds heretofore executed and recorded as aforesaid for the purpose of conveying land situated in said District, acknowledged out of the District of Columbia, before a judge of the United States court, or before two aldermen of a city, or the chief magistrate of a city, or before a notary public; and all deeds heretofore executed and recorded as aforesaid for the purpose of conveying land situated in said District, acknowledged by an attorney in fact, duly appointed, or by an officer of a corporation, duly authorized, who has acknowledged the same to be his act and deed, instead of the act and deed of the grantor or of the corporation; and all deeds heretofore executed and recorded as aforesaid for the purpose of conveying land situated in said District to which there is not annexed a legal certificate as to the official character of the officer or officers taking the acknowledgment, shall be, and the same are hereby, declared to be of the same effect and validity to pass the fee-simple or other estate intended to be conveyed, and bar dower in the real estate therein mentioned in favor of parties in actual possession, claiming under and through such deeds, as if such deeds had been by such *femes covert* executed and acknowledged, or acknowledged in case of a dower right, in the form heretofore prescribed by law; as if such deeds had been executed and acknowledged by the grantor in the deed; as if such power of attorney had been proved before the officer or officers taking the acknowledgment; as if such power of attorney had been proved before two justices of the peace; as if such acknowledgment had been made before any judge of a state court, or before two justices of the peace; as if such attorneys in fact or officer of a corporation had acknowledged the deed to be the deed of the grantor or of the corporation; as if such deeds had thereto annexed a certificate, in legal form, that the officer or officers taking the acknowledgment were really what they purport to be: Provided, That the certificate of acknowledgment by a *feme covert* shall show that the acknowledgment was made "apart" or "privily" from her husband, or use some other term importing that her acknowledgment was made out of his presence, and also that she acknowledged or declared that she willingly executed or that she willingly acknowledged the deed, or that the same was her voluntary act, or to that effect: And provided, also, That when the power of attorney shall have [been] executed by a *feme covert* the same shall be effectual and sufficient if there shall have been such an acknowledgment of the same as would be sufficient, under the provisions of this act, to pass her estate and interest therein were she a party executing the deed of conveyance, the record and copy thereof of any deed recorded as aforesaid to be evidence thereof, in the same manner and to have the same effect as if such deed had been originally executed, acknowledged, and recorded according to law.

force in the District of Columbia in 1859, we think it was then competent for a married woman, outside of the District, to execute, with her husband, a power of attorney to convey her lands therein, which, when acknowledged by her according to the statute relating to the acknowledgment by married women of deeds conveying their real property in the District, thereby became a valid and sufficient instrument to authorize the conveyance by attorney. It is not claimed that the acknowledgment to the power of attorney in this case was insufficient in matter of form to comply with the statute in that respect.

64] *The real contention is, assuming the acknowledgment to have been sufficient, that a married woman could not by any manner of acknowledgment appoint an attorney with authority to convey her lands. It is true that by the common law a married woman could not convey an estate of freehold owned by her unless by levying a fine or suffering a common recovery. This was altered by the statute in England of 3 & 4 Wm. IV. chap. 74, abolishing fines and recoveries, and providing other means for the conveyance of estates. In most, if not all, of the states of the Union, statutes have been passed providing for the manner in which a married woman can dispose of her real estate. These statutes were intended to and did set aside the technicalities of the common law, and they provided some simple and effectual method for the transfer of the interests of married women in real estate. The chief justice of the court of appeals of the District of Columbia, in delivering the opinion of that court in this case, has cited several Maryland statutes which the court holds were in force in this District in 1859, and those statutes are also held to provide for the case of the execution of a power of attorney by a married woman, joined in by her husband and privily acknowledged by her, authorizing the attorney in fact to convey her real property in the District.

This separate acknowledgment is provided for in probably all the statutes of the various states relating to the subject of the conveyance by married women of any interest they may have in real estate. It has been said to be the most important and essential element in the method employed to transfer such estates.

The statutes referred to in the opinion are the statutes of Maryland of 1715, chapter 47; 1752, chapter 8; and 1766, chapter 14; and in those statutes the ceremony of the private examination of the married woman and her voluntary acknowledgment of the deed were made substitutes for the private examination as to her voluntary consent in the levying of the fine or the suffering of a common recovery. After citing these various statutes of Maryland and commenting upon their provisions relating to conveyances of married women, the chief justice, in his opinion in this case, says:

65] *"These provisions of the acts of 1715 and 1766 were in force in this District in 1859, and are still in force, and they were in no respect repealed by or in conflict with the acts of Congress of the 31st of May, 1832 (4 Stat. at L. 520), and of the 20th of April, 1838 (5 Stat. at 226), relating to the execution and acknowlt of deeds for land in the District of Columbia. The acts of Congress do not profess to repeal the acts of Maryland of 1715 and 1766, or to be exclusive in their operation; but they have, in some particulars not involved here, amplified and extended the provisions of the former statutes then in force. And construing these statutes altogether, and looking to the reason and policy upon which they are founded, it would seem to be clear that in the year 1859 and down to the year 1865, it was competent to a *feme covert*, by a joint power of attorney with her husband, duly executed and acknowledged according to the forms prescribed by the statute, to execute and acknowledge a valid deed of conveyance of her real estate situate in the District of Columbia. It is well settled that a power to convey land must possess the same requisites, and observe the same solemnities in execution and acknowledgment, as are necessary in a deed directly conveying the land; and that a title to land can only be acquired and lost according to the laws of the place where the land is situated. *Clark* v. *Graham*, 19 U. S. 6 Wheat. 577 [5: 334]. In this case the property to be conveyed was specifically mentioned and described in the power of attorney; and the power of attorney was executed and acknowledged at Carlisle, in the state of Pennsylvania, by husband and wife, under their hands and seals, and the acknowledgment and authentication of the instruments were in all respects in accordance with the provision of the statutes in force in the District of Columbia, providing the manner and form in which the real estate of *femes covert* could be conveyed. Indeed, we do not understand that the statutory requirement in respect to form of acknowledgment and authentication thereof is a matter of objection. The terms of the statutes, 'any grantor or bargainor of any lands or tenements' being out of the province; or 'any person or persons conveying,' etc., not residing in the province *at the time, etc., may acknowledge [66 said deed by letter of attorney, well and sufficiently proved, etc., are sufficient to embrace *femes covert*, authorized to sell and convey their real estate. If not, then the husband could not sell and convey by power of attorney, free of the contingent right of dower of his wife, for if the wife could not acknowledge by power of attorney a deed for the conveyance of her own real estate, she would be equally unable to acknowledge by power of attorney a deed for the relinquishment of dower in the lands of her husband. Such disability, we think, was never intended by the legislatures passing the statutes to which we have referred, to be fixed upon *femes covert* having lands with right to convey the same."

We give great weight to the views expressed by the chief justice in regard to these statutes of Maryland because, as is well known, he occupied for many years a seat upon the bench as chief justice of the court of appeals of that state, and is specially familiar with its laws and the construction given them by the courts of the state. In addition to such circumstances, and from a perusal of the various statutes cited, our own judgment concurs with the court of appeals upon this question. We think a clear implication arises from the provisions of these acts

that a power of attorney such as has been described, and acknowledged as already mentioned, was good in 1859 in this District. We can think of no good reason for excluding such implication. Where the person is by the statute allowed to do the principal thing directly, we think she could do it by power of attorney as described in this case. The power to convey includes in such case the power to appoint another to do the same thing. We therefore agree with the views expressed by some of the text-writers, when power is given by statute to married women to convey their interest in real estate where their husbands join in the conveyance and where the private examination is made, that in such cases the right of the wife to dispose of it by power of attorney joined in by her husband and where she was privately examined, etc., would naturally be implied. The common law which incapacitates a married woman from making a [67 contract *in general is so far altered by the statute as to permit her to execute a power of attorney and to therein contract to ratify his acts, instead of conveying directly, as the statute in terms provides. See 3 Washb. Real Prop. 4th ed. p. 258. The author there says: "It is laid down unqualifiedly, in some of the states, that a married woman cannot make a valid power of attorney, even jointly with her husband, to make a deed of her interest. But it is difficult to perceive any reason for the rule where she can do the principal thing herself; and such a right is clearly recognized by statute in Massachusetts. A similar right is also recognized by statute in New York." We do not think the aid of a statute is necessary. When the power is given her by law to convey directly, she can by the same ceremonies authorize another to do the act for her. The reason which would prevent it is, as we think, entirely too technical, fragile, and refined for constant use. It is said in Story on Agency, § 6: "So in regard to married women, ordinarily, they are incapable of appointing an agent or attorney; and, even in case of a joint suit at law, an appointment of an attorney by a married woman is void; and her husband may make an attorney for both. But where a married woman is capable of doing an act, or of transferring property or rights with the assent of her husband, there, perhaps, she may, with the assent of her husband, appoint an agent or attorney to do the same." In this case we hold that, as the wife was capable of conveying her real estate in Washington in 1859, by a deed, properly executed and acknowledged by her privily, etc., and joined in by her husband, she could accomplish the same thing by authorizing another to convey for her, where the authority was joined in by her husband, and the required private examination, etc., was made.

The court of appeals of Maryland has never, so far as we can discover, construed the statutes above cited in any manner opposed to the views expressed by the court of appeals of this District in this case. The cases of *Webster's Lessees* v. *Hall*, 2 Harr. & M'H. 19 [1 Am. Dec. 370]; *Flannigan* v. *Young*, 2 Harr. & M'H. 38; *Hollingsworth* v. *M'Donald*, 2 Harr. & J. 230 [3 Am. Dec. 545], and *Lawrence* v. *Heister*, 3 Harr. [68 & J. 371], *in which the above-named statutes are referred to, were all cases where deeds had been executed and where the acknowledgment of either the wife or husband was held to be defective under the provisions of those statutes. In some of the cases it was said to be necessary, in order to pass the interest of the wife in her land, that she and her husband must join in the deed as grantors, which must be properly acknowledged, etc. This statement was not made as descriptive of the only method by which a married woman could convey her land, but was made in relation to the defective manner in which the deed of conveyance was executed in the particular case, which was the case of a deed defectively acknowledged under the statute. No decision has been cited by counsel for the appellants from the courts of Maryland which is inconsistent with or opposed to the construction given to these statutes by the court below.

In *Holladay* v. *Daily*, 86 U. S. 19 Wall. 606 [22: 187], the plaintiff and his wife appointed an attorney with general power to convey land which belonged to the husband. The attorney in fact subsequently conveyed the land, and the plaintiff Holladay, after such conveyance, alleging that he had never received any of the consideration money recited in the deed, sued to recover back the possession of the land. The only question was as to the sufficiency in law of the power of attorney from Holladay and wife to Hughes, the attorney in fact, and his deed thereunder to pass the title of the husband. It was held that the power was sufficient, the court saying: "Here the object, and the sole object, of the power was to enable the attorney to pass the title freed from any possible claim of the wife; and under the law of Colorado that result could be accomplished by the deed of the husband alone as fully without as with her signature." What was said by the learned justice in delivering the opinion of the court in that case in regard to the manner in which the interest of married women in real estate could be conveyed was not necessary to the decision of the case, the point decided being that, considering its form, the power of attorney signed by the husband and wife was valid to convey his interest in the real property.

*Finally, upon this branch of the case, [69 we also concur with the lower court in holding that the 1st section of the act of Congress, already mentioned, contains a clear legislative recognition of the right to make this power of attorney. In this case, we think this fact is entitled to exceptional consideration. The act was evidently drawn with care, and it fully and plainly describes the different defects of the various instruments upon which it was intended to operate. Although the section is quite long and the phraseology is somewhat involved, yet the meaning of the section is perfectly clear. Certain provisions therein fully recognize the then existing right of a married woman to appoint jointly with her husband an attorney in fact to convey lands owned by her in this District, and language is used for the purpose of curing certain named defects which might exist in the execution or acknowledgment of such a paper. Speaking of the acknowledgment, the statute in the 1st section proceeds in this way: "And provided,

also, That when the power of attorney shall have [been] executed by a *feme covert*, the same shall be effectual and sufficient if there shall have been such an acknowledgment of the same as would be sufficient, under the provisions of this act, to pass her estate and interest therein were she a party executing the deed of conveyance, the record and copy thereof of any deed recorded as aforesaid to be evidence thereof, in the same manner and to have the same effect as if such deed had been originally executed, acknowledged, and recorded according to law." It had already been provided in the section "that the certificate of acknowledgment by a *feme covert* shall show that the acknowledgment was made 'apart' or 'privily' from her husband, or use some other term importing that her acknowledgment was made out of his presence, and also that she acknowledged or declared that she willingly executed or that she willingly acknowledged the deed, or that the same was her voluntary act, or to that effect."

The acknowledgment attached to the power of attorney in this case was sufficient under the provisions of this act to pass the estate and interest of Mrs. Ransom if she had been a 70] *party executing a deed conveying her real estate in the District.

Upon a consideration of all the circumstances, we have no doubt that the power of attorney in question was properly executed and acknowledged, and that it authorized the person named therein as attorney in fact to convey Mrs. Ransom's real estate situated in this District.

(2) The next question which arises is whether this power of attorney was revoked by the war which broke out between the two sections of the country in 1861.

Lieutenant Ransom, although one of the last officers to go out, did resign his commission in the army of the United States and went south and entered the army of the Confederacy, in which before the close of the war, he attained high rank. His wife followed him, so that during the war they were both inside the lines of the Confederacy.

We are of opinion that the war did not revoke the power of attorney executed by Mrs. Ransom and her husband. It is not every agency that is necessarily revoked by the breaking out of a war between two countries in which the principal and agent respectively live. Certain kinds of agencies are undoubtedly revoked by the breaking out of hostilities. Agents of an insurance company, it is said, would come within that rule. *New York Life Insurance Company* v. *Davis*, 95 U. S. 425 [24: 453]. In that case Mr. Justice Bradley, in delivering the opinion of the court, said:

"That war suspends all commercial intercourse between the citizens of two belligerent countries or states, except so far as may be allowed by the sovereign authority, has been so often asserted and explained in this court within the last fifteen years that any further discussion of that proposition would be out of place. As a consequence of this fundamental proposition, it must follow that no active business can be maintained, either personally or by correspondence, or through an agent, by the citizens of one belligerent with the citizens of the other. The only exception to the rule recognized in the books, if we lay out of view contracts for ransom and other matters of absolute necessity, is that of allowing the payment *of debts to an agent of an alien enemy, [71 where such agent resides in the same state with the debtor. But this indulgence is subject to restrictions. In the first place, it must not be done with the view of transmitting the funds to the principal during the continuance of the war; though, if so transmitted without the debtor's connivance, he will not be responsible for it."

The learned judge then adds that, in order to the subsistence of the agency during the war, it must have the assent of the parties.

These remarks were made in relation to the case then before the court, which was an action on a policy of life insurance issued by a New York corporation before the war upon the life of Davis, a citizen and resident of the state of Virginia. The premiums were regularly paid until the beginning of the war, the last one having been made December 28, 1860. Previous to the war the company had an agent residing in Petersburg, Virginia, where the assured also resided, and premiums on the policy had been paid him in the usual way. About a year after the war broke out the agent entered the Confederate service and remained there until the close of the war. An offer of payment of the premium due in December, 1861, was made to the agent, which he declined to receive, alleging that he had received no receipts from the company, and that the money, if he did receive it, would be confiscated by the Confederate government. He testified that he refused to receive any premiums, had no connection with the company during the war, and after it terminated did not resume his agency. Davis died in September, 1867. The plaintiff below was assignee of the policy, and claimed to recover the amount of $10,000, on the ground that he was guilty of no laches and that at the close of the war the policy revived. The judge instructed the jury that if the assured was ready and offered to pay his premium to the agent in Virginia, after the breaking out of the war, there was no forfeiture of the policy, although the agent refused to receive the money, if within reasonable time after the war he endeavored to pay his premium and the company refused to receive it. The defendant contended that the war put an end *to the agency, and that the[72 offer to pay the premium to the former agent was of no validity, and the failure to pay rendered the policy void. This court held that the case was nearly on all fours with that of *New York Life Insurance Company* v. *Statham*, 93 U. S. 24 [23: 789], but the point as to the supposed power of an agent of a company in the adhering states to receive premiums in a state in insurrection after the war broke out not having been specially adverted to in the opinion of the court in that case, it was particularly considered in the *Davis Case*, as above quoted from. It was in relation to such an agency that the remarks were made. Agents of a life insurance company are undoubtedly engaged in the active business of their principal. Their duty is to receive the premiums for all policies obtained by them

and to transmit such premiums to the home office. The prompt transmission of such premiums is a necessity for the successful prosecution of the business of the company. Upon their receipt the company is able to invest them in some interest-bearing security, and thus provide funds for the ultimate payment of the policy when it matures. It is easy to see that active and continuous business of such a nature could not be carried on during a war where the principal and the agent reside in the different countries engaged in such war.

In the case of *Kershaw* v. *Kelsey*, 100 Mass. 561 [97 Am. Dec. 124], the general subject of the contracts and business entered into and transacted between the citizens of the different states at war with each other is examined, and the question treated with great care by Mr. Justice Gray in delivering the opinion of the supreme judicial court of Massachusetts, and numerous authorities are referred to and commented upon in the opinion. In the course of that opinion it was said at page 572 [97 Am. Dec. 135]: "The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or 73] intercourse, whether by *transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the text-books are taken from the *dicta* which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war."

Under the circumstances of this case, we think the attorney in fact had the right to make the conveyance he did. It was not an agency of the class such as is mentioned in *New York Life Insurance Company* v. *Davis*, *supra*, and was not necessarily revoked and avoided by the war. Where it is obviously and plainly against the interest of the principal that the agency should continue, or where its continuance would impose some new obligation or burden, the assent of the principal to the continuance of the agency after the war broke out will not be presumed, but must be proved, either by his subsequent ratification or in some other manner. And, on the other hand, where it is the manifest interest of the principal that the agency, constituted before the war, should continue, the assent of the principal will be presumed. Or, if the agent continues to act as such, and his so acting is subsequently ratified by the principal, then those acts are just as valid and binding upon the principal as if no war had intervened. *New York Life Insurance Company* v. *Davis*, *supra*.

It is entirely plain, as we think, that the mere fact of the breaking out of a war does not necessarily, and as a matter of law, revoke every agency. Whether it is revoked or not depends upon the circumstances surrounding the case and the *nature and character of the [74 agency. This case shows that in 1859, at the time when the power of attorney was executed, Lieutenant Ransom and his wife were desirous of realizing their share of the value of the land in controversy. It was vacant, unimproved land in the city of Washington, and the charge for taxes was quite burdensome. The parties desired to realize the money. No sale of the property was effected from that time until the latter part of 1864, or early part of 1865. There is no evidence of any such change of circumstances as would naturally suggest a revocation of the authority to sell, but, on the contrary, the testimony is otherwise. It appears to have been to the interest of all parties to sell and thus to free themselves from a constant source of expense. In addition to that, the evidence is clear and sufficient that after the sale the action of the attorney in fact of Mrs. Ransom was ratified and confirmed by her by the receipt of her share of the purchase money or its expenditure for her benefit and with her assent and approval. Her sister, Mrs. Gibson, testified that Mrs. Ransom's share of the purchase money was either paid over to her or expended for her at her direction. This full and complete ratification of the act of the agent shows conclusively the assent of the principal to the continuance of the agency, notwithstanding the war. Some criticism is made upon this testimony of Mrs. Gibson because, after the passage of so many years, she is unable to state definitely which course was pursued, whether the money was paid to Mrs. Ransom, or whether it was expended for her at her direction. We think the criticism is not well founded. Mrs. Gibson might well have been able to state with absolute certainty that she either paid the money to Mrs. Ransom or expended it for her at her direction, and yet after the lapse of time she might also be unable to state with like certainty which of the two courses was pursued. It is perfectly possible for a witness to be certain of the ultimate fact and yet to have forgotten the intermediate facts upon which that ultimate fact was based.

Here we have a power of attorney properly executed for the purpose of selling, among other lots, this real estate in question, and a state of circumstances which fairly shows that *it was for the benefit and interest of the [75 principal that such real estate should be sold at the time the sale in fact occurred; we have also the principal's receipt of her share of the purchase money in 1865, with full knowledge of all the facts, and her acquiescence in and approval of the action of her attorney up to the time of her death in February, 1881. Upon these facts we think it clear that the instrument executed by the attorney in fact

was as valid and effectual as if no war had intervened. The ratification of the act of the attorney was full and complete. It recognized and assented to the continued existence of the agency. The purchase money for the land was received by the principal, and to permit her heirs after her death to repudiate the transaction on the ground that the power of attorney had been revoked would be at war with every principle of equity and fair dealing. This principle applies as strongly in the case of a married woman as in any other, and it will not permit her, or, upon her death, her heirs at law, to repudiate a transaction the benefits of which she received with full knowledge of the circumstances attending it, and yet claim to recover an estate which had been sold with her authority and the purchase money for which had been paid to her. *Bein* v. *Heath*, 47 U. S. 6 How. 247 [12: 424]; *Canal Bank* v. *Partee*, 99 U. S. 325, 329 [25: 390, 392]; *Bedford* v. *Burton*, 106 U. S. 338 [27: 112], considers generally the obligation of married women to do equity under circumstances somewhat similar in principle to the present case.

Nor does the act of Congress of July 17, 1862, to suppress insurrections, etc. (12 Stat. at L. 589), chap. 189, have any effect upon the sales, transfers, or conveyance of the estate and property of persons in rebellion after September 23, 1862, except as to the United States. As against that government, the transfers of property liable to seizure were null and void; they were not void as between private parties or against any other party than the United States. *Conrad* v. *Waples*, 96 U. S. 279, 288 [24: 721, 723].

(3) Even though the power of attorney were valid and had not been revoked by the war, it is objected that the instrument executed by the attorney in fact conveyed no title, but at best was a mere contract of sale; and,

76] *(4) That this objection is not cured by the act of Congress, above set forth.

These two questions may be considered together; and it makes no difference in the result whether the instrument be construed as conveying a legal title, or an equitable title only.

Some of the justices of this court concur in opinion with the court of appeals that, taking all the provisions of the instrument together, it did not amount to a deed of conveyance, but only to an agreement to convey made by an attorney who was authorized by his power to make a conveyance. In that aspect of the case, the instrument would convey an equitable title which would afford a good defense to this bill; and it would be unnecessary to invoke the curative act of Congress.

But a majority of this court is of opinion that the instrument was in the nature of a conveyance of the legal title, though defectively executed, and that it came within the provisions of the act, and the defect was thereby cured.

We agree generally that although there are words of conveyance *in præsenti* in a contract for the purchase and sale of lands, still if from the whole instrument it is manifest that further conveyances were contemplated by the parties, it will be considered an agreement to convey and not a conveyance. The whole question is one of intention to be gathered from the instrument itself. *Jackson, Shipley*, v. *Moncrief*, 5 Wend. 26; *Ogden* v. *Brown*, 33 Pa. 247; *Phillips* v. *Swank*, 120 Pa. 76.

Looking at the instrument executed by the attorney it will be seen that he refers to and annexes the power of attorney executed to him by Robert Ransom, Jr., and Mrs. Ransom, his wife, states the consideration received by him from Mr. Tayloe, acknowledges its receipt, and then acknowledges that he has "bargained and sold to Mr. B. O. Tayloe, his heirs and assigns, all the right, title, and estate of them, the said Robert Ransom, Jr., and Mary Ransom, being one undivided third part of, in, and to" the various pieces of ground, including the ground in question, and then adds "with the improvements and appurtenances." Stopping here, and *construing the language of the instrument, [77 there can be no question that it was executed as a conveyance of the interest of the principals in the land, and was intended as such by the attorney in fact. Although the instrument shows an intention on the part of the attorney to convey the title of his principals, yet, instead of signing their names by himself as attorney, he signs his own name, preceding the signature with the statement, "In testimony whereof, I have hereunto set my hand and seal this 29th day of November, 1864." This is one of the defective executions of an instrument under a power of attorney, spoken of in the act of Congress. It is alleged, however, that the following language, which appears at the end of the instrument executed by Huntt, changes the character of that instrument, and shows that it was not intended as a conveyance but as a simple contract of sale. The language referred to comes immediately after the words "with the improvements and appurtenances," and is as follows: "And I hereby further agree, in behalf of said Robert and Mary Ransom, that they shall and will, as soon as convenient, make and execute a proper deed of conveyance of said premises to said Benjamin O. Tayloe in fee simple."

We do not think this language changes the effect of the prior portion of the instrument, nor does it show that the intention of the person executing it was simply to enter into a contract of sale. He is the only one who signs it. The instrument shows that he is executing it as an attorney in fact and by virtue of the power of attorney annexed to the instrument. Although he assumes therein to bargain and sell (in legal effect to convey) to Mr. Tayloe, his heirs and assigns, all the right, title, and estate of his principals, being a one undivided third part of the real estate in question, yet he also agrees in the same instrument, in addition to the conveyance by himself of the title of his principals, to also obtain from them a deed of the same premises. This portion of the instrument is a contract in the nature of a covenant for further assurance. It may well be that the grantee, Mr. Tayloe, while taking the conveyance from the attorney in fact, and paying the full consideration for the land, would also desire to obtain *a deed [78 conveying the same title and executed by the parties in person. This desire may easily be understood even upon the assumption that the instrument executed by virtue of the power of

attorney was intended to convey the title. Such a deed would remove all possible question which could, in any event, arise, based upon the fact that the conveyance was executed by an attorney instead of by a principal. The agreement to obtain a conveyance from his principals is entirely consistent with the prior portion of the instrument in which the attorney assumes to convey the title by virtue of the power of attorney which he annexes. If the attorney had, instead of agreeing in behalf of his principals that they should make and execute a proper deed of conveyance of the premises, agreed that he would himself at some future time make such a deed, a different question would be presented, for in that case, taking the whole instrument together, it might be argued that there was no intention at the time to convey the title. But where, in addition to conveying the title himself by apt words, clearly expressed, he simply agrees to also procure a proper deed from his principals at some future time, there is nothing inconsistent in that agreement with the intention to himself convey the title by virtue of the power. Nor do we regard the fact as material upon this latter point that in the acknowledgment of the instrument in question, taken by two aldermen who were *ex officio* justices of the peace, they describe the instrument as a certain contract of sale, and certify that "Mr. Huntt executed said contract and acknowledged the same to be his act and deed." What the aldermen may have regarded as the legal effect of the instrument is not of much importance, and whether they describe is as a contact of sale or as a conveyance cannot alter the character of the paper itself or its legal effect.

Being of opinion that the paper was in the nature of a conveyance, we also think that the defective execution of the instrument was cured by the act of Congress. This instrument was executed by the attorney in fact, who acknowledged the same to be his act and deed instead of the act and deed of his principals, and the act of Congress provides that in such case 79] *the deed shall have the same effect as if such attorney in fact had acknowledged the deed to be the deed of the grantors (his principals). One or two other defects existed of a like nature, that is, of a nature which might be cured by a legislative act, and which were cured by the act in question.

The statute applies where the parties intended to convey, thought they had conveyed, and yet had not complied with the requisites necessary to make the conveyance in all things effective. In such case, especially where the consideration for the instrument has been received and retained, curative statutes may be passed which give validity to the defective instruments to the same extent as was intended by the parties at the time when they were executed. *Watson* v. *Mercer*, 33 U. S. 8 Pet. 88, 110 [8: 876, 884]; *Randall* v. *Krieger*, 90 U. S. 23 Wall. 137 [23: 124].

The chief objection to the act, assuming that the instrument was a conveyance, is that it does not apply in this case as plaintiffs urge, because at the time when the act was passed the parties claiming through this deed were not, as plaintiffs contend, in the actual possession of the land covered by it. The statute declares the instrument is to have the effect and validity to pass the fee simple to the estate intended to be conveyed and to bar dower in the real estate therein mentioned "in favor of parties in actual possession, claiming under and through such deeds." It is said that this limitation to the parties in actual possession refers to the time when the act was passed, and if the parties claiming under the deed were not at that time in actual possession of the premises, the statute has no application to them. We think the act applies if at the time when it was passed the parties claiming under the defective instrument were in actual possession of the land, and that the act also applies if the parties claiming under such instrument were not in actual possession at the time of its passage, but subsequently came into such possession. The act cured the defects in the instrument mentioned therein, if when it passed the parties were in actual possession, claiming under such instruments, and if thereafter ousted they could still claim the benefit of the act even in an attempt to regain possession. If not in actual possession *when the act was passed, they could not[80 have the benefit thereof in an attempt to obtain possession thereafter. But if thereafter they were in actual possession, they could defend that possession under the act, so far as their title depended upon defective instruments existing at the time when the act was passed and which were of a character covered by its terms.

We think this is a fair construction of the act, and that it ought to be liberally construed for the purpose of obtaining the benefits it was clearly intended to give in the case of a defective execution of otherwise valid instruments. This view renders it unnecessary to decide as to the validity of the objection that these defendants were not in actual possession when the act was passed. We do not decide whether they were or not. They were in actual and undisturbed possession at the commencement of this suit, and they can avail themselves of the act to protect such possession and their title under the deed in question.

(5) The fifth objection taken we have already answered in holding that Mrs. Ransom did, in fact, receive the purchase price of her share in the land with full knowledge that it was such purchase price, and thereby ratified and confirmed the act of her attorney.

By this disposition of the whole case upon the merits we are not to be considered as deciding that parties situated as the plaintiffs were in this case, out of possession, can maintain an action for partition. We have not discussed that question, and do not decide it, because it was unnecessary on account of the views we have stated in relation to the other aspects of the case.

We are of opinion that the complainants have failed to make out a cause of action, and *the judgment dismissing the bill must therefore be affirmed.*

Mr. Justice **White** did not sit in this case and took no part in its decision.

WILLIAM HOLDER, *Plff. in Err.*,
v.
AULTMAN, MILLER, & COMPANY.

(See S. C. Reporter's ed. 81-92.)

Jurisdiction of this court—Michigan statutes as to foreign corporations—contract, when made —when not made in Michigan.

1. Where a case is brought to this court from a circuit court under the act of March 3, 1891, § 5, the jurisdiction of this court does not depend upon the question whether the right claimed under the United States Constitution has been upheld or denied in the court below, and is not limited to the constitutional question, but includes the whole case.
2. Under the Michigan statute making void all contracts made in that state by any foreign corporation which has not filed its articles of association and paid its franchise tax, a contract made elsewhere than in Michigan is valid, although it is to be performed in that state.
3. A contract is made when, and not before, it has been executed or accepted by both parties, so as to become binding upon both.
4. A contract signed in Michigan by the parties (one of whom is a foreign corporation which signed by its agent), which stipulates that it shall not be valid until approved at the principal office of the corporation in Ohio, is not, when so approved in Ohio, a contract made in Michigan, within its statute invalidating contracts by foreign corporations which have not filed their articles and paid a franchise tax.

[No. 109.]

Argued November 8, 9, 1897. Decided January 10, 1898.

IN ERROR to the Circuit Court of the United States for the Eastern District of Michigan to review a judgment for the plaintiff, Aultman, Miller, & Co., a corporation of Ohio, against William Holder, defendant, a citizen of Michigan, for the price of agricultural machines furnished by plaintiff to defendant and sold by the latter under a contract in writing. *Affirmed.*

See same case below, 68 Fed. Rep. 467.

Statement by Mr. Justice **Gray:**

This was an action of assumpsit, brought September 21, 1894, in the circuit court of the United States for the eastern district of Michigan, by Aultman, Miller, & Co., a corporation of the state of Ohio, against William Holder, a citizen of the state of Michigan, to recover the price of agricultural machines furnished by the plaintiff to the defendant, and sold by the defendant, under a contract in writing, the material parts of which were as follows:

"This agreement, made this 20th day of February, 1894, between Aultman, Miller, & Co., a corporation duly incorporated under the laws of the state of Ohio, of Akron, Ohio, of the first part, and William Holder, of Laingsburgh, county of Shiawassee, and state of Michigan, of the second part, witnesseth, That the party of the second part is hereby authorized to sell Buckeye mowers, reapers, and binders and extra parts thereof in the following territory, *viz.*, Laingsburgh and vicinity," and other specified territory in Michigan, "for and during the season of 1894, on the following terms and conditions, *viz.*:

"The party of the second part agrees: First. To use all reasonable diligence in canvassing and supplying said territory *with said ma-[82 chines." Second. "To sell the said machines at the retail list prices authorized by said first party;" "to grant credit to such persons only as are of well-known responsibility;" "to see that all notes taken for machines sold are drawn on blanks furnished by the said first party;" "and, in all cases of doubt as to the responsibility of the purchaser, to require a mortgage on property, real or personal;" and to redeem all notes not accepted by the party of the first part. Third. To indorse, unless sufficiently secured, "all notes given by renters and parties owning no real estate." Fourth. "That all machines and parts of machines, and all other goods received on commission under this contract, shall be held by the said second party on special storage and deposit as the property of the party of the first part until converted into notes or money," and such notes shall remain the property of the first party; and, "in all cases where machines are sold for cash, or part cash and notes, all such cash received shall be promptly remitted." Fifth. "To see that all machines sold are properly set up and started;" and "to keep a correct record of sales." Sixth. To receive all "goods shipped or delivered on account of said first party;" to pay the freight on them, and keep them insured; "to keep all unsold goods well housed and cared for, subject to the order of the party of the first part;" and to make no charge for handling or storage. Seventh. To furnish "repairs, free of charge, to customers," only in case of flaw or defect. Eighth. "To make prompt and accurate reports of machines on hand, as often as requested by the first party or its general agent; to promptly execute orders for transfer of machines, if any are on hand unsold; and, in case of failure to make such report or transfers, to pay said first party for all machines remaining on hand at settlement unsold by reason of such failure, at the option of said first party." Ninth. "To sell, or assist in the sale of, no other mowing machines, or combined mowing and reaping machines, or harvesters and binders, in said territory, during the continuance of this contract." Tenth. "To sell and deliver all machines set up and used as samples, or settle for same in cash or approved notes at settlement time." Eleventh. To advertise this agency.

*"The party of the first part further [83

NOTE.—*As to contracts, their interpretation and validity*, see note to Bell v. Bruen, 11: 89.

As to what laws are void, as impairing obligation of contracts, see note to Fletcher v. Peck, 3: 162.

As to constitutionality of law altering charter, as impairing contract, see note to Dartmouth College v. Woodward, 4: 629.

As to validity of contracts made by foreign corporations, which have not complied with statutory conditions of the right to do business in a state; where a penalty is imposed; mere prohibition of business; contracts expressly declared void; effect of forec'osure; estoppel.—see note to Edison General Electric Co. v. Canadian P. Nav. Co. (Wash.) 24 L. R. A. 315.

agrees with the party of the second part: First. To furnish to said second party such machines of the kinds they make as may be wanted to supply said territory, so long as their stock on hand will enable them to fill the orders. No commission will be allowed on orders taken and not filled;" "nor shall any commission whatever be due said second party until a full settlement of account is made." Second. "To allow said second party as compensation for receiving, handling, storing, selling, setting up and starting machines, and making collections whenever required," certain specified commissions. Third. "To furnish the said second party a stock of extra castings and other repairs," to be sold on commission. Fourth. "To sell the said second party knives and sickles," and certain other things, at a discount of 50 per cent. Fifth. "To furnish said second party blank notes, orders, circulars, and posters, and such other printed documents as they are accustomed to supply their agents.

"NOTICE.—It is especially agreed that when sales have not been closed by cash or notes on or before delivery, as stated above, then the party of the first part may send a person to settle with the purchasers of machines, and the party of the second part shall pay all the expenses of making such settlement. It is further agreed that Aultman, Miller, & Co. shall not be held liable under any written or printed warranty given by them on their machines that are allowed to go out without first having been settled for. No canvassers or expert that may be sent to aid you shall have any authority to make any change whatever in our contract with you; and all sales made by him will be subject to your approval or rejection, as no allowance will be made to you for loss of interest or reduction in price on sales made by him; nor will any promise not authorized in writing by our manager at Lansing, Mich., be recognized at settlement."

"In witness whereof, the parties hereunto have set their hands the day and date above written.

"Aultman, Miller, & Co.,
"By D. C. Gillett.

84] *"This contract not valid unless countersigned by our manager at Lansing, Mich., and approved at Akron, Ohio.

"Wm. Holder.

"Countersigned, Lansing, Mich., Feb. 27, 1894.

"R. H. Worth, Manager."

Across the back of the contract were written these words:

"Approved April 29, 1894.

"Ira M. Milloy, Secretary."

The declaration alleged that "on February 27, 1894, at the said village of Laingsburgh and at the city of Lansing, in the eastern district of Michigan, the said plaintiff, by D. C. Gillett and R. H. Worth, its duly authorized agents, entered into a written contract with the defendant, William Holder," above stated; and that "afterwards, to wit, on April 27, 1894, the said written contract was approved by the plaintiff at its office in the city of Akron, in the state of Ohio, and the same then and there became and was a binding and valid contract between the defendant and the plaintiff, according to the terms thereof, to wit, at the city of Lansing, in the eastern district of Michigan:" that the plaintiff faithfully performed its contract, and in pursuance thereof shipped to the defendant a large number of mowers, reapers, and binders, and extra parts for the same; and the defendant sold them under the contract, and became liable to pay the plaintiff the sum of $5,052.56; and had never paid him that sum, or any part thereof. The declaration, besides a count on the contract, contained the common counts.

The defendant relied on the statute of Michigan of 1891, chap. 182, § 1, as amended by the statute of 1893, chap. 79, and copied in the margin; † and alleged that the contract sued on was *made and to be performed in the state [85 of Michigan, within the meaning of the statute; that the plaintiff being a foreign corporation, was at the time of the execution of that contract doing business in the state of Michigan, within the meaning and application of the statute, and had not complied with its requirements; and that the contract was therefore absolutely void and without force as against the defendant.

The parties waived in writing a trial by jury, and submitted the case to the decision of the court, which found the following facts:

On April 29, 1894, the parties entered into the contract above stated; and it was executed, accepted, and approved, as *set forth there- [86 in, and in the indorsement thereon. Its provi-

† An Act To Amend Section One of Act Number One Hundred and Eighty-Two of the Public Acts of Eighteen Hundred and Ninety-One, Entitled "An Act To Provide for the Payment of a Franchise Fee by Corporations," Approved July Two, Eighteen Hundred and Ninety-One.

Sec. 1. The people of the state of Michigan enact, That section 1 of act number one hundred and eighty-two of the Public Acts of eighteen hundred and ninety-one, entitled "An Act To Provide for the Payment of a Franchise Fee by Corporations," approved July two, eighteen hundred and ninety-one, be and the same is hereby amended so as to read as follows:

Sec. 1. The people of the state of Michigan enact, That every corporation or association hereafter incorporated or formed by consolidation or otherwise, by or under any general or special law of this state, which is required by law to file articles of association with the secretary of state, and every foreign corporation or association which shall hereafter be permitted to transact business in this state, which shall not, prior to the passage of this act, have filed or recorded its articles of association under the laws of this state and been thereby authorized to do business therein, shall pay to the secretary of state a franchise fee of ½ of 1 mill upon each dollar of the authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof; and that every corporation heretofore organized or doing business in this state, which shall hereafter increase the amount of its authorized capital stock, shall pay a franchise fee of ½ of 1 mill upon each dollar of such increase of authorized capital stock of such corporation or association, and a proportionate fee upon any and each subsequent increase thereof: Provided, that the fee herein provided, except in cases of increase of capital stock, shall in no case be less than $5; and in case any corporation or association hereafter incorporated under the law of this state, or foreign corporation authorized to do business in this state, has no authorized capital stock, then in such case each and every corporation or association so incorporated or doing business in this state shall pay a franchise fee of $5. All contracts made in this state after the 1st day of January, 1894, by any corporation which has not first complied with the provisions of this act, shall be wholly void.

This act is ordered to take immediate effect.

Approved May 13, 1893.

sions, so far as the plaintiff is concerned, have been fulfilled, and there is a balance due to the plaintiff under it of $5,052.56. The plaintiff is a corporation organized and existing under the general laws of Ohio, having its corporation office and its manufactory at Akron in that state; and does not manufacture any goods in the state of Michigan. It sells its goods in Michigan by means of local commission agents, and has a general agent at Lansing in Michigan: its commission agents are under contracts with it similar to that sued on; and all contracts are sent to the plaintiff at Akron, for approval or rejection, before taking any effect. The goods manufactured by the plaintiff at its factory in Akron, and sold by it in Michigan, are shipped from the factory upon orders received from commission agents and forwarded by the general agent from Lansing to Akron. Goods are shipped, either directly to the commission agent, or in bulk to Lansing or elsewhere in Michigan, and reshipped in smaller lots to the commission agents. The plaintiff owns a warehouse in Lansing for the transfer of such reshipments, for the temporary storage of a small stock of extras or repairs, which experience has shown may be suddenly needed by customers throughout the state during the harvest season. Some of the commission agents throughout the state also keep on hand a very small stock of repairs for the immediate use of their customers. These are partly commission goods, and partly goods sold directly to them. Accounts with every commission agent in Michigan are kept at the plaintiff's office in Akron. The plaintiff effects settlements with its commission agents by sending copies of such accounts to its general agent, who goes over the season's work with each commission agent, collects the cash and notes taken in payment for machines sold, and forwards them to the plaintiff at Akron, subject to the plaintiff's approval or rejection of the notes. The notes are filed and kept by the plaintiff at Akron until just before maturity, when they are sent to the bank or to express agents for collection and remittance to Akron. The plaintiff has never filed a copy of its articles of association in the office of the **87**]*secretary of state or in any other office in Michigan, or paid any franchise fee to the state of Michigan, or in any way complied, or attempted to comply, with the statute above mentioned.

Upon these findings of fact the court made the following conclusions of law: 1st. The plaintiff's business, as carried on under and in pursuance of the contract, is an interstate commerce business; and the plaintiff is not subject to the aforesaid statute; and the statute, so far as it applies, or purports to apply, to foreign corporations like the plaintiff, which are doing an interstate commerce business, is in conflict with the provision of the Constitution of the United States authorizing Congress to regulate interstate commerce. 2d. The contract was made and executed in the state of Ohio, and does not provide for the transaction of any business in Michigan other than an interstate commerce business, and the plaintiff is therefore within the protection of the Constitution of the United States. 3d. The plaintiff is entitled to recover the sum of $5,052.56. 68 Fed. Rep. 467.

Judgment was rendered for the plaintiff accordingly; and the defendant sued out a writ of error from this court, upon the ground that the case was one in which a law of a state was claimed to be in contravention of the Constitution of the United States, within the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, § 5).

Mr. **Clark C. Wood** for plaintiff in error.

Messrs. **John A. Bradley, Fred A. Baker,** and *Olin L. Sadler* for defendant in error.

Mr. Fred A. Maynard, Attorney General of Michigan, filed a brief in behalf of that state by permission of the court.

Mr. Justice **Gray** delivered the opinion of the court:

This action was brought in the circuit court of the United States for the eastern district of Michigan, by a *manufacturing corpora- [**88** tion of the state of Ohio, having its principal office and its factory at Akron in that state, against one of its commission agents, a citizen of Michigan, to recover the price of agricultural machines sold by the defendant in Michigan under a contract in writing, by which the plaintiff authorized the defendant to sell, within a certain territory in Michigan, such machines supplied to him by the plaintiff; and the defendant agreed to canvass the territory, to sell the machines at retail prices fixed by the plaintiff, to hold the unsold machines as the plaintiff's property, to keep and render account of sales, and to remit the proceeds to the plaintiff.

The defendant relied on a statute of Michigan of May 13, 1893, which required every foreign corporation, permitted to transact business in that state, and not having filed articles of association under its laws, to pay a franchise tax of ¼ of 1 mill upon each dollar of its capital stock; and further provided that "all contracts made in this state after January 1, 1894, by any corporation which has not first complied with the provisions of this act, shall be wholly void." Mich. Pub. Acts 1893, chap. 79, p. 82.

The circuit court, in giving judgment for the plaintiff, held that the contract was made in the state of Ohio, and that the statute of Michigan, so far as it applied to the business carried on by the plaintiff in that state under the contract, was in conflict with the Constitution of the United States authorizing Congress to regulate interstate commerce. 68 Fed. Rep. 467.

This was therefore a "case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States," and was rightly brought directly to this court by writ of error under the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, § 5). Upon such a writ of error, differing in these respects from a writ of error to the highest court of a state, the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not *limited to the constitution- [**89**

al question, but includes the whole case. *Whitten* v. *Tomlinson*, 160 U. S. 231, 238 [40: 406, 411]; *Penn Mut. L. Ins. Co.* v. *Austin*, 168 U. S. 685 [*ante*, 626].

But this court has not found it necessary to pass upon the constitutional question, because it is of the opinion that the contract is not within the statute set up by the defendant.

By the clear terms of the statute of Michigan, the invalidity of the contract does not depend upon the place where, or the time when, it is to be performed, but upon its being "made in this state after January 1, 1894." A contract made before that date is valid, although it is to be performed afterwards; and a contract made elsewhere than in Michigan is valid, although it is to be performed in this state.

A contract is made when, and not before, it has been executed or accepted by both parties, so as to become binding upon both.

This contract is admitted to have been drawn up at Laingsburgh in the state of Michigan, where the defendant resided. It begins by stating that it is "made this 20th day of February, 1894, between" the plaintiff and the defendant; and it ends with the clause, "In witness whereof, the parties hereunto have set their hands the day and date above written." Then follows the signature, "Aultman, Miller, & Co., by D. C. Gillett," who may be assumed to have been the plaintiff's local agent at Laingsburgh. That signature is followed by a stipulation, evidently addressed by the plaintiff to the other party to the contract, in these words: "This contract not valid unless countersigned by our manager at Lansing, Michigan, and approved at Akron, Ohio." Then follows the signature of the defendant, "William Holder," who thereby necessarily assents to this stipulation, as well as to the other terms of the contract. Both parties thus agree that the contract was not to be valid until countersigned by the plaintiff's manager at Lansing in Michigan, and also approved at Akron in Ohio, the site of the plaintiff's principal office. It further appears, upon the contract itself, that it was afterwards, on February 27, 1894, countersigned at Lansing, by "R. H. Worth, Manager;" and, by an indorsement on the con-
90]tract, *that it was approved at Akron April 29, 1894, as shown by the signature of "Ira M. Milloy, Secretary."

The plaintiff in its declaration alleged that on February 27, 1894, at Laingsburgh and Lansing, the plaintiff "by D C. Gillett and R. H. Worth, its duly authorized agents, entered into a written contract with the defendant." The date on which the plaintiff "entered into" the contract with the defendant is thus alleged to have been, not February 20, 1894, mentioned at the beginning of the contract as the day on which it was made, and which may have been the day on which it was signed at Laingsburgh, by Gillett in behalf of the plaintiff, and by the defendant in person, but February 27, 1894, the day on which it was countersigned at Lansing by Worth, the plaintiff's manager. The plaintiff thus assumed that the contract did not exist as a contract before it was countersigned by the plaintiff's manager at Lansing; and there is no more reason for assuming that it existed as a contract before it was approved at the plaintiff's principal office at Akron, for the stipulation above quoted required both countersigning by the manager at Lansing, and approval at Akron, to make it a valid contract. Accordingly, the declaration further alleged that "afterwards, to wit, on April 27, 1894, the said written contract was approved by the plaintiff at its office in the city of Akron, and the same then and there was and became a binding and valid contract between the defendant and the plaintiff, according to the terms thereof." The words "to wit, at the city of Lansing in the eastern district of Michigan," would seem to have been added by way of formal venue only, in accordance with the ancient mode of pleading in suing upon a transaction which took place abroad. As Lord Mansfield said, "No judge ever thought that when the declaration said in Fort St. George, *viz.*, in Cheapside, that the plaintiff meant it was in Cheapside." *Mostyn* v. *Fabrigas*, 1 Cowp. 161, 177. See also *McKenna* v. *Fisk*, 42 U. S. 1 How. 241, 248 [11: 117, 119].

The circuit court found, as facts, that the parties entered into the contract on April 29, 1894, which was the date of its approval at the plaintiff's home office in Ohio; and that *it[**91** was executed, accepted, and approved as set forth therein, and in the indorsement thereon.

Whether, therefore, we look to the contract itself, to the plaintiff's declaration, or to the findings of fact by the court, it clearly appears that the contract, when, after being drawn up in writing and signed by the plaintiff's local agent, it was tendered to the defendant and assented to and signed by him in Michigan, contained a distinct stipulation that it was not valid, unless, not only countersigned by the plaintiff's manager in Michigan, but also approved at the plaintiff's principal office in Ohio; and that it was on April 29, 1894, and at Akron in the state of Ohio, that the contract was approved by the plaintiff's secretary at its principal office, and then and there, for the first time, became a valid and binding contract between the parties. It cannot therefore be considered as "made," within the meaning of the statute in question, at any earlier time, or other place.

The approval at the plaintiff's home office was not a ratification by the plaintiff of an unauthorized act of one of its agents; for each of its agents, Gillett in first signing the contract, and Worth in countersigning it, appears to have acted within the strict limits of his authority. But the final approval by the plaintiff itself was an act which, according to the express stipulation of the parties, and in the contemplation of every person who affixed his signature to the paper, was a necessary step to complete the execution of the instrument by the plaintiff, and to make it a valid and binding contract between the parties.

The opinion of the supreme court of the state of Michigan in *Seamans* v. *Temple Co.*, cited at the bar, contains nothing inconsistent with this conclusion. It was there held that a contract of insurance, made in another state by a corporation thereof, upon an application procured through its agents in Michigan upon property in Michigan, could not be sued on in the courts of Michigan, because of provisions of earlier statutes of Michigan, making it unlawful for

any foreign insurance company to transact any business of insurance in the state, and for any person to aid in any way in procuring a policy 92] *of insurance by a foreign corporation upon property in the state. Howell's Mich. Ann. Stat. §§ 4331, 4354, 8136. And the court said: "If it be conceded that the contract was made in Wisconsin, and that the premiums and loss, if any, are payable there, it is as much in contravention of the policy of this state as though it had been made and was to be performed here. It cannot be supposed that the statutes cited were intended merely to prevent the act of making the contract in this state." 105 Mich. 400, 404 [28 L. R. A. 430].

The statute now before this court contains no such provisions as were contained in the statutes in question in that case; but it simply invalidates "contracts made in this state" by a foreign corporation which has not filed its articles of association in Michigan and paid the franchise tax imposed by this statute.

Judgment affirmed.

JOHN T. POWERS, *Plff. in Err.*,
v.
CHESAPEAKE & OHIO RAILWAY COMPANY.

(See S. C. Reporter's ed. 92-103.)

Order remanding cause—when petition for removal may be filed—petition may be amended—trial in state court.

1. An order of the circuit court remanding a cause to the state court because there is no separable controversy between the citizens of different states is not reviewable by this court.
2. A petition for removal filed as soon as the case becomes a removable one,—as, when the action is discontinued against defendants as to whom there is no separable controversy who are citizens of the same state with the plaintiff,—is filed in time, although it is after the time when defendant was required to answer.
3. A petition for removal may be amended in the circuit court of the United States, by leave of that court, so as to state more fully and distinctly the facts which support the grounds of removal, if upon the face of the petition and of the whole record of the state court sufficient grounds for removal are shown.
4. Making a defense in a state court after that court has declined to surrender jurisdiction of the case does not defeat the defendant's right to insist that the case has been lawfully removed into the circuit court of the United States, where the objection to jurisdiction is saved upon the record.

[No. 144.]

Argued December 6, 7, 1897. Decided January 10, 1898.

IN ERROR to the Circuit Court of the United States for the District of Kentucky to review a judgment of that court dismissing an action brought by John T. Powers, plaintiff, against the Chesapeake & Ohio Railway Company *et al.*, to recover damages for injuries suffered by plaintiff from the running of the train of said company against him by the negligence of the defendants. *Judgment affirmed.*

See same case below, 65 Fed. Rep. 129.

Statement by Mr. Justice **Gray:**

This action was brought September 7, 1893, in an inferior court of the state of Kentucky, by Powers against the Chesapeake & Ohio Railway Company, as well as against Boyer, Evans, and Hickey, the conductor, engineer, and fireman of a railway train of the company, to recover damages for injuries suffered by the plaintiff from the running of the train against him by the negligence of the defendants. The summons was not served on Hickey, but was served on the other defendants.

The railway company, before its answer was required by the law of Kentucky to be filed, removed the case into the circuit court of the United States, upon a petition alleging that the matter in dispute exceeded, exclusive of interest and costs, the sum or value of $2,000; that the railway company was a citizen of the states of Virginia and West Virginia only, and the plaintiff was a citizen of the state of Kentucky; that there was in this suit a separate controversy, which could be fully determined, as between them; and that the other defendants were fraudulently and improperly joined for the sole purpose of defeating the railway company's right of removal. In the circuit court of the United States, a transcript of the record of the proceedings in the state court was filed; and after a hearing a motion by the plaintiff to remand the case to the state court was sustained by an opinion filed and entered of record which stated that the plaintiff was a citizen of Kentucky and the railway company a citizen of Virginia, and the other defendants were admitted to be citizens of Kentucky; and held that there was no separable *controversy [94 between the railway company and the plaintiff; and the case was ordered to be remanded accordingly.

The railway company then filed in the state court a transcript of the proceedings in the circuit court of the United States, and an answer containing a demurrer, and denying the facts alleged in the original petition, and alleging that the other defendants were fellow servants of the plaintiff. A year after the first petition for removal, and when the case was called for trial before a jury in the state court, the plaintiff discontinued his action against the individual defendants; the court overruled the demurrer; and the railway company filed a

NOTE.—*As to removal of causes under act of 1875; citizenship,*—see note to Meyer v. Delaware R. Const. Co. 25: 593.

As to removal by one of two or more defendants; separable controversies,—see note to Sloane v. Anderson, 29: 899.

As to removal of causes to United States courts for local prejudice, see notes to Gaines v. Fuentes, 23: 524; and Jefferson v. Driver, 29: 897.

As to removal of causes from state to Federal courts, where United States Constitution, act of Congress, or treaty comes in question, see note to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

As to civil rights; removal of causes, when denied,—see note to Civil Rights Cases, 27: 835.

As to removal of actions against officers; U. S. Rev. Stat. § 643,—see note to Davis v. South Carolina, 27: 574.

second petition for removal, like the first, except in alleging that in bringing this suit Evans and Hickey were fraudulently and improperly joined as defendants for the purpose of defeating the railway company's right of removal; that because of their joinder the cause had been remanded to the state court; and that the action, having now been discontinued as against them, was for the first time pending against the railway company alone. The state court denied the petition for removal, and the railway company excepted to the denial; the trial proceeded in that court, resulting in a verdict and judgment for the plaintiff; and the railway company appealed to the court of appeals of the state.

At the next term of the circuit court of the United States, the railway company filed a transcript of the record of the proceedings in the state court. The plaintiff moved to remand the case to the state court upon the grounds that it was not removable under the acts of Congress; that the second petition for removal was not filed within the time fixed by those acts; and that the question sought to be made by the second petition for removal had been already adjudged by the circuit court of the United States, and its former adjudication was a bar to the second proceeding for removal. The railway company (having filed affidavits showing that Boyer and Hickey were citizens of Kentucky, and that the discontinuance of the action as against the individual defendants was made by the plaintiff's attorney without their request or knowledge and without any consid **95**] eration moving *from them) was permitted by the circuit court of the United States to amend its second petition for removal, by substituting therein the name of Boyer for that of Evans, in correction of a clerical mistake in the petition; and by alleging that Evans was a citizen of Virginia, and Boyer and Hickey were citizens of Kentucky, and that by reason of the fraudulent and improper joinder of them to defeat the railway company's right of removal, the plaintiff was estopped to deny that the second petition for removal was not filed within the time required by law.

The circuit court of the United States, being of opinion that the plaintiff had fraudulently joined Boyer and Hickey as defendants in order to defeat the removal of the case to that court, and was therefore estopped to deny that the second petition for removal was filed in time, granted the petition for removal, and denied the motion to remand. 65 Fed. Rep. 129. The plaintiff then pleaded, in abatement of the cause in the circuit court of the United States, and to the jurisdiction of that court, the proceedings in the state court in which the railway company took part after the denial of its second petition for a removal, and its appeal to the court of appeals of the state; and, for the same reasons, moved the court to defer all proceedings until the termination of the case in the courts of the state, and in this court if the case should be brought here from the courts of Kentucky; and also moved to remand the cause to the state court. The circuit court of the United States sustained a demurrer to the plea, and denied the motions to defer and to remand.

The case was afterwards called for trial in the circuit court of the United States; and, the plaintiff insisting on his objection that the court was without jurisdiction, because the case had never been properly removed into that court, and declining for that reason to recognize the jurisdiction thereof or to prosecute his action therein, the court, overruling all the plaintiff's objections, and being of opinion that the original petition of the plaintiff did not state a cause of action, adjudged that the action be dismissed, and rendered final judgment for the defendant.

*A writ of error from this court was sued [**96** out by the plaintiff, upon the sole ground that the cause was not properly removed into the circuit court of the United States and therefore that court was without jurisdiction. The court allowed the writ of error, and certified to this court the question so presented, as a question of the jurisdiction of the circuit court, under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, § 5).

Messrs. **Lawrence Maxwell**, Jr., *William Goebel*, and *Alfred Mack* for plaintiff in error.

Mr. **Charles B. Simrall** for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

In the circuit court of the United States, the plaintiff contended that the court had no jurisdiction to entertain the case and to render the final judgment complained of, because the case had not been duly removed into that court from the state court in which it had been commenced.

The question thus presented was not, as in *Smith* v. *McKay*, 161 U. S. 355 [40: 731], whether a suit of which the circuit court of the United States was admitted to have jurisdiction was cognizable on the common-law or on the equity side of the court; but the question was whether the circuit court of the United States had any jurisdiction whatever of the case. The jurisdiction of the circuit court of the United States was thus in issue, and, the question of its jurisdiction having been duly certified, the case was rightly brought from the circuit court of the United States directly to this court, under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, § 5), upon the question of jurisdiction only.

The action was brought against a railroad company, and several of its servants to recover for an injury alleged to have been caused to the plaintiff by the negligence of all the defendants. It is well settled that an action of tort, which *might have been brought [**97** against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, "a defendant has no right to say that an action shall be sev-

eral, which a plaintiff elects to make joint. . . . A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to a final determination in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings." *Pirie* v. *Tvedt*, 115 U. S. 41, 43 [29: 331, 332]; *Sloane* v. *Anderson*, 117 U. S. 275 [29: 899]; *Little* v. *Giles*, 118 U. S. 596, 600, 601 [30: 269-271]; *Louisville & Nashville Railroad Co.* v. *Wangelin*, 132 U. S. 599 [33: 474]; *Torrence* v. *Shedd*, 144 U. S. 527, 530 [36: 528, 531]; *Connell* v. *Smiley*, 156 U. S. 335, 340 [39: 443, 445]. Applying this rule, the circuit court of the United States, when this case was first removed into that court, ordered it to be remanded. 65 Fed. Rep. 129, 130.

It is true that the same court, in similar cases between other parties, has since decided otherwise; and, upon a review of conflicting authorities, and referring to the distinction taken under the old system of special pleading between trespass and trespass on the case, has held that a master and servant cannot be joined in an action for a tort, and therefore the controversy between each of them and the plaintiff is a separate controversy. *Warax* v. *Cincinnati, N. O. & T. P. Railway Co.* 72 Fed. Rep. 637; *Hukill* v. *Mansfield & Big Sandy Railroad Co.* 72 Fed. Rep. 745.

But it is unnecessary now to consider which of the views of the circuit court upon this question is the correct one, because that court, by its order remanding this case, distinctly and finally adjudged, as between these parties and for the purposes of this case, that, at the time of the filing of the first petition for removal, **98**]the case was not removable, because, *as it then stood, some of the defendants were citizens of the same state with the plaintiff, and there was no separate controversy between the plaintiff and the railway company, a citizen of a different state from himself. That order is not reviewable by this court. *Gurnee* v. *Patrick County*, 137 U. S. 141 [34: 601]; *Ex parte Pennsylvania Co.* 137 U. S. 451 [34: 738]; *Birdseye* v. *Shaeffer*, 140 U. S. 117 [35: 402]; *Missouri Pacific Railway Co.* v. *Fitzgerald*, 160 U. S. 556 [40: 536].

After the case had been so remanded, and when it was called for trial in the state court, the plaintiff discontinued his action against all the individual defendants, leaving it an action between citizens of different states; and the case then for the first time became one in its nature removable, and the single remaining defendant thereupon immediately filed a second petition for removal, which was denied by the state court, but was granted and an amendment thereof allowed by the circuit court of the United States. 65 Fed. Rep. 129.

The existence of diverse citizenship, or other equivalent condition of jurisdiction, is fundamental; the want of it will be taken notice of by the court of its own motion, and cannot be waived by either party. *Mansfield, C. & L. M. Railway Co.* v. *Swan*, 111 U. S. 379 [28: 462]. But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is, in the words of Mr. Justice Bradley, "but modal and formal," and a failure to comply with it may be the subject of waiver or estoppel. *Ayers* v. *Watson*, 113 U. S. 594, 597-599 [28: 1093-1095]; *Northern Pacific Railroad Co.* v. *Austin*, 135 U. S. 315, 318 [34: 219]; *Martin* v. *Baltimore & Ohio Railroad Co.* [*Gerling* v. *Baltimore & O. R. Co.*], 151 U. S. 673, 688-691 [38: 311, 317, 318]; *Connell* v. *Smiley*, 151 U. S. 335 [39: 443].

Undoubtedly when the case, as stated in the plaintiff's declaration, is a removable one, the defendant should file his petition for removal at or before the time when he is required by the law or practice of the state to make any defense whatever in its courts. *Edrinyton* v. *Jefferson*, 111 U. S. 770 [28: 594]; *Baltimore & Ohio Railroad Co.* v. *Burns*, 124 U. S. 165 [31: 333]; *Kansas City, Ft. S. & M. Railroad Co.* v. *Daughtry*, 138 U. S. 298 [34: 963]; *Martin* v. *Baltimore & Ohio Railroad Co.* [*Gerling* v. *Baltimore & O. R. Co.*], 151 U. S. 673, 686, 687 [38: 311, 316].

But it by no means follows, when the case does not become *in its nature a removable[**99** one until after the time mentioned in the act has expired, that it cannot be removed at all.

In *Northern Pacific Railroad Co.* v. *Austin*, 135 U. S. 315 [34: 219], where a plaintiff suing in an inferior court of a state had laid his damages at less than the sum necessary to authorize a removal into the circuit court of the United States and was permitted at the trial to increase the *ad damnum* above that sum, and judgment of the district court was affirmed by the highest court of the state, a writ of error to that court was dismissed by this court, solely because no application for removal had been made after the allowance of the amendment; and the chief justice, in delivering the opinion, said: "If the application had been made, the question would then have arisen whether it came too late under the circumstances. The defendant was not entitled to remove the suit as originally brought, 'before or at the term at which such cause could be first tried, and before the trial thereof.' But the objection to removal, depending upon the absence of the jurisdictional amount, was obviated by the amendment. As the time within which a removal must be applied for is not jurisdictional, but modal and formal (*Ayers* v. *Watson*, 113 U. S. 594, 598 [28: 1093, 1094]), it may, though obligatory to a certain extent, be waived. And as, where a removal is effected, the party who obtains it is estopped upon the question of the time, so, if the conduct of the plaintiff in a given case were merely a device to prevent a removal, it might be that the objection as to time could not be raised by him." 135 U. S. 318 [34: 219].

The question whether a defendant may file, in the state court in which the suit was commenced, a petition for removal after the time mentioned in the act of Congress has elapsed, in a case which was not removable when that time expired, is now directly presented for adjudication; and the answer to this question depends upon the terms and effect of the act in force when these proceedings took place.

In order to warrant a removal from the court of a state into a circuit court of the United States, according to the terms of that act, the necessary diverse citizenship or other foundation of the jurisdiction of the circuit court of

100]the United States *must exist. It is only when that does exist that "any party entitled to remove any suit . . . may make and file a petition in such suit in such state court at the time, or at any time before the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending," and to give bond to file a copy of the record in that court "on the first day of its then next session." Act of March 3, 1887 (24 Stat. at L. 552, chap. 373), as corrected by act of August 13, 1888 (25 Stat. at L. 435, chap. 866).

This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity. But, so long as there does not appear of record to be any removable controversy, no party can be entitled to remove it, and the provision of the act of Congress, that "any party entitled to remove any suit . . . may make and file a petition for removal" at or before the time when he is required to make answer to the suit, cannot be literally applied. To construe that provision as restricting to the time prescribed for answering the declaration the removal of a case which is not a removable one at that time, would not only be inconsistent with the words of the statute; but it would utterly defeat all right of removal in many cases; as, for instance, whenever citizens of the same state as the plaintiff were joined as defendants through an honest mistake, not discovered by the plaintiff until after the time prescribed for answering; or whenever a personal injury was supposed, at the time of bringing an action therefor, to be a comparatively trifling one, which might be fully compensated by a sum much less than $2,000, and was afterwards discovered to be so much graver that there could be no doubt of the power and the duty of the court to allow an amendment increasing the *ad damnum*.

The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his con-**101**]trol, is to hold *that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought.

The result is that, when this plaintiff discontinued his action as against the individual defendants, the case for the first time became such a one as, by the express terms of the statute, the defendant railway company was entitled to remove; and therefore its petition for removal, filed immediately upon such discontinuance, was filed in due time.

A petition for removal, when presented to the state court, becomes part of the record of that court, and must doubtless show, taken in connection with the other matters on that record, the jurisdictional facts upon which the right of removal depends; because, if those facts are not made to appear upon the record of that court, it is not bound or authorized to surrender its jurisdiction, and if it does, the circuit court of the United States cannot allow an amendment of the petition, but must remand the case. *Crehore* v. *Ohio & Mississippi Railway Co* 131 U. S. 240 [33: 144]; *Jackson* v. *Allen*, 132 U S. 27 [33: 249]. But if, upon the face of the petition and of the whole record of the state court, sufficient grounds for removal are shown, the petition may be amended in the circuit court of the United States, by leave of that court, by stating more fully and distinctly the facts which support those grounds. *Carson* v. *Dunham*, 121 U. S. 421, 427 [39: 992. 994]; *Martin* v. *Baltimore & Ohio Railroad Co.* [*Gerling* v. *Baltimore & O. R. Co.*], 151 U. S. 673, 690, 691 [38: 311, 318].

In the case at bar, the second petition for removal, as presented to the state court, alleged that the petitioner was a citizen of the states of Virginia and West Virginia only, that the plaintiff was a citizen of the state of Kentucky, that Evans and Hickey had been fraudulently and improperly joined as defendants for the purpose of defeating the petitioner's right of removal, that because of their joinder the case had been remanded to the state court, and that the action,*having been discontinued against[**102** them, was now for the first time pending against the petitioner alone; and by the transcript, previously filed in the state court, of the record of the proceedings in the circuit court of the United States upon the first petition for removal, containing the opinion and order remanding the case, it appeared to have been admitted that the individual defendants were citizens of Kentucky.

It was thus made to appear, upon the record of the state court, that the case could not have been removed before, and that it had now become in its nature removable, by reason of the diverse citizenship of the parties. Such being the case, it was rightly removed by the second petition for removal into the circuit court of the United States; and this petition was rightly permitted to be amended in that court.

The petition, as amended, distinctly alleged that Evans was a citizen of Virginia, that Boyer and Hickey were both citizens of Kentucky, and that by the discontinuance against them the action was for the first time pending against the railway company alone; and thus showed a case which the railway company was entitled to remove, independently of the allegations that these persons had been fraudulently joined as defendants to defeat the right of removal, and that the plaintiff was therefore estopped to deny that the second petition for removal was filed in time.

We do not find it necessary to pass upon the points of fraudulent joinder and of estoppel, made by the railway company, and upon which the circuit court of the United States proceeded in retaining jurisdiction of the case, because, for the reasons before stated, we are of opinion that, upon the true construction of the act of Congress, the petition, filed as soon as the case became a removable one, and before the railway company took any new steps in defense of the action, was seasonably filed; and that it sufficiently stated grounds for re-

moval, and was therefore rightly permitted to be amended.

It is hardly necessary to add that the railway company, by making defense in the state court after that court had declined to surrender jurisdiction of the case, did not lose or impair 103]*its right to insist that the case had been lawfully removed into the circuit court of the United States. The defendant, notwithstanding its objection, duly saved upon the record, to the jurisdiction of the state court, having been forced to a hearing in that court, is entitled to have the error in this respect corrected in any court having jurisdiction for the purpose. *Removal Cases*, 100 U. S. 457, 475 [25: 593, 600]; *Edrington* v. *Jefferson*, 111 U. S. 770, 774 [28: 594, 596].

Judgment affirmed.

UNION MUTUAL LIFE INSURANCE COMPANY, *Plff. in Err.*,
v.
ELIZABETH KIRCHOFF.

(See S. C. Reporter's ed. 103-115.)

Federal question, when raised too late—decision by state court.

1. A Federal question raised after the case has been decided on the merits by the supreme court of the state, and remanded to a lower court merely for an accounting, is raised too late for the purpose of a writ of error to this court, where it does not arise on the accounting itself, but by a motion to amend the answer by setting up the Federal question.
2. A declaration by the supreme court of the state on a second appeal, that the plaintiff's rights grew out of an alleged contract, and not merely by reason of anything done in a Federal court, does not amount to a disposition, on a second appeal, of a claim of a Federal right based on the action of the Federal court, where such right might have been, but was not, raised on the first appeal.

[No. 155.]

Argued December 16, 17, 1897. Decided January 10, 1898.

IN ERROR to the Supreme Court of Illinois to review a judgment of that court affirming the judgment of the Appellate Court of that State which affirmed the judgment of the Circuit Court of Cook County in that State, settling the accounts between Elizabeth Kirchoff, plaintiff, and the Union Mutual Life Insurance Company, defendant, and ordering the insurance company to convey certain property on payment of the amount found due. There was also a motion to dismiss. *Writ of error dismissed.*

See same case below, 128 Ill. 99, 33 Ill. App. 607, 133 Ill. 368, 51 Ill. App. 67, 149 Ill. 536. See also same case, 160 U. S. 374 [40: 461].

Statement by Mr. Chief Justice **Fuller:**

This was a bill filed by Elizabeth Kirchoff in the circuit court of Cook county, Illinois, against the Union Mutual Life Insurance Company, to compel a conveyance of two certain lots in accordance with an agreement between the company and herself on payment of the amount due thereunder as provided for. The circuit court dismissed the bill on hearing, and the cause, after an ineffectual appeal directly to the state supreme court (128 Ill. 199), was carried to the appellate court, which reversed the decree of the circuit court, and remanded the cause with directions that an account be taken, and that, when the amount due the company was ascertained, a decree be entered that on payment of such amount, with interest, the company should convey to Mrs. Kirchoff. 33 Ill. App. 607. From this judgment the insurance company prosecuted an appeal to the supreme court, and the judgment was affirmed. 133 Ill. 368. To review this judgment a writ of error was sued out from this court, but was dismissed *on the ground that the judg [105 ment of the supreme court was not final. 160 U. S. 374 [40: 461].

The case had, in the meantime, gone back to the circuit court, an accounting had been had, and a decree had been entered settling the accounts between the parties, and ordering the insurance company to convey the property in question on payment of the amount found due. From this decree the insurance company appealed to the appellate court; the decree of the circuit court was affirmed, 51 Ill. App. 67; and this second judgment of the appellate court was affirmed by the supreme court. 149 Ill. 536. To review the latter judgment the insurance company prosecuted this writ of error.

The facts as found by the state courts were substantially these: In May, 1871, the Union Mutual Life Insurance Company loaned $60,000 to Elizabeth Kirchoff, her husband, Julius Kirchoff, and her mother, Angela Diversey, upon their judgment note, secured by trust deed, conveying many parcels of land belonging to them in severalty, among which were the lots in question, which lots belonged to Elizabeth Kirchoff. Default having been made in the payment of interest and taxes, judgment was taken against Mrs. Diversey, and later a bill was filed by the insurance company in the circuit court of the United States to foreclose the trust deed. The bill in addition sought to cure a misdescription of the property belonging to Mrs. Diversey, who filed an answer denying the right of the company to correct the misdescription, and averring that the note and mortgage were procured from her by misrepresentation. While this bill was pending an agreement was reached by the parties, pursuant to which the company released to Mrs. Diversey its claim upon 40 acres of the land belonging to her, and she executed to them a warranty deed for the remainder,

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws, see notes to Jackson, Hart, v. Lamphire, 7: 679; and Commercial Bank v. Buckingham, 12: 169.

As to effect of decision of state courts in Federal courts; rule of property; questions of general or commercial law; effect of state decisions in other states; Federal questions,—see note to Forepaugh v. Delaware, L. & W. R. Co. (Pa.) 5 L. R. A. 508.

while Mrs. Kirchoff and her husband executed a quitclaim deed of all the property belonging to them and included in the trust deed, it being agreed as part of the transaction that Mrs. Kirchoff might purchase from the company the two lots above named for $10,000, $1,000 in cash and $9,000 in annual payments, for which Mrs. Kirchoff was to execute her notes, extend-
106]ing *over a period of nine years, bearing interest at 6 per cent, and secured by mortgage upon the two lots. But as there was an intervening claim on one of the lots growing out of a sheriff's deed in pursuance of a sale on a judgment against Mrs. Kirchoff, rendered subsequently to the original trust deed but prior to the deed from Kirchoff and wife to the company, it was agreed that the foreclosure proceedings should continue to be prosecuted; that as soon as the company got a deed from the master it would convey to Mrs. Kirchoff and take the mortgage from her, and the company would thus obtain and convey clear title, and the mortgage back would be a first lien.

No defense was made to the foreclosure; the case went to decree and sale: and a master's deed was issued to the insurance company.

During the prosecution of the foreclosure proceedings a receiver had been appointed of all the property, and about nine months after the confirmation of the report of sale the receiver filed a petition, stating that Julius Kirchoff was in possession of the premises and refused to pay rent therefor, and asking for a writ of assistance to put the receiver in possession, to which Julius Kirchoff filed an answer setting up the agreement and objecting to the issue of the writ lest his rights be prejudiced; but the writ was nevertheless issued.

It appeared on the second hearing that prior to September 10, 1884, the United States had seized the property for certain revenue taxes due from a firm then occupying it as a distillery, Mrs. Kirchoff being in no way connected with the firm; that the property was sold, the government bidding it in and taking a deed for it; and that the government conveyed to the insurance company. In the account stated Mrs. Kirchoff was required to repay the amount the insurance company paid the government, with interest.

The supreme court of Illinois held, on the second appeal, on the authority of *Mansfield* v. *Excelsior Refinery Company*, 135 U. S. 326 [34: 162], that the United States took no title by its deed as against Mrs. Kirchoff; and, further, that the insurance company could not set up
107] any right under the deed from *the government, because of its acquisition long prior to the submission of the case upon the first appeal. No question was raised in this court in respect of this transaction.

Messrs. **E. Parmalee Prentice,** *Frank L. Wean,* and *Josiah H. Drummond,* for plaintiff in error:

This is a bill to redeem from a mortgage which had been previously foreclosed in the Federal court. Such a bill is necessarily a bill to review the foreclosure decree and is beyond the jurisdiction of the state courts to entertain.

The subject-matter of the bill makes out a bill of review.

Randall v. *Howard*, 67 U. S. 2 Black, 585 (17: 269); *Nougue* v. *Clapp*, 101 U. S. 551 (25: 1026); *Graham* v. *Boston, H. & E. R. Co.* 118 U. S. 161 (30: 196); *Rae* v. *Hulbert*, 17 Ill. 572; *Frisby* v. *Withers*, 61 Tex. 134.

The bill does not state such a case as may be the subject of an original bill to set aside a decree for fraud.

Gaines v *Fuentes*, 92 U. S. 10 (23: 524); *Barrow* v. *Hunton*, 99 U. S. 80 (25: 407); *Johnson* v. *Waters*, 111 U. S. 640 (28: 547); *Arrowsmith* v. *Gleason*, 129 U. S. 86 (32: 630).

It was a part of complainant's case to allege and prove that the facts now relied upon for relief could not have been brought forward in defense of the previous suit. In the absence of such allegation and proof, the present bill is merely a bill for a rehearing.

Marshall v. *Holmes*, 141 U. S. 589 (35: 870); *Avery* v. *United States*, 79 U. S. 12 Wall. 304 (20: 405).

The fact that the proceedings in the state courts review the Federal foreclosure decree is shown by the effect of the decree in the state courts upon the Federal decree.

The only fraud charged in complainant's bill is that she conspired with the insurance company to defraud her creditors; the bill states an illegal agreement.

Randall v. *Howard*, 67 U. S. 2 Black, 585 (17: 269); *Dent* v. *Ferguson*, 132 U. S. 50 (33: 242).

The Federal decree of foreclosure is conclusive of the matter litigated in the present suit.

Assuming the existence of the agreement found by the state courts, nevertheless the evidence shows that ten months before the decree in the Federal courts was entered, the insurance company notified the defendant in error that it refused to recognize the contract which she claimed.

It was the duty of the Kirchoffs, at once, upon the repudiation by the insurance company of the contract claimed, to interpose their defense in the foreclosure proceeding, if they had any. Having failed to do so, they are precluded by the Federal decree from setting up claims which existed before that decree.

Dowell v. *Applegate*, 152 U. S. 327 (38: 463); *Aurora* v. *West*, 74 U. S. 7 Wall. 82, 102 (19: 42); *Cromwell* v. *Sac County*, 94 U. S. 351 (24: 195); *Case* v. *Beauregard*, 101 U. S. 688 (25: 1004); *Dimock* v. *Revere Copper Co.* 117 U. S. 559 (29: 994); *Mally* v. *Mally*, 52 Iowa, 654; *Bailey* v. *Bailey*, 115 Ill. 551, 557; *Rogers* v. *Higgins*, 57 Ill. 244, 247; *Harmon* v. *Auditor of Public Accounts*, 123 Ill. 122; *Stickney* v. *Goudy*, 132 Ill. 213; *May* v. *Coleman*, 84 Ala. 325; *Jones* v. *Vert*, 121 Ind. 140; *Adair* v. *Mergenthein*, 114 Ind. 303; *Caldwell* v. *White*, 77 Mo. 471, 473; *Shelbina Hotel Asso.* v. *Parker*, 58 Mo. 327.

The United States court had jurisdiction.

Milwaukee & M. R. Co. v. *Soutter*, 69 U. S. 2 Wall. 632 (17: 886); *Freeman* v. *Howe*, 65 U. S. 24 How. 450 (16: 749); *Randall* v. *Howard*, 67 U. S. 2 Black, 585 (17: 269).

Messrs. **William S. Harbert,** *George R. Daley,* and *Ira. W. Buell,* for defendant in error:

There is no Federal question involved and the motion to dismiss should be sustained.

This court has no jurisdiction for the reason

that it does not appear that the right, title, privilege, or immunity now claimed was specially set up or claimed at the proper time and in the proper way.

Willard v. *Petitt*, 153 Ill. 663; *Hook* v. *Richeson*, 115 Ill. 431; *Brooklyn* v. *Orthwein*, 140 Ill. 620; *Re Spies*, 123 U. S. 131 (31: 80); *Chappell* v. *Bradshaw*, 128 U. S. 132 (32: 369); *Susquehanna Boom Co.* v. *West Branch Boom Co.* 110 U. S. 57 (28: 69); *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685 (41: 1165).

The title acquired in the foreclosure proceedings in the United States circuit court is not attacked by the bill nor discredited by the decree, and therefore no Federal question is presented.

The perfecting of the title by the foreclosure proceeding was part of the agreement and the agreement was therefore not hostile to the foreclosure proceedings.

Mansfield v. *Excelsior Refinery Co.* 135 U. S. 326 (34: 162).

There was not and could not have been any adjudication in the foreclosure suit of the issues in this suit.

The application for writ of assistance placed in issue only the right of possession of the premises as between Julius Kirchoff and the receiver and the rights of the parties hereto were in no manner affected by the order issued on said application.

Aspden v. *Nixon*, 45 U. S. 4 How. 467 (11: 1059).

There was nothing immoral, inequitable, improper, or which could have resulted to the injury of anyone in the agreement.

If this court should hold that a Federal question is involved in this case, then such question was correctly decided.

Proper effect was given to the decree of the Federal court.

Dupasseur v. *Rochereau*, 88 U. S. 21 Wall. 130 (22: 588); *Crescent City L. S. L. & S. H Co.* v. *Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141 (30: 614); *Smith* v. *Adsit*, 90 U. S. 23 Wall. 368 (23: 114); *Whetherell* v. *Ebeale*, 123 Ill. 668; *Adams County* v. *Burlington & M. River R. Co.* 112 U. S. 123 (28: 678); *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590 (22: 429); *Hale* v. *Akers*, 132 U. S. 554 (33: 442); *Bacon* v. *Texas*, 163 U. S. 207 (41: 132).

In chancery a right presupposes a remedy and the course pursued by defendant in error was the only course open to her.

Peugh v. *Davis*, 96 U. S. 332 (24: 775); *Alexander* v. *Rodriguez* (*Villa* v. *Rodriguez*) 79 U. S. 12 Wall. 323 (20: 406).

Though the question relates only to the character of the evidence, and is therefore, as we view it, a matter exclusively for the state courts, yet the agreement was not repugnant to the statute of frauds.

McManus v. *O'Sullivan*, 91 U. S. 578 (23: 390); *Romie* v. *Casanova*, 91 U. S. 379 (23: 374); *Warren* v. *Warren*, 105 Ill. 568; *Beegle* v. *Wentz*, 55 Pa. 369, 93 Am. Dec. 762; *Morrill* v. *Cooper*, 65 Barb. 512; *Lantry* v. *Lantry*, 51 Ill. 458, 2 Am. Rep. 310; *Fischbeck* v. *Gross*, 112 Ill. 208.

Issues of fact are not reviewable by this court.

Dower v. *Richards*, 151 U. S. 658 (38: 305); *Cunningham* v. *Neagle*, 135 U. S. 14 (34: 63); *Kenney* v. *Effinger*, 115 U. S. 577 (29: 498); *Baldwin* v. *Kansas*, 129 U. S. 52 (32: 640).

Mr. Chief Justice **Fuller** delivered the opinion of the court:

When this case was before us on the prior writ of error we were obliged to dismiss the writ because the judgment sought to be reviewed was not final. *Union Mut. L. Insurance Company* v. *Kirchoff*, 160 U. S. 374 [40: 461]. And the question whether, had this been otherwise, the jurisdiction could have been maintained, was necessarily not considered. That inquiry, however, now meets us on the threshold, as, in order to invoke our jurisdiction on the ground of the denial of a title or right claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, such title or right must be specially set up or claimed at the proper time and in the proper way.

The judgment of the supreme court of Illinois, when the case was first before it (133 Ill. 368), established the agreement between Mrs. Kirchoff and the insurance company as claimed by her, and determined that she was entitled to the relief she sought by reason thereof, and the cause was remanded for the purposes of an accounting merely. And although the fact that the case was sent back for further proceedings deprived the judgment of that finality deemed essential to the issue of a writ of error from this court, yet it does not follow that the prior determination on the merits can be overhauled on the ground of the existence of a Federal question which was not raised when that determination was arrived at.

*As observed by the supreme court [**108** when the case was a second time before that tribunal (149 Ill. 536, 542): "Nothing is better settled than that where a cause has been reviewed by this court, and remanded with directions as to the decree to be entered, a party, on a subsequent appeal, cannot assign for error any cause accrued or existed prior to the judgment of that this court. All errors not assigned will be considered as waived, and cannot afterwards be urged. *Hook* v. *Richeson*, 115 Ill. 431; *Village of Brooklyn* v. *Orthwein*, 140 Ill. 620, and cases cited."

The record does not disclose that any right or title was specially set up or claimed under any statute of, or authority exercised under, the United States in the courts below or in the supreme court of Illinois prior to the decision of the latter court on the first appeal.

The original bill after setting up the agreement to the effect, among other things, that the title was to be perfected in the company by the foreclosure proceedings, as well as by complainant's deed of release and quitclaim, prayed that the company might be compelled to specifically perform the agreement and convey the lots to her on performance on her part. To this defendant filed a demurrer, assigning as cause that the bill did not show a contract enforceable either at law or in equity. The demurrer was overruled and defendant answered, denying the averments of the bill, pleading the statute of frauds, and asking "the same right by its answer as if it had pleaded or demurred to said bill of complaint." The bill was subsequently amended and prayed that complainant might be allowed "to redeem said premises according to the terms of said agreement; that said defendant may be com-

pelled by the decree of this court to perform the said agreement with your oratrix and convey to her the said two lots of lands hereinbefore specifically described, according to the terms thereof, as before stated;" and for an accounting.

When from the judgment of the appellate court reversing the circuit court and directing the entry of a decree in complainant's favor on **109**]payment of the amount due from *her to the company as ascertained on an accounting, the first appeal was taken to the supreme court, the errors there assigned nowhere in terms raised a Federal question. And, in affirming the judgment of the appellate court, the supreme court did not consider or discuss any Federal question as such in its opinion. The supreme court held that the agreement was fully made out, and that complainant was entitled to a conveyance of the lots; that it was not material whether the agreement was called an agreement to redeem or an agreement of repurchase, "as the form of the transaction, in a court of equity, is not to be regarded;" that the bill need not be treated as strictly a bill for specific performance, but it was enough that complainant was entitled to have her property restored to her upon discharging the burden upon it fixed in amount by the agreement.

The supreme court of Illinois [133 Ill. 380] further said: "It is also claimed that complainant's failure to assert the alleged agreement in the foreclosure proceedings is a bar to its assertion here—that the proceedings in the foreclosure are conclusive. We are unable to concur in this position. It was a part of the arrangement under which the complainant was to obtain the two lots in controversy, that a decree of foreclosure should be entered, and that the premises should be sold under such decree. The decree was rendered and the sale made by consent, for the purpose of clearing the different tracts of land mentioned in the quitclaim deed from certain encumbrances. The decree was not adverse to the interest of complainant, but in harmony with her interest. She is not attacking the decree, but claiming the enforcement of an agreement under which it was rendered, and in our judgment there is no ground for holding that the rights of complainant were cut off or in any manner impaired by the decree."

It is now contended that it then appeared that defendant claimed to hold an absolute title to the lots in question by virtue of the foreclosure proceedings and of the master's deed obtained thereunder, and hence that the title was claimed under an authority exercised under the United States; that a Federal question was thereby raised on the record; that **110**] the *decision of the case necessarily involved passing on the claim of title; that the opinion of the supreme court of Illinois showed that it was passed upon; and that the necessary effect of the decree and judgment of the state court was against the right and title of defendant sufficiently claimed under Federal authority. But we cannot accept this conclusion.

In the recent case of *Oxley Stave Company* v. *Butler County*, 166 U. S. 648, 654, [41: 1149, 1151], this court, speaking by Mr. Justice Harlan, said:

"The only remaining question was not otherwise raised than by the general allegation that the decree was rendered against dead persons as well as in the absence of necessary parties who had no notice of the suit, and therefore no opportunity to be heard in vindication of their rights. Do such general allegations meet the statutory requirement that the final judgment of a state court may be re-examined here if it denies some title, right, privilege, or immunity 'specially set up or claimed' under the Constitution or authority of the United States? We think not. The specific contention now is that the decree of the Butler county circuit court in the suit instituted by the county of Butler was not consistent with the due process of law required by the 14th Amendment of the Constitution of the United States. But can it be said that the plaintiff *specially* set up or claimed the protection of that amendment against the operation of that decree by simply averring—without referring to the Constitution or even adopting its phraseology—that the decree was passed against deceased persons as well as in the absence of neeessary or indispensable parties?

"This question must receive a negative answer, if due effect be given to the words 'specially set up or claimed' in § 709 of the Revised Statutes. These words were in the 25th section of the judiciary act of 1789 (1 Stat. at L. 85, chap. 20), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a state, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of *the case, that they were claimed under[**111** the Constitution, treaties, or statute of the United States. The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission, or authority of the United States, he must so declare; and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the circuit courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. Hence, the averment that a party resides in a particular state does not import that he is a citizen of that state. *Brown* v. *Keene*, 33 U. S. 8 Pet. 112, 115 [8: 885, 886]; *Robertson* v. *Cease*, 97 U. S. 646, 649 [24: 1057, 1059]. Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

Tested by this rule it is quite apparent that defendant did not specially set up or claim a Federal right or title within the meaning of § 709, and that no right or title so claimed was

denied by the supreme court on the first appeal.

And as the judgment of that court determined the rights of the parties and left open only the amount due on the accounting, the suggestion of the disposition of a Federal question by that judgment comes too late.

After the case went back to the circuit court for the entry of decree in favor of Mrs. Kirchoff and the accounting, defendant moved for leave to amend its answer by inserting the following:

"And the said defendant, further answering, says that by reason and in virtue of the said 112] foreclosure decrees in the said *United States court, the sale thereunder, the confirmation thereof, and all the acts and doings of said court therein the said Union Mutual Life Insurance Company acquired a title and right to the lands aforesaid; that said right and title was acquired and is claimed under the Constitution, statutes, and authority of the United States; that a decree for redemption or specific performance of the contract alleged in said bill would be against the right and title of said company thus acquired and hereby claimed under the Constitution, laws, and authority of the United States; that a decree for redemption or specific performance, as prayed for in said bill, or either of them, would fail to give full faith, credit, and effect to the said decrees, orders, and acts of the United States circuit court in the foreclosure proceedings aforesaid; that a decree for redemption or specific performance, as prayed for, or either of them, cannot be entered without attacking and pretending to nullify or impair the said decrees, orders, and acts of the said United States circuit court, and that, for the foregoing reasons, this court is without jurisdiction of the subject-matter of the action set forth in the bill of complaint, and is without jurisdiction to enter a decree for redemption or specific performance, as prayed for in said bill of complaint."

But the circuit court refused to allow the amendment.

There was no contention that any Federal question arose on the accounting itself. The case having reached the appellate court the second time, the insurance company assigned, among other errors, that the circuit court erred "in that it did not dismiss complainant's bill for want of jurisdiction;" "in not holding that it was without jurisdiction to enter a decree allowing redemption;" "in entering a decree which would in effect nullify the decree and doings of the circuit court of the United States for the northern district of Illinois;" "in entering a decree in conflict with the decree of the United States circuit court;" " in refusing to the defendant leave to file the proposed amendment to its answer;" "in entering a decree against the validity of titles claimed by defendant under the authority of the United States."

It will be perceived that so far as Federal ques-113]tions were *thus attempted to be raised, they were all covered by the prior judgment.

The appellate court on the second appeal held itself bound by the previous decision and declined to enter on matters of defense which might have been then availed of. The supreme court was of the same opinion, for it ruled that where a case had once been reviewed by the court, and remanded with directions as to the decree to be entered, error could not be assigned on a subsequent appeal for any cause existing at the time of the prior judgment. Nevertheless the supreme court [149 Ill. 539] said:

"Much of the argument of counsel for appellant is devoted to an effort to show a want of jurisdiction in the circuit court of Cook county over the subject-matter of this litigation. Whether, upon this second appeal, that is an open question, we do not deem it important to determine, being clearly of the opinion that the position of counsel is untenable. It is said the suit is brought to review and set aside a decree of the United States circuit court, and the bill is treated, throughout the discussion, as hostile to the foreclosure proceeding in that court, or as attempting to obtain relief properly available in that action.

"This is a misapprehension of the scope and purpose of complainant's bill. In our former opinion we said: 'After the settlement had been concluded it turned out that certain encumbrances existed against some of the property, which were subsequent to the trust deed, but which would take priority to the quitclaim deed executed by complainant and her husband. It therefore became necessary, in order to obtain a perfect title, to go on with the foreclosure proceedings, which was done.' This statement is based upon an allegation of the bill to the effect that, it being represented to the complainant by the attorney of the company that it would be necessary to foreclose the trust deed in order to make good the title in the company to the lots before they could take a mortgage thereon for the instalments of redemption money, it was agreed between the parties that the agreement for redemption should not be executed until after the title had been perfected *in the company by fore-[114 closure, but in the meantime complainant should execute and deliver to the company her quitclaim deed, and should interpose no defense to such foreclosure. The allegation was found, in the opinion above referred to, sustained by proofs, and is conclusive of that fact upon this appeal. The foreclosure decree in the Federal court was therefore as much the result of the agreement relied upon by complainant as was the making of the quitclaim deed by her. So far from this being an attempt to review, modify, or set aside the decree of the United States circuit court, the right of action is predicated, in part, at least, upon it.

"Whether the bill be called a bill to redeem, or given another name, can in no way affect the question of jurisdiction in the state court. The relief sought is the enforcement of a contract to reconvey the property in question, which we have already held the complainant entitled to. Her rights grow out of the alleged contract, and not by reason of anything that was done, or could have been done, in the Federal court in the foreclosure suit.

"That a court of equity has jurisdiction to enforce the contract, whether it be called a contract to redeem or to reconvey, is, we think, too clear for argument."

The supreme court did not decide that the case was reopened as to matters previously adjudicated, and we cannot regard these observations as amounting to such disposition, on a second appeal, of Federal questions which might have been, but were not, raised on the first appeal, as would justify us in taking jurisdiction.

It was further argued at this bar that the agreement was fraudulent and illegal as respected the foreclosure decree; and that the decree of the state court, upholding an agreement thus tainted, ascribed to that decree an operation which would not have been permitted in the courts of the United States, and in that view involved a review thereof or a refusal to give it its due effect.

We do not find that the state courts were asked to pass on any such question. If it was really contended before them that the agreement was invalid on the ground that it pro **115**]vided *that the United States court should go to decree and sale in order to cut off intervening liens, it may be conceded that those courts held, on the facts appearing, that the agreement was not open to that objection, but it would not follow that thereby a Federal question was disposed of. And the point was certainly embraced by the first judgment.

We are of opinion that we cannot revise the present judgment on the ground that plaintiff in error was thereby denied any right properly claimed, and in apt time, in accordance with § 709 of the Revised Statutes.

Writ of error dismissed.

GEORGE P. WETMORE *et al., Plffs. in Err.*,
v.
DAVID RYMER *et al.*

(See S. C. Reporter's ed. 115-128.)

Review of dismissal of judgment—determination of value of lands—presumption—certainty as to amount.

1. A party whose suit has been dismissed by the United States circuit court for want of jurisdiction has the right to have such judgment reviewed by this court.
2. The determination as to the value of lands in dispute, made by the circuit court upon the evidence, without submitting the question to the jury, can be reviewed by this court when the circuit court has dismissed the suit for want of jurisdiction.
3. A liberal presumption ought to be indulged in favor of plaintiff's evidence as to the value of land in controversy, when this is a jurisdictional question, and the court gave leave to both parties to file affidavits on the question, and the defendant fails to procure a single sworn statement on the subject.
4. A suit cannot be properly dismissed by a circuit court on the ground that the subject-matter is of less value than the jurisdictional amount, unless the facts made to appear on the record create a legal certainty of that conclusion.

[No. 76.]

Submitted November 1, 1897. Decided January 17, 1898.

IN ERROR to the Circuit Court of the United States for the Eastern District of Tennessee to review a judgment dismissing for want of jurisdiction an action of ejectment brought by George P. Wetmore *et al.*, plaintiffs, against David Rymer *et al.*, to recover a tract of land in Polk county. *Reversed* and cause remanded with instructions.

Statement by Mr. Justice **Shiras:**

This was an action of ejectment brought in the circuit court of the United States for the eastern district of Tennessee to recover a tract of land in Polk county. The declaration alleged that the land was worth more than $2,000. The defendants disclaimed as to a portion of the *land, and pleaded not guilty and [**116** the statute of limitations as to the remainder.

At the trial, after the plaintiffs' evidence was closed, the defendants moved the court to dismiss the plaintiffs' suit for want of jurisdiction because it appeared that the matter in dispute did not exceed, exclusive of interest and costs, the sum or value of $2,000; but the court suspended action on this motion until the verdict of the jury should be rendered. The defendants then proceeded to introduce their evidence on the matters put in issue by the pleadings, and, after argument of counsel and the charge of the court, the jury found a verdict in favor of the plaintiffs, and assessed their damages for the detention of the premises at $1. Thereupon the court rendered judgment on the verdict and a writ of possession and execution accordingly.

But immediately upon the rendition of the verdict and judgment the court set them aside, entertained the defendants' motion to dismiss for want of jurisdiction, and gave leave to both parties to file affidavits showing the value of the land in controversy.

Upon consideration of the evidence heard on the trial and of affidavits produced on behalf of the plaintiffs, the court, being of opinion that the value of the matter in dispute was less than $2,000, and that there was not a substantial controversy between the parties of sufficient value to be within the jurisdiction of the court, dismissed the suit for want of jurisdiction, and rendered judgment for costs against the plaintiffs. The plaintiffs excepted to this action of the court; a bill of exceptions was sealed; and a writ of error was allowed to this court.

Mr. **Charles Seymour for plaintiffs in error.**

No counsel for defendants in error.

NOTE.—*Jurisdiction of United States Supreme Court dependent on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy*,—see note to Gordon v. Ogden, 7: 592.

That only parties to record can be heard on appeal or writ of error, see note to Harrison v. Nixon, 9: 201.

As to what questions the United States Supreme Court will review on writ of error; bill of exceptions, —see note to Parks v. Turner, 13: 883.

As to amount necessary to give jurisdiction in circuit court cases prior to act of 1875; amount necessary since act of 1875; amount in dispute,—see note to Schunk v. Moline, M. & S. Co. 37: 256.

Mr. Justice **Shiras** delivered the opinion of the court:

The first question that arises upon this record **117**]is whether *the action of the circuit court in dismissing the plaintiffs' action for the want of jurisdiction is reviewable by us. The court acted in pursuance of the 5th section of the act of March 3, 1875 (18 Stat. at L. 472, chap. 137), which provided, "that if, in any suit commenced in a circuit court or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just; but the order of said circuit court dismissing or remanding said cause to the state court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

By the 6th section of the act of August 13, 1888 (25 Stat. at L. 433, chap. 866), amending the act of March 3, 1887, it was enacted "that the last paragraph of section five of the act of Congress approved March third, eighteen hundred and seventy-five, entitled 'An Act To Determine the Jurisdiction of Circuit Courts of the United States and to Regulate the Removal of Causes from State Courts and for Other Purposes,' and § 640 of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be and the same are hereby repealed."

Any doubt that may have been caused by this repealing enactment, as to the power to review the judgment of a circuit court dismissing a suit for want of jurisdiction, was removed by the act of February 25, 1889 (25 Stat. at L. 693, chap. 236), entitled "An Act To Provide for Writs of Error or Appeals to the Supreme Court of the United States in All Cases Involving the Question of the Jurisdiction of the Courts Below," and which provided "that **118**]in all cases where a final judgment *or decree shall be rendered in a circuit court of the United States in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the Supreme Court of the United States to review such judgment or decree without reference to the amount of the same; but in cases where the decree or judgment does not exceed the sum of $5,000 the Supreme Court shall not review any question raised upon the record except such question of jurisdiction; such writ of error or appeal shall be taken and allowed under the same provisions of law as apply to other writs of error or appeals."

This act of February 25, 1889, was followed by the act of March 3, 1891 (26 Stat. at L. 826, chap. 517), which provided, in its 5th section, "that appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

These provisions of the several statutes plainly disclose the intent of Congress that a party whose suit has been dismissed by a circuit court for want of jurisdiction shall have the right to have such judgment reviewed by this court. And we have accordingly heretofore held that the action of the circuit courts in such cases is subject to our revision. *Williams* v. *Nottawa Twp.* 104 U. S. 209 [26: 719]; *Barry* v. *Edmunds*, 116 U. S. 550 [29: 729]; *Hartog* v. *Memory*, 116 U. S. 588 [29: 725]; *Morris* v. *Gilmer*, 129 U. S. 315 [32: 690]; *Deputron* v. *Young*, 134 U. S. 249 [33: 924]; *Lehigh Min. & Mfg. Co.* v. *Kelly*, 160 U. S. 327 [40: 444].

The question raised by this writ of error is whether the circuit court erred in dismissing the plaintiffs' suit for the alleged reason that the value of the property in dispute did not amount to the sum of $2,000, exclusive of interest and costs, and that, therefore, such suit did not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court; and, as prescribed by the 5th section of the act of March 3, 1891, *such question of the jurisdiction of the[**119** circuit court alone is presented for our decision. *Shields* v. *Coleman*, 157 U. S. 168 [39: 660].

The question whether the land in dispute was of a value sufficient to give the circuit court jurisdiction was purely one of fact, and as that question was not submitted to the jury, but was passed on by the court upon affidavit, it is now suggested that, upon a writ of error, this court cannot consider the facts disclosed by the affidavits, but is restricted to any errors of law shown by the record.

Undoubtedly, the general rule is that upon a writ of error only matters of law appearing on the face of the record can be considered, and that evidence, whether written or oral, and whether given to the court or to the jury, does not become a part of the record unless made so by some regular proceeding at the time of the trial and before the rendition of the judgment. Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law; and ordinarily a bill of exceptions lies only upon some point arising either upon the admission or rejection of evidence, or is a matter of law arising from a fact found, or not denied, and which has been overruled by the court. *Arthurs* v. *Hart*, 58 U. S. 17 How. 6 [15: 30].

The difficulty arises out of the peculiar character of the legislation which we are now considering. Prior to the passage of the act of 1875 questions going to the jurisdiction of the court could only be raised by a plea in abatement in the nature of a plea to the jurisdiction. See *Farmington* v. *Pillsbury*, 114 U. S. 138 [29: 114], and cases there cited. If such a plea presented a question of law upon the face of the

record, this court could review the decision of the court below upon such question of law. If the plea asserted matters of fact *dehors* the record, it was open for the parties to agree upon a statement of facts, or to take exceptions to the rulings of the court in admitting or rejecting evidence offered to the jury or in giving instructions, and in either event only questions of law would be presented for our decision.

120] *But, under the act of 1875, the trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, inquire into the facts as they really exist. *Williams* v. *Nottawa Twp.* 104 U. S. 209 [26: 719]; *Barry* v. *Edmunds*, 116 U.S. 550 [29:729]; *Morris* v. *Gilmer*, 129 U. S. 315 [32:690]; *Deputron* v. *Young*, 134 U. S. 249 [33: 924]. And our present problem is to preserve as well the power of the trial court to make such inquiries as the right of suitors, so expressly reserved to them in the statute, to have the action of the lower court reviewed by the Supreme Court of the United States.

In equity cases, which come up on appeal, and where the evidence on which the court below acted is presented here, the action of that court can be readily reviewed But in cases at law, like the present one, how can we review the judgment of the court below, unless that judgment is either based on the verdict of a jury or upon facts found in an agreed statement?

The statute does not prescribe any particular mode in which the question of the jurisdiction is to be brought to the attention of the court, nor how such question, when raised, shall be determined.

When such a question arises in an action at law its decision would usually depend upon matters of fact, and also usually involves a denial of formal, but necessary, allegation contained in the plaintiff's declaration or complaint. Such a case would be presented when the plaintiff's allegation that the controversy was between citizens of different states, or when, as in the present case, the allegation that the matter in dispute was of sufficient value to give the court jurisdiction, was denied.

In such cases, whether the question was raised by the defendant or by the court on its own motion, the court might doubtless order the issue to be tried by the jury. The action of the court, in the admission or rejection of evidence, or in instructing the jury, would thus be subjected to the review by this court which was intended by Congress.

Such was the course pursued in the case of *Jones* v. *League*, 59 U. S. 18 How. 76 [15: 263]. **121]** *That was an action at law to try title to land. League, the plaintiff, averred himself to be a citizen of Maryland, the defendants being citizens of Texas. By a plea in abatement the defendants alleged that, at the time of the commencement of the suit, League was a citizen of Texas. On this plea the plaintiff took issue, and a trial of that issue was had, which resulted, under the instructions of the court, in a verdict of the jury for the plaintiff. The case was brought up, by a writ of error, to this court, where the validity of the instructions given by the trial court was considered.

A similar course was followed in the case of *Chicago & Northwestern Ry. Co.* v. *Ohle*, 117 U. S. 125 [29: 837]. There an action had been brought by Ohle in a state court of Iowa against the railway company, which took the case by a removal petition into the circuit court of the United States, on the ground that Ohle was a citizen of Iowa and the railway company a citizen of Illinois. Ohle was permitted by the circuit court to file a plea in abatement or to the jurisdiction, alleging that both he and the railway company were citizens of Illinois. Upon this plea issue was joined, and a trial had with a jury; and the cause was brought to this court by a writ of error, where the instructions of the court to the jury were reviewed and the judgment affirmed.

But the question might arise in such a shape that the court might consider and determine them without the intervention of a jury. And it would appear to have been the intention of Congress to leave the mode of raising and trying such issues to the discretion of the trial judge.

But whether the judge shall elect to submit the issue to the jury, or to himself hear and determine them, it is the manifest meaning of this legislation that, in either event, the parties are not to be concluded by the judgment of the circuit court. As we have already said, if the questions are submitted to the jury there will be a ready remedy, by proper exceptions and a writ of error, to correct any errors into which the trial court may have fallen. And if the court takes to itself the determination of the disputed questions, it is imperative, in order to give effect to the intention of Congress, that *its action must take a form that will ena- **[122** ble this court to review it, so far as to determine whether the conclusion of the court below was warranted by the evidence before that court.

Thus in *Barry* v. *Edmunds*, 116 U. S. 550 [29: 729], where the judgment of the circuit court, dismissing a cause because in its opinion the matter in dispute did not amount to the jurisdictional value, was reversed, it was said: "In making such an order, therefore, the circuit court exercises a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proved and controlled by fixed rules of law. It might happen that the judge, on the trial or hearing of a cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction on this account 'shall appear to the satisfaction of said circuit court.'" In *Hartog* v. *Memory*, Id. 588 [29:725], it was said: "No doubt if, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of

proceeding, and act as justice may require for its own protection against fraud or imposition. But the evidence on which the circuit court acts in dismissing the suit must be pertinent either to the issue made by the parties, or to the inquiry instituted by the court; and must appear of record if either party desires to invoke the exercise of the appellate jurisdiction of this court for the review of the order of dismissal. And when the defendant has not so pleaded as to entitle him to object to the jurisdiction, and the objection is taken by the court of its own motion, justice requires that the 123] plaintiff *should have an opportunity to be heard upon the motion, and to meet it by appropriate evidence."

And this language from *Barry* v. *Edmunds* was quoted with approval in the case of *Deputron* v. *Young*, 134 U. S. 252 [33: 929].

This court must therefore consider whether the judgment of the circuit court, dismissing the suit for want of jurisdiction, was warranted by the facts of the case as they are disclosed in the record.

The declaration was as follows:

"The plaintiff, George Peabody Wetmore, who is a citizen of the state of Rhode Island. Matilda C. Alloway, a citizen and resident of the state of Pennsylvania, V. K. Stevenson, Hugh Stevenson, Paul E. Stevenson, Eloise Stevenson Kernochan and James L. Kernochan, her husband, and Maxwell Stevenson, by Paul E. Stevenson, his next friend, all of whom are citizens and residents of the state of New York, sue the defendants, David Rymer, Sam. Rymer, Tom Payne, and W. Calvin McConnell, all of whom are citizens and residents of Polk county, Tennessee, to recover the following described lands, situate in the county of Polk, in the southern division of the eastern district of Tennessee, to wit:

"In town. one, range three east, of the basis line, Ocoee district.

"The south half of section one, the south half of section two, the northwest quarter of section eleven, all of section twelve, the southwest quarter of section thirteen.

"In town. two, range four east, of the basis line, Ocoee district.

"All of sections one and two and three and five and eight and nine and ten and eleven and twelve and thirteen and fourteen and fifteen and seventeen and twenty and twenty-one and twenty-two and twenty-three and twenty four and twenty-five and twenty-six and twenty-seven and twenty-eight and thirty-three and thirty-four and thirty-five, the north half and the southeast quarter of section six, the east half of section seven, the east half of section eighteen, the east half and the northwest quar- 124] ter of section nineteen, the *north half and the southeast quarter of section twenty-nine, the east half of section thirty-two, the west half of the west half of section thirty-six.

"In town. one, range four east, of the basis line, Ocoee district.

"All of sections thirty-one and thirty-five and thirty-six, the west half of section thirty-four.

"As shown on the general plan of the Ocoee district of the state of Tennessee, to which and the grants for said land reference is made for full description.

"Which lands are worth more than two thousand dollars and of which lands said plaintiffs were possessed, claiming in fee, before the commencement of this suit, and after said possession accrued the said defendants, on the 1st day of January, 1892, entered thereupon and unlawfully withhold and detain the same, together with one thousand dollars due for the detention thereof."

The plea was as follows:

"And now comes the defendant, David Rymer, and for plea to plaintiffs' declaration says that he is not in possession of and does not claim and has not entered upon or been in possession of or claimed any part of the lands in said declaration described, except the following described lands, to wit: The southwest ¼ of section 17, the north ½ of section 20, the east ½ and southwest ¼ of section 18, and the northeast ¼ of section 19, all in township 2, range 4 east, of the basis line, Ocoee district, Tennessee; and as to all the lands except those herein described this defendant here and now disclaims any and all interest, right, or title.

"And for further plea in this behalf said defendant says that as to the said southwest ¼ of section 17, the north ½ of section 20, the east ½ and southwest ¼ of section 18, and the northeast ¼ of section 19, all in township 2, range 4 east, of the basis line, Ocoee district, Polk county, Tennessee, he is not guilty in manner and form as the plaintiffs in their said declaration have alleged; and of this put himself upon the country."

The verdict and judgment were for all the lands claimed in *the declaration, being a[125 connected body of land of about 25,000 acres. The plea claimed right of possession of between 1,000 and 2,000 acres. The evidence upon which the court passed was restricted to the value of the land claimed by the defendants. And it is urged on behalf of the plaintiffs that the value of the entire tract claimed in the declaration and recovered by the verdict should have been considered in passing upon the question of the value of the matter in dispute; that, while the disclaimer may estop the defendants, it does not deprive the plaintiffs of their right to a verdict and judgment for the entire tract claimed, upon which a writ of possession may issue; that judgment in ejectment is conclusive as to title so far as the parties are concerned.

But we do not consider it necessary to consider or decide this contention, because we are of opinion that the evidence sufficiently disclosed, for the purposes of maintaining jurisdiction, that the value of the land claimed in the plea exceeded the sum of $2,000. As that evidence is brief it seems proper to state it in the very form in which it appears in the bill of exceptions.

At the trial and before the jury rendered their verdict, the plaintiffs introduced as a witness one Oscar W. Muller, who testified that he was a surveyor and had surveyed the lands for the plaintiffs. On cross-examination by defendants' attorney he testified that the market value of the land was 50 cents per acre; that it was wild or mountain land, and not worth more than that unless its prospective value was to be considered, and that the land described in the plea of the defendants was not worth $1,000.

After the verdict and judgment, and upon

the motion made to dismiss, the plaintiffs filed the affidavit of Charles Seymour, who testified that he was the attorney and had been for twenty-five years the agent of what are known as the Wetmore and Stevenson lands, in Polk county, Tennessee, and that he is familiar with most of the lands and has been on the lands in dispute in this cause, and that the lands set out in the plea of the defendants lie on Lost creek and Little Lost creek, and form a connecting way **126**] to many thousands of acres of land *of the plaintiffs, which lie in that vicinity, and that the lands described in this plea are worth more than $2,000 on account of their location, and are not to be judged by the general price for mountain land in the vicinity; that these lands lie near the foot of Frog mountain, on the northwesterly side, where the timber is more than usually heavy and unusually valuable, both for accessibility and quality.

The plaintiffs likewise filed the affidavit of J. B. Brock, in which he testified as follows:

"I have lived in Polk county over forty years; was sheriff for six years, and have herded cattle for about twenty-five years on and in vicinity of lands set out in defendants' plea, and I know the location of some twenty thousand acres lying near by, understood to be the property of Wetmore and Stevenson heirs, the plaintiffs in this suit. The lands described in the plea are worth much more than the ordinary mountain lands. I sold a quarter section of 160 acres lying a mile from the lands in the plea for $400, and the lands described in the plea are near the foot of the mountain, where the timber is better than on most of the mountains; and the way they lie, if I owned the Wetmore and Stevenson lands, I would not want to sell at all, as they are part of a large boundary that would be needed for shelter of cattle off the mountain and for roadways, and control of the ways to the herding grounds or timber-work, or if mining be done would be in the way. Not long before the defendant took the lease in 1888 from Wetmore and Stevenson he offered to make me a deed for some land a mile and a half from any land in his present plea in this suit."

The plaintiffs likewise filed the affidavit of O. W. Miller, who, having testified that he has been county surveyor for Polk county for a number of years, and has surveyed the lands in dispute, and also surrounding lands, said:

"While I value the mountain land as a whole at fifty cents per acre, the land in litigation, lying on the waters of Lost creek and Little Lost creek at the foot of the mountain, forms part of a connected body of land of about twenty-five thousand acres, and forms a gateway and **127**]outlet to this body *for timber and stock to the Hiwassee river and railroad, without which the rest of the body would be materially reduced in value, say from ten to twenty cents per acre. To cut this off and permanently block this approach would reduce the value of the whole from two to four thousand dollars."

The defendants filed no affidavits and adduced no evidence on the question of value, but appeared to have relied wholly on the statement of O. W. Miller when under cross-examination at the trial.

It is not easy to see upon what sound view of this evidence the learned judge of the circuit court deprived the plaintiffs of their verdict and judgment. There was no pretense that the plaintiffs had fraudulently overstated the value of the land in order to confer jurisdiction.

It does not seem to have occurred to the defendants that the land which they claimed was not worth $2,000, until, at the trial, their attorney caught at the statement of one of plaintiffs' witnesses that he estimated wild mountain land at fifty cents per acre. When the court gave leave to both parties to file affidavits showing the value of the lands in controversy, the defendants were unable or unwilling to make or procure to be made a single statement under oath on the subject of the inquiry. A liberal presumption ought, therefore, to be indulged in favor of the plaintiffs' evidence in that regard. It is well known that there is no matter in respect to which the judgments of men more widely differ than in regard to the value of real estate.

We give no weight to that portion of the plaintiffs' evidence that goes to show damage to the balance of their lands by an adverse occupancy of the land claimed by the defendants. But looking only at the evidence bearing strictly on the value of the controverted lands, it seems obvious that while the market value of the wild mountain land generally was estimated by one of the witnesses at fifty cents an acre, yet it was testified by several witnesses that these particular lands possessed a special value by reason of their location at the foot of the mountain, and because the timber on them was more than usually heavy and valuable both for accessibility *and quality. [**128** Charles Seymour, who had been familiar with the lands for twenty-five years as agent for their owner, testified that the lands described in the plea were worth more than $2,000 on account of their location and the quality of their timber, and were not to be adjudged by the general price for mountain land in the vicinity.

It is unnecessary to quote authorities to show that, in estimating the market value of land, everything which gives it intrinsic value is a proper element for consideration; not only its present use but its capabilities are to be considered. Even unimproved land lying at the foot of a mountain range is obviously more valuable than similar lands less eligibly situated.

Applying the law as heretofore stated by this court, in the cases cited, that a suit cannot be properly dismissed by a circuit court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion, we conclude that, in the present case, the want of jurisdiction was not made clear, and that the evidence before that court did not warrant a dismissal of the action for the want of jurisdiction.

The judgment of the Circuit Court dismissing the action is accordingly reversed, and the cause is remanded with directions to restore the judgment on the verdict.

WILLIAM RICHARDSON, Trustee, *Plff. in Err.*,
v.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, and M. H. Sullivan and Emily F. Sullivan, Executor and Executrix of D. F. Sullivan, Deceased.

(See S. C. Reporter's ed. 128-132.)

Spanish grant, when not sufficient to sustain ejectment.

A Spanish grant of "an extension or tract of the bay of Pensacola, whose superficies of water" is equal to a certain area, "with the depth from the surface of the water as far as 10 feet English below the actual bottom . . . the whole in full property, and for the purpose of constructing wharves and houses for bathing," reserving the right of the public to construct wharves, is not a grant of title, but of a mere license, easement, or right of use which will not sustain ejectment, where no evidence of prior possession is given.

[No. 251.]

Submitted December 13, 1897. Decided January 17, 1898.

IN ERROR to the Supreme Court of the State of Florida to review a judgment of that court affirming the judgment of the Circuit Court of Escambia County, Florida, in favor of defendants, in an action of ejectment brought by William Richardson, trustee, plaintiff, against the Louisville & Nashville Railroad Company *et al.*, for a tract of or extension of the Bay of Pensacola. *On motion to dismiss. Affirmed.*

The facts are stated in the opinion.

Mr. **Gregory L. Smith** for defendants in error, for motion to dismiss.

Mr. **W. A. Blount** for plaintiff in error, in opposition to motion.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was an action of ejectment brought by plaintiff in error in the circuit court of Escambia county, Florida.

On the trial plaintiff offered in evidence an alleged Spanish grant of several tracts from Don Alexander Ramirez, intendant of the army and superintendent general of Cuba and the two Floridas, to Don Vicente Sebastian **130**] Pintado with proof of *execution; and also deraignment of paper title from Pintado's heirs to himself. No evidence was offered of actual prior occupation. The property sued for was included in one of the tracts, described as follows:

"The lands designated by the letter C are an extension or tract of the bay of Pensacola, whose superficies of water is equal to an area of 718½ arpents, superficial, occupying between the eastern point of the mouth of the creek of Casa Blanca, commonly called Bayou Chico, and the western point of the mouth of the rivulet or creek of Texar, commonly called Bayou Texar, and a line drawn in the direction of southeast of the needle, 95 perches of Paris, within the sea, from the aforesaid first point, and the other line of 100 of said perches in length, counted from the second point mentioned within the sea, also from the same point of southeast of the needle, which embraces the whole of the front from the one to the other mouth of the creeks of Casa Blanca and Texar, between which is the town of Pensacola, the whole conforming and according to the plan annexed, made for the greater clearness and understanding in which is represented the figure which the said land forms in the water and the limits within the bay of Pensacola, being that part of the land and beach which is found between the said two points of the mouths of the mentioned creeks, the curve which the shore of the water of the sea at the highest tide in calm weather makes, and with the depth from the surface of the water as far as 10 feet English below the actual bottom, or towards the center of the earth, in the whole, the space which the figure represented in the said plan C embraces, considering it as a solid, since it has these three dimensions of longitude, latitude, and depth. . . . The whole in full property and for the purpose of constructing wharves and houses for bathing, reserving and saving, not only the right of his majesty, but also that of the public, at all times whenever it becomes convenient, and it be designed to construct wharves with whatsoever funds, municipal or common, intending the exclusion only with respect to particular individuals."

*Defendants objected to the introduc- [**131** tion of the grant upon the following grounds, *viz.*:

"The grant so far as it relates to the *locus in quo* was a mere license to Pintado to use the property in a particular way and vested in him no sufficient title upon which to recover in ejectment.

"Because said grant, so far as it relates to the *locus in quo*, was not an exclusive grant of the property occupied by the defendants.

"Because said grant, so far as it relates to the *locus in quo*, was not within the delegated authority of the officer who attempted to grant the same.

"Because said grant, so far as it relates to the *locus in quo*, is not one which was validated or recognized by the treaty between the United States and Spain.

"Because it is not shown that Alexander Ramirez had the power or authority to make said grant, so far as it related to the *locus in quo*."

The trial court sustained defendants' objections and excluded the grant, and plaintiff excepted.

Thereupon a verdict was returned for defendants and judgment entered thereon, from which an appeal was taken to the supreme court of the state. In that court the plaintiff in error assigned but one error, to wit. "The refusal of the court to admit in evidence the grant from Alexander Ramirez to Vicente S. Pintado."

The supreme court of Florida affirmed the

NOTE.—*As to ejectment for possession of public street*, see note to Thomas v. Hunt (Mo.) 32 L. R. A. 857.

As to statute authorizing trespass to each public waters, see note to New England Trout & S. Club v. Mather (Vt.) 33 L. R. A. 569.

As to ownership of land under Lake Erie, see note to People v. Silberwood (Mich.) 32 L. R. A. 694.

judgment, and held that the purpose of the grant "as to the water front therein described was not to grant the land and water as such within the described limits, but the right to use the same, within such limits and to the depth stated below the surface of the soil, for the purpose of constructing wharves and houses for bathing, such right of use being to the exclusion of any similar right of use in any other individuals, and subordinate to the right of the King and the public to construct wharves with municipal or common funds within such limits; also, that while the King of Spain could have made such a grant to Pintado, it would have 132]been contrary to his laws then in *force in West Florida and a case of special exception from their effect, and that Ramirez had no authority to make the grant, and it was void and vested no title in the grantee." *Richardson* v. *Sullivan's Executors* [38 Fla. 90], 20 So. Rep. 815. And see *Sullivan* v. *Richardson*, 33 Fla. 1, where the case is fully considered on a prior appeal.

On affirming the judgment the supreme court entered an order to the effect that, in holding the grant void, a claim by plaintiff of a right, title, or privilege under the treaty between the United States and Spain of February 22, 1819, had been disposed of adversely to him; and a writ of error from this court was allowed.

As before stated, defendants objected to the admission of the grant in evidence on the grounds that, so far as it related to the *locus in quo*, it "was a mere license to Pintado to use the property in a particular way, and vested in him no sufficient title on which to recover in ejectment;" and also that the grant "was not within the delegated authority of the officer who attempted to grant the same." Thus the construction of the grant and its validity were presented for consideration as distinct inquiries, and while the trial court assigned no reasons for its action, the supreme court passed on both questions, and in its first opinion elaborately discussed them.

But in sustaining the ruling of the trial court in excluding the alleged grant, the supreme court rested its decision on the want of authority to make such a grant as it held this to be. Therefore, the contention on behalf of plaintiff in error is that this court necessarily has jurisdiction. As, however, we entirely concur with the state court in the view that the grant was not a grant of title, but of a mere license, easement, or right of use, and no evidence of prior possession was offered, we need not consider whether the grant as thus correctly construed was valid or not, for, even if valid, the ruling on this record could not have been other than it was. The ruling was so obviously correct that we do not feel constrained to retain the case for further argument. *Chanute City* v. *Traper*, 132 U. S. 210 [33: 345]

Judgment affirmed.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, [133

Plff. in Err.,

v.

PATRICK L. SOLAN.

(See S. C. Reporter's ed. 133-138.)

Power of state to regulate railroads—state statute as to railroads, when not void.

1. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce.
2. A state statute prohibiting contracts to exempt a railroad company from liability as a common carrier is not in any just sense a regulation of commerce, or void as to interstate business.

[No. 73.]

Argued November 1, 1897. Decided January 17, 1898.

NOTE.—*As to power of Congress to regulate commerce*, see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.

As to interstate commerce; regulation of; power of Congress, how far exclusive,—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

From what liability a contract that a common carrier is not to be liable for loss or damage will exonerate, see note to New Jersey Steam Nav. Co. v. Merchant's Bank, 12: 465.

As to liability of carrier for injuries to passengers carried free or riding on a pass, see note to New York C. R. Co. v. Lockwood, 21: 627.

As to interstate or foreign transportation, see note to Missouri P. R. Co. v. Sherwood (Tex.) 17 L. R. A. 643.

As to whether shipments between points in the same state lose their character of domestic commerce by passing out of the state during transportation, see note to Houston Direct Nav. Co. v. Insurance Co. of N. A. (Tex.) 30 L. R. A. 713.

As to contracts exempting carriers from liability for their own negligence or that of their servants; validity of.

A common carrier may limit its liability by contract, but it cannot thereby relieve itself from the consequences of its own negligence. New York C. R. Co. v. Lockwood, 84 U. S. 17 Wall. 357 (21: 627); Bank of Kentucky v. Adams Exp. Co. 93 U. S. 174 (23: 872); Campania La Flecha v. Brauer, 168 U. S. 104 (*ante*, 398); South & North Ala. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana), 129 U. S. 397 (32: 788); Little Rock, M. R. & T. R. Co. v. Talbot, 39 Ark. 523; Merchants' Despatch & Transp. Co. v. Cornforth, 3 Colo. 280, 25 Am. Rep. 757; Camp v. Hartford & N. Y. S. B. Co. 43 Conn. 333; Georgia R. Co. v. Gann, 68 Ga. 350; Illinois C. R. Co. v. Adams, 42 Ill. 474, 92 Am. Dec. 85; United States Exp. Co. v. Harris, 51 Ind. 127; Goggin v. Kansas P. R. Co. 12 Kan. 416; Reno v. Hogan, 12 B. Mon. 63, 54 Am. Dec. 513; Simon v. The Fung Shuey, 21 La. Ann. 363; Hoadley v. Northern Transp. Co. 115 Mass. 304, 15 Am. Rep. 106; Willis v. Grand Trunk R. Co. 62 Me. 488; Schriver v. Sioux City & St. P. R. Co. 24 Minn. 506; Chicago, St. L. & N. O. R. Co. v. Abels, 60 Miss. 1017; Ashmore v. Pennsylvania Steam Towing & Transp. Co. 28 N. J. L. 180; Atchison & N. R. Co. v. Washburn, 5 Neb. 117; Branch v. Wilmington & N. R. Co. 88 N. C. 573; United States Exp. Co. v. Backman, 28 Ohio St. 144; Seller v. The Pacific, 1 Or.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment of that court affirming the judgment of an inferior court of that State in favor of Patrick L Solan, plaintiff, against the Chicago, Milwaukee, & St. Paul Railway Company, for the recovery of damages for injuries to plaintiff from the derailing, by defendant's negligence, of a caboose attached to a freight train of defendant. *Affirmed.*

See same case below, 95 Iowa, 260, 28 L. R. A. 718.

The facts are stated in the opinion.

Messrs. **George E. Clarke,** *Burton Hanson,* and *George R. Peck* for plaintiff in error.

Messrs. **S. M. Stockslager** and *George C. Heard* for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

This was an action brought in an inferior court of the state of Iowa against a railroad corporation incorporated under the laws of the state of Wisconsin, and authorized to transact business in the state of Iowa, and having a railroad extending from Rock Valley in Iowa to Chicago in Illinois, to recover $10,000, as damages for injuries suffered by the plaintiff between Boyden and Sheldon in Iowa, from the derailing, by the defendant's negligence, of a caboose attached to a freight train of the defendant, in which the plaintiff was traveling under a written contract by which the defendant agreed to carry him with cattle from Rock Valley to Chicago.

The defendant, in its answer, denied its negligence, and alleged contributory negligence on the part of the plaintiff; and further alleged that by a clause in the contract under which the plaintiff and the cattle were carried it was "among other things expressly stipulat [134 ed that the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in any amount exceeding the sum of $500;' that in consideration of said clause in said contract the defendant entered into a contract for the transportation of said stock from Rock Valley, Iowa, to Chicago, Illinois, for a less sum than its regular, usual charges, which fact the owner and ship-

409; Pennsylvania R. Co. v. Butler, 57 Pa. 335; Nashville & C. R. Co. v. Jackson, 6 Heisk. 271; Virginia & T. R. Co. v. Sayers, 26 Gratt. 328.

In some states it has been held that the carrier may, by express contract, limit its liability for damages caused by the negligence of its servants. Spinetti v. Atlas S. S. Co. 80 N. Y. 71, 36 Am. Rep. 579; Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300; Pearsall v. Western U. Teleg. Co. 124 N. Y. 268; Baltimore & O. R. Co. v. Skeels, 3 W.Va. 556; Farmers' & M. Bank v. Champlain Transp. Co. 23 Vt. 186; Wilson v. New York C. & H. R. R. Co. 97 N. Y. 87; Elliot v. New York C. & H. R. R. Co. 33 N. Y. S. R. 861; Seybolt v. New York, L. E. & W. R. Co. 95 N. Y. 573, 47 Am. Rep. 75; Ulrich v. New York C. & H. R. R. Co. 108 N. Y. 80.

It cannot by a general notice limit its liability. Steele v. Townsend, 37 Ala. 247, 79 Am. Dec. 49; Michigan S. & N. I. R. Co. v. Heaton, 31 Ind. 397, note; Kimball v. Rutland & B. R. Co. 26 Vt. 247; Moses v. Boston & M. R. Co. 32 N. H. 523, 44 Am. Dec. 381; Smith v. North Carolina R. Co. 64 N. C. 235; Wallace v. Matthews, 39 Ga. 617, 99 Am. Dec. 473; New Orleans Mut. Ins. Co. v. New Orleans, J. & G. N. R. Co. 20 La. Ann. 302; Blossom v. Dodd, 43 N. Y. 267, 3 Am. Rep. 701; Madan v. Sherard, 73 N. Y. 329, 29 Am. Rep. 153; Rathbone v. New York C. & H. R. R. Co. 140 N. Y. 48.

In order that it may limit its liability by a notice in a receipt, it must be shown that it was assented to by the shipper (Southern Exp. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; Peck v. Weeks, 34 Conn. 145; Southern Exp. Co. v. Newby, 36 Ga. 635, 91 Am. Dec. 783; Illinois C. R. Co. v. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Little v. Boston & M. R. Co. 66 Me. 239; Buckland v. Adams Exp. Co. 97 Mass. 124, 93 Am. Dec. 68; Levering v. Union Transp. & Ins. Co. 42 Mo. 88, 97 Am. Dec. 320; Moses v. Boston & M. R. Co. 24 N. H. 71, 55 Am. Dec. 222; Smith v. North Carolina R. Co. 64 N. C. 235; Mann v. Birchard, 40 Vt. 326), or brought to his knowledge (Sager v. Portsmouth S. & P. & E. R. Co. 31 Me. 238, 1 Am. Rep. 659; Camden & A. R. Co. v. Baldauf, 16 Pa. 67; Laing v. Colder, 8 Pa. 479, 49 Am. Dec. 533).

Every presumption is against an intention to contract for immunity of the carrier for not exercising ordinary diligence, and hence the general rule is that contracts will not be construed as exempting from liability for negligence unless expressed in unequivocal terms; such exemption will not be inferred from general words in the contract. Mynard v. Syracuse, B. & N. Y. R. Co. 71 N. Y. 180; Nicholas v. New York C. & H. R. R. Co. 89 N. Y. 370; Kenney v. New York C. & H. R. R. Co. 125 N. Y. 422; Zimmer v. New York C. & H. R. R. Co. 42 N. Y. S. R. 63; Brewer v. New York, L. E. & W. R. Co. 124 N. Y. 59; Elliott v. New York C. & H. R. R. Co. 33 N. Y. S. R. 861; Holsapple v. Rome, W. & O. R. Co. 86 N. Y. 275; Stinson v. New York C. R. Co. 32 N. Y. 333; Jeanings v. Grand Trunk R. Co. 127 N. Y. 438; Park v. Preston, 108 N. Y. 434.

In England since the railway and canal traffic act of 1854 a common carrier may exempt himself from liability for negligence by express contract, provided the circumstances make such an exemption just and reasonable. Harrison v. London, B. & S. C. R. Co. 2 Best. & S. 122; M'Cance v. London & N. W. R. Co. 7 Hurlst. & N. 477; Great Western R. Co. v. Glenister, 29 L. T. N. S. 422; Martin v. Great Indian Peninsular R. Co. L. R. 3 Exch. 9; Hodgman v. West Midland R. Co. 5 Best & S. 173; Zunz v. South-Eastern R. Co. L. R. 4 Q. B. 539, 38 L. J. Q. B. N. S. 209; Turner v. South-Eastern R. Co. 10 Best & S. 594; Simons v. Great Western R. Co. 18 C. B. 805; Peck v. North Staffordshire R. Co. 10 H. L. Cas. 473; Aldridge v. Great Western R. Co. 15 C. B. N. S. 582; Lewis v. Great Western R. Co. 5 Hurlst. & N. 867.

The conditions on the back of a pass are binding, and relieve the carrier from liability for the negligence of its servants. Griswold v. New York & N. E. R. Co. 53 Conn. 371, 55 Am. Rep. 115; Rogers v. Kennebec S. B. Co. 86 Me. 261, 25 L. R. A. 491; Muldoon v. Seattle City R. Co. 7 Wash. 528, 22 L. R. A. 794; Annas v. Milwaukee & N. R. Co. 67 Wis. 46, 58 Am. Rep. 848; Higgins v. New Orleans, M. & C. R. Co. 23 La. Ann. 133; Mobile & O. R. Co. v. Hopkins, 41 Ala. 486, 94 Am. Dec. 607; Rose v. Des Moines Valley R. Co. 39 Iowa, 246; Illinois C. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; Arnold v. Illinois C. R. Co. 83 Ill. 273, 25 Am. Rep. 386; Toledo, W. & W. R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Jacobus v. St. Paul & C. R. Co. 20 Minn. 125, 18 Am. Rep. 360; Bryan v. Missouri P. R. Co. 82 Mo. App. 228; Gulf, C. & S. F. R. Co. v. McGown, 65 Tex. 640; Kinney v. Central R. Co. 32 N. J. L. 407, 90 Am. Dec. 675, 34 N. J. L. 513, 3 Am. Rep. 265; Wells v. New York C. R. Co. 24 N. Y. 181; Perkins v. New York C. R. Co. 24 N. Y. 196, 82 Am. Dec. 281; Ulrich v. New York C. & H. R. R. Co. 108 N. Y. 80.

A valid contract limiting the liability of a carrier to a certain agreed valuation of the property carried may be made where it is just and reasonable in its terms and a reduced rate of freight is made the consideration for it. Richmond & D. R. Co. v.

per of said stock and the plaintiff all well knew at the time of the making of the said contract and at the time the plaintiff started in transit with said stock from Rock Valley, Iowa, to Chicago, Illinois; that said contract related exclusively to interstate transportation and constituted an interstate commerce transaction, and that the plaintiff and the owner and shipper of said stock, having accepted the benefits of said contract, are now estopped from questioning its validity or disavowing the same; that at common law said contract is a valid and legal contract, and that § 1308 of the Code of Iowa is void and unconstitutional, so far as said contract is concerned, as being an attempt to regulate and limit contracts relating to interstate commerce; that under and by virtue of the terms of said contract plaintiff is not entitled in any event to judgment herein to exceed the sum of $500."

The section of the Code of Iowa, referred to in the answer, is as follows: "No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into." Iowa Code of 1873, § 1308.

At the trial, it appeared that the plaintiff and the cattle under his charge were carried under such a contract as alleged in the answer, and that he suffered injuries as alleged in the declaration; and the court, against the defendant's objections and exceptions, excluded evidence offered by the defendant that the rate on cattle carried the same distance under contracts other than this one was 50 per cent higher than was charged by this contract; and instructed the jury that, if the *defendant was [135 negligent and the plaintiff was without fault, the jury should allow him such a sum as would compensate him for his injuries; and that the clause in the contract, limiting the plaintiff's damages to $500, was not permitted by law, and was void.

The jury returned a verdict for the plaintiff in the sum of $1,000, upon which judgment was rendered. The defendant appealed to the supreme court of Iowa, which affirmed the

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Payne, 86 Va. 481, 6 L. R. A. 849; Louisville & N. R. Co. v. Manchester Mills, 88 Tenn. 653; Louisville & N. R. Co. v. Sherrod, 84 Ala. 178; Hart v. Pennsylvania R. Co. 112 U. S. 331 (28: 717); Brown v. Cunard S. S. Co. 147 Mass. 58; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Brown v. Wabash, St. L. & P. R. Co. 18 Mo. App. 568; St. Louis, I. M. & S. R. Co. v. Weakly, 50 Ark. 397; St. Louis, I. M. & S. R. Co. v. Lesser, 46 Ark. 236; Squire v. New York C. R. Co. 98 Mass. 239, 93 Am. Dec. 162; Earnest v. Southern Exp. Co. 1 Woods, 573; Muser v. Holland, 17 Blatchf. 412; Muser v. American Exp. Co. 1 Fed. Rep. 382; Zimmer v. New York C. & H. R. R. Co. 42 N. Y. S. R. 63; Steers v. Liverpool, N.Y. & P. S. S. Co. 57 N. Y. 1, 15 Am. Rep. 453; Zimmer v. New York C. & H. R. R. Co. 137 N. Y. 460.

A common carrier may limit by contract its liability for injury to goods in transit. Dorr v. New Jersey Steam Nav. Co. 11 N. Y. 485, 62 Am. Dec. 125.

An exemption clause in a receipt for baggage given by an express agent to a traveler on board a train, under circumstances which would not fairly apprise him of its existence therein, is inoperative. Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701.

A shipper who contracts with a carrier to have his goods carried to the end of the latter's route and then forwarded by another carrier does not, by virtue of a clause in the contract limiting the common-law liability of the first carrier, thereby empower the latter to limit that of the next carrier. Babcock v. Lake Shore & M. S. R. Co. 49 N. Y. 491.

A clause in an express receipt, that the express company shall not be liable for any loss of a package for over $50 unless the value thereof was stated, does not include a loss occasioned by the company's negligence. Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300.

A telegraph company cannot limit its common-law liability for negligence by a mere notice. Pearsall v. Western U. Teleg. Co. 124 N. Y. 256.

An agreement with a carrier to transport a horse at reduced rates, in consideration of his being valued at a specific sum in case of death or injury, precludes the shipper from recovering any larger sum. Zimmer v. New York C. & H. R. R. Co. 137 N. Y. 460.

A clause in a free pass exempting the carrier from damages to the passenger from the negligence of its servants is not against public policy. Wells v. New York C. R. Co. 24 N. Y. 181.

When a railroad pass exempts the carrier from responsibility for the negligence of its servants it means what it says, gross negligence as well as slight. Perkins v. New York C. R. Co. 24 N. Y. 196, 82 Am. Dec. 281.

A recovery for damages to a passenger from negligence may be had, notwithstanding the contract under which he rides contains a clause exempting the carrier therefrom, if such contract is one providing for the transportation of freight for hire and the passenger is to look after it during transit. Smith v. New York C. R. Co. 24 N. Y. 222.

A common carrier may lawfully contract to exempt itself from liability for negligence in consideration of carrying a person and his property at reduced rates. Bissell v. New York C. R. Co. 25 N. Y. 442, 82 Am. Dec. 369.

Loading stock on a car is not part of a journey so as to come within a clause in a pass exempting a carrier from injuries to persons riding free to take care of the stock. Stinson v. New York C. R. Co. 32 N. Y. 333, 88 Am. Dec. 332.

A contract to carry a person free, assuming no liability in the matter, is not sufficient to free a carrier from liability for the consequences of its negligence. Blair v. Erie R. Co. 66 N. Y. 313, 23 Am. Rep. 55.

When a common carrier is required by law to transport anyone without charge, the latter's involuntary acceptance of a pass containing a stipulation against liability for damages does not operate as a forfeiture of the right to recover them. Seybolt v. New York, L. E. & W. R. Co. 95 N. Y. 562, 47 Am. Rep. 75.

When a person is travelling under a pass containing the usual agreement of assumption by him of all risk of accident, his purchase of a seat in a drawing-room car does not nullify such agreement. Ulrich v. New York C. & H. R. R. Co. 108 N. Y. 80.

When a messenger of an express company is being carried by a railroad company pursuant to a contract between the companies, of which he has no knowledge, the railroad company's duty to him to carry him safely is not absolved by a clause in the contract whereby all the risks of such carriage are assumed by the express company. Brewer v. New York, L. E. & W. R. Co. 124 N. Y. 59, 11 L. R. A. 483.

General language in a contract for the carriage of persons, releasing the carrier from any liability for damage to them, does not exempt the carrier from liability for the negligence of its servants.

judgment. 95 Iowa, 260 [28 L. R. A. 718]. The defendant sued out this writ of error.

By the law of this country, as declared by this court, in the absence of any statute controlling the subject, any contract by which a common carrier of goods or passengers undertakes to exempt himself from all responsibility for loss or damage arising from the negligence of himself or his servants is void as against public policy, as attempting to put off the essential duties resting upon every public carrier by virtue of his employment, and as tending to defeat the fundamental principle on which the law of common carriers was established—the securing of the utmost care and diligence in the performance of their important duties to the public. *New York C. Railroad Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357 [21: 627]; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* [*The Montana*], 129 U. S. 397 [32: 788]; *Compania de Navigacion la Flecha* v. *Brauer*, 168 U. S. 104, 117 [*ante*, 398, 404]. In the leading case of *New York C. Railroad Co.* v. *Lockwood*, above cited, it was accordingly adjudged that an agreement in writing with a railroad company, by which a drover traveling with his cattle upon one of its trains, in consideration of his cattle being carried at less rates, stipulated to take all risk of injury to them and of personal injury to himself, did not exempt the company from all responsibility for injuries to him caused by the negligence of its servants. In *Hart* v. *Pennsylvania Railroad Co.* 112 U. S. 331 [28: 717], the general rule was affirmed; but a contract fairly made between a railroad company and the owner of goods, by which the latter was to pay a rate of freight based on the condition that the company assumed liability only to the extent of an agreed valuation of the goods, even in case of loss or damage by its negligence, was upheld as a just and reasonable mode of securing a due *proportion be- [136 tween the amount for which the company might be responsible and the compensation which it received, and of protecting itself against extravagant or fanciful valuations.

The statute of the state of Iowa, the validity of which is drawn in question in this case, affirms and extends, as applied to railroad corporations, the principle of the common law,

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Kenny v. New York C. & H. R. R. Co. 125 N. Y. 422.

A provision in the contract to the effect that the carrier will not be responsible for delay in the transit of the property will not relieve him from the consequences of delay occasioned by negligence; to constitute such an exception it must be expressly stated in the contract. Jennings v. Grand Trunk R. Co. 127 N. Y. 438.

The interpretation and validity of a contract for carriage over a railroad are to be governed by the law of the state where the contract is made. Davis v. Chicago, M. & St. P. R. Co. 93 Wis. 470, 33 L. R. A. 654.

A carrier cannot by special contract limit its common-law liability for losses not occasioned by negligence where it does not afford the shipper an opportunity to contract for the service required without such restriction even if he makes the special contract without objection or demand for a different one. Little Rock & Ft. S. R. Co. v. Cravens, 57 Ark. 112, 18 L. R. A. 527.

However broad or general may be the language of the contract which does not specifically and in express terms release the carrier from the consequences of his own negligence, it will not effect such release if the general words may operate without including such negligence. Morris v. Wier, 20 Misc. 586; Holsapple v. Rome, W. & O. R. Co. 86 N. Y. 275.

Contracts by which carriers of passengers seek to exempt themselves from liability for the result of negligence of agents or servants must be founded on a good consideration, and the fact that an employee of the carrier injured while traveling on a pass which contained a limited-liability clause, in the hands of his foreman, of which no notice to him is shown, had previously had passes to travel by himself, does not establish any such contract existing at the time of the injury. Pendergast v. Union R. Co. 10 App. Div. 207.

In Dorr v. New Jersey Steam Nav. Co. 11 N. Y. 485-487, the court, laying down some general rules, says: "The courts of this state have steadily adhered to the common-law rule, that a common carrier cannot screen himself from liability by notice, whether brought home to the owner or not. Since the very full and learned discussion of that question in Hollister v. Nowlen, 19 Wend. 234, 32 Am. Dec. 455, and Cole v. Goodwin, 19 Wend. 251, 32 Am. Dec. 470, it has been regarded as settled upon mature deliberation, and the conclusion arrived at in those cases has been uniformly acquiesced in and followed. Camden & A. R. & Transp. Co. v. Belknap, 21 Wend. 354; Clark v. Faxton, 21 Wend. 153; Alexander v. Greene, 3 Hill, 9, 7 Hill, 533; Powell v. Myers, 26 Wend. 594."

A contract providing that a common carrier shall not be liable to a drover for injury caused by its negligence is void as against public policy. Davis v. Chicago, M. & St. P. R. Co. 93 Wis. 470, 33 L. R. A. 654.

While a carrier may restrict its liability to its own line by contract with the shipper it cannot do so by a mere stipulation in a bill of lading not signed by the shipper, without proof that the shipper accepted the same, consenting to the restriction. Illinois C. R. Co. v. Carter, 165 Ill. 570, 36 L. R. A. 527.

A contract exempting a carrier from liability for loss by fire from any cause whatsoever in transporting blasting powder is not void as unconscionable or unreasonable. California Powder Works v. Atlantic & P. R. Co. 113 Cal. 329, 36 L. R. A. 648.

A contract on the back of a ticket on which an employee of the carrier was traveling as a passenger is invalid so far as it purports to exonerate the carrier from liability for its negligence or that of its servants. Doyle v. Fitchburg R. Co. 166 Mass. 492, 33 L. R. A. 844.

Failure of a railroad company to provide suitable and safe facilities for loading and unloading stock, and also for watering and feeding them, while being carried over its line of road, is negligence against which a common carrier is not permitted to contract. Chesapeake & O. R. Co. v. American Exch. Bank, 92 Va. 496.

Provisions in a bill of lading restricting a carrier's liability do not bind the shipper unless he accepted the bill of lading and understood and assented to such provisions. Chicago & A. R. Co. v. Davis, 159 Ill. 53.

A railroad company is liable for an injury to a groom in charge of horses belonging to his employer, caused by the company's negligence, although the contract under which the horses and groom were transported exempted the company from liability for negligence, where the contract was not made by the groom and he did not know of the exemption. Coppock v. Long Island R. Co. 89 Hun, 186.

by enacting that "no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into." Iowa Code of 1873, § 1308; Iowa Stat. 1866, chap. 113.

Under this statute, the courts of the state, in the case at bar, held that the stipulation in the contract under which the plaintiff and the cattle in his charge were carried by the defendant, that the defendant should "in no event be liable to the owner or person in charge of said stock in any amount exceeding the sum of $500," was void, and could not be enforced by the courts. The plaintiff having been accordingly permitted to recover a verdict and judgment for a larger sum, the question presented by this writ of error is whether the statute, as applied to a claim for an injury happening within the state, under a contract for interstate transportation, contravenes the provision of the Constitution of the United States empowering Congress to regulate interstate commerce.

This question is substantially answered by previous judgments of this court.

The question of the right of a railroad corporation to contract for exemption from liability for its own negligence is, indeed, like other questions affecting its liability as a common carrier of goods or passengers, one of those questions not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the state in which the cause of action arises. But the law to be applied is none the less the law of the state, and may be changed by its legislature, except so far as restrained by the Constitution of the state **137**] *or by the Constitution or laws of the United States. *New York C. Railroad Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357, 368 [21: 627, 637]; *Hough* v. *Texas & P. Railway Co.* 100 U. S. 213, 226 [21: 612, 618]; *Burgess* v. *Seligman*, 107 U. S. 20, 33 [27: 359, 365]; *Myrick* v. *Michigan Central Railroad Co.* [*Michigan C. R. Co.* v. *Myrick*], 107 U. S. 102, 109 [26: 325, 327]; *Smith* v. *Alabama*, 124 U. S. 465, 476, 478 [31: 508, 512, 1 Inters. Com. Rep. 804]; *Lake Shore & M. S. Railway Co.* v. *Prentice*, 147 U. S. 101, 106 [37: 97, 101]; *Baltimore & Ohio Railroad Co.* v. *Baugh*, 149 U. S. 368 [37: 772]; *Paine* v. *Central Vermont Railroad Co.* 118 U. S. 152, 161 [30: 193, 196].

Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of a state, are subject to its law. It is in the law of the state that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within a state, to the protection of that state, as those who travel on domestic trains. A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the state has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, *they are rather to be regarded [**138** as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits.

Such are the grounds upon which it has been held to be within the power of the state to require the engineers and other persons engaged in the driving or management of all railroad trains passing through the state to submit to an examination by a local board as to their fitness for their positions; or to prescribe the mode of heating passenger cars in such trains. *Smith* v. *Alabama*, 124 U. S. 465 [31: 508, 1 Inters. Com. Rep. 804]; *Nashville, C. & St. L. Railway Co.* v. *Alabama*, 128 U. S. 96 [32: 352, 2 Inters. Com. Rep. 238]; *New York, New Haven, & Hartford Railroad Co.* v. *New York*, 165 U. S. 628 [41: 853]. See also *Western U. Teleg. Co.* v. *James*, 162 U. S. 650 [40: 1105]; *Hennington* v. *Georgia*, 163 U. S. 299 [41: 166]; *Gladson* v. *Minnesota*, 166 U. S. 427 [41: 1064].

The statute now in question, so far as it concerns liability for injuries happening within the state of Iowa—which is the only matter presented for decision in this case—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares, or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods.

Judgment affirmed.

139] A. HOWARD RITTER, Executor of William M. Runk, Deceased, *Plff. in Err.*,

v.

MUTUAL LIFE INSURANCE COMPANY of New York.

(See S. C. Reporter's ed. 139-160.)

Exclusion of evidence—intention to defraud insurance company—when one who commits suicide is to be regarded as sane—intentional self-destruction, when a defense—public policy.

1. The exclusion of evidence which would, if admitted, have precluded judgment for the plaintiff, cannot be complained of by him.
2. An intention to defraud an insurance company by committing suicide is sufficiently proved to warrant a verdict for the company, where one who committed suicide, after declaring that he could only pay his debts with his life, had taken the insurance in question, which added about $8,000 to the annual premiums that he must pay, when he was already carrying life insurance on which he was required to pay annual premiums of about $12,000, while his income was inadequate to meet such burden.
3. One who commits suicide, understanding the consequences that will follow to himself, his character, his family, and others, and comprehending the wrongfulness of what he is about to do, as a sane man would, is to be regarded as sane.
4. Intentional self-destruction by the assured when of sound mind is itself a defense to an action on a life policy, even if the policy does not expressly declare that it shall be void in such a case.
5. A contract of life insurance expressly providing for payment if the assured in sound mind took his own life would be against public policy as tempting or encouraging suicide to make provision for those dependent upon the insured or to whom he was indebted.

[No. 142.]

Argued December 3, 6, 1897. Decided January 17, 1898.

ON A WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Third Circuit to review a judgment of that court affirming the judgment of and for the Eastern District of Pennsylvania in favor of the defendant, the Mutual Life Insurance Company of New York, in an action brought by A. Howard Ritter, executor, etc., to recover the amount of six policies of life insurance issued upon the life of William M. Runk. *Affirmed.*

See same case below, 28 U. S. App. 612.

NOTE.—*As to insurance on life of another; who may have; interest necessary,*—see note to Ætna L. Ins. Co. v. France, 24: 287.

As to assignability of policy of insurance, see note to Page v. Burnstine, 26: 268.

As to effect of provision avoiding policy of life insurance in case of suicide, see note to Mutual L. Ins. Co. v. Terry, 21: 236.

As to policy "for whom it may concern;" effect of; who may recover upon,—see note Hooper v. Robinson, 26: 219.

As to notice on insanity to insurer, see note to Buchannan v. Supreme Conclave, I. O. of H. (Pa.) 34 L. R. A. 486.

The facts are stated in the opinion.

Messrs. **Richard C. Dale, George Tucker Bispham,** and *John Hampton Barnes* for plaintiff in error.

Messrs. **John G. Johnson,** *Edward Lyman Short,* and *Charles P. Sherman* for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought against the Mutual Life Insurance Company of New York on six policies of life insurance, each bearing date November 10, 1891, one for $20,000, one for $15,000, and four for $10,000 each. There was a verdict in its favor, upon which judgment was entered, and that judgment was affirmed in the circuit court of appeals. 28 U. S. App. 612.

*The policies were all alike except as to [141 the amount of insurance, and were in the following form:

"In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the city of New York, unto William M. Runk, of Philadelphia, in the county of Philadelphia, state of Pennsylvania, his executors, administrators, or assigns, twenty thousand dollars, upon acceptance of satisfactory proof at its home office of the death of the said William M. Runk during the continuance of this policy, upon the following condition, and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made part hereof. The annual premium of seven hundred and eighty-two dollars shall be paid in advance on the delivery of this policy and thereafter to the company, at its home office in the city of New York, on the tenth day of November in every year during the continuance of this contract. In witness whereof," etc. The "provisions, requirements, and benefits" thus made part of the policy will be referred to hereafter.

The assured died October 5, 1892, all premiums falling due previous to his death having been paid. It is not disputed that he took his own life.

In the affidavit of defense filed by the insurance company it is stated that at or about the time of the execution of the policies in suit Runk held policies upon his life to the extent of $315,000 issued to him by other companies; that during the year 1892 he effected additional insurance to a considerable amount, the total amount at or about the time of his death being $500,000; that prior to taking the additional insurance of $200,000, he was indebted in a very large amount by reason of the improper use of moneys intrusted to him in a fiduciary and in a quasi fiduciary capacity; that he was without resources of his own sufficient to meet the amount of that indebtedness; that he was confronted with the fear of being convicted of breach of trust, and was desirous to protect pecuniarily those whom he had injured; that he deliberately determined to commit suicide for the purpose of escaping the necessity *of meeting those whose confidence [142 had been betrayed, and with the intention,

through moneys expected to be paid on his policies of insurance, to liquidate wholly or in part the debts owing by him; that he deliberately and intentionally took his life, being at the same time in sound mind and in the full possession of his mental faculties; and that his suicide was not the result of nor occasioned by mental unsoundness, but was the act of a man mentally and morally able to understand all the consequences thereof.

The affidavit of defense also contained the following statements:

"The policies of insurance sued upon contain a refereuce to the application therefor, which is made a part of the contract of insurance. A copy of this application is hereto attached, which, it is prayed, may be taken as a part of this affidavit. Under the advice of counsel the defendant avers that this application is a part of said contract, and that the contract of insurance was a contract made in the state of New York, and to be interpreted by, and in accordance with, the laws of that state.

"The policies of insurance sued upon were delivered to the said Runk upon the faith of an independent contract entered into by him, embodied in the said application, to the effect that if such policies should be granted, he, the said Runk, did, 'warrant and agree . . . that I will not die by my own act, whether sane or insane, during the said period of two years —said period of two years dating from the 6th day of November, 1891.

"The said Runk did, within the period of two years, commit a breach of said contract by killing himself, as has been before stated, in the way and manner above recited. By reason of the breach of said contract, and only by reason of such breach, the policy of insurance matured, and damages occasioned by such breach are equivalent in amount to that demanded under the policies."

Each of the applications for policies signed by the assured and attached to the affidavit of defense contained the following:

143] *"I hereby warrant and agree . . . not to engage in any specially hazardous occupation or employment during the next two years following the date of issue of the policy for which application is hereby made, and also not to engage in any military or naval service, in time of war, during the continuance of the policy, without first obtaining permission from this company; I also warrant and agree that I will not die by my own act, whether sane or insane, during the said period of two years."

At the trial below the defendant offered in evidence Runk's application for insurance. This was objected to on the ground that the application was not attached to the policy, and under an act of the general assembly of Pennsylvania approved May 11, 1881, could not, for that reason, be considered as part of the contract or be admitted in evidence. The defendant, by counsel, stated at the time that the paper was not offered for the purpose of making it as an "application" part of the contract, but to prove that an independent, collateral, contemporaneous agreement was entered into by which Runk stipulated that he would not die by his own act, whether sane or insane, during the period of two years The objection to this evidence was sustained, Judge Butler, who presided at the trial in the circuit court, observing: "The representation or statement or agreement, call it by whatever name you choose, is in my estimation a part of the application for insurance, and it constitutes a condition on which the policy was applied for and obtained, as much so as any representation contained in the paper itself, and it is therefore by the statute excluded by reason of the fact that a copy was not attached to the policy. . . . The statute intended that the policy shall exhibit on its face, or the policy in connection with whatever it refers to shall exhibit to the insured, the conditions on which he holds the policy. The object of this would be to limit the policy of insurance, to qualify it, to make it available only in case the party lived up to this contract."

The statute of Pennsylvania to which reference was made is in these words: "That all life and fire insurance policies upon the lives or property of persons within this commonwealth, *whether issued by companies organ- [**144** ized under the laws of this state, or by foreign companies doing business therein, which contain any reference to the application of the insured, or the constitution, by laws, or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application, as signed by the applicant, and the by-laws referred to; and, unless so attached and accompanying the policy, no such application, constitution, or by-laws shall be received in evidence, in any controversy between the parties to, or interested in, the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties." Laws of Pa. 1881, p. 20.

Whether the circuit court erred in excluding the application which, by the terms of the contract, constituted the consideration of the company's promise to pay, is a question that need not be considered. If error was committed in this particular, it was one for the benefit of the plaintiff in the action; for, if the application had been admitted in evidence as part of the contract of insurance, the agreement and warranty of the assured not to die by his own act, whether sane or insane, within two years from the date of the policy, would have precluded any judgment against the insurance company. *Travelers' Ins. Co.* v. *McConkey*, 127 U. S. 661, 666 [32:308, 310]. Upon this writ of error, therefore, we must assume that the contract of insurance contained no such agreement or warranty by the assured, nor any express condition avoiding the policy in case of suicide. Besides, the defendant does not insist that this court should determine the right of the parties upon the basis that the application of Runk constituted part of the contract of insurance. It may be added that we do not wish to be understood as expressing any opinion upon the question whether the circuit court erred either in its construction of the Pennsylvania statute of 1881, or in applying that statute to the policies here in suit.

At the trial in the circuit court, the plaintiff submitted the following points:

*1. The evidence was not sufficient to [**145**

warrant the jury in finding that the deceased entered into the contracts of insurance evidenced by the policy sued upon with the intention of defrauding the company.

2. The evidence was not sufficient to warrant the jury in finding that the deceased entered into the contracts of insurance with the intention of committing suicide.

3. The evidence upon the part of the defendant did not warrant any inference of fact constituting a defense in law to the plaintiff's right to recover the amount due upon the policies.

4. The mere fact that the insured committed suicide did not, standing alone, avoid the policies, there being no condition in them to that effect.

5. If one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequence, and effect, such self-destruction will not of itself prevent recovery upon the policies.

The company submitted the following points as the basis of instructions to the jury:

1. There could be no recovery by the estate of a dead man of the amount of policies of insurance upon his life, if he takes his own life designedly, whilst of sound mind.

2. If the jury found that Runk committed suicide when he was of sound mind, being morally and mentally conscious of the act he was about to commit, of its consequences, and of its nature, with the deliberate intent to secure to his estate and to his creditors the amount of the policies sued upon, there could be no recovery.

3. If the jury found that Runk obtained the policies of insurance sued upon at a time when he was insolvent and an embezzler, with the intent thereby to secure, in case of his death, from the defendant, a fund with which to pay those to whom he was indebted, and whose property he had embezzled, and subsequently committed suicide, whilst of sound mind, with the deliberate intent to carry out this scheme, there could be no recovery.

146] *4. The defendant was entitled to set off the loss occasioned by the failure of Runk to keep his agreement not to die by his own hand within two years of the date thereof; and the amount of this loss cannot be less than that of the policies sued upon.

The court disaffirmed the plaintiff's first, second, and third points without comment. It disaffirmed the plaintiff's fourth point relating to the effect upon the rights of the assured of suicide standing alone, and affirmed the defendant's first point relating to the same matter.

The plaintiff's fifth point was affirmed, the court, however, accompanying its affirmance of that point with some observations to be presently referred to.

It will be observed that the plaintiff's first and second points assumed that the evidence was not sufficient to warrant a finding that the assured entered into the contracts of insurance with the intention either to defraud the company or to commit suicide. The court rightly refused to so instruct the jury. When the last policies were taken out by Runk he was carrying insurance on his life for an amount large enough to require annual premiums of about $12,000. His income, so far as the record shows, was inadequate to meet such a burden. And yet, in 1891, he largely increased the insurance on his life, and added about $8,000 to the sum to be paid annually for premiums. Besides these facts, it appeared that on the day before his death he avowed that his debts must be paid, and that they could only be paid with his life. That avowal was in a letter written to his partner, in which he said that he had deceived the latter, and could only pay his debts *with his life*. That letter concluded: "This is a sad ending of a promising life, but I deserve all the punishment I may get, only I feel my debts must be paid. This sacrifice will do it, and only this. I was faithful until two years ago. Forgive me. Don't publish this." On the same day he wrote to his aunt to whom he was indebted in a large sum, saying, among other things: "Forgive me for the disgrace I bring upon you, but it is the only way I can pay my indebtedness to you." In addition he left for the guidance of his executor a memorandum *of his busi-[147 ness affairs, prepared just before his death, and which tended to show that he was at that time entirely at himself.

In view of these and other facts established by the evidence, the court did not err in disaffirming the first and second of plaintiff's points. We may add that, under the charge to the jury, it became unnecessary for them to inquire whether the policies were taken out with the intention of defrauding the insurance company or of committing suicide. The court said to the jury: "What constitutes insanity, in the sense in which we are using the term, has been described to you and need not be repeated. If this man understood the consequences and effect of what he was doing or contemplating, to himself and to others, if he understood the wrongfulness of it, as a sane man would, then he was sane, so far as we have occasion to consider the subject; otherwise he was not. Here the insured committed suicide, and, as the evidence shows, did it for the purpose, as expressed in his communication to the executor of his will, as well as in letters written to his aunt and his partner of enabling the executor to recover on the policy, and use the money to pay his obligations. I therefore charge you that if he was in a sane condition of mind at the time, as I have described, able to understand the moral character and consequences of this act, his suicide is a defense to this suit. The only question, therefore, for consideration is this question of sanity. There is nothing else in the case. That he committed suicide, and committed it with a view to the collection of this money from the insurance companies and having it applied to the payment of his own obligations, is not controverted and not controvertible. It is shown by his declaration, possibly not verbal, but written. The only question, therefore, is whether or not he was in a sane condition of mind, or whether his mind was so impaired that he would not, as I have described, properly comprehend and understand the character

of the act he was about to commit. In the absence of evidence on the subject he must be presumed to have been sane. The presumption of sanity is not overthrown by the act of **148**] committing suicide. Suicide *may be used as evidence of insanity, but standing alone it is insufficient to establish it. . . . If you find him to have been insane, as I have described, your verdict will be for the plaintiff. Otherwise it will be for the defendant."

It thus appears that the case was placed before the jury upon the single issue as to the alleged insanity of the assured at the time he committed suicide, and with a direction to find for the plaintiff if the assured was insane at that time, and for the company if he was then of sound mind.

Assuming that the jury obeyed the instruction of the court, their verdict must be taken as finding that the assured was not insane at the time he took his life. We must then inquire whether the observations of the trial court on the subject of insanity were liable to objection.

We have seen that the plaintiff asked the court to instruct the jury that if the assured intentionally killed himself when his reasoning faculties were so far impaired by insanity that he was unable to understand the moral character of his act, even if he did understand its physical nature, consequence, and effect, such self-destruction would not of itself prevent recovery upon the policies.

This was the only instruction asked by the plaintiff which undertook to define insanity, and, as before stated, it was given by the court. But in giving it the court said: "We must understand what is meant and intended by the term 'moral character of his act.' It is a term which has been used by the courts, and is correctly inserted in the point; but it is a term which might be misunderstood. We are not to enter the domain of metaphysics in determining what constitutes insanity, so far as the subject is involved in this case. If Mr. Runk understood what he was doing, and the consequences of his act or acts, to himself as well as to others,—in other words, if he understood, as a man of sound mind would, the consequences to follow from his contemplated suicide, to himself, his character, his family, and others, and was able to comprehend the wrongfulness of what he was about to do, as a sane man would,—then he is to be regarded by you as sane. Otherwise, he is not." Substantially the **149**] same observations *were made in that part of the charge, which is above given.

The plaintiff insists that the definition of insanity, as given by the trial court, was much narrower than was required or permitted by the decisions of this court. It is said that the impairment not only of the moral vision but also of the will, leaving the deceased in a condition of inability to resist the impulse of self-destruction, has been accepted by this court as describing a phase of insanity or mental unsoundness. One of the cases to which the plaintiff referred in support of this view is *Davis* v. *United States*, 165 U. S. 373, 378 [41:750,754], which was a prosecution for murder. It was there held that the accused was not prejudiced by the following instruction given to the jury: "The term 'insanity' as used in this defense means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong, and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control." This was substantially what had been held by this court in previous cases. *Mutual Life Ins. Co.* v. *Terry*, 82 U. S. 15 Wall. 580 [21:236]; *Bigelow* v. *Berkshire L. Ins. Co.* 93 U. S. 284 [23:918]; *Charter Oak L. Ins. Co.* v. *Rodel*, 95 U. S. 232 [24:433]; *Manhattan L. Ins. Co.* v. *Broughton*, 109 U. S. 121 [27:878]; *Connecticut Mut. L. Ins. Co.* v. *Lathrop*, 111 U. S. 612 [28:536]; *Accident Ins. Co. of N. A.* v. *Crandal*, 120 U. S. 527 [30:740].

In *Terry's Case*, above cited—which was an action upon a life policy declaring the policy void if the assured died by his own hand,—it became necessary to instruct the jury on the subject of insanity. The court said: "We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the *voluntary **[150** act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable."

Recurring to the ruling of the court in the present case, it is not perceived that the plaintiff had any ground to complain that its definition of insanity was too strict or too narrow. His fifth point, in general terms, defined insanity as being a condition in which the reasoning faculties are so far impaired that the person alleged to be insane when committing self-destruction was unable to understand the moral nature of his act, even if he understood its physical nature. This definition was not rejected. On the contrary, it was accepted, the court at the time making some observations deemed necessary to show what, in law, was meant by the words "moral nature of his act." By those observations, the jury were informed that if the assured understood what he was doing, and the consequences of his act or acts to himself and to others,—that is, if he understood, as a man of sound mind would, the consequences to follow from his contemplated suicide, to himself, his character, his family, and others, and was able to comprehend the wrongfulness of what he was about to do, as a sane man would,—then he was to be regarded as sane; otherwise, not.

It is suggested that the attention of the jury should have been brought specifically or more directly to the fact that unsoundness of mind

exists when there is an impulse to take life which weakened mental and moral powers cannot withstand—a condition in which there is no continued existence of a governing will strong enough to resist the tendency to self-destruction. But the words of the charge, although of a general character, substantially embodied these views. The court stated the principal elements of a condition of sanity as contrasted with insanity. What it said was certainly as specific as the instruction asked by **151**] the plaintiff. If the plaintiff *desired a more extended definition of insanity than was given, his wishes, in that respect should have been made known. The court having affirmed his view of what was evidence of insanity, and such affirmance having been accompanied by observations that brought out with more distinctness and fullness what was meant by the words "moral character of his act," the plaintiff has no ground to complain; for nothing said by the court upon the question of insanity was erroneous in law or inconsistent with that which the plaintiff asked to be embodied in the charge.

No error of law having been committed in respect of the issue as to the insanity of the assured, it is to be taken as the result of the verdict that he was of sound mind when he took his life.

This brings us to the question whether the insurance company was liable—assuming that it was not a part of the contract enforceable in Pennsylvania, that the assured should "not die by his own act, whether sane or insane," within two years from the date of the policy.

It is contended that the court erred in saying to the jury, as in effect it did, that intentional self-destruction, the assured being of sound mind, is in itself a defense to an action upon a life policy, even if such policy does not in express words declare that it shall be void in the event of self-destruction when the assured is in sound mind. But is it not an implied condition of such a policy that the assured will not purposely, when in sound mind, take his own life, but will leave the event of his death to depend upon some use other than wilful, deliberate self-destruction? Looking at the nature and object of life insurance, can it be supposed to be within the contemplation of either party to the contract that the company shall be liable upon its promise to pay, where the assured, in sound mind, by destroying his own life, intentionally precipitates the event upon the happening of which such liability was to arise?

Life insurance imports a mutual agreement whereby the insurer, in consideration of the payment by the assured of a named sum annually or at certain times, stipulates to pay a **152**]* larger sum at the death of the assured. The company takes into consideration, among other things, the age and health of the parents and relatives of the applicant for insurance, together with his own age, course of life, habits, and present physical condition; and the premium exacted from the assured is determined by the probable duration of his life, calculated upon the basis of past experience in the business of insurance. The results of that experience are disclosed by standard life and annuity tables showing at any age the probable duration of life. These tables are deemed of such value that they may be admitted in evidence for the purpose of assisting the jury in an action for personal injury, in which it is necessary to ascertain the compensation the plaintiff is entitled to recover for the loss of what he might have earned in his trade or profession but for such injury. *Vicksburg & M. Railroad Co.* v. *Putnam*, 118 U. S. 545, 554 [30: 257, 258]. If a person should apply for a policy expressly providing that the company should pay the sum named if or in the event the assured, at any time during the continuance of the contract, committed self-destruction, being at the time of sound mind, it is reasonably certain that the application would be instantly rejected. It is impossible to suppose that an application of that character would be granted. If experience justifies this view, it would follow that a policy stipulating generally for the payment of the sum named in it upon the death of the assured should not be interpreted as intended to cover the event of death caused directly and intentionally by self-destruction whilst the assured was in sound mind, but only death occurring in the ordinary course of his life.

That the parties to the contract did not contemplate insurance against death caused by deliberate, intentional self-destruction when the assured was in sound mind, is apparent from the "provisions, requirements, and benefits" referred to in and made part of the policy. They show that the policy was issued on the twenty year distribution plan, and was to be credited with its distributive share of surplus apportioned at the expiration of twenty years from the date of issue; that, after three full annual premiums were paid, the company would, *upon the legal surrender of the policy,[**153** before default in the payment of any premium, or within six months thereafter, issue a non-participating policy for a paid-up insurance, payable as provided, for the amount required by the provisions of the New York statute of May 21, 1879 (Laws of New York, chap. 347); that the assured was entitled to surrender the policy at the end of the first period of twenty years "and the full reserve computed by the American table of mortality, and four per cent interest, and the surplus, as defined above, will be paid therefor in cash;" that if the assured surrendered the policy the total cash value at the option of the policy holder should be applied "to the purchase of an annuity for life, according to the published rates of the company at the time of surrender;" that after two years from the date of the policy the only conditions that should be binding on the holder of the policy were that "he shall pay the premiums at the time and place and in the manner stipulated in the policy, and that the requirements in the company as to age and military or naval service in time of war shall be observed;" that in all other respects, if the policy matured after the expiration of two years, the payment of the sum insured should not be disputed; and that the party whose life was insured should always wear a suitable truss. These provisions of the contract tend to show that the death referred to in the policy was a death occurring in the ordinary course of the life of the assured, and not by his own violent act designed to bring about that event.

In the case of fire insurance it is well settled that although a policy, in the usual form, indemnifying against loss by fire, may cover a loss attributable merely to the negligence or carelessness of the insured, unaffected by fraud or design, it will not cover a destruction of the property by the wilful act of the assured himself in setting fire to it, not for the purpose of avoiding a peril of a worse kind but with the intention of simply effecting its destruction. Much more should it be held that it is not contemplated by a policy taken out by the person whose life is insured and stipulating for the payment of a named sum to himself, his exec-
154]utors, administrators, or assigns, *that the company should be liable, if his death was intentionally caused by himself when in sound mind. When the policy is silent as to suicide, it is to be taken that the subject of the insurance, that is, the life of the assured, shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind. To hold otherwise is to say that the occurrence of the event upon the happening of which the company undertook to pay was intended to be left to his option. That view is against the very essence of the contract.

There is another consideration supporting the contention that death intentionally caused by the act of the assured when in sound mind —the policy being silent as to suicide—is not to be deemed to have been within the contemplation of the parties; that is, that a different view would attribute to them a purpose to make a contract that could not be enforced without injury to the public. A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment. If, therefore, a policy—taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators, or assigns —expressly provided for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted.

Is the case any different in principle if such policy is silent as to suicide, and the event insured against—the death of the assured—is brought about by his wilful, deliberate act when in sound mind? Light will be thrown on this question by some of the adjudged cases, having more or less bearing upon the precise point now before this court for determination.

The plaintiff insists that the question just stated is answered in the affirmative by the opinion in *Mutual Life Ins. Co.* v. *Terry*, above
155]*cited As before stated, that was an action upon a life policy, containing the condition that it should be void if the assured should "die by his own hand;" and the controlling question was whether the condition embraced the case of an assured who committed self-destruction at a time when his reasoning faculties were so far impaired that he was unable to comprehend the moral character, the general nature, consequences, and effect of the act he was about to commit, or when he was impelled thereto by an insane impulse which he had not the power to resist. There was no question in that case as to the effect upon the rights of the parties of intentional self-destruction, where the policy contained no provision as to suicide. In the course of the review of the adjudged cases reference was made in the opinion of this court to *Borradaile* v. *Hunter*, 5 Mann. & G. 639, and also to *Hartman* v. *Keystone Ins. Co.* 21 Pa. 466, 479. In the former case it appeared that the assured threw himself into the Thames and was drowned, and the jury found that he voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and intending thereby to do so, but at the time of committing the act he was not capable of judging between right and wrong. The question was as to the liability of the insurance company on a policy issued to the assured containing a clause or proviso that the policy should be void if "the assured should die by his own hands, or by the hands of justice, or in consequence of a duel." Maule, Erskine, and Coltman, JJ., held that the company was not liable, while Tindal, C. J., was of the opinion that the proviso embraced cases of felonious suicide only, and not cases of self-destruction whilst the assured was under the influence of frenzy, delusion, or insanity. In the latter case it appeared that the assured committed self-destruction by taking arsenic. The supreme court of Pennsylvania held that there could be no recovery, Chief Justice Black saying: "The conditions of the policy are, that it shall be null and void 'if the assured shall die by his own hand, in or in consequence of a duel, or by the hands of justice,' etc. The plaintiff argues that the first clause here quoted *does not embrace a [156
suicide committed by swallowing arsenic. Where parties have put their contract in writing their rights are fixed by it. But the contract is what they meant it to be, and when we can ascertain their meaning from the words they have used, we must give it effect. One rule of interpretation is, that we must never attribute an absurd intent if a sensible one can be extracted from the writing. No absurdity could be greater than a stipulation against suicide in a duel. The words 'die by his own hand' must therefore be disconnected from those which follow. Standing alone, they mean any sort of suicide. Besides this, the court was very plainly right in charging that if no such condition had been inserted in the policy, a man who commits suicide is guilty of such a fraud upon the insurers of his life that his representatives cannot recover for that reason alone." Mr. Justice Hunt, delivering the opinion in *Terry's Case*, made an observation in relation to the two cases just cited which is supposed to be favorable to the plaintiff's contention. He said: "In *Hartman* v. *Keystone Ins. Co.* the doctrine of *Borradaile* v. *Hunter* was adopted, with the confessedly unsound addition that suicide would avoid a policy, although there were no condition to that effect in the policy." This observation of the learned justice was irrelevant to the case before the court and cannot be regarded as de-

termining the point in judgment. If it was meant there could be a recovery by the personal representative of an assured who took out the policy, and who, in sound mind, took his own life,—the policy being silent in reference to suicide,—we cannot concur in that view.

In *New York Mut. Life Ins. Co.* v. *Armstrong*, 117 U. S. 591, 600 [29: 997, 1000], which was an action by the assignee of a life policy, the defense, in part, being that the assignee murdered the assured in order to get the benefit of the policy, Mr. Justice Field, speaking for this court, said: "Independently of any proof of the motives of Hunter [the assignee] in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. **157**] It would be a reproach to *the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired."

In *Hatch, Admr.*, v. *Mutual Life Insurance Co.* 120 Mass. 550 [21 Am. Rep. 541], it appears that a policy of insurance on the life of a married woman provided that "if the said person whose life is hereby insured shall die by her own act or hand, whether sane or insane, . . . this policy should be null and void." It was in proof that the assured died by reason of a miscarriage produced by an illegal operation performed upon and voluntarily submitted to by her with intent to cause an abortion, and without any justifiable medical reason for such an operation. The court, observing that this voluntary act on the part of the assured was condemned alike by the laws of nature and by the laws of all civilized states, and was known by the assured to be dangerous to life, said: "We are of opinion that no recovery can be had in this case, because the act on the part of the assured causing death was of such a character that public policy would preclude the defendant from insuring her against its consequences; for we can have no question that a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion would be contrary to public policy, and could not be enforced in the courts of this commonwealth." The report of the case shows that it was decided without reference to the questions raised by the special clauses of the policy.

The subject was considered by the supreme court of Alabama in *Supreme Commandery, K. of G. R.* v. *Ainsworth*, 71 Ala. 436, 446 [46 Am. Rep. 332]. Chief Justice Brickell, delivering the unanimous judgment of that court, said:

"In all contracts of insurance there is an implied understanding or agreement that the risks insured against are such as the thing insured, whether it is property or health or life, is usually subject to, and the assured cannot voluntarily and intentionally vary them. Upon principles of public policy and morals, the fraud, or the criminal misconduct of the assured, is, in contracts of marine or fire insurance, **158**] an *implied exception to the liability of the insurer. *Waters* v. *Merchants' Louisville Ins. Co.* 36 U. S. 11 Pet. 213 [9: 691]; *Citizens' Ins. Co.* v. *Marsh*, 41 Pa. 386; *Chandler* v. *Worcestor Mut. F. Ins. Co.* 3 Cush. 328. Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and consideration of the contract. It cannot be in the contemplation of the parties that the assured, by his own criminal act, shall deprive the contract of its material element; shall vary and enlarge the risk, and hasten the day of payment of the insurance money. The doctrine asserted in *Fauntleroy's Case*, that death by the hands of public justice, the punishment for the commission of crime, avoids a contract of life insurance, though it is not so expressed in the contract, has not, so far as we have examined, been questioned, though the case itself may have led to the very general introduction of the exception into policies The same considerations and reasoning which support the doctrine seem to lead, of necessity, to the conclusion that voluntary criminal self destruction, suicide, as defined at common law, should be implied as an exception to the liability of the insurer, or, rather, as not within the risks contemplated by the parties, reluctant as the courts may be to introduce by construction or implication exceptions into such contracts, which usually contain special exceptions." Again: "The fair and just interpretation of a contract of life insurance, made with assured, is, that the risk is of death proceeding from other causes than the voluntary act of the assured, producing or intending to produce it;" and that "the extinction of life by disease, or by accident, not suicide, voluntary and intentional, by the assured, while in his senses, is the risk intended; and it is not intended that, without the hazard of loss, the assured may safely commit suicide."

In support of the general proposition that the law will not enforce contracts and agreements that are against the public good, and therefore are forbidden by public policy, reference is often made to the case of *The Amicable Society etc.* v. *Bolland*, 4 Bligh, N. R. 194, 211, known as *Fauntleroy's Case*. *That was an ac-[**159** tion by assignees in bankruptcy to secure the amount due on a policy of insurance stipulating for the payment of a certain sum, upon the death of Fauntleroy, to his executors, administrators, or assigns. The assured was convicted of forgery, and for that offense was executed. The lord chancellor, after observing that the question was whether the parties representing and claiming under one who effects insurance upon his life, and afterwards commits a capital felony, for which he was tried and executed, could recover the amount named in the policy, said: "It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money year by year, upon condition that, in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it

not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes—namely, the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on the grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we, considering the policy, give to it the effect of that insertion which, if expressed in terms, would have rendered the policy, as far as that condition went at least, altogether void?"

Referring to that case, Bunyon in his work on Life Insurance says: "It would render those natural affections which make every man desirous of providing for his family an inducement to crime; for the case may be well supposed of a person insuring his life for that purpose, with the intention of committing suicide. For a policy, moreover, to remain in force when death arose from any such cause would 160 be a fraud *upon the insurers, for a man's estate would thereby benefit by his own felonious act. Hence the rule of law when there is no condition whatever; but in that case, if the suicide or self destruction takes place when the assured is *insane* and not accountable for his acts, the rule arising from public policy does not apply, and his representatives are entitled to the policy money." 3d ed. p. 96.

In *Moore* v. *Woolsey*, 4 El. & Bl. 242, 254,—in which the question was as to the rights of an assignee under a policy providing that if the assured should die by dueling or by his own hand, or the hand of justice, it should be void as to the personal representative of the assured,—Lord Campbell, Ch. J., said that, "if a man insures his life for a year, and commits suicide within the year, his executors cannot recover on the policy, as the owner of a ship who insures her for a year cannot recover upon the policy if within the year he causes her to be sunk; a stipulation that, in either case upon such an event the policy should give a right of action, would be void."

For the reasons we have stated, it must be held that the death of the assured, William M. Runk, if directly and intentionally caused by himself, when in sound mind, was not a risk intended to be covered, or which could legally have been covered, by the policies in suit.

The case presents other questions, but they are of minor importance, and do not affect the substantial rights of the parties.

We perceive no error of law in the record, and the judgment is affirmed.

Mr. Justice **Peckham** did not participate in the consideration or decision of this case.

HENRY W. BENJAMIN, *Appt.*,
v.
CITY OF NEW ORLEANS.

(See S. C. Reporter's ed. 161-164.)

When judgments of circuit court of appeals are final—appeal to this court.

1. The judgments and decrees of the circuit court of appeals are final in all cases in which the jurisdiction is dependent entirely upon the opposite parties being aliens and citizens, or citizens of different states, under the judiciary act of 1891, § 6.

2. A case in which the jurisdiction of the circuit court was determined on appeal to depend solely upon diverse citizenship, and in which, after reversal, an amendment to show such jurisdiction by additional statements as to the citizenship of assignors of the claims was made, cannot be taken to this court by appeal from the decree of the circuit court of appeals affirming the decree of the circuit court dismissing the case for lack of jurisdiction.

[No. 188.]

Argued January 10, 1898. Decided January 31, 1898.

APPEAL from a decree of the United States Circuit Court of Appeals for the Fifth Circuit affirming the decree of the Circuit Court of the United States for the Eastern District of Louisiana dismissing for want of jurisdiction an action brought by Henry W. Benjamin, plaintiff, against the city of New Orleans to collect certain police warrants or certificates. *Dismissed.*

See same case below, 71 Fed. Rep. 758, 41 U. S. App. 178. Also see same case, 153 U. S. 411 [38: 764].

The facts are stated in the opinion.

Messrs **J. D. Rouse** and *William Grant*, for appellant:

The decree upon the demurrer was that "said demurrer be maintained and the bill of complaint dismissed with costs."

The decree was an adjudication upon the merits of the complainant's case, and might be pleaded as *res judicata* to a new bill brought by the complainant for the same cause of action.

Aurora v. *West*, 74 U. S. 7 Wall. 99 (19: 48); *Bissell* v. *Spring Valley Twp.* 124 U. S. 225 (31: 411); *Lyon* v. *Perin & G. Mfg. Co.* 125 U. S. 698 (31: 839).

Said circuit court of appeals erred in holding that, in order to give jurisdiction of complainant's bill to the circuit court, it was necessary for the complainant to aver that the citizenship of the assignors of the certificates on which he sues as assignee was such at the time the assignment was made as would have enabled them to sue in the circuit court if no assignment had been made.

Broughton v. *Pensacola*, 93 U. S. 266, 268 (23: 896, 897); *Meriwether* v. *Garrett*, 102 U. S.

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence*, see note to Emory v. Greenough, 1: 640.

As to colorable conveyances to enable suit to be brought: motive of transfer, when no objection; coupons; residence of assignor,—see note to McDonald v. Smalley, 7: 237.

472, 527 (26: 197, 209); *New Orleans* v. *Christmas* (*New Orleans* v. *Gaines's Admr.*), 131 U. S. 191 (33: 99).

The complainant being an alien, and the defendant a citizen of the state of Louisiana, the case is within the jurisdiction of the circuit court by reason of the diverse citizenship of the parties, unless it is within one of the exceptions named in the judiciary act.

Bradley v. *Hunt*, 75 U. S. 8 Wall. 393 (19: 467).

It has been held that if an alien should sue a citizen, and should omit to state the character of the parties in the bill, though the court could not exercise its jurisdiction while this defect in the bill remained, yet it might, as is every day's practice, be corrected at any time before the hearing, and the court would not hesitate to decree in the cause.

Conolly v. *Taylor*, 27 U. S. 2 Pet. 565 (7: 521); *Waters* v. *Barril*, 131 U. S. lxxxiv Appx. (18: 878).

So it is not essential to the maintenance of the jurisdiction of the circuit court, in a case arising under the Constitution, that the pleadings should refer in words to the particular clause of the Constitution relied on, but it is sufficient to show that the suit is one of which the circuit court is entitled to take cognizance.

Hanford v. *Davies*, 163 U. S. 280 (41: 160).

It has been repeatedly held by this court that a suit cannot be properly dismissed by the circuit court of the United States, as not substantially involving a controversy within the jurisdiction of the court, unless the facts, when made to appear on the record, create a legal certainty of that conclusion.

Barry v. *Edmunds*, 116 U. S. 550 (29: 729); *Deputron* v. *Young*, 134 U. S. 252 (33: 929).

It follows from this that a case shown to be within the jurisdiction of the court, although the jurisdictional fact be defectively stated, cannot be rightfully dismissed for want of jurisdiction.

Mr. **Branch K. Miller,** for appellee:

Where, in the circuit court, the jurisdiction is in issue and is denied, the plaintiff must elect whether he will bring the case to the Supreme Court on the question of jurisdiction alone, or carry it to the circuit court of appeals upon all the questions involved; the judgment of the court of appeals in such latter case can only be reviewed in this court upon a certificate from the former.

McLish v. *Roff*, 141 U. S. 661-668 (35: 893-895); *Interior Constr. & I. Co.* v. *Gibney*, 160 U. S. 219 (40: 401); *Chappell* v. *United States*, 160 U. S. 507 (40: 513); *Warner* v. *New Orleans*, 167 U. S. 474 (*ante*, 241); *United States* v. *John*, 155 U. S. 109 (39: 87).

No writ of error lies from this court to the court of appeals in any case where the judgment or decree of the latter is final, under § 6 of the act of 1891.

Aztec Min. Co. v. *Ripley*, 151 U. S. 80 (38: 81).

Such judgments or decrees are final in every case where Federal jurisdiction is founded on the diversity of citizenship of the parties.

Rouse v. *Letcher*, 156 U. S. 47 (39: 341); *Gregory* v. *Van Ee*, 160 U. S. 643 (40: 566); *Carey* v. *Houston & T. C. R. Co.* 161 U. S. 116-133 (40: 639-644); *Colorado C. Consol. Min. Co.* v. *Turck*, 150 U. S. 138-144 (37: 1030-1032); *Borgmeyer* v. *Idler*, 159 U. S. 408-415 (40: 199-201); *Rouse* v. *Hornsby*, 161 U. S. 588 (40: 817); *Press Pub. Co.* v. *Monroe*, 164 U. S. 105 (41: 367).

The averment of the bill setting out the citizenship of the parties should be clear and precise; it cannot be made inferentially. Where the jurisdiction depends upon the citizenship of one of the parties, plaintiff or defendant, the name of the state in which his citizenship is held must be set out; it is not sufficient to declare that he is a citizen of a state other than that of which the plaintiff or defendant, as the case may be, is a citizen.

Bradley v. *Hunt*, 75 U. S. 8 Wall. 393 (19: 467); *Metcalf* v. *Watertown*, 128 U. S. 586 (32: 543); *Parker* v. *Ormsby*, 141 U. S. 85 (35: 656); *New Orleans* v. *Benjamin*, 153 U. S. 411-433 (38: 764-772).

Mr. Chief Justice Fuller delivered the opinion of the court:

This was a bill filed by Henry W. Benjamin, "an alien and a subject of the Kingdom of Great Britain," on February 9, 1891, in the circuit court of the United States for the eastern district of Louisiana, "against the city of New Orleans, a municipal corporation created by the laws of the state of Louisiana, and a citizen of said state; the city of Kenner, also a municipal corporation created by the laws of and a citizen of said state; the police jury of the parish of Jefferson and *the police jury [**162**] of the parish of St. Bernard, political corporations created by the laws of and citizens of said state," seeking to collect, in the manner and on the grounds therein set forth, certain metropolitan police warrants or certificates. The defendants other than the city of New Orleans seem to have dropped out in the course of the proceedings.

The jurisdiction of the circuit court was attacked by defendant but was maintained, and a decree entered in favor of complainant, from which defendant appealed to the circuit court of appeals for the fifth circuit, whereupon that court certified certain questions to this court, by the answers to which it was determined that no such dispute or controversy arose in the case as gave jurisdiction to the circuit court without regard to the diverse citizenship of the parties, and that as the suit was, under the pleadings, a suit to recover the contents of choses in action within the meaning of the judiciary act of 1887 and 1888, by the assignee thereof, and it did not appear that it could have been brought in that court by the assignors, the jurisdiction of the circuit court could not be maintained on the ground of diverse citizenship. *New Orleans* v. *Benjamin*, 153 U. S. 411 [38: 764].

On receipt of the answers certified from this court, the circuit court of appeals reversed the decree of the circuit court and ordered that court to dismiss the bill, unless by amendment its jurisdiction could be made affirmatively to appear. Thereupon complainant amended the bill by inserting the following: "And your orator avers that each of said persons in whose favor said claims accrued and to whom said certificates were issued, are now, and were on the 9th day of February, 1891, citizens re-

spectively of states other than the state of Louisiana, and competent as such citizens to maintain suit in this honorable court against the defendants for the recovery of said indebtedness, represented by said certificates, if no assignment or transfer thereof had been made."

The city of New Orleans demurred for the reason that the case was not one of equitable cognizance, and that the amendment was insufficient to show jurisdiction. The circuit court sustained the demurrer on both grounds and **163**] dismissed the *bill (71 Fed. Rep. 758), whereupon the cause was taken to the circuit court of appeals, which affirmed the decree because the necessary diversity of citizenship was not affirmatively shown. 41 U. S. App. 178.

The case was not brought here directly from the circuit court of the United States on the question of the jurisdiction of that court as such, nor did the circuit court of appeals, when the case came before it for the second time, certify any question on which it desired our instruction.

On the contrary, this is an appeal from a judgment of the circuit court of appeals affirming the decree of the circuit court, and the inquiry at once presents itself as to our jurisdiction to entertain such appeal.

By the 6th section of the judiciary act of March 3, 1891, the judgments or decrees of the circuit courts of appeals are made final in certain classes of cases, and, among others, "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states." This case confessedly did not belong to either of the other classes, and if it fell within the class just mentioned, this appeal will not lie.

The judicial power extends to controversies between citizens of different states; and between citizens of a state and citizens or subjects of foreign states; but from the judiciary act of 1789 to the act of August 13, 1888, it has been provided, in substance (the differences being immaterial here), that no circuit court shall "have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." And, to avoid the operation of this limitation, it is necessary in such cases that the record should show that the suit could have been maintained in the circuit court in the name of the assignor. *Parker* v. *Ormsby*, 141 U. S. 81 [35: 654].

164] *As this suit stood, after it had been determined that the jurisdiction of the circuit court could not be invoked on the ground that the cause of action arose under the Constitution or laws of the United States, the jurisdiction rested on the fact that the complainant was an alien and the defendant a citizen of Louisiana, although, by reason of the restriction, it was also essential that it should appear that complainant's assignors might have brought suit in the circuit court if they had not assigned their claims.

But the jurisdiction was none the less dependent on diverse citizenship as between complainant and defendant because it might be defeated if complainant did not bring himself within the restriction. The diverse citizenship of the assignors of the claims was not another ground of jurisdiction than the diverse citizenship of complainant and defendant, and the 6th section, in referring to cases in which the jurisdiction is dependent entirely on diverse citizenship between the opposite parties to the suit or controversy, refers to cases where no other distinct ground of jurisdiction is relied on. It frequently happens that more than one ground is set up as between the same parties, and also separate and different grounds in respect of one or more of several parties. We think the case, within the intent and meaning of that section, clearly belongs to the class in which the judgments and decrees of the circuit court of appeals are made final.

Appeal dismissed.

Mr. Justice **White** took no part in the consideration and decision of this case.

J. B. CESSNA, Kate Cessna, His Wife,[**165**
John R. Keedle *et al.*, *Appts.*,
v.
UNITED STATES *et al.*

(See S. C. Reporter's ed. 165-189.)

Mexican grant—power of town council—repudiation of grant—treaty of Guadalupe Hidalgo—duty of nation—conditions of grant.

1. A grant by the ayuntamiento of El Paso, under the Mexican national colonization law of January 4, 1823, of land outside the limits of the town, which was made subject to the approval of the government, and which was disapproved by the provincial deputation, is not a valid final grant.
2. Under the said Mexican colonization law, the ayuntamiento or town council had no power, without the approval or direction of the government, to make a grant of land outside of the 4 leagues belonging to the town.
3. The disavowal and repudiation of such grant and the expulsion of the grantee from the country, by the Mexican government, preclude the grantee from claiming the validity of the grant as against the United States, after the cession of the territory to this government.
4. Under the treaty of Gaudalupe Hidalgo this government will not recognize as valid any grants which were not at the time of the treaty of cession recognized by the Mexican government as valid, or any whose conditions had not been performed.
5. It is the duty of a nation receiving a cession of territory to respect all rights of property as those rights were recognized by the nation making the cession, but it is no part of its duty to right the wrongs which the grantor nation may have theretofore committed.

NOTE.—*That dominion acquired over conquered or ceded territory does not devest the vested rights of individuals to property: former laws continue until altered by the new sovereign,*—see note to Delassus v. United States, 9: 71.

As to Missouri private land claims, see note to Les Bois v. Bramell, 11: 1051.

4. Under the terms of the act creating the court of private land claims, even if there were no other objections to the proceedings, the admitted fact that the conditions and requirements of this grant were never performed is sufficient to justify the ruling of the court in dismissing the petition.

[No. 78.]

Argued and Submitted January 4, 1898. Decided February 21, 1898.

APPEAL from a judgment of the Court of Private Land Claims dismissing the claim of the plaintiffs J. B. Cessna *et al.* against the United States, that their title to a tract of land in the territory of New Mexico and near the city of El Paso, Texas, be confirmed. *Affirmed.*

Statement by Mr. Justice **Brewer:**

On January 9, 1893, the appellants as plaintiffs filed their petition in the court of private land claims, praying that their title to a tract of land in the territory of New Mexico, and near to the city of El Paso, Texas, be confirmed. The plaintiffs named as defendants, besides the United States, the unknown owners of the Dona Ana Bend colony, Mesilla colony, and Bracito grants. The United States as well as certain individuals representing themselves to be the owners of these grants appeared and answered. Thereafter a trial was had, and on June 26, 1895, the court entered a decree, finding that the plaintiffs' claim of a land grant had not been sustained by satisfactory proof, and dismissing the petition. From such decree the plaintiffs have brought this appeal.

The facts disclosed by the record, and about which there is little dispute, are substantially as follows: In April, 1823, one Doctor John Heath, or Juan Gid, as his name is written in the Spanish, petitioned the ayuntamiento or general council of El Paso for a grant of a tract of land, which petition was acted upon by the ayuntamiento, and a tract 5 leagues square was granted to him. This petition was in these words:

Doctor Don Juan Gid, citizen of the United States of North America, in the best legal form allowed by law, appears before your honorable body and states: That, not having received up to date any answer to the communication of December last of last year, which **166**] I presented to the former *ayuntamiento, the predecessor of your honorable body, which (communication), approved in all its parts, was forwarded to His Imperial Majesty by the same, for which reason and because of the increase (ampleacion) of the power which is given to your honorable body by the law of colonization which was issued by the National Instituent Assembly (Junta) of the Empire on the 3d of January of the present year. For these reasons I again have recourse through this, repeating my request to your honorable body, adding that I offer to bring for the settlement of the land of El Bracito, which I ask may be given to me, thirty families of Christian Catholics, and among them blacksmiths, gunsmiths, silversmiths, carpenters, tailors, shoemakers, saddlers, architects, mathematicians, chemists, mineralogists, surgeons, doctors of medicine, and to establish a hospital with its corresponding drug store and proper stock therein, with the necessary instruments for all operations; also to build a warehouse supplied with all kinds of merchandise for wholesale; the necessary machines for the manufacture of cotton and cloth goods, another for the manufacture of gunpowder, offering until payment of the expense of transportation, to furnish the amount of this article all this jurisdiction may need at the very low price of one dollar per pound; it being first class for the use of arms; with the understanding that in all the said trades there shall be admitted for instruction the youths whose parents may see fit to dedicate them thereto; the children of this country (suelo) having the preference thereto.

In view of what has been said, and because, for establishing the said machinery, utilizing the farms, grazing stock, and for the other field interests, it is indispensable that it have the extension which is necessary therefor, it behooves me to demonstrate to your honorable body that the land which may be assigned to me, limiting me to the smallest amount, be at least enough for (sea lo menos para) an hacienda, and that said designation be made for me on both sides, that is to say, that it be on both sides of El Bracito, because the said land being broken it is necessary to leave out various portions of it. I also propose to your honorable body that, until time *permits whatever else may be desirable, **[167** this settlement be attached to the parish of this jurisdiction; likewise that the pasture and woodlands be common, with the same privilege as other people of this locality: recommending that it be without prejudice to those farms (sementeras), and that the petitioner be the person to whom is intrusted the distribution of said lands, he being considered the legitimate justice of said families.

Candor of mind being what I most appreciate, and to join myself with my brethren, the faithful inhabitants of this Empire, living always in the simple peace, in order to dispel all rumors of hatred, I ask your honors that, you being pleased, and in order that the said law of colonization be executed in all its parts, notice of this, my petition, be given to the individuals of this jurisdiction, in order that all these gentlemen who like may better or equal it with a view to the right or preference, in which act your honorable body, to whom is intrusted the power of father of this country (patria), will weigh at their true value the incalculable benefits that result from my petition whereupon, far from seeking means to deprive it thereof, it would be encouraged in every way to procure their increase.

Wherefore, I ask and petition your honorable body to be pleased to accede to what I petition, being pleased to pardon the fault that this my petition is not upon paper of the proper seal, for there is none in this place, I being ready to pay the fees that belong to the national treasury. I protest that I do not act in bad faith, and the necessary, etc.

Paso, April 7th, 1823.

Juan Gid.

Certain proceedings were had upon this petition, which it is unnecessary to mention in detail.

On April 22 this order was made by the ayuntamiento:

This ayuntamiento having on this day received that which by its order was to be executed by the commission appointed from its midst to do the surveying that was to be done in the land of El Bracito, this being 5 leagues in
168] each direction, *the whole of it composing an 'hacienda,' according to article 5 of the colonization plan, which land was granted by this ayuntamiento to Don Juan Gid for the purpose of settlement as stated afterwards, and he, being satisfied with what was done in all its parts by the said commission, it was entered as a minute in due witness thereof, the president and other members of which that is composed signing it before me, the secretary, to which I certify. José Ygnacio Rascon, José Morales, José Maria Belarde, José Francisco Carbajal, Juan Maria Barela, Antonio Prudencio, José Maria Garcia, Saturnino Aguiar, José Manuel Garcia, Lorenzo Provencio, José Albares.

Juan Maria Ponce De Leon, Secretary.

And on the 25th the following:

The present expediente in which there has been granted to Don Juan Gid, Anglo-American of the United States, the lands of El Bracito for settlement, being considered by this ayuntamiento as closed, proceed to what is to be done, under the tariff in force in this ayuntamiento and by its secretary that Juan Gid may know what fees he is to pay for what has been done therein placing the original in the archives as a perpetual testimony, but nevertheless to this shall be sent, together with a certified copy, by the first mail or safe-conduct of the governor of this province for his superior information; another of the same kind being given to the party in interest for his protection. And by the present order the president and members of this corporation so determined and signed it, before me, the secretary, to which I certify. José Ygnacio Rascon, José Morales, José Maria Belarde, José Francisco Carbajal, Saturnino Aguiar, José Manuel García, Lorenzo Provencio.

Juan Maria Ponce De Leon, Secretary.

It is a copy of the original expediente which on petition of Don Juan Gid was made in order to grant to him for settlement the land of El Bracito, in accordance with the colonization plan, together with what is afterward stated: which original remains accordingly in the archive, to which I certify.

Juan Maria Ponce De Leon, Secretary. [Rubric.]

169] *A copy of these proceedings was sent to the governor of the province, and the following action was taken by the provincial deputation:

In the session of the 17th of the present month the acting governor of this province, Captain José Antonio Vizcarra, presented to this deputation the reports which your honorable body makes to him in an undated official communication which said chief received; and he also presented another official letter, dated the 26th of last April, accompanied by a copy of the proceedings had by your honorable body in giving to the foreigner Mr. John Heath, at the Bracito, possession of land belonging to the people of that jurisdiction.

The deputation in the same session resolved to express to your honorable body the surprise it felt at the violent and mistaken procedure with which you conducted yourselves in giving land to foreigners, not only with prejudice to the inhabitants of that jurisdiction, but also in violation of the same law of which your honorable body availed itself in order to carry into effect the possession referred to, thus opening the door to the continual complaints of its people; this deputation refraining from making other observations to your honorable body, on account of the colonization law, which was the moving cause in the concession of the Bracito land to the said Heath having been repealed; but proceeding to direct your honorable body that, in order not to make itself responsible for damages which the foreigner might claim if he should introduce into this province the families that he offers to bring, it should notify the said Heath, through the plenipotentiary of the United States resident in New Mexico, or in some other manner which it may deem more prompt and effective, that the possession which has been given to him at the Bracito, belonging to that jurisdiction of El Paso, was through a mistaken opinion and wrong understanding in relation to the colonization law already repealed.

And I communicate it to you by direction of the said deputation, with the understanding that I shall communicate to you the decision that may be arrived at when the petition of *Mr. Albo and the other persons of that [170 town shall have been discussed, your honorable body notifying me of the receipt of and compliance with these instructions.

God preserve your honorable body many years.

Santa Fé, June 19, 1823, the third year of independence and the second of liberty.

Francisco Javier Chavez. [Scroll.]

Juan Bautista Vigil. [Scroll.]

Deputy Secretary.

It does not appear that notice of this action of the provincial deputation was at the time communicated to Heath, for soon after the final order of the ayuntamiento he returned to this country and to the state of Missouri, of which state he had theretofore been a citizen, made a disposition of his property, and collected a body of colonists, with whom, in the year 1824, he proceeded to El Paso, with a view of taking possession of this tract of land. Instead of being permitted to occupy the tract he was banished from the country, forced to abandon the property that he had brought with him, and sent back to the United States a bankrupt. He returned to Missouri, where he lived until he died, in the year 1851. Petitioners claim under him.

The national colonization law of January 4, 1823, under which these proceedings were had, is, so far as it can have any application to the

present case, translated by Rockwell (Rockwell's Spanish Laws, p. 617) as follows:

"Art. 1. The government of the Mexican nation will protect the liberty, property, and civil rights of all foreigners who profess the Roman Catholic apostolic religion, the established religion of the empire.

"Art. 2. To facilitate their establishment, the executive will distribute lands to them, under the conditions and terms herein expressed.

"Art. 3. The empresarios, by whom is understood those who introduce at least two hundred families, shall previously contract with the executive, and inform it what branch of industry they propose to follow, the proper-
171]ty or resources they *intend to introduce for that purpose; and any other particulars they may deem necessary, in order that with this necessary information, the executive may designate the province to which they must direct themselves; the lands which they can occupy with the right of property; and the other circumstances which may be considered necessary.

"Art. 4. Families who emigrate, not included in the contract, shall immediately present themselves to the ayuntamiento of the place where they wish to settle, in order that this body, in conformity with the instructions of the executive, may designate the lands corresponding to them, agreeably to the industry which they may establish.

"Art. 5. The measurement of land shall be the following: Establishing the vara at three geometrical feet, a straight line of five thousand varas shall be a league; as quare, each of whose sides shall be one league, shall be called a sitio; and this shall be the unity of counting one, two, or more sitios; five sitios shall compose one hacienda."

"Art. 7. One labor shall be composed of one million square varas, that is to say, one thousand varas on each side, which measurement shall be the unity for counting one, two, or more labors. These labors can be divided into halves and quarters, but not less.

"Art. 8. To the colonists, whose occupation is farming, there cannot be given less than one labor, and to those whose occupation is stock raising, there cannot be given less than one sitio.

"Art. 9. The government of itself or by means of the authorities authorized for that purpose, can augment said portions of land as may be deemed proper, agreeably to the conditions and circumstances of the colonists.

"Art. 10. Establishments made under the former government which are now pending, shall be regulated by this law in all matters that may occur, but those that are finished shall remain in that state.

"Art. 11. As one of the principal objects of laws in free governments ought to be to approximate, so far as is possible, to an equal distribu-
172] tion of property, the *government, taking into consideration the provisions of this law, will adopt measures for dividing out the lands, which may have accumulated in large portions, in the hands of individuals or corporations, and which are not cultivated, indemnifying the proprietors for the just price of such lands to be fixed by appraisers."

"Art. 19. To each empresario, who introduces and establishes families in any of the provinces designated for colonization, there shall be granted at the rate of three haciendas and two labors, for each two hundred families so introduced by him, but he will lose the right of property over said lands should he not have populated and cultivated them in twelve years from the date of the concession. The premium cannot exceed nine haciendas and six labors, whatever may be the number of families he introduces.

"Art. 20. At the end of twenty years the proprietors of the lands, acquired in virtue of the foregoing articles, must alienate two-thirds part of said lands, either by sale, donation, or in any other manner he pleases. The law authorizes him to hold in full property and dominion one-third part.

"Art. 21. The two foregoing articles are to be understood as governing the contracts made within six months, as, after that time, counting from the day of the promulgation of this law, the executive can diminish the premium as it may deem proper, giving an account thereof to Congress, with such information as may be deemed necessary.

"Art. 22. The date of the concessions for lands constitutes an inviolable law for the right of property and legal ownership; should anyone through error, or by subsequent concession, occupy land belonging to another, he shall have no right to it, further than a preference in case of sale, at the current price.

"Art. 23. If, after two years from the date of concession, the colonist should not have cultivated his land, the right of property shall be considered as renounced, in which case the respective ayuntamiento can grant it to another.

"Art. 24. During the first six years from the date of the concession the colonist shall not pay tithes, duties on their produce, nor any contribution under whatever name it may be called.

*"Art. 25. The next six years from the[173 same date they shall pay half tithes, and the half of the contributions, whether direct or indirect, that are paid by the other citizens of the empire. After this time they shall, in all things relating to taxes and contributions, be placed on the same footing with the other citizens."

"Art. 29. Every person shall be free to leave the empire, and can alienate the lands over which he may have acquired the right of property, agreeably to the tenor of this law, and he can likewise take away from the country all his property, by paying the duties established by law."

There is a dispute as to the proper translation of § 4, the original of which is:

"Art. 4. Las familias que por si mismas vengan á establecerse, se presentarán immediatamente al respectivo Ayuntamiento del lugar en que quieran radicarse, para que conforme á las órdenes con que se hallen del Gobierno se les designe por aquel cuerpo el terreno que les corresponda segun la industria que van á plantear;"

—and a translation thereof, as furnished by Mr.

Tipton, a special agent and Spanish expert of the department of justice in the office of the United States attorney for the court of private land claims, is:

"Art. 4. The families who come of themselves to settle shall present themselves immediately to the respective ayuntamiento of the place at which they desire to establish themselves in order that, in conformity with the orders which they have from the executive, there be designated to them by that body the lands to which they are entitled according to the industry which they are going to undertake."

At the time of the enactment of this colonization law Iturbide was the Emperor of Mexico. Soon thereafter a revolution followed. He abdicated on March 20, 1823, and his banishment was ordered by a decree of the Constituent Congress of Mexico, April 23, in these words:

"The Sovereign Constituent Congress of Mexico, in the session of yesterday, decreed the following:

"1. That the coronation of Agustin de [174] Iturbide being an *act of violence and of force, and void in law, there is no occasion to discuss the abdication he makes of the Crown.

"2. Consequently, it also declares as void the hereditary succession and the titles that have emanated from the cornation; and that all the acts of the late government, from the 19th of May to the 29th of March last, are illegal, but subject to revision by the present Congress for their conformation or revocation.

"3. The supreme executive authority will cause the prompt departure of Agustin de Iturbide from the territory of the nation."

Article 10 of the original draft of the treaty of Guadalupe Hidalgo, as agreed upon between the commissioners representing this government and Mexico, was as follows:

"Art. 10. All grants of land made by the Mexican government, or by the competent authorities in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid to the same extent that the same grants would be valid if the same territories had remained within the limits of Mexico. But the grantees of land in Texas, put in possession thereof, who, by reason of the circumstances of the country since the beginning of the troubles between Texas and the Mexican government, may have been prevented from fulfilling all the conditions of their grants, shall be under the obligation to fulfil the said conditions within the periods limited within the same, respectively; such periods to be now counted from the date of the exchange of ratifications of this treaty; in default of which the said grants shall not be obligatory upon the state of Texas in virtue of the stipulations contained in this article. The foregoing stipulation in regard to grantees of land in Texas is extended to all grantees of land in the territories aforesaid elsewhere than in Texas, put in possession under such grants; and in default of the fulfilment of the conditions of any such grant within the new period, which, as above stipulated, begins with the day of the exchange of ratifications of this treaty, the same shall be null and void." Message of the President of the United States, transmitting papers relative to the treaty *of Guada- [175] lupe Hidalgo, Feb. 8, 1849, Ex. Doc. 50, H. R. 30th Cong., 2d Sess. p. 17.

That article, however, was stricken out by the Senate of the United States, and in the message of President Polk the reasons for its rejection are stated in the following language (*Ibid.* 32):

"The objection to the tenth article of the original treaty was not that it protected legitimate titles, which our laws would have equally protected without it, but that it most unjustly attempted to resuscitate grants which had become mere nullities, by allowing the grantees the same period after the exchange of the ratifications of the treaty, to which they had been originally entitled after the date of their grants, for the purpose of performing the conditions on which they had been made. In submitting the treaty to the Senate I had recommended the rejection of this article. That portion of it in regard to lands in Texas did not receive a single vote in the Senate. This information was communicated by the letter of the Secretary of State to the Minister of Foreign Affairs of Mexico, and was in possession of the Mexican government during the whole period the treaty was before the Mexican Congress, and the article itself was reprobated in that letter in the strongest terms. Besides, our commissioners to Mexico had been instructed 'that neither the President nor the Senate of the United States can ever consent to ratify any treaty containing the tenth article of the treaty of Guadalupe Hidalgo in favor of grantees of land in Texas or elsewhere.' And again, 'should the Mexican government persist in retaining this article, then all prospect of immediate peace is ended, and of this you may give them an absolute assurance.'"

And in the treaty as ratified were left the following provisions which guarantee only the rights of Mexicans to property belonging to them in the territory (9 Stat. at L. 929, art. 8):

"Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove *at any time to the Mexican [176] Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever. . . . In the said territories, property of every kind now belonging to Mexicans not established there shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States."

The act creating the court of private land claims provides in § 13 (26 Stat. at L. 860, chap. 539):

"First. No claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the states of

the Republic of Mexico having lawful authority to make grants of land, and one that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect."

The 8th subdivision of the same section also contains this limitation:

"No concession, grant, or other authority to acquire land made upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed, unless it shall appear that every such condition and requirement was performed within the time and in the manner stated in any such concession, grant, or other authority to acquire land."

Messrs. **Robert Rae, J. B. Cessna,** and *T. B. Catron* for appellants.

Messrs. **John K. Richards,** Solicitor General, **Matthew G. Reynolds,** Special Assistant to the Attorney General, and **Frank Springer** for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

The court of private land claims was of the opinion that the ayuntamiento or town council had no power to make a grant such as this of a tract entirely outside the 4 square leagues supposed to belong to the town; and, secondly, that even if it had such power the conditions of the alleged grant were never performed by Heath, and therefore he acquired no title to the property.

The colonization law of January 4, 1823, was in force only a short time, having been suspended by the decree of April 11, 1823, and superseded by the law of August 18, 1824. Few proceedings were had under it, and therefore its true meaning cannot be considered as determined by any settled usage of the Mexican authorities. Indeed, counsel for appellants, with all their industry, have been able to find but one other grant made or attempted to be made under its authority. It is, to say the least, difficult to discern in this law any warrant for an original grant by the ayuntamiento. Article 2 provides that "the executive will distribute lands." This is in accord with the settled policy of the old Spanish law, which reserved to the King the power of granting lands. Doubtless this power was often exercised under the directions of the King by subordinate officials, but full control was retained by him. So, here, the executive retains the control of the distribution of lands. It is true the article provides that such distribution shall be "under the conditions and terms herein expressed," but that simply means the conditions and terms under which the executive will act. Article 3 refers to grants to empresarios, and that specifically declares that they "shall previously contract with the executive," who will "designate the province to which they must direct themselves; the lands which they can occupy." It is said that Heath does not come *within the terms [178 of this article because he did not propose to introduce at least two hundred families, and this contention is doubtless correct. Article 4, upon which the plaintiffs specially rely, makes provision for families who emigrate "not included in a contract," evidently referring thereby to the empresario contracts specified in the preceding section. Such families are directed to "present themselves to the ayuntamiento of the place where they wish to settle, in order that this body, in conformity with the instructions of the executive, may designate the lands corresponding to them, agreeably to the industry which they may establish." Accepting the contention of plaintiffs that Heath comes within the scope of this article, we note these limitations: The emigrating families are to present themselves to the ayuntamiento of the "place where they wish to settle," not the ayuntamiento of the town nearest to the land upon which they wish to settle. The natural meaning of this is that when families desire to settle within the limits of a town they shall present themselves to the ayuntamiento of that town for a designation of the lands they may occupy. It would be strange to find that a town council was empowered to grant lands outside the limits of the town and anywhere within the territory or department in which it was situated, while it is not strange to find that council authorized to locate emigrants upon those vacant lands not exceeding 4 leagues square which, according to Spanish and Mexican custom, were ordinarily appurtenant and subject to the jurisdiction of the town. We do not mean to intimate that El Paso in fact possessed a territory of 4 square leagues over which it had jurisdiction, although that seems to have been the opinion of the court of private land claims, for it said: "El Paso, like other Spanish towns, is presumed to have had a grant of 4 square leagues of land, and the ayuntamiento had the power to make allotments of land within the 4 leagues so granted."

This matter was considered in *United States* v. *Santa Fé*, 165 U. S. 675, 699 [41: 874, 883], and the conclusion was reached after full examination that it was not true under the Spanish law that every town was entitled to a grant of 4 leagues square, the *court saying: [179 "The inference to be deduced from all these documents supports the theory that under the Spanish laws, as found in the Recopilacion, all towns were not entitled by operation of law to 4 square leagues, but that at a late date the Spanish officials had adopted the theory that 4 square leagues was the normal quantity which might be designated as the limits of the new pueblos to be thereafter created."

Still it was undoubtedly true that by special grant or contract many towns did not have such an area of contiguous and dependent territory, and it would seem that this article gave the ayuntamiento authority to designate such portion of those lands as it deemed suitable to the industry which the emigrating families proposed to undertake.

We notice another limitation in this article, and that is that the designation by the ayuntamiento is to be made "in conformity with the instructions of the executive." This con-

templates, as preliminary to the action of the ayuntamiento, some instructions from the executive, either general or special. Within the letter of this provision the executive might, in a given case, authorize the ayuntamiento of a particular town to designate lands outside of the town lands proper for emigrating families; but surely in this article there is no general grant of power to every town council to give away lands anywhere within the territory or department without any previous instructions or directions from the executive. Neither is the power contended for to be found in article 28, which simply authorizes the ayuntamiento, in case any colonist shall fail to cultivate the land which has been given him, to regrant the same tract to another. It might well be that the ayuntamiento shall have power after the lapse of a grant to regrant the same tract to another party. But it does not follow there from that the power to regrant lapsed lands implies a power to make an original grant.

Neither is the plaintiffs' case helped by the assertion that the fact of a grant presumes the power to make it. Counsel quote from *United States* v. *Peralta*, 60 U. S. 19 How. 343, 347 [15: 678, 680]: "The presumption arising from [180] the grant itself makes it prima *facie evidence of the power of the officer making it, and throws the burden of proof on the party denying it."

Whatever may be the scope of this proposition, we find in these proceedings a distinct declaration that the town council regarded its action as only preliminary, and requiring for finality the approval of the government. In the first resolution passed by the ayuntamiento on the petition of Dr. Heath it is recited:

"1st. That, saving the superior determination of the government to which this shall be given, his proposals and petition are admitted, and when he presents himself, the land he asks for shall be assigned to him in these terms: The head (toma) of the Bracito shall be the central point of the square of said 'hacienda;' that is to say, two and a half leagues in a straight line up the river, and two and a half leagues down the river, the same being observed in the sides that form the square."

And in the letter transmitting the proceedings to the governor it is said:

"The imitative circumstances of the new settlers and the fact that this corporation has no municipal ordinances regulating the distribution of land that may be useful and beneficial in promoting settlement, agriculture, arts, etc., place this corporation under the necessity of making known to your superiority the resolution, that your excellency may be pleased to dictate whatever may be your pleasure in the matter, whether it be by yourself or after consulting the most excellent provincial deputation."

And again—

"In order to avoid jealousies among private individuals and interests of some breeders of stock who generally are prejudicial to these in the development of agriculture and arts, it is observed that this jurisdiction is just beginning, and at the same time gets poorer and poorer if it is not given or provided with industries and arts, and in order to have them in its territory a means therefor is that adopted by virtue of article 4, inasmuch as to reject it difficulties would hereafter arise both because of the scarcity in the national exchequer and the poverty of these residents, for whom this ayuntamiento, *to which it very closely belongs [181] to look out for their happiness, has, without delay, put in operation the franchise of the law, this corporation stating, nevertheless, that if it has erred in anything, the concession has been made subject to the superior determination.

. . . . . .

"This ayuntamiento has found it convenient and worthy of public confidence to bring all of the foregoing before your excellency and the most excellent provincial deputation, that you may, in view thereof, order what may be just and convenient to remove uncertainties and to proceed with certainty in every matter, which is what is desired."

So that the ayuntamiento assuming to act declared specifically that it did so "subject to the superior determination," and submitted its action to the governor of the province.

Further, on the receipt of this communication by the acting governor, it was presented to the provincial deputation, which expressly disapproved the proposed grant, and directed that notice of its disapproval should be promptly communicated to Dr. Heath. The language of the resolution passed by the provincial deputation is clear. It declares that the action taken by the ayuntamiento was not only with prejudice to the inhabitants of that jurisdiction, but also in violation of law. It is true that it does not point out wherein the violation of law consists, and refrains from further observations on account of the repeal of the colonization law, but it does direct the ayuntamiento to give notice to Heath, through the United States minister, or in some other manner, that the possession given to him was "through a mistaken opinion and wrong understanding in relation to the colonization law already repealed," and that this notice should be given in order to prevent any claim for damages in case Dr. Heath should introduce into the province the families that he had offered to bring. Even if the disapproval had been based solely on the fact that the colonization law of 1823 had been repealed, that would have been sufficient, for whatever might be adjudged the power of the ayuntamiento, and although it might have made a grant without reference to the provincial deputation *or the governor of the [182] province, yet, for reasons which to it were satisfactory, it expressly declared that the grant was subject to their approval, and in case that approval was withheld, of course the grant never became operative.

The other case to which counsel refer, in which the ayuntamiento assumed to act under the law of 1823, instead of supporting the contention that it had absolute power in the matter, tends in the other direction, and supports the opposite contention, for in that, as in this, it referred its action for approval to the governor of the province. That case was of a grant of a tract on the left side of the Rio Grande, made to Don José Lerma by this same ayuntamiento of El Paso, the proceedings in respect to which were introduced in evidence. They show that upon the petition of Lerma, on August 23, 1823, the ayuntamiento passed a resolution

declaring that it deemed it proper to make the grant, but adding: "Let all that has been done be brought to the knowledge of the most excellent deputation of Chihuahua in order that it may approve this grant, if it be its superior pleasure."

In pursuance of this resolution the application was presented to the deputation of Chihuahua, which on October 10, 1823, approved the proposed grant in the following words:

"Agreeably to the resolution of the enlightened council of the town of El Paso, this most excellent deputation have deemed it proper to approve the grant of all the lands, woods, and 'sierras' applied for by the resident Don José Lerma, it being of advantage to the nation to open fields and to form settlements resulting in public utility, that enlightened council being ordered to appoint a commission that shall proceed to survey these lands and to give possession to the party interested, in the name of the supreme powers of the nation, of the lands, 'sierras,' woods, and pasturages applied for by him on the left side of the Rio Bravo del Norte."

On the receipt of such approval on October 30, 1823, the ayuntamiento proceeded to pass this resolution:

"Having received the foregoing application and approbation of the most excellent provincial deputation of Chihuahua to granting and putting the resident Don José Lerma in posses-
183 sion *of the unimproved lands, woods, pasturages, and 'sierras' for which he made application for the purpose of settling on the line of the Rio Bravo del Norte and on the left side from opposite the 'Ojo del Toro,' or be it the 'Sierra de todos Sanos,' to the 'Sierra Blanca,' the enlightened council of this town, in compliance with the order of said most excellent deputation, resolved to appoint a commission of respectable and honorable persons who shall proceed to survey and delineate those lands and to put said Don José Lerma in possession thereof."

It also appointed a commission to set off the tract to Lerma. On December 12, 1823, on the report of that commission, it entered the following order:

"The land grant applied for by the resident Don José Lerma, being approved by the united council and by the most excellent provincial deputation of the city of Chihuahua, as is evidenced by the foregoing proceedings carried on by the president of the appointed commission, who is also the president of this corporation, let this record be referred to its secretary for taxation of the per diem and writing therein, according to the tariff in force in this council, in order that the party interested may be informed of the fees he must pay."

Even this action did not seem to resolve all doubts as to the validity of this grant, for, in a petition presented by Lerma to the constitutional governor of the state of Chihuahua in 1828, he set forth the action of the ayuntamiento and the provincial deputation in 1823, and the delivery to him of the tract, and then, after alleging that the subsequent ayuntamiento refused to acknowledge the validity of the grant, added:

"In these terms he appeals to your excellency, praying that he be recognized in his rights of ownership of the lands which belong to him, confirming him in his said property which was granted to him in order that a settlement be formed in said lands, and that the council of the town of El Paso be notified accordingly. I pray for justice and make the necessary protestation at Paso del Norte, May 12, 1828."

Upon such petition the following action was taken:

To the President of the Council of the Town of El Paso del Norte:

*The decree or title of possession or- [184
dered to be given by the provincial deputation and the council of El Paso del Norte in the year 1823, whereby fifty leagues of land on the left side of the Rio Bravo were granted to Don José Lerma, has been ratified and confirmed by the second constitutional congress of this state in consideration of distinguished military services rendered to the Republic by the retired lieutenant, José Lerma:

Therefore, this government considers that the land transferred by the granted bounty as an exclusive property of the said Lerma, ratifying it in all its parts. The council of El Paso del Norte will act accordingly. God and liberty.

Chihuahua, June 30, 1828.

This order of the governor, as will be seen, did not rest the validity of the grant upon the action of the ayuntamiento, or even upon its action as approved by the provincial deputation, but recited that the title had been ratified and confirmed by the second constitutional congress of the state. So that the only other case in which, as said by counsel, action was taken under this law of 1823 by any ayuntamiento clearly shows that it did not understand that it had absolute power, but that its proceedings required approval by the provincial deputation, or some higher authority. The court of private land claims was right in its conclusions that no final grant had ever been made to Doctor Heath of the tract in controversy.

But it is unnecessary to rest the case upon this alone, for even if the ayuntamiento had full and final jurisdiction in the premises, and had made an absolute and unconditional grant, —one beyond the power of any superior authority to disapprove and annul,—still we think the judgment of the court of private land claims was right, because, as indisputably appears from the evidence, when Doctor Heath came with his colonists to take possession of the tract the Mexican authorities repudiated the alleged grant, denied his rights, and practically drove him from the country. Not only that, but, as the record shows, the Mexican government thereafter granted to other parties large portions of the same tract. The disavowal, repudiation, expulsion, and subsequent grants were in no respects the irregular acts of a mere mob or other unauthorized parties. They *were the deliberate official proceed- [185
ings of the duly constituted authorities of the Mexican government. This repudiation commenced in 1824 and continued until the cession of territory to the United States, under the treaty of Guadalupe Hidalgo. During all

those years, so far as the record shows, no action was taken by Doctor Heath to enforce his claim or recover damages from the government of Mexico for the alleged wrongs done him. Neither were any proceedings taken by him, or those claiming under him, from the treaty of cession until the presentation of this petition before the court of private land claims. In other words, for seventy years (more than twenty of which the land was within the dominion of the government of Mexico) this claim was permitted to lie dormant. Other people have passed into possession of parts, at least, of the tract, and are occupying it under subsequent grants from that government. Twice during this lapse of time was provision made for an adjustment of claims of citizens of the United States against the government of Mexico. On April 11, 1839, a convention was entered into between the two nations referring to four commissioners all claims of citizens of the United States against Mexico which had been presented to this government for consideration. 8 Stat. at L. 526. And again, in the treaty of Guadalupe Hidalgo, there was a further provision of like nature. 9 Stat. at L. 922. Article 14 of that treaty released the Mexican government in these words:

"The United States do furthermore discharge the Mexican Republic from all claims of citizens of the United States, not heretofore decided against the Mexican government, which may have arisen previously to the date of the signature of this treaty; which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the board of commissioners provided for in the following article, and whatever shall be the total amount of those allowed."

The 15th article, which created the commission, directed that it should be guided and governed by the principles and rules of decisions prescribed by the 1st and 5th articles of a prior unratified convention, and in the 1st of those articles it was provided:

186] *"The said commissioners thus appointed shall, in the presence of each other, take an oath to examine and decide impartially the claims submitted to them, and which may lawfully be considered, according to the proofs which shall be presented, the principles of right and justice, the law of nations, and the treaties between the two Republics."

So that if Doctor Heath had any claim against the Mexican government on account of being deprived of this alleged grant he could, by a presentation of it under one or other of these treaties, have received full compensation. The fact that he made no claim is persuasive evidence that he did not understand that what had taken place amounted to a complete grant.

Further, when the United States received this territory under the treaty of Guadalupe Hidalgo they refused to recognize as still valid and enforceable all grants which had been assumed to be made prior thereto by the Mexican authorities. Article 10 as proposed by the commissioners was rejected by this government and stricken out from the treaty. That article not only contemplated binding this government to respect all grants which would have been recognized as valid by the government of Mexico if no cession had been made, but also proposed to give to grantees who had failed to perform the conditions of their grants, and whose failure to perform might be deemed to have avoided the grants, further time to perform the conditions. By the rejection of this article this government distinctly declared that it did not propose to recognize any grants which were not at the time of the treaty of cession recognized by the Mexican government as valid, or any whose conditions, either precedent or subsequent, had not been fully performed.

In this respect the action taken was in harmony with the general rule of international law. It is the duty of a nation receiving a cession of territory to respect all rights of property as those rights were recognized by the nation making the cession, but it is no part of its duty to right the wrongs which the grantor nation may have theretofore committed upon every individual. There may be an exception when the dispossession *and wrong of the[187 grantor nation were so recently before the cession that the individual may not have had time to appeal to the courts or authorities of that nation for redress. In such a case perhaps the duty will rest upon the grantee nation, but such possible exception has no application to the present case and in no manner abridges the general rule that among the burdens assumed by the nation receiving the cession is not the obligation to right wrongs which have for many years theretofore been persisted in by the grantor nation. Because Mexico had more than twenty years before the cession forcibly taken from Doctor Heath land that was rightfully his and given part or all of it to other persons it does not follow that when the United States accepted the cession they came under obligations to do that which Mexico had failed to do, place Doctor Heath in possession and restore to him the land of which he had been thus wrongfully deprived. Such action if taken might well expose this government to just claims for compensation in behalf of the subsequent grantees of Mexico, who apparently took no personal part in the wrongs done to Heath. Doctor Heath may have had a claim against Mexico for those wrongs, but he failed to prosecute his claim in the way prescribed, and he cannot now make his failure to pursue such prescribed way a reason for enforcing a title which that nation had refused to recognize. So long as Mexico repudiated his claim to this tract his only recourse was by direct appeal or through the intervention of this government to seek compensation for the property of which he had been deprived. When this government accepted the cession of the territory it did not thereby assume an obligation to satisfy any pecuniary demands which he as an individual may have had against the Mexican government. In other words, it took that territory bound to respect all rights of property which the Mexican government respected, but under no obligations to right the wrongs which that government had theretofore committed.

But even if there were an obligation on the part of this government, either under the general rules of international law or the terms of the treaty of cession, to recognize plaintiff's

188] *claim to this particular tract, yet the time, manner, and conditions of enforcing it would depend upon the will of Congress. And in creating the court of private land claims Congress has prescribed the character of claims which that court may determine and the conditions which must attach to any claim which it may enforce. This claim, even if the grant in its inception was valid, was not one which it was within the province of the court of private land claims to approve and confirm. The 8th clause of § 13 forbids the confirmation of a grant made upon any condition or requirement, either antecedent or subsequent, unless it appears that such condition and requirement had been performed within the time and in the manner stated in the grant. That certain conditions or requirements were attached to this grant is evident from a perusal of the application and the order. That they were not performed is admitted by plaintiffs. Their contention is that performance was prevented by the Mexican authorities, and having been prevented it should be considered that performance was waived and the title had become absolute. Whatever may be said as to the duty of this government to treat a condition whose performance was prevented by the Mexican authorities as a condition performed does not detract from the proposition that the court of private land claims is not vested with such power. It is a mere creature of statute with prescribed and limited powers. It has no general equity jurisdiction. It can confirm a grant made upon condition only when such condition was performed. It is not under the statute at liberty to treat anything as equivalent to performance. Cases in which there was no performance of the conditions of the grant are cases which must be considered as reserved by Congress for further action on its part. So that under the terms of the act creating the court of private land claims, even if there were no other objections to the proceedings, the admitted fact that the conditions and requirements of this grant were never performed is sufficient to justify the ruling of the court in dismissing the petition.

Of course, the observations above made may 189]not be applicable *to a case in which the Mexican government had, subsequently to the original grant and prior to the cession, waived the performance of the conditions. For as it had power in the first instance to make the grant without conditions, its action in subsequently waiving or removing such conditions was equivalent to an original grant without conditions.

We have not deemed it necessary to consider the matter of limitations and laches. That this is an old claim is evident, seventy years having elapsed between its inception and its prosecution. Whether it must also be adjudged a stale claim and beyond judicial recognition need not be determined. The other reasons presented for its rejection are sufficient.

We see no error in the proceedings, and *the judgment is affirmed.*

HENRY M. BAKER, *Appt.*,
v.
HORACE S. CUMMINGS.

(See S. C. Reporter's ed. 189-209.)

Statute of limitations in equity cases—suit to set aside sale for fraud—laches.

1. Courts of equity, in cases of concurrent jurisdiction, are bound by the statute of limitations which govern actions at law.
2. A suit in equity to set aside for fraud a sale by one partner in a law firm to another of his interest in fees to be earned in certain cases will be dismissed where the plaintiff, with full knowledge of the fraud for more than three years, has chosen to remain silent and permit his partner to go on and expend time and labor in prosecuting the claims as if they were his own, and thereby put himself in a better position than he would have occupied if he had asserted his rights in due season.
3. Equitable powers will not be exercised to discover whether one has been wronged, when, with full knowledge of the alleged wrong, he has allowed the bar of the statute of limitations to arise, and has slept upon his rights until such a situation has arisen as to render it inequitable to afford him relief.

[No. 189.]

Argued January 14, 17, 1898. Decided February 21, 1898.

APPEAL from a decree of the Court of Appeals of the District of Columbia affirm-

NOTE.—*As to limitation of time in equity cases*, see notes to Pratt v. Carroll, 3: 627, and Thomas v. Brockenbrough, 6: 287.

As to equity of redemption barred by time, see note to Thomas v. Brockenbrough, 6: 287.

As to statute of limitations in cases of fraud in equity, see note to Stearns v. Page, 12: 928.

As to effect of disability occurring after statute of limitations begins to run, see note to Harris v. McGovern, 25: 317.

That neither time nor statute of limitations runs against the state, see note to Gibson v. Chouteau 20: 534.

Courts of equity adopt and apply the statutes of limitations in cases of concurrent jurisdiction with courts of law.

Courts of equity, although not in all cases bound by the statute of limitations, unless expressly brought within its provisions, have nevertheless acted in this respect, in analogy to courts of law, and given effect to the statute in all cases of concurrent jurisdiction. Bruen v. Hone, 2 Barb. 586; Phares v. Walters, 6 Iowa, 106; Young v. Mackall, 3 Md. Ch. 398; Teackle v. Gibson, 8 Md. 70; Hertle v. Schwartze, 3 Md. 366; Knight v. Brawner, 14 Md. 1; Wilson v. Anthony, 19 Ark. 16; Hill v. Boyland, 40 Miss. 618; Goff v. Robins, 33 Miss. 153; Perkins v. Cartmell, 4 Harr. (Del.) 270, 42 Am. Dec. 753; Gunn v. Brantley, 21 Ala. 633; Crocker v. Clements, 23 Ala. 296; Keaton v. McGwier, 24 Ga. 217; Manning v. Warren, 17 Ill. 267; White v. First Soc. of M. E. Church, 3 Lans. 477; Elwood v. Deifendorf, 5 Barb. 398.

Although strictly these statutes do not extend to suits in equity, yet the courts acknowledge their obligation; and where the statute takes away the right of entry, or would bar an ejectment in twenty years, it will, by analogy, bar relief in equity, although the time within which a writ of right or other real action might be brought had not expired. Emendorf v. Taylor, 23 U. S. 10

ing the decree of the Supreme Court of that District in favor of the plaintiff, Horace S. Cummings, setting aside a sale of certain fees in certain cases, and settling the accounts between the parties in favor of the plaintiff for the sum of $32, 772.14, in an action brought to procure cancelation of said sale on the ground of fraud and for a settlement of the accounts between him and the defendant, Henry M. Baker, and to recover the amount claimed due him. *Reversed*, and cause remanded with directions to set aside the decree of the supreme court and to dismiss the suit.

See same case below, 4 App. D. C. 230, 8 App. D. C. 515.

Statement by Mr. Justice **White:**

This suit was commenced by appellee Cum
190]mings on*February 1, 1890, by a bill filed on the equity side of the supreme court of the District of Columbia against Baker, the appellant. In substance, the bill set forth the formation about the year 1874 of a partnership between Cummings and Baker for the practice of law in the city of Washington; that the expenses were to be borne and the profits shared equally between the partners; that the firm some years thereafter became attorneys for the collection of claims against the United States in favor of certain inspectors of customs for arrears of pay claimed to be due them. It alleged that on September 6, 1886, Cummings sold to Baker all his interest in the fees earned but not then divided, and those yet to be earned from such claims, and that there was consequently a dissolution of the partnership as to these matters, but that it continued as to all other business until September, 1889, when the partnership was dissolved. The object of the bill was to procure a cancelation and annulment of the sale of the fees in inspector cases made as above stated and of the written instrument of assignment by which it was evidenced, on the ground of false representations claimed to have been made by Baker to Cummings in the negotiations for the sale, which representations were averred to have brought about the consent to the sale and the execution of the assignment to carry out the same. The fraud specified was, in substance, this: That Baker had misrepresented the amount of the fees then actually earned by the firm and undivided between the partners on the inspectors' claims, for which appropriations had then been made by Congress, by stating to Cummings that the then earned fees only equaled about $20,000, when in truth and in fact they were, to the knowledge of Baker, about $32,000; that as to the future claims then in the hands of the firm but not then allowed by the Treasury Department or appropriated for by Congress, Baker had knowingly largely understated the amount thereof by representing them to be only $80,000, when in fact they then amounted to about $275,000. The relief prayed was an annulment of the sale; a full settlement of the partnership affairs, treating the fees in the inspector cases as being a part of the partnership assets; and

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Wheat. 152 (6: 289); People, Southwick, v. Everest, 4 Hill, 71; Reeves v. Dougherty, 7 Yerg. 222, 27 Am. Dec. 496; Hayden v. Bucklin, 9 Paige, 512; Long v. White, 5 J. J. Marsh. 231; Ridley v. Hettman, 10 Ohio, 524; Saunders v. Gatlin, 1 Dev. & B. Eq. 95; Cleveland Ins. Co. v. Reed, 1 Biss. 180; Hovenden v. Lord Annesley, 2 Sch. & Lef. 629; Humbert v. Trinity Church, 24 Wend. 587; Moore v. Porcher, Bail. Eq. 195; Hamilton v. Hamilton, 18 Pa. 20, 55 Am. Dec. 585; Wood v. Wood, 3 Ala. 756; Cumming v. Berry, 1 Rich. Eq. 114.

Effect will be given to the statute of limitations in equity as well as at law in proper cases. Lewis v. Marshall, 1 McLean, 16; Bank of United States v. Daniel, 37 U. S. 12 Pet. 32 (9: 989); Lewis v. Marshall, 30 U.S. 5 Pet. 470 (8: 195); Tharp v. Tharp, 15 Vt. 105; Collard v. Tuttle, 4 Vt. 491, 24 Am. Dec. 627; McCrea v. Purmort, 16 Wend. 460, 30 Am. Dec. 103; Lansing v. Starr, 2 Johns. Ch. 150; Murray v. Coster, 20 Johns. 576, 11 Am. Dec. 333, 5 Johns. Ch. 522; Atwater v. Fowler, 1 Edw. Ch. 417; Kane v. Bloodgood, 7 Johns. Ch. 90, 11 Am. Dec. 417; Wanamaker v. Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748; Conover v. Conover, 1 N. J. Eq. 403; Watkins v. Harwood, 2 Gill & J. 307.

A court of equity will, in analogy to the statute, presume a settlement and payment from the lapse of the same time, if the presumption be not rebutted by evidence which satisfactorily accounts for the delay, and the case does not come within the exceptions of the statute. Spear v. Newell, 13 Vt. 288; Mardre v. Leigh, 1 Dev. Eq. 360; Ryan v. Parker, 1 Ired. Eq. 89; Harrison v. Harrison, 1 Call, (Va.) 420; Watkins v. Harwood, 2 Gill & J. 307; Lingan v. Henderson, 1 Bland, Ch. 236; Mitchell v. Woodson, 37 Miss. 567; Mandeville v. Lane, 28 Miss. 312; Borden v. Peay, 20 Ark. 293; Harris v. Mills, 28 Ill. 44, 81 Am. Dec. 259; McDowell v. Heath, 3 A. K. Marsh. 222; Shelby v. Shelby, Cooke (Tenn.) 179, 5 Am. Dec. 686; Murphy v. Blair, 12 Ind. 184; Bailey v. Carter, 7 Ired. Eq. 282; Thomas v. Brockenbrough, 23 U. S. 10 Wheat. 146 (6: 287); Judah v. Brandon, 5 Blackf. 506; Demarest v. Wynkoop, 3 Johns. Ch. 129, 8 Am. Dec. 437.

A court of equity will give effect to the statute in all cases where the plaintiff could have brought an action at law for the same matter. Godden v. Kimmell, 99 U. S. 201 (25: 431); Mann v. Fairchild, 2 Keyes, 106; Roosevelt v. Mark, 6 Johns. Ch. 266; Clark v. Ford, 3 Keyes, 370; Stafford v. Bryan, 3 Wend. 532; McCrea v. Purmort, 16 Wend. 460, 33 Am. Dec. 103; Spoor v. Wells, 3 Barb. Ch. 199; Sherwood v. Sutton, 5 Mason, 143; Pratt v. Northam, 5 Mason, 95; Hunt v. Wickliffe, 27 U. S. 2 Pet. 201 (7: 397); Lindsay v. Hyatt, 4 Edw. Ch. 97.

Regardless of the question whether the statute is applied in express terms to courts of equity, it is, in all cases, except where relief is sought on the ground of fraud, bound thereby, when the statute has conferred absolute rights upon a person, or when its jurisdiction over the subject-matter is only concurrent with that of courts of law. Phalen v. Clark, 19 Conn. 421, 50 Am. Dec. 253; Coulson v. Walton, 34 U. S. 9 Pet. 62 (9: 51); Miller v. M'Intyre, 31 U. S. 6 Pet. 61 (8: 320).

Twenty years' adverse possession succeeding an actual or virtual disseisin bars a suit in equity as well as at law. Gates v. Jacob, 1 B. Mon. 306; Dexter v. Arnold, 3 Sumn. 152; Miller v. M'Intyre, 31 U. S. 6 Pet. 61 (8: 320); Coulson v. Walton, 34 U. S. 9 Pet. 62 (9: 51); Lewis v. Marshall, 30 U. S. 5 Pet. 470 (8: 195); Bowman v. Wathen, 42 U. S. 1 How. 189 (11: 97); Rhode Island v. Massachusetts, 40 U. S. 15 Pet. (10: 721); Peyton v. Stith, 30 U. S. 5 Pet. 485 (8: 200); Bank of United States v. Daniel, 37 U. S. 12 Pet. 33 (9: 989); Hayman v. Keally, 3 Cranch, C. C. 325.

Where an actual adverse possession has continued for twenty years, it constitutes a complete bar in equity, wherever the same possession would

191]in aid of the final settlement which *was asked, there was also a prayer that Baker be enjoined from prosecuting an action instituted by him against Cummings, in December, 1889, to recover $2,712.81, and interest, it being averred that Baker's right to this amount was involved in a settlement of the entire partnership affairs.

The answer of Baker denied that there had been any fraud practised upon Cummings in the purchase of his interest in the fees in the inspector cases, and the alleged misrepresentations as to both classes of fees, whether earned or to be earned, was expressly denied. The averment that the complainant had sold his interest in the fees on a basis of his ownership of one half therein was directly traversed, and, on the contrary, it was alleged that the assignment resulted from the following circumstances and had been made upon these conditions: That the existence of claims by inspectors of customs against the government had been discovered by Baker, and that he had procured the business of prosecuting them for the firm for a compensation, in most cases, of 25 per cent of the sum collected, and had substantially by his own labors pressed them to a successful issue, and that the result of his exertions had been to earn for the partnership a considerable sum of money, which had been, prior to 1886, divided between the partners equally; that during the course of the business Cummings had given little or no attention to the inspectors' claims, but, on the contrary, had neglected, not only these claims, but the partnership affairs generally; that, in consequence of these facts, for months prior to September, 1886, Baker had determined to put an end to the partnership, and had so informed Cummings; that for the purpose of preventing this dissolution and securing a continued association with him (Baker) in business, which Cummings desired, an agreement had been entered into between the partners that Cummings, instead of taking an equal interest in the earnings of the firm from the inspectors' cases, should dispose of his rights therein on the basis of his having only a one-third instead of a one-half interest; that on this agreement, as to the proportion in which the partners should be entitled to the fees, and Cummings's judgment of the future result of claims unallowed and unappropriated *for, which were in their very[192 nature largely conjectural, the sale was made for a consideration of $15,000 cash to be paid by Baker to Cummings, the latter to retain in addition the full amount of all fees due to him for his services as assignee of an insolvent banking firm, which latter amount, without the release, it was averred, would have been an asset of the partnership, and was estimated to equal $10,000, of which Baker's share would have been one half.

The answer, moreover, averred that at the time of the sale Cummings had full information of the condition of the business in the inspector cases and dealt with his eyes open; that as a partner he was not only familiar with the general manner in which the business was conducted, but also, about two weeks prior to

operate at law to bar an ejectment. Hunt v. Wickliffe, 27 U. S. 2 Pet. 201 (7: 397).

Unless courts of equity acted in analogy to these statutes in cases where a party has a choice of forms, the result would be that the effect and real end of the statute would be eluded. Roosevelt v. Marks, 6 Johns. Ch. 266; Troup v. Smith, 20 Johns. 33; Elmendorf v. Taylor, 23 U. S. 10 Wheat. 152 (6: 289).

Although statutes of limitation strictly do not bind courts of equity, they will use the analogy of the statute and recognize rights acquired thereunder. Bartlett v. Ambrose, 42 U. S. App. 381, 78 Fed. Rep. 839, 24 C. C. A. 397.

Courts of equity having concurrent jurisdiction with courts of law will generally refer to the statute of limitations as applied in the latter courts to determine when the bar will be complete in equity. Boone v. Colehour, 165 Ill. 305.

Lapse of time is as complete a bar to a constructive or implied trust in equity as at law, unless there has been a fraudulent concealment of the cause of action. Hayden v. Thompson, 36 U. S. App. 361, 71 Fed. Rep. 60, 17 C. C. A. 592.

When the complainant has a concurrent remedy in a court of equity and in a court of common law, time is as absolute a bar in equity as it is at law, and in such cases the limitation, as to actions at law, applies. *Re* Nellley, 95 N. Y. 332; Borst v. Corey, 15 N. Y. 505; Rundle v. Allison, 34 N. Y. 182.

The statutory limitation of ten years applies to a right of action in equity, where the equitable remedy is not a mere incident of the right attainable at law. Hoyt v. Tuthill, 33 Hun, 196.

Where relief by action at law would result in multiplicity of suits, or otherwise be imperfect as a remedy, the statutory limitation of ten years will apply to the time within which an action for equitable relief may be brought. Borst v. Corey, 15 N. Y. 505; Rundle v. Allison, 34 N. Y. 180.

When there is an adequate remedy at law, the election by the plaintiff to ask equitable relief does not avoid the limitation which would have governed had he sought legal redress. Hann v. Culver, 73 Hun, 109.

The statute of limitations is applied in equity in matters of account, to actions to remove a cloud upon a title, to actions to foreclose mortgages, or title bonds, or for the specific performance of contracts; and generally courts of equity will adopt the statute in analogy to the nature of the claim sought to be enforced. Mann v. Fairchild, 3 Abb. App. Dec. 152; Hubbell v. Sibley, 50 N. Y. 468; Atwater v. Fowler, 1 Edw. Ch. 417; Hogden v. Guttery, 58 Ill. 431; Cleveland Ins. Co. v. Reed, 1 Biss. 180; Anderson v. Baxter, 4 Or. 105; Hall v. Denckla, 28 Ark. 506; Day v. Baldwin, 34 Iowa, 380.

The statute has been held applicable in equity in the following instances: In proceeding to set aside a judgment on account of fraud (Moon v. Baum, 58 Ind. 194); an action to enforce a mortgage (Eubanks v. Leveridge, 4 Sawy. 274); to redeem from a mortgagee (Smith v. Foster, 44 Iowa, 442); to vacate a judgment on the ground of fraud (Rock Rapids Independent School Dist. v. Schreiner, 46 Iowa, 172); to impeach the validity of a decree for a divorce *à mensa et thoro* (Bourlon v. Waggaman, 28 La. Ann. 481); to annul a mortgage on the ground of fraud (Renshaw v. Herbert, 29 La. Ann. 285); to annul a contract on the ground of lesion (Blake v. Nelson, 29 La. Ann. 545); to restore a record in a suit to enforce a contract (Wyatt v. Luton, 10 Heisk. 458); to reopen an account (Spurill v. Sanderson, 79 N. C. 466); to enforce the liability of stockholders for the debts of a corporation (Godfrey v. Terry, 97 U. S. 171 (24: 944)), or for the division of lands and profits thereof (Harlow v. Lake Superior Iron Co. 41 Mich. 583); or to recover for lands taken under legislative authority (Sommer v. Pacific R. Co. 4 Mo. App. 586); or to recover in any instance where the complainant has or ever had a remedy at law (Cleveland v. Williamson, 57 Ala. 402; Brennan v. Ford, 46 Cal. 7).

the sale, he received from Baker papers and documents which fully informed him of the exact condition of the claims, his interest in which it was proposed to sell, the papers and documents in question having been handed to Cummings during the pendency of the negotiations in order that he might ascertain the precise situation.

In addition, the answer averred that immediately after the sale, and before Cummings had cashed a check for $15,000, given him by Baker in payment of the amount of the purchase price, Cummings was put in possession of papers and documents which were acted upon by him, and which, if any fraudulent representation had been made in relation to the sale, fully informed him of the fact in ample time to have protected his interest; and although this full information was given him, before the purchase price was collected, Cummings made no pretense of any deceit practised upon him, or made any complaint as to the contract, but continued in the partnership as a member of the firm as to other business, and that the first complaint which was made by him of any unfairness in the transaction was nearly three years after the sale, and then only after Baker had insisted upon payment to him by Cummings of a sum which Baker claimed was due him, and had moreover expressed his unalterable intention to dissolve the partnership. The defense of the bar of the statute of limitations was specially pleaded.

193] *At the hearing a decree was entered for complainant, and a reference was made to an auditor to state the accounts between the parties. Pending the hearing on such reference, an appeal from the interlocutory decree was prosecuted in the court of appeals of the District of Columbia, where a judgment of affirmance was rendered. 4 App. D. C. 230. Subsequently, on confirmation of the report of the auditor, a final decree was entered in favor of the complainant for the sum of $32,772.14, with interest thereon from the 1st day of July, 1895, until paid, in which sum embraced a credit to Baker of the items claimed by him in his action at law against Cummings. From this final decree an appeal was taken to the court of appeals for the district, by which it was affirmed. 8 App. D. C. 515. This appeal was then taken.

Messrs. **George F. Edmunds** and **S. R. Bond** for appellant.

Messrs. **Franklin H. Mackey** and *A. G. Safford* for appellee.

Mr. Justice **White** delivered the opinion of the court:

Before approaching a discussion of the issues which we deem it necessary to pass upon in order to conclude the controversy which the record presents, it will subserve the purpose of clearness of statement to give a brief outline of the proof as to matters about which there is no substantial controversy, and to point to the controverted question, thus eliminating from view irrelevant contentions, and concentrating the attention on the material issues.

1. The existence of the partnership was established as alleged, and the fact that the claims of the inspectors had been unearthed by Baker, and had been mainly secured by him for the firm on a contingent fee of 25 per cent, and had been almost exclusively prosecuted by him, was established beyond question. That Cummings had not given any great attention to the business for several years, and that Baker was dissatisfied therewith and had threatened to dissolve *the partnership many[**194** months before September, 1886, though not explicitly admitted by Cummings, was also conclusively established.

2. The sale of Cummings's interest in the inspector fees, both earned and unearned, for a consideration which embraced a cash payment of $15,000, was also established beyond dispute. That in the negotiations which preceded the sale, Cummings contemplated something besides a mere division between himself and Baker in equal proportions of the rights of each in and to the fees, were also indisputably proved. This is testified to by Cummings himself as follows:

"I said, 'Mr. Baker, I make you this proposition: I will take one half fees in all the cases in which we have powers of attorney and contracts prior to the 1st of January, 1886, or I will take one third of all the fees in all the cases (leaving him two thirds), or I will take $15,000, as you offer, according to what you think is the best for me.' "

Undoubtedly, also, the proof establishes that when the sale was made the fees for cases allowed and appropriated for then undivided amounted to about $32,000, and that the claims subsequently allowed and appropriated for largely exceeded $80,000. From these conceded facts there arises a grave contention; Cummings claiming that, as he was entitled to an equal share of the fees, he was led, by the misrepresentations of Baker, into making a seeming sale of his interest, receiving as a consideration virtually nothing but his own money; Baker, on the other hand, contending that the transaction between the parties did not contemplate a mere division of their interest, but a sale by Cummings of his rights on the basis of his being entitled only to one-third interest in the fees, in order to obtain a continuance of the partnership as to other matters, and that the sum of $15,000 and the right of Cummings to retain the assignee's fees before referred to, was fixed by Cummings, from his knowledge of the business and his investigations made at the time, as a fair equivalent for his agreed one-third right as above stated.

3. Nor does any real dispute exist as to the fact that when the active negotiations for the sale began, papers were handed *Cummings[**195** by Baker, from which an understanding of the state of the whole business could have been derived; that these papers were taken home by Cummings and retained for several weeks until just before the sale was consummated. Whilst as to these facts there is no conflict in the proof, there is a controversy as to whether it was established that Cummings examined the papers carefully so as to put himself in possession of the information which might have been obtained from them; Cummings claiming that the papers were of such a confused nature that he could have arrived at an accurate knowledge only by inquiry, labor,

and investigation, which he did not make, as he preferred to rely upon Baker's special acquaintance with the status of the claims. Baker, on the other hand, claiming that he had no greater information than was accessible to Cummings, and that the latter dealt on the faith of his own knowledge and estimate, and not upon information derived from or representations made by Baker personally.

4. The proof also establishes, and there is no contention on the subject, that on the evening of the sale or the morning of the day following Baker left the city of Washington for the state of New Hampshire; that he left Cummings in the office, and before going placed in his hands a document known in the record as Exhibit H. M. B., No. 3, to enable Cummings to look after any matters in the inspector cases which might require attention during his (Baker's) absence; that at the same time Baker left with Cummings the bank deposit book of Baker, with his check book containing signed and unfilled checks to be used as occasion required in the making of remittances or payments in the inspector cases; that Cummings acted upon this authority and made deposits of drafts collected from the government, drew checks for amounts due claimants, and made entries indicating these latter facts upon the schedule in question; that at the time of Baker's departure Cummings had not cashed the check given him by Baker as the consideration for the sale, and that Cummings canceled it, and on different occasions filled up three of the signed checks left by Baker, for [196] the sum of $5,000 each, and *collected the same, thus acquiring the consideration referred to. The proof further established that Baker remained absent for nearly a month, and on his return found Cummings in the office as usual; that they continued thereafter to occupy the same office, and that no complaint was made by Cummings as to the fairness of the sale until nearly three years thereafter, at which time Baker was pressing a claim against Cummings, and had told him that he was going to dissolve the partnership.

The controverted issue arising from the foregoing unquestioned facts is this: Cummings claims that he did not derive knowledge of the fraud he complains of from the matters just stated; whilst Baker asserts that if the fraud in the purchase complained of by Cummings had existed, full knowledge thereof was conveyed to Cummings by the facts above stated, and that the silence of the latter and his inaction for years, and until Baker had made claim for money and stated his intention to dissolve partnership, not only establishes the want of foundation for Cummings's assertion that there was misrepresentation and fraud in the sale, but also makes clear the fact that the right to make such claim was barred, both by limitations and laches, when the demand of Cummings was actually preferred.

It results from the foregoing that the facts as to the controverted matters are embraced in a narrow compass, and that the whole case really resolves itself into two issues: 1st. Does the proof establish that the purchase and sale in question was as claimed by Cummings, or as asserted by Baker? In that question is necessarily embraced the further one of whether Cummings, at the time of the sale, had actual knowledge of the fraudulent representations claimed to have been made by Baker. This is, in terms, included, because it would be impossible in reason to declare that one had been deluded or deceived by misrepresentations into entering into a contract if he had actual knowledge when the contract was made that the alleged inducing representations were false. 2d. Conceding that Cummings was misled by the fraudulent representations of Baker as alleged, did he immediately after the *sale, and [197] before the collection by him of the cash consideration of the sale, discover that the representations were untrue, and thereby become aware that he had been grossly deceived and defrauded, and did he, with such knowledge, say nothing about the matter, collect the cash consideration, remain silent, and continue in partnership with Baker, occupying the same office for years, and only assert that he had been deceived when a dissolution of the partnership was threatened and he was pressed to pay a sum which Baker claimed Cummings owed him? This latter inquiry assumes a twofold aspect, for although in the bill, in the opinions below, and in the argument at bar, the efficient misrepresentation, which it is asserted rendered the assignment void, was the fraudulent statement as to the sum of the fees on the claims then allowed and appropriated for, nevertheless it is also, as we have seen, asserted in the bill and contended in argument that there was a misrepresentation as to the pending claims not yet acted upon by the department, and which were then unappropriated for by Congress.

We will defer an examination of the testimony as to the existence of the fraud and misrepresentation complained of until we have passed on the charge that, if there was fraud and misrepresentation, Cummings had full knowledge thereof immediately after the sale. We adopt this order of consideration because if it be found that such was the case, the question whether the fraud originally existed will become immaterial, in view of the defenses of limitation and laches. Moreover, in reviewing the question of knowledge, we will do so in the order stated, that is, first, discovery of the alleged fraud and misrepresentation as to the amount of fees collected and in process of collection from claims appropriated for at the time of the sale; and, second, discovery of the misrepresentation as to the amount of pending claims for which further fees were expected. Here, also, it is to be premised that if the first proposition be found to be well taken, an examination of the second will be wholly unnecessary. This, obviously, is the case, for as the statute of limitations began to run from the time when suit might have been brought to annul the sale, it *results that the discovery of [198] the falsity of *any* material and fraudulent representation by which the sale had been induced, gave rise to the right to commence an action to rescind, and therefore fixed the period when the statute of limitations commenced its course.

I.—*Did the schedules left with Cummings the day after the sale, when Baker went off to New Hampshire, and which remained in the custody*

of Cummings and were practically under his control, convey to Cummings full knowledge that he had been grossly deceived as to the amount of fees collected, as alleged by him, if his statement that such false representation had been made was true, and did he remain silent for three years thereafter?

In entering upon an analysis of the evidence upon this particular subject, we shall be governed by the principle determined by this court in numerous cases—of which *Stuart* v. *Hayden*, 169 U. S. 1 [*ante*, 639], decided at the present term, is the last expression—that when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it be clear that their conclusion was erroneous.

To determine whether Cummings knew immediately after the sale and before he had collected the price thereof whether misrepresentations had been made to him and fraud practised upon him as to fees from cases then appropriated for, it is, of course, essential to see clearly what were the misrepresentations asserted to have been made, and what was the fraud claimed to have been perpetrated. They were, as alleged in the bill, that Baker, with a knowledge that the fees from the claims allowed and appropriated for were $32,000, had concealed the fact from Cummings, and represented that such fees were only equal to $20,000 or thereabouts. It is obvious then that the fraudulent representation alleged was not as to the amount of the claims allowed and appropriated for upon which the fee of 25 per cent was to be calculated, but as to the sum of the fees to arise from the calculation. And this is unmistakably established by the testimony of Cummings in his examination on the 29th of February, 1892, where he said, in describing the representation made by Baker to him:

199] *"I asked Mr. Baker how many fees there were that were due us in cases that had been adjudicated and for which appropriation had been made, and which were then in the process of collection, and he said about $20,000, or not more than $22,000. I was somewhat surprised at that, and I so expressed my surprise to him; he said that our fees in some of those cases were not as much as usual; some only about 10, 15, or 20 per cent."

It is not reasonable to infer that surprise could have arisen as to the amount of fees if there had been no antecedent knowledge of the sum of the claims on which the fees were to be calculated. The fact that Cummings had approximate general knowledge of the amount of the claims is not only shown by the particular statement just cited, but by his declaration that he observed when appropriations were made, knew at the time that the appropriation of August, 1886, had been made, and also knew that practically all of the inspector cases were controlled by his firm. As all the fees earned which were embraced in the sale arose from claims covered by the appropriation made in August, 1886, it follows that these statements by Cummings and his admitted knowledge of the August appropriation taken together leave no doubt that Cummings was fully informed as to the sum of the claims from which the earned fees arose. Indeed, the possibility of any other view of the testimony is removed by a statement of Cummings subsequently made, and to which we shall hereafter more fully refer, in which he plainly says that he knew that the gross amount coming in on the basis of the usual compensation was $32,000, and supposed that the reduced amount arose from charges against it.

Now, then, the issue of fact to be determined is this: Could it have been possible for Cummings to have received the schedule in question on the morning after the sale, to have dealt with it, to have made entries on it at various times, without being informed that the fees of the firm were not less than 25 per cent in a sufficient number of cases to have justified any belief whatever that the sum of the fees was reduced from $32,000 to $20,000? The schedule left in his hands by *Baker contained [**200** seven sheets. In one column was the name of the claimant, in another the total allowance, in a third the fee, in a fourth the amount of the remittance to the claimant, in a fifth the date of the remittance, in a sixth whether remitted by check, in a seventh the number of the check, and in an eighth column the date of the check. The amount of the aggregate fees appearing on each sheet was added up and stated at the bottom of the column. With such total stated, the only act required to ascertain the aggregate amount of all the fees was to sum the footings of the sheets. And yet the want of knowledge by Cummings of the fraud is predicated upon the proposition that although these sheets were in his hands for nearly a month while he was dealing with them, making entries on them, he was so careless as never even to make the addition which would have conveyed to him absolute knowledge of the fact that the fraud had been committed. But even the addition was not necessary, for if the fraudulent misrepresentation was made, it was not, as we have seen, as to the gross amount, but as to the net fees to be realized from the gross amount, that is, that the diminished amount arose from the fact that in the cases on the schedule the firm was getting less than 25 per cent. But on the sheets, in the column of fees immediately next to the column of amount allowed, the sum of the fee in each case was stated, and no eye could even casually look at the schedule without observing that nearly all the fees were stated therein at the rate of 25 per cent, and not at a diminished rate. However, to hold that Cummings did not derive knowledge from the schedule, the reasoning must go yet further. Out of 106 names on the schedule, there were only five where the fees stated were less than 25 per cent, and in four of these five cases the fact that the fee was a reduced percentage was made evident by the statement expressed in figures immediately opposite the name of the claimant, giving the exact percentage upon which the fee was calculated. The mind, then, is driven to the conclusion that the testimony beyond doubt establishes that Cummings knew immediately after the sale and before he collected the price that Baker had made to him a gross and wilful misrepresentation, if the *statement [**201**

was made by Baker to which Cummings testifies, and which he asserts operated to induce him to part with his interest.

Overwhelming as is the proof that the schedule conveyed to Cummings the knowledge of the fraud if it had been perpetrated, such fact is unquestionably shown by Cummings's further testimony. At a subsequent stage of his examination when he was questioned on the subject and his possession of the schedule had been developed, he frankly admitted that his possession of the schedule and his dealings with it had informed him that Baker's representation which he swore had been made about the diminished percentage was untrue, but that he had on such discovery lulled himself into security by the belief that there must have been another reason for Baker's statement of the reduction in the amount of fees, that is, the large sums which Baker might have had to pay out to other attorneys, and presumably under this belief he remained silent. We extract a question and answer bearing on this subject:

"*Q.* Now, then, your check was paid in that way. When did you first obtain any knowledge as to the amount of claims which had been collected by Baker upon the first class of cases—I allude to the class of cases in which he said there were from $20,000 to $22,000 in fees, the cases in which appropriation had already been made; and you may also state at the same time when you first discovered in regard to the other class of cases in which no appropriation had been made—when you first discovered the amount?

"*A.* The amount of the claims that had been adjudicated and which were in the process of collection I discovered, of course, within a day or two after Mr. Baker had delivered me the schedules, and I continued the collections, because these schedules contained the name, the amount, the fee, and all the data pertaining to each case, and it was hard for me to reconcile the amount of fees that he said and the amount of fees that were on the schedule, and I know often we had to pay out a large amount of our fees to other attorneys, as I frequently had paid one half of a 202] fee to a local attorney to work *up the evidence, and I had supposed the great diminution of these fees from what I supposed, *viz.*, $32 000, in the vicinity of $30,000 was owing to the division with other lawyers. It has been my habit in a number of cases—I write down my ideas of things, and on that occasion I sat down and I made a private memorandum for myself, giving my impressions of the matter, wondering as to whether I had done the best or not and wondering if the facts were———"

However unreasonable may be this explanation, and however natural is the inference that, if Cummings had discovered that his partner had made a gross misstatement to him and defrauded him, he would not have completed the sale by collecting the consideration, but would have called his attention to the facts when the partner returned a month after, need not be discussed since the reason given by Cummings for the conduct is rendered wholly nugatory by another consideration, which is this: The seventh of the sheets left in the custody of Cummings contained a statement of the sums to be paid to other attorneys by the firm on the claims mentioned in the schedule. The form of this sheet was slightly different from that of the others. It showed the name of the attorney to whom the fee was due, in the next column in what case the fee was due, in the third column the date of the remittance of the fee, in the fourth column whether remitted by check, and in the fifth the date of the check. Now, if, as demonstrated by the proof and as admitted by Cummings himself in his second statement, his dealings with and relations to the schedule conveyed to him knowledge that there was no truth in Baker's supposed representation as to reduced percentages coming to the firm, how in reason can it be denied that knowledge that the amount could not have been materially reduced by fees paid to other attorneys must have also been conveyed to him when the schedule plainly showed the fact as to the amounts to be paid other attorneys and that they aggregated less than $1,500. Indeed, it is justly to be inferred from the testimony that, as the facts shown by the schedule were developed and Cummings's memory was refreshed by the examination thereof, his mental condition changed, and he reached the *conclusion that he had been previously [203 mistaken in saying that, although the schedule had informed him of the amount, he had been lulled into security, since he subsequently swore that the schedules gave him no information whatever, because he did not look at them at all. His statement to this effect is as follows:

"When Mr. Baker handed me that paper and called my attention to the fact that all had not been collected, and that quite a number of payments were still to be made, I simply put it in my desk; I paid no attention to it, because I considered the trade was made. I had nothing to do with it, but simply took that paper, and when a power of attorney would come in with power to cash the draft I would make the proper entry, but it never came into my head that there was anything wrong about it. I considered that I had sold out to Mr. Baker for a fair consideration. I had no idea that I was being paid with my own money."

"So, also, on cross-examination in rebuttal, the following question was asked and answer given by complainant:

"*Q.* Mr. Cummings, you have stated that Exhibit H. M. B., No. 3 (the schedule we have been referring to), in answer to a question by Mr. Claughton, was in your possession, and that you paid no attention to it and put it aside. You did not take enough interest in it to go over it and see what it was?

"*A.* The transaction was closed, as I supposed."

Again, after being cross-examined at some length and called upon to explain his delay in instituting the present proceedings, and after he had stated that in 1886 he knew of the fact of the appropriation in August of that year by Congress, he was asked to state if he had discovered any facts in 1888 in relation to the appropriation of 1886 which he did not have in 1886. The reply was:

"*A.* I knew no more about the standing of the appropriations of 1886 for these cases and of the settlements thereunder for two years after those settlements were made; in other words, I had no knowledge of the appropriation of 1886 until my suspicions were aroused in 1888. *I supposed it was all fair and square.* **204]*** "I don't know that I learned anything in 1888 of consequence about the appropriation of 1886, but it was only when the three appropriations, amounting to about $240,000 in 1888, instead of the $80,000 as was represented to me, that I began to inquire into the matter, and my knowledge of the appropriation of 1886 and of the fees thereunder was gained by taking the appropriation of 1886 and going into the First Auditor's Office and seeing what drafts were delivered to Mr. Baker or Cummings, or Cummings and Baker, under the appropriation of 1886. When I had gotten the list of those drafts I got the correct amount of them.

"I think it was in the fall or winter of 1888 or 1889 when I got the list. I did not get a list; I made a list and I went back to my office and I took the Treasury executive document containing the allowances of those cases, and I estimated, as far as I could, and I believe that I am correct, that Mr. Baker received $135,000 on the claims of 1886.

"I don't remember now that I knew anything about the appropriation of 1886, intervening between 1886 and 1888, though I may have done so, but I do not remember it."

But the "list" referred to did not give him as much information as was contained in the schedule which was handed to him immediately after the sale, and which he had in his sole custody for more than three weeks. Nor can the statement of the witness that the schedule was not looked at, overcome the inherent probabilities as to the knowledge which must have been conveyed, in view of their contents, of the length of time they were in Cummings's possession, of his entries thereon and dealings therewith, and, above all, his previous sworn statement. In other words, the last statement that knowledge was not conveyed by the schedule cannot be taken as true without repudiating the previous declaration that the schedule had given the knowledge, but that it so doing did not excite suspicion, for a reason which the schedules themselves show could not have existed.

From the record we infer that this result must have produced an impression upon the mind of Cummings, for later on in his examination, when his attention was called to the fact that if **205]*** he had been deceived by Baker as to the sum of the fees when the sale was made, he could not have escaped discovering it when the schedules were handed to him after the sale, he again changed his position and declared that he did not then take any action because the discovery of the misrepresentation as to the amount of the fees earned had not excited his suspicions, because of the immateriality of such misrepresentations.

"*A.* I am not going to give ideas, but simply facts. My whole idea as to whether I had made a poor trade or not had nothing to do with the amount of fees received in 1886, but solely and entirely on account of the future business that would come in; when Mr. Baker had told me that there was only $75,000 or $80,000 more of cases, out of which there would be a possible $20,000 of fees, I did not know whether that was correct or not, and, as I stated, I could not tell, but time alone would tell."

The situation, then, is this: Looking at the case, as made by the testimony of Cummings, it is impossible to avoid reaching two conclusions; 1st, that Cummings knew the exact condition of the earned fees shortly after the sale, and knew also that he had been grossly deceived if his statement of the transaction was the true one, and that with this full information he collected the price of the sale and remained quiescent for three years without complaining and without attempting to have the wrong rectified; 2d, that this conduct on his part is first attributed to one cause and then to another and conflicting one. When both of these explanations are shown by the proof to be untrue, then the matter is finally explained by him by the statement that on the discovery of the facts he so acted, because he attached no importance whatever to the amount of the fees earned at the time of the sale, and considered that he had not been defrauded by the untrue representations which he asserted had been made in reference thereto. But the bill of complaint, as we have seen, proceeds and the judgments below rested upon the theory that the representation as to the amount of the earned fees at the time of the sale was the most material ground for rescinding the contract.

*Our conclusion is, that the evidence **[206** not only clearly but beyond all question or dispute overwhelmingly shows that if the false representations as to the earned fees were made as alleged, there was entire knowledge thereof by Cummings. And, for reasons heretofore stated, this conclusion renders unnecessary any inquiry into the question of when Cummings discovered the falsity of the alleged representations as to the amount of pending claims.

The question which arises is, Can Cummings invoke the aid of a court of equity to afford him the relief which he seeks? A negative answer is compelled by a consideration of the most elementary principles.

As said in *Metropolitan National Bank* v. *St. Louis Despatch Co.* 149 U. S. 448 [37: 799]: "Courts of equity in cases of concurrent jurisdiction consider themselves bound by the statutes of limitation which govern actions at law." That Cummings might at his election have pursued a remedy for the alleged fraud in a court of law is obvious. And it is equally clear that such remedy at law, by action on the case predicated on the facts as to deceit and fraud, which are alleged in the bill now before us, would have been barred in three years from the discovery of the fraud under the Statutes of Limitation of Maryland of 1715, chap. 23, § 2, in force in the District of Columbia. 1 Kilty's Statutes, 111; Comp. Laws Dist. Col. chap. 42, § 6, p. 360. It hence follows, irrespective of the equitable doctrine of laches, that the relief which the bill seeks

to obtain ought not to be allowed by a court of equity.

Apart, however, from the bar of the statute of limitations, the facts as to the full knowledge of the fraud, if any existed, by Cummings more than three years before the filing of his bill, and his conduct after he obtained it, his permitting Baker to go on and prosecute the claims as if they were his own, debars Cummings from invoking a court of conscience to put him in a much better position than he could possibly have occupied if he had spoken and asserted his rights in due season.

There cannot be a doubt that the right existed in Baker to have dissolved the partnership at any time. If this right on his part had been exercised, Cummings would not have been in 207] *a position to have availed himself of the labors of Baker in prosecuting the future claims to a successful culmination, and would not therefore have been a participant in the profits arising therefrom. If with a full knowledge of the fraud Cummings chose to remain silent, to permit Baker to go on with the prosecution of the claims, to incur the expenditure of time and labor not only in the cases in which he was successful but in the cases in which he failed, Cummings cannot in conscience be allowed to reap the rewards which he could not possibly have obtained had he spoken with reasonable promptness, when the knowledge of the fraud if it existed was brought home to him in the most pointed and unequivocal way.

These broad considerations of equity and justice were not applied below because it was deemed that the occasion for their enforcement had not arisen, for two reasons: First, because it was thought that even if Cummings discovered the fraud in ample time to have availed himself of his rights, he was lulled into not doing so by his faith and confidence in Baker and his disinclination to believe that Baker had perpetrated so gross a fraud upon him. Second, because it was said as Cummings's share of the earned fees, upon the theory of a half and half division, was equal to the price which he received, there was no consideration for the sale, and the transaction was wholly void, hence there was no room for the application either of the statute of limitations or the doctrine of laches. In other words, that the partnership continued as to the inspector claims just as if no sale had been made. And the doctrine was carried to its logical outcome, since the judgment below awarded to Cummings a share in the fees earned by Baker, from contracts not under the control of the firm at the time of the sale of the interest in the inspector cases, but which were acquired by Baker thereafter.

But neither of these views meets our approbation. The first is completely answered by the fact that the analysis of the evidence which we have made conclusively establishes that if the fraud was perpetrated as alleged, the fullest knowledge was conveyed to Cummings more than three years before he brought his suit. 208]Under this state of facts the *reasoning comes then to this, that there is no doctrine, either of limitation or of laches, applicable to a case of alleged fraud even although the party obtains almost at once full knowledge thereof, if he choose without due reason to affirm that he did not act because he was unwilling to believe his own senses. Reduced to its ultimate deduction, the proposition maintains this doctrine, that if one against whom a fraud has been perpetrated, and who thereafter is in all respects fully informed of its nature and extent, chooses not to act, his so electing may continue indefinitely, provided only he declares, not that he did not know, but that knowing he did not believe.

The second proposition, conceding *arguendo* the facts are as it assumed them to be, that is, that the price was paid Cummings from his own money, leads in reason to an equally impossible result, since its consequence is substantially to affirm that neither limitation nor laches can be applied in equity when from a given view of the proof it is considered that a fraud has been committed of such a nature as to avoid a contract. That this is the logical outcome of the proposition is shown by its application to the case under consideration. Whether or not Cummings was paid by his own money depends upon an analysis of the facts and a finding as to their preponderance. If the theory of Baker be true that the contract contemplated a division between the partners as to the claims in question, not upon the basis of one half each, but upon the basis of two thirds to Baker and one third to Cummings, because the claims had been largely realized by the efforts of Baker, and because, as a consideration for so dividing, Baker agreed as to other business to continue the partnership with Cummings when otherwise he would have dissolved, there can be no pretense for the claim that Cummings was paid with his own money. To say, then, that Cummings was paid by his own money necessitates deciding that the fraud was established as alleged by Cummings. But the principle by which the bar of the statute of limitations is enforced by a court of equity, and upon which the doctrine of laches rests, is that equitable powers will not be exercised to discover whether one has been wronged when, with full *knowledge of the alleged wrong, he[209 has allowed the bar of the statute of limitations to arise, and has slept upon his rights until such a situation has arisen as to render it inequitable to afford him relief. By the effect of the proposition referred to these principles are subverted, and a new doctrine arises which may be thus stated: A court of equity will not grant relief against fraud where the one against whom the fraud has been committed has, after its discovery, allowed the bar of the statute of limitations to be accomplished, unless there has been fraud, and if there has been such fraud neither laches nor limitation can ever apply.

Because we rest our conclusions upon the application of the bar of the statute and the laches of Cummings, we must not be considered as intimating that we conclude that there was either clear and convincing proof, or even a preponderance of proof, that the sale was as claimed by Cummings.

It follows that *the decree of the Court of Appeals of the District of Columbia must be reversed*, and the cause be remanded to that court, with

directions to set aside the decree of the Supreme Court of the District of Columbia, and to remand the cause to that court with instructions to dismiss the bill. And it is so ordered.

UNITED STATES, *Appt.*,
v.
JOHN F. KLUMPP *et al.*

Tariff act of 1894.

(See S. C. Reporter's ed. 209-217.)

Worsted dress goods are "manufactures of wool" within the meaning of the act of Congress of August 27, 1894, ¶ 297, providing that the reduction of rates of duty on manufactures of wool shall not take effect until January 1, 1895.

[No. 159.]

Argued January 20, 1898. Decided February 21, 1898.

ON A WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a decision of that court affirming the decision of the Circuit Court of the United States for the Southern District of New York, which reversed the decision of the board of general appraisers overruling a protest of importers John F. Klumpp *et al.* as to duties assessed by the collector upon imported merchandise. *Judgment of the Circuit Court of Appeals reversed; judgment of the Circuit Court also reversed*, and cause remanded with directions to affirm the decision of the Board of General Appraisers.

See same case below, G. A. 2769, 68 Fed. Rep. 908, 38 U. S. App. 467.

Statement by Mr. Chief Justice **Fuller:**

210] *On the 30th day of August, A. D. 1894, John F. Klumpp and others, doing business as a partnership under the name of Alexander Murphy & Co., imported into New York certain merchandise consisting of women's and children's dress goods composed of worsted. The collector classified this merchandise and assessed it for duty under paragraph 395 of the tariff act of October 1, 1890 (26 Stat. at L. 567, chap. 1244), at 12 cents per square yard and 50 per cent ad valorem. The importers protested, claiming the goods to be dutiable under paragraph 283 of the tariff act of August 27, 1894 (28 Stat. at L. 509, chap. 349), at 40 per cent or 50 per cent ad valorem, according to the value per pound.

The board of general appraisers overruled the protest (G. A. 2769), and the importers carried the matter to the circuit court, which reversed the decision of the board of general appraisers. 68 Fed. Rep. 908. On an appeal to the circuit court of appeals for the second circuit, the decision of the circuit court was affirmed. 38 U. S. App. 467. The case was then brought here on certiorari.

It was admitted below "that the classification of the merchandise by the collector was worsted dress goods, at twelve cents per square yard and fifty per cent ad valorem under schedule K, paragraph 395 of the tariff act of October 1, 1890."

And "that the merchandise in controversy is worsted dress goods, made from the fleece of the sheep, which has been combed and spun into worsted yarn, and is not composed of the hair of the camel, goat, alpaca, or other animal than sheep."

Paragraph 395 of Schedule K of the act of October 1, 1890, entitled "Wool and Manufactures of Wool," reads: "On women's and children's dress goods, coat linings, Italian cloth, bunting, and goods of similar description or character composed wholly or in part of wool, worsted, the hair of the camel, goat, alpaca, or other animals, and not specially provided for in this act, the duty shall be twelve cents per square yard, and in addition thereto fifty per centum ad valorem: Provided, That on all such goods weighing over four ounces per square yard the duty per pound shall be four times the duty imposed *by this act[211 on a pound of unwashed wool of the first class, and in addition thereto fifty per centum ad valorem."

Paragraph 283 of Schedule K of the act of August 27, 1894, entitled "Wool and Manufactures of Wool," provided: "On women's and children's dress goods, coat linings, Italian cloth, bunting, or goods of similar description or character, and on all manufactures composed wholly or in part of wool, worsted, the hair of the camel, goat, alpaca, or other animals, including such as have India rubber as a component material, and not specially provided for in this act, valued at not over fifty cents per pound, forty per centum ad valorem; valued at more than fifty cents per pound, fifty per centum ad valorem."

Paragraphs 280 to 286, inclusive, under this schedule, provided for duties on articles made, or composed, "wholly or in part of wool, worsted, or the hair of the camel, goat, alpaca, or other animals," except that paragraph 282, which referred to blankets, etc., omitted the word "worsted."

Paragraphs 287 to 296, inclusive, related to carpets, mats, etc., and the concluding paragraph of the schedule read: "297. The reduction of the rates of duty herein provided for manufactures of wool shall take effect January first, eighteen hundred and ninety-five."

Paragraph 685, one of the paragraphs of the free list, was as follows: "685. All wool of the sheep, hair of the camel, goat, alpaca, and other like animals, and all wool and hair on the skin, noils, yarn waste, card waste, bur waste, slubbing waste, roving waste, ring waste, and all waste, or rags composed wholly or in part of wool, all the foregoing not otherwise herein provided for."

Mr. **John K. Richards,** Solicitor General, for appellant.

Messrs. **W. Wickham Smith** and *Charles Curie* for appellees.

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect,—see note to Greely v. Thompson, 13: 397.

As to recovery for goods sold to smugglers, see note to Graves v. Johnson (Mass.) 15 L. R. A. 834.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Women's and children's dress goods "com-**212**]posed wholly or *in part of wool, worsted, the hair of the camel, goat, alpaca, or other animals," were dutiable under paragraph 395 of the act of October 1, 1890, at 12 cents per square yard and 50 per cent ad valorem; under paragraph 283 of the act of August 27, 1894, at 40 or 50 per cent ad valorem, according to value. But by paragraph 297, the reduction of the rates of duty on "manufactures of wool" was not to take effect until January 1, 1895. And if that paragraph applied to worsted dress goods for women and children, then the collector was right, and the judgment must be reversed.

Was it intended that the words "manufactures of wool," as used in this paragraph, should include or exclude worsted goods?

Worsted goods are made out of wool, and are necessarily a manufacture of wool. The Century Dictionary defines "worsted" as a noun: "A variety of woolen yarn or thread, spun from long staple wool which has been combed, and in the spinning is twisted harder than is usual;" and as an adjective: "Consisting of worsted; made of worsted yarn: as, *worsted* stockings."

"Worsted is but wool, spun and twisted in a particular manner," said Mr. Justice Story, in *Whiting* v. *Brancroft*, 1 Story, 560. And in *Cohn* v. *Seeberger*, 30 Fed. Rep. 425, it was found by Judge Blodgett that "worsted is made by combing the long fibered wools so that the fibers shall lie or be arranged alongside of each other; while wool is treated by carding, so as to interlock the fibers with each other."

As between worsted yarns and woolen yarns the Encyclopedia Britannica says that the fundamental distinction "rests in the crossing and interlacing of the fibers in preparing woolen yarn,—an operation confined to this alone among all textiles, while for worsted yarn the fibers are treated, as in the case of all other textile materials, by processes designed to bring them into a smooth parallel relationship to each other." Vol. 24, p. 658.

Although through the introduction of improved processes of manufacture, it gradually became possible to comb shorter and finer varieties of wool, and thus to manufacture worsted **213**] *goods of higher grade and better quality, approximating worsted to woolen goods, and removing the reason for any distinction between them in the matter of duties, the tariff laws prior to May 9, 1890, made a distinction in that respect between woolen and worsted goods, resting on the difference in the process of manufacture; but the raw material was, of course, always the same, namely, wool.

By the tariff acts of April 27, 1816 (3 Stat. at L. 310, chap. 107); of May 22, 1824 (4 Stat. at L. 25, chap. 136); May 19, 1828 (4 Stat. at L. 270, chap. 55); July 14, 1832 (4 Stat. at L. 583, chap. 277); August 30, 1842 (5 Stat. at L. 548, chap. 270), worsted stuff goods were recognized as manufactures of wool.

By the acts of July 30, 1846 (9 Stat. at L. 42, chap. 74); March 2, 1861 (12 Stat. at L. 252, res. 15); July 14, 1862 (12 Stat. at L. 543, chap. 168); June 30, 1864 (13 Stat. at L. 202, chap. 171); March 2, 1867 (14 Stat. at L. 559, chap. 197); March 3, 1883 (22 Stat. at L. 488, chap. 121), "manufactures of wool not otherwise provided for," were separated from "manufactures of worsteds not otherwise provided for," and distinct duties levied on each, while from 1861 distinct duties were levied on articles specifically described, whether manufactured of wool or worsted.

In *Seeberger* v. *Cohn*, 137 U. S. 95 [34: 599], it was held that cloths popularly known as diagonals, and in trade as worsteds, were subject to duty under the act of March 3, 1883, as manufactures of worsted and not as manufactures of wool, the ground of decision being thus stated by Mr. Justice Gray, delivering the opinion of the court:

"In the interpretation of the customs acts, nothing is better settled than that words are to receive their commercial meaning; and that when goods of a particular kind, which would otherwise be comprehended in a class, are subjected to a distinct rate of duty from that imposed upon the class generally, they are taken out of that class for the purpose of the assessment of duties.

"Of the two successive paragraphs in the customs act of 1883, upon which the parties respectively rely, the first imposes a certain scale of duties on 'all manufactures of wool of every description, made wholly or in part of wool, not specially *enumerated or [**214** provided for in this act;' and the second imposes a lower scale of duties on 'all manufactures of every description, composed wholly or in part of worsted.' . . .

"Though worsted is doubtless a product of wool, and might in some aspects be considered a manufacture of wool, yet manufactures of worsted being subjected by the second paragraph to different duties from those imposed by the first paragraph on manufactures of wool, it necessarily follows that a manufacture of worsted cannot be considered as a manufacture of wool, within the meaning of this statute."

This decision was announced November 17, 1890, but the controversy had been pending for a long time in the courts, and on May 9, 1890, an act was passed, "providing for the classification of worsted cloths as woolens," by enacting "that the Secretary of the Treasury be, and he hereby is, authorized and directed to classify as woolen cloths all imports of worsted cloth, whether known under the name of worsted cloth or under the names of worsteds, or diagonals, or otherwise." 26 Stat. at L. 105, chap. 200.

And since that date no distinction for customs purposes between woolens and worsteds has been recognized by Congress.

By the act of October 1, 1890, the same duties were levied upon worsted and woolen goods. Paragraphs 375 to 387 divided all wools, hair of the camel, goat, alpaca, and other like animals into three classes, and levied certain duties on each class. Paragraphs 391 to 398 provided for certain duties on described articles, whether made wholly or in part of "wool, worsted, the hair of the camel, goat, alpaca, or other animals."

By the act of August 27, 1894, wool was put on the free list (¶ 685), and the paragraphs of

the act of October 1, 1890, classifying wools and levying duties on the different classes, were omitted. Paragraphs 280 to 286, inclusive, of Schedule K of this act prescribed duties on certain enumerated articles, whether composed wholly or in part of wool, worsted, the hair of the camel, goat, alpaca, or other animal.

There was no distinction made by either of **215**]these acts between *manufactures of wool and manufactures of worsted for the purposes of duty, and the word "worsted" seems to have been used out of abundant caution and as conducive to greater certainty.

The act of July 24, 1897, commonly known as the Dingley act, omits the repetition of the words "wool, worsted, hair of the camel, goat, alpaca, and other animals," and uses the single word "wool." Paragraph 383 provides: "Whenever, in any schedule of this act, the word 'wool' is used in connection with a manufactured article of which it is a component material, it shall be held to include wool or hair of the sheep, camel, goat, alpaca, or other animal, whether manufactured by the woolen, worsted, felt, or any other process." 30 Stat. at L. 151, chap. 11.

Manifestly the distinction on which the decision in *Seeberger* v. *Cahn* turned was done away with by the acts of October 1, 1890, and August 27, 1894, as well as by that of May 9, 1890, and there certainly is no imperative ground for its reinstatement by technical construction.

The reason for the postponing of the taking effect of the reduction of duties obviously had nothing to do with the process of manufacture, but related to the material of which the goods were composed, which material had been relieved from duty by paragraph 685 of the act.

Congress undoubtedly concluded that the manufacturers of goods from wool had laid in a large stock of material, which equitably they should be allowed a reasonable time to work off, and that there was probably on hand a large stock of goods, to dispose of which reasonable time should be allowed, rather than that the large dealers should be induced to bring in foreign goods at a cost which involved ruinous competition; while at the same time the wool growers ought to have their original market until they could adjust themselves to the new condition of things.

The specific rate was compensatory, and, when stricken out, and the duty on raw material abolished, a postponement was provided for in order to avoid injustice.

But the reason for postponing the reduction **216**]on manufactures *of wool, which, on the face of the act, we think properly imputable to Congress, is as applicable to worsted goods as to any other goods fabricated from wool.

It will be perceived that the acts of 1890 and 1894 did not levy a duty on "worsted dress goods," *eo nomine*, nor on worsted dress goods by commercial designation, nor on worsted dress goods as distinguished from woolen dress goods; but a duty on dress goods, whether made of "wool, worsted, the hair of the camel, goat, alpaca, or other animals." The description is addressed to the quality and material of the goods, namely, women's and children's dress goods, made of wool, worsted, etc.

The principle, then, that the special designation of an article by its commercial meaning should prevail over general terms used in the same or a later act has no application.

In *Barber* v. *Schell*, 107 U. S. 617 [27: 490], the words "cotton laces, cotton insertings," etc., used in the act of 1846, were held to be designations of articles by special description of quality and material, and the general provision of 1857, transferring to Schedule C "all manufactures composed wholly of cotton, which are bleached, printed, painted, or dyed," whereby a different duty was imposed on such goods, was held to apply. Mr. Justice Blatchford said: "The designations qualified by the word 'cotton,' in the act of 1846, are designations of articles by special description, as contradistinguished from designations by a commercial name or a name of trade. They are designations of quality and material." *Cadwalader* v. *Zeh*, 151 U. S. 171, 178 [38: 115, 118].

It is argued that the same reasoning which brings worsted goods within the words "manufactures of wool," would also compel the inclusion of goods composed of the hair of the camel and other animals, confessedly not covered by the phrase.

Doubtless wool considered as the sheep's coat might be said to be the sheep's hair, and fleeces of the hair of the Angora goat, the Llama, the Alpaca, and other like animals, might be called their wool. In the Encyclopædia Britannica (9th ed. vol. 24, p. 653) under the title of "Wool and Woolen Manufactures," *it is said: **[217** "Wool is a modified form of hair, distinguished by its slender, soft, and wavy or curly structure, and by the highly imbricated or serrated surface of its filaments. The numerous varieties of the sheep are the most characteristic, as they are also by far the most important, producers of wool; but the sheep is by no means the only animal which yields wool, employed for industrial purposes. The alpaca and other allied fibers obtained from the alpaca and its congeners in South America, the mohair yielded by the Angora goat, and the soft woolly hair of the camel are all wools of much industrial importance, while the most costly wool in the world is that yielded by the Cashmere goat of the Himalayan Mountains. At what point, indeed, it can be said that an animal fiber ceases to be hair and becomes wool it is impossible to determine, because in every characteristic the one class by imperceptible gradations merges into the other, so that a continuous chain can be formed from the finest and softest merino to the rigid bristles of the wild boar." G. A. 2834; *Lyon* v. *United States*, 8 U. S. App. 409, 413.

But the acts of 1890 and 1894, as well as prior tariff acts, distinguished the wool of the sheep from the hair of the camel, goat, and other like animals, as raw materials. And there is nothing in this record from which to conclude that Congress felt obliged to make concessions by way of alleviating the effect of the act of 1894 on the production of the hair of the camel, the goat, the alpaca, and so on, in this country, or on manufactures thereof.

We think that the words "manufactures of wool," in paragraph 297, had relation to the raw material out of which the articles were made, and that as the material of worsted dress goods was wool, such goods fell within the paragraph.

Judgment of the Circuit Court of Appeals reversed; judgment of the Circuit Court also reversed, and the cause remanded to that court with a direction to affirm the decision of the board of general appraisers.

218] CHARLES P. BARRETT, *Plff. in Err.*, *v.* UNITED STATES (No. 1).

(See S. C. Reporter's ed. 218-231.)

Motion to elect in criminal case—judicial districts in South Carolina.

1. An exception to the denial of defendant's motion on the evidence, to compel the district attorney to elect on which one of several conspiracies disclosed by the evidence he would ask for a conviction, will not be considered where the bill of exceptions does not contain the evidence.

2. Under U. S. Rev. Stat. § 546, there were not in 1894 two judicial districts in the state of South Carolina, to the territorial limits of each of which the jurisdiction of the circuit court of the United States was confined; but an indictment could lawfully be found in such court held in one district, and a trial therein had, for a criminal offense committed in the other district of said state.

[No. 53.]

Argued January 21, 1898. Decided February 21, 1898.

IN ERROR to the Circuit Court of the United States for the District of South Carolina to review a judgment of conviction of Charles P. Barrett for conspiracy to commit an offense against the United States. *Affirmed.*

See same case below, 65 Fed. Rep. 62.

Statement by Mr. Justice **Fuller:**

Barrett was indicted, with others, as stated in the caption of the transcript of the record, "at a circuit court of the United States for the fourth circuit in and for the district of South Carolina, begun and holden at Columbia in the district aforesaid, on the 4th Monday in November, 1894, before the Honorable Wm. H. Brawley, United States judge for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such cases made and provided," for conspiracy to commit an offense against the United States, under §§ 5440 and 5480 of the Revised Statutes, and, having been duly tried, was found guilty, and sentenced to imprisonment and fine.

To review this judgment, this writ of error was prosecuted.

The indictment commenced as follows:

United States of America, } To wit: In the
District of South Carolina. } Circuit Court.

At a stated term of the circuit court of the United States for the district of South Carolina, begun and holden at Columbia, within and for the district aforesaid, on the fourth Monday of November, in the year of our Lord one thousand eight hundred and ninety-four, the jurors of the United States of America within and for the district aforesaid upon their *oaths respectively do present that [**219** Charles P. Barrett [and others, naming them], together with divers other evil-disposed persons to the jurors aforesaid unknown, late of the district aforesaid, on the first day of July, in the year of our Lord one thousand eight hundred and ninety-two, at Spartanburg, in the state of South Carolina aforesaid, in the district aforesaid and within the jurisdiction of this court, being persons of evil minds and dispositions, wickedly devising and intending to commit the offense against the United States hereinafter set forth, fraudulently, maliciously, and unlawfully did combine, conspire, confederate, and agree together between and among themselves to commit against the United States this offense—etc., etc.

Certain exceptions were taken to the action of the court in refusing to sustain a challenge to the array of both grand and petit jurors on the ground that they were drawn from both the eastern and western districts of South Carolina, when the alleged offense was charged in the indictment to have been committed in the county of Spartanburg in the western district of said state; to the order of the court overruling defendant's demurrer to the indictment on the ground that the offense was charged to have been committed in the county of Spartanburg, in the state of South Carolina, the same being in the western district of said state, although the indictment was found in the city of Columbia in the county of Richland in the eastern district thereof; to the refusal of the court to sustain defendant's plea to the jurisdiction on the ground that, although the alleged offense was charged to have been committed in the county of Spartanburg, the same being in the western district of South Carolina, the trial was sought to be had in the city of Columbia in the county of Richland, in the eastern district of said state; to the denial by the court of defendant's motion that the district attorney be required to elect on which one of several conspiracies disclosed by the evidence to have been committed, if any, he would ask for a conviction; and to the refusal of the court to arrest judgment because the grand jurors who found the indictment and the petit jurors who found the verdict were drawn from the western *and eastern districts of South Carolina, [**220** although the offense was alleged to have been committed in the county of Spartanburg in the western district; because the indictment was found in the county of Richland in the eastern district at a time not authorized by law for the sitting of the United States court for the western district, and because the trial was had in the county of Richland in the eastern district for an offense committed in the western district.

Mr. **Charles C. Lancaster** for plaintiff in error.

Mr. **James E. Boyd,** Assistant Attorney General, for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

As to the action of the court overruling defendant's motion on the evidence to compel the district attorney to elect, the bill of exceptions does not contain the evidence, and it is impossible for this court to know the ground on which the circuit court proceeded. The exception in that regard need not therefore be considered.

In respect of the other exceptions, they all present the same objection in different forms, namely, that the state of South Carolina was divided into two judicial districts, and that an indictment could not be lawfully found in the circuit court of the United States held in the eastern district, or a trial be therein had, for a criminal offense committed in the western district.

The Constitution provides that the trial of crimes shall be had in the state "where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed,"—art. 3, § 2, cl. 3; and by Amendment 6, that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the 221]crime shall have been committed, *which district shall have been previously ascertained by law."

This indictment was found December 3; the trial had December 6 to 11; and the defendant sentenced December 12, 1894, in the circuit court in session at Columbia. Were there at that time two judicial districts in South Carolina within the intent and meaning of the Constitution and the acts of Congress in that behalf?

The circuit court of each judicial district sits within and for that district; and its jurisdiction as a general rule is bounded by its local limits. *Toland* v. *Sprague*, 37 U. S. 12 Pet. 300, 328 [9: 1093, 1104]; *Devoe Manufacturing Company, Petitioner*, 108 U. S. 401 [27: 764]. At the same time courts may be required to be held at different places in a judicial district, and prosecutions for offenses committed in certain counties may be required to be tried, and writs and recognizances to be returned at each place, but this does not affect the power of the grand jury sitting at either place to present indictments for offenses committed anywhere within the district. *Logan* v. *United States*, 144 U. S. 263 [36: 429]. As to where trials shall be had in a judicial district depends entirely on the legislation upon the subject. *Rosecrans* v. *United States*, 165 U. S. 257 [41: 708]; *Post* v. *United States*, 161 U. S. 583 [40: 816].

By the judiciary act of September 24, 1789, the then United States were divided into thirteen districts, of which New Hampshire, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Georgia, and South Carolina each constituted one district, called by the name of the state, as, for instance, "South Carolina district;" while a part of the state of Massachusetts was erected into a district "called Maine district," and a part of the state of Virginia into a district "called Kentucky district," the remaining part of the state of Massachusetts being made a district "called Massachusetts district," and the state of Virginia, except so much thereof as was thereby made the district of Kentucky, a district "called Virginia district." 1 Stat. at L. 73, chap. 20.

The plan was to make each of the states a judicial district, and to direct the appointment of a judge, a clerk to be *appointed by him, [222 a district attorney, and a marshal, for each district. But that part of Massachusetts now constituting the state of Maine, and that part of the state of Virginia now forming the state of Kentucky, were erected into independent districts under the names of "Maine district" and "Kentucky district," and the district court established in each was invested with the powers of a circuit court.

By the 4th section these districts, "except those of Maine and Kentucky," were divided into three circuits, called the eastern, the middle, and the southern circuits; and it was provided that circuit courts should be held "in each district of said circuits," by two of the justices of the Supreme Court and "the district judge of such districts."

North Carolina having ratified the Constitution November 21, 1789, Congress by the act of June 4, 1790 (1 Stat. at L. 126, chap. 17), gave effect to the judiciary act of 1789 in that state, erecting it into a district to be called "North Carolina district," establishing a district court with one judge, and annexing the district to the southern circuit. Rhode Island having ratified the Constitution May 29, 1790, a similar act to give effect to the judiciary act was passed June 23, 1790 (1 Stat. at L. 128, chap. 21), by which Rhode Island was annexed to the eastern circuit.

From the first, then, district courts have been, in exceptional instances, vested with circuit-court jurisdiction.

On February 21, 1823, an act was passed entitled "An Act to Divide the State of South Carolina into Two Judicial Districts," as follows: "That the State of South Carolina be, and the same is hereby divided into two districts, in manner following, that is to say: the districts of Lancaster, Chester, York, Union, Spartanburg, Greenville, Pendleton, Abbeville, Edgefield, Newberry, Laurens, and Fairfield shall compose one district, to be called the western district; and the residue of the state shall form one other district, to be called the eastern district. And the terms of the said district court for the eastern district shall be held in Charleston, at such times as they are now by law directed to be holden. And for the trial of all such criminal and civil causes as are by law *cognizable in the district [223 courts of the United States which may hereafter arise or be prosecuted, or sued, within the said western district, there shall be one annual session of the said district court holden at Laurens court-house, to begin on the second Monday in May in each year; to be holden by the district judge of the United States of the state of South Carolina; and he is hereby authorized and directed to hold such other special sessions as may be necessary for the despatch of the causes in the said court, at such time or times as he may deem expedient, and may adjourn such special sessions to any other

time previous to a stated session." 3 Stat. at L. 726, chap. 11.

By an act approved May 25, 1824, entitled "An Act to Alter the Times of Holding the Circuit and District Courts of the United States for the District of South Carolina" (4 Stat. at L. 34, chap. 145), it was provided that the circuit court "for the district of South Carolina" should annually be held "at Charleston on the second Tuesday of April, and at Columbia on the third Tuesday of November," etc.; and that "the times of holding the district court of the United States at Laurens court-house, South Carolina, shall be so altered that the said court shall hereafter convene on the Tuesday next ensuing, after the adjournment of the circuit court of the United States at Columbia."

On March 3, 1825, this act was amended by providing that "the circuit court for the district of South Carolina, at Columbia, South Carolina, shall commence on the fourth Tuesday in November, annually." 4 Stat. at L. 124, chap. 78.

By an act of May 4, 1826, the sessions of the circuit court "for the district of South Carolina" were again changed (4 Stat. at L. 160, chap. 37) and again February 24, 1829 (4 Stat. at L. 335, chap. 19).

By the act of March 1, 1845 (5 Stat. at L. 730, chap. 39), it was provided, referring to the circuit court, "that the spring term of said court shall be held in and for the district of South Carolina at Charleston, on the Wednesday preceding the fourth Monday in March."

By an act approved August 16, 1856, entitled [224] "An *Act to Alter the Time for Holding the District Court in South Carolina, and for Other Purposes" (11 Stat. at L. 43, chap. 119), it was provided that so much of the act of May 25, 1824, as provided "for holding the district court of the United States at Laurens court-house, South Carolina, on the Tuesday next ensuing after the adjournment of the circuit court of the United States at Columbia, be and the same is hereby repealed; and that in place thereof the said court shall be held at Greenville court-house, South Carolina, on the first Monday in August in each year." And it was further provided that the jurors for said court, grand as well as petit, should be drawn "from the inhabitants of Greenville district, South Carolina," except that the jurors for the first term of the court should be drawn at "the term of the district court to be holden in the city of Charleston;" and further, that "the said district court for Greenville, in addition to the ordinary jurisdiction and powers of a district court of the United States, shall have jurisdiction of all causes (except appeals and writs of error) which now are or may be hereafter made cognizable in a circuit court of the United States, and shall proceed in the same manner as a circuit court."

The act of July 15, 1862 (12 Stat. at L. 576, chap. 178), provided that "the districts of South Carolina, Georgia, Alabama, Mississippi, and Florida shall constitute the fifth circuit;" and repealed the act or acts which vested circuit-court powers in the district courts for the districts of Texas, Florida, Wisconsin, Minnesota, Iowa, and Kansas; while by the act of March 3, 1863 (12 Stat. at L. 794, chap. 100), the districts of California and Oregon were constituted the tenth circuit; and so much of any act or acts as vested in the district courts for California and Oregon the power and jurisdiction of circuit courts was repealed.

By the act of July 23, 1866 (14 Stat. at L. 209, chap. 210), it was provided that "the districts of Maryland, West Virginia, Virginia, North Carolina, and South Carolina shall constitute the fourth circuit."

The act of April 10, 1869 (16 Stat. at L. 44, chap. 22), authorized the appointment of a circuit judge "for each of the nine existing judicial circuits;" but that act, by the act of July 1, 1870, *was not to be construed "to re- [225] quire a circuit court to be held in any judicial district in which a circuit court was not required to be held by previously existing law." 16 Stat. at L. 179, chap. 186.

In the Ku Klux Cases, tried in the circuit court at Columbia, in the fall of 1871, before Circuit Judge Bond and District Judge Bryan, Mr. Reverdy Johnson objected to the issue of a venire to summon additional grand and petit jurors "from the body of the district" embracing the whole state, though he admitted that "it is true that the circuit court has jurisdiction, as a court, over the entire district of South Carolina." The court ruled that so far as the circuit court was concerned there was but one district in South Carolina. South Carolina Ku Klux Trials, pp. 8, 9, 10.

The Revised Statutes were adopted June 22, 1874 (the second edition being published in 1878), and contain the following sections:

"Sec. 530. The United States shall be divided into judicial districts as follows:—

"Sec. 531. The states of California, Connecticut, Delaware, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Oregon, Rhode Island, Vermont, and West Virginia, each, constitute one judicial district."

"Sec. 546. The state of South Carolina is divided into two districts, which shall be called the eastern and western districts of the district of South Carolina. The western district includes the counties of Lancaster, Chester, York, Union, Spartanburg, Greenville, Pendleton, Abbeville, Edgefield, Newberry, Laurens, and Fairfield, as they existed February 21, 1823. The eastern district includes the residue of said state."

"Sec. 551. A district judge shall be appointed for each district, except in the cases hereinafter provided. Every such judge shall reside in the district for which he is appointed, . . .

"Sec. 552. There shall be appointed in each of the states of Alabama, Georgia, Mississippi, South Carolina, and Tennessee, one district judge, who shall be district judge for each of the districts included in the state for which he is appointed, and shall reside within some one of the said districts. . . ."

*"Sec. 571. The district courts for the [226] western district of Arkansas, the eastern district of Arkansas at Helena, the northern district of Mississippi, the western district of South Carolina, and the district of West Virginia,

shall have, in addition to the ordinary jurisdiction of district courts, jurisdiction of all causes, except appeals and writs of error, which are cognizable in a circuit court, and shall proceed therein in the same manner as a circuit court.

"Sec. 572. The regular terms of the district courts shall be held at the times and places following: . . . In the eastern district of South Carolina, at Charleston, on the first Monday in January, May, July, and October. In the western district, at Greenville, on the first Monday in August."

"Sec. 604. The judicial districts of the United States are divided into nine circuits as follows: . . . Fourth. The fourth circuit includes the districts of Maryland, Virginia, West Virginia, North Carolina, and South Carolina. . . ."

"Sec. 608. Circuit courts are established as follows: One for the three districts of Alabama, one for the eastern district of Arkansas, one for the southern district of Mississippi, and one for each district in the states not herein named; and shall be called the circuit courts for the districts for which they are established."

"Sec. 658. The regular terms of the circuit courts shall be held in each year, at the times and places following . . .: In the district of South Carolina, at Charleston, on the first Monday in April; and at Columbia on the fourth Monday in November."

"Sec. 767. There shall be appointed in each district, except in the middle district of Alabama, and the northern district of Georgia, and the western district of South Carolina, a person learned in the law, to act as attorney for the United States in such district. . . . The district attorney of the eastern district of South Carolina shall perform the duties of district attorney for the western district of said state."

Section 776 makes similar provision as to United States marshals for said districts.

"Sec. 563. The district courts shall have jurisdiction as follows:

227] *"First. Of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, the punishment of which is not capital. . . ."

"Sec. 629. The circuit courts shall have original jurisdiction as follows: . . . Exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the district courts of crimes and offenses cognizable therein."

The Revised Statutes were compiled under an act of June 27, 1866, providing "for the revision and consolidation of the statute laws of the United States" (14 Stat. at L. 74, chap. 140), the appointment of three commissioners being thereby authorized to accomplish the work. These commissioners were directed to arrange the statutes and parts of statutes "under titles, chapters, and sections, or other suitable divisions and subdivisions, with headnotes briefly expressive of the matter contained in such divisions; also with side notes, so drawn as to point to the contents of the text, and with references to the original text from which each section is compiled."

By the act of March 2, 1877 (19 Stat. at L. 268, chap. 82), the preparation and publication of a new edition of the Revised Statutes was provided for, the work to be done by a single commissioner, who was required to add to the marginal references made in the previous revision.

In *United States* v. *Lacher*, 134 U. S. 624, 626 [33:1080, 1082], we said: "If there be any ambiguity in § 5467, inasmuch as it is a section of the Revised Statutes, which are merely a compilation of the statutes of the United States, revised, simplified, arranged, and consolidated, resort may be had to the original statute from which this section was taken to ascertain what, if any, change of phraseology there is, and whether such change should be construed as changing the law. *United States* v. *Bowen*, 100 U. S. 508, 513 [25: 631, 632]; *United States* v. *Hirsch*, 100 U. S. 33 [25: 539]; *Myer* v. *Car Company* [*Meyer* v. *Western Car Co.*], 102 U. S. 1, 11 [26: 59, 60]. And it is said that this is especially so where the act authorizing the revision directs marginal references, *as is the case here. 19 Stat. at L. [228 268, chap. 82, § 2; Endlich, Interpretation of Statutes, § 51."

Section 546 appears under "Title 13. The Judiciary. Chapter 1. Judicial Districts;" and the cross-reference in the margin is to the act of "21 Feb. 1823, chap. 11, § 1, vol. 3, p. 726."

When, then, Congress enacted this section it seems to have construed the act of 1823, not as dividing the state into two judicial districts, as indicated in the title of the act, but into two districts in the sense of geographical divisions, which is in harmony with the language used in the body of the act. At all events, the phraseology of § 546 is only consistent with the conclusion that the state constituted but one judicial district, containing two divisions, which were "called the eastern and western districts of the district of South Carolina."

And it should be remembered that there was, during all this time (and this has prevailed from thence hitherto), but one judge, one attorney, and one marshal for the district of South Carolina.

It is said that in the first draft of the commission to revise the statutes, the commissioners recommended the adoption of a section corresponding to § 546, in this language: "The district of South Carolina is divided into two divisions, which will be called the eastern and western divisions of the district of South Carolina. The western division includes the counties of Lancaster, etc., as they existed February 21, 1823. The eastern division includes the residue of said state." And it is argued that because § 546 was couched in its present language, notwithstanding the recommendation, that it therefore follows that Congress intended to divide the state into two judicial districts. We cannot concur in that view. While the use of the word "division" might have been more felicitous, yet we think the meaning of the statute was sufficiently plain, and that it would be inad-

missible to recur to the draft of the commissioners to create a doubt where none existed. Moreover, it would be a much greater stretch of construction to say that because Congress did not see fit to use the word "division," therefore it should be held that the **229**]*words actually employed, "of the district of South Carolina," were inadvertently inserted, and should be rejected altogether.

It should be noted that by § 608 circuit courts were established for each district in the states not therein named, the states specified being Alabama, Arkansas, and Mississippi, and yet that by § 571 certain district courts, including that for the western district of South Carolina, retained circuit-court powers.

Nevertheless, it was held by Chief Justice Waite, sitting with Judge Bond in the circuit court in 1877: "As to the question of the jurisdiction of this court throughout the entire state of South Carolina, we decide, for the purposes of this trial, in favor of the jurisdiction. This is in accordance with the uniform practice of the court, without objection from any quarter, for nearly half a century." *United States* v. *Butler*, 1 Hughes, 457, 463.

And in 1886 it was said by Simonton, J., holding the circuit court: "All parts of the state of South Carolina are within the jurisdiction of this court. Its process runs all through the state. It does not know, in the sense which affects its jurisdiction, either the eastern or western district." *Young* v. *Merchants' Ins. Co.* 29 Fed. Rep. 273, 275.

However we are relieved from considering the effect upon the jurisdiction of a circuit court having jurisdiction throughout a state, constituting a single judicial district, of a part of the district being subjected to the jurisdiction of the circuit court clothed with circuit-court powers, as the act of February 6, 1889 (25 Stat. at L. 655, chap. 113), in terms "established a circuit court of the United States in and for the western district of Arkansas, for the northern district of Mississippi, and for the western district of South Carolina, respectively, as the said districts are now constituted by law;" and withdrew circuit-court powers from said district courts.

By the act of April 26, 1890 (26 Stat. at L. 71, chap. 165), it was provided that there should be "four regular terms of the circuit court of the United States for the district of South Carolina in each year, as follows: In the **230**] city of Greenville, on the *first Monday in February and on the first Monday in August; in the city of Charleston, on the first Monday in April; and in the city of Columbia, on the fourth Monday in November;" and that "the office of the clerk of said court shall be kept in the cities of Charleston and of Greenville, and the clerk shall reside in one of the said cities and shall have a deputy in the other." And although the act then went on to prescribe terms "of the district courts in the eastern district of South Carolina;" and "of the district court in the western district of South Carolina," we think the operation of the prior sections was not thereby affected.

It may be added that in the legislative, executive, and judicial appropriation act of May 28, 1896, appropriations were made for the salaries (among others) of the United States district attorney "for the eastern and western districts of the district of South Carolina," and of the United States marshal "for the eastern and western districts of the district of South Carolina." 29 Stat. at L. 140, chap. 252, §§ 7, 9.

From this review of the statutes we are unable to arrive at any other conclusion than that in 1894, when these proceedings were had, there were not two judicial districts in the state of South Carolina, to the territorial limits of each of which the jurisdiction of the circuit court was confined; and that the exceptions in this regard must be held not to have been well taken.

It is also suggested in the brief for plaintiff in error that error supervened in that the record does not affirmatively show the issue of the venire for the grand and petit juries; nor that the defendant was arraigned; nor that he was personally present when the verdict was rendered and sentence pronounced.

But the record does show that the indictment was duly returned; that motions to quash the indictment and the venire of grand and petit juries were made and overruled; that the defendant pleaded "not guilty" to said indictment; that the trial came on on that issue, and a petit jury was duly impaneled and sworn; that trial was had and a verdict of guilty returned, and sentence thereon entered; and that no exceptions were *saved to any of these proceedings other[**231** than the exceptions before mentioned.

The result is that *the judgment must be affirmed.*

CHARLES P. BARRETT, *Plff. in Err.*,
v.
UNITED STATES (No. 2).

(See S. C. Reporter's ed. 231-233.)

Judicial district of South Carolina.

The state of South Carolina constitutes but one judicial district, and an indictment found in the circuit court of the United States held in the eastern district of that state may be properly remitted for trial to the district court for the western district of that state.

[No. 175.]

Argued January 21, 1898. Decided February 21, 1898.

IN ERROR to the District Court of the United States for the Western District of South Carolina to review a judgment convicting Charles P. Barrett of conspiracy under § 5440 of the Revised Statutes. *Affirmed.*

The facts are stated in the opinion.

Mr. **Charles C. Lancaster** for plaintiff in error.

Mr. **James E. Boyd,** Assistant Attorney General, for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was an indictment for conspiracy under § 5440 of the Revised Statutes, found by the grand jury "in the circuit court of the

United States for the district of South Carolina begun and holden at Columbia within and for the district aforesaid, on the fourth Monday of November, in the year of our Lord one thousand eight hundred and ninety four," and on motion of the "United States attorney for the district of South Carolina," was by the circuit court, January 30, 1895, by order entered on its minutes, "remitted from the circuit court of the United States for the district of South Carolina to the district court of the United States for the western district of South Carolina."

232] *At the February term, 1895, of the district court held at Greenville, in the western district, the district judge presiding, the defendant pleaded not guilty; the cause was tried, defendant was found guilty, and, thereupon was sentenced to imprisonment and fine. From this judgment a writ of error was prosecuted to this court.

On the trial defendant raised certain objections presented by exceptions, which are enumerated in a bill of exceptions: by demurrer that the indictment was found in the eastern district of South Carolina, although the crime was charged to have been committed in the western district; by preliminary plea, "that the jurors of the grand jury by whom the indictment was found were drawn, summoned, and impaneled from both the eastern and western districts of South Carolina, instead of from the western district of said state alone;" that the indictment was found in the circuit court of the United States for South Carolina, held in the city of Columbia, in the eastern district of said state, and was remitted to the district court for the western district of said state; by motion on the close of the testimony for the United States, "that the attorney for the United States be required to elect on which one of the conspiracies he would ask for a conviction," that is, of several distinct conspiracies, which the evidence tended to show; by motion in arrest that the grand jurors, who found the indictment, were drawn, summoned, and impaneled from both the districts when the crime was charged to have been committed in one of them; that the indictment was found in the eastern district at a time when there was no law authorizing the "holding any court of the United States for the western district of South Carolina;" because the indictment was remitted, "not to the district court of the United States for the eastern district of South Carolina, but to the district court of the western district of said state."

The court overruled all these objections, in whatever form presented, and defendant excepted.

Sections 817, 1037, and 1038 of the Revised Statutes are as follows:

"Sec. 817. The grand and petit jurors for the 233]district *court, sitting in the western district of South Carolina, shall be drawn from the inhabitants of said district who are liable, according to the laws of said state, to do jury duty in the courts thereof; and all jurors shall be drawn during the sitting of the court for the next succeeding term."

"Sec. 1037. Whenever the district attorney deems it necessary, any circuit court may, by order entered on its minutes, remit any indictment pending therein to the next session of the district court of the same district, where the offense charged in the indictment is cognizable by the said district court. And in like manner any district court may remit to the next session of the circuit court of the same district any indictment pending in the said district court.

"Sec. 1038. Any district court may, by order entered on its minutes, remit any indictment pending therein to the next session of the circuit court for the same district, when, in the opinion of such district court, difficult and important questions of law are involved in the case; and thereupon the proceedings in such case shall be the same in the circuit court as if such indictment had been originally found and presented therein."

No objection was raised that the petit jury by which defendant was tried was not, and it was conceded at the bar that it was, in fact, drawn from the inhabitants of the western district of the district of South Carolina, and no complaint is preferred in that regard.

We have just decided that the state of South Carolina constitutes but one judicial district, and, this being so, the indictment was properly remitted, in accordance with § 1037, to the next session of the district court of that district, begun and holden on the 1st Monday of February, 1895, in the western district of the district.

All other questions have been disposed of adversely to plaintiff in error in the preceding case.

Judgment affirmed.

PHILIP LEVIS, *Appt.*, [234

v.

CHARLES R. KENGLA, in His Own Right and as Guardian of the Infant Defendants, Edith Louise Kengla and Eunice Marie Kengla.

(See S. C. Reporter's ed. 234-237.)

Oral agreement to hold land as trustee.

Where a mortgagee purchased the mortgaged premises at a foreclosure sale, and the mortgagor remained in possession for about a year after the sale, and then removed upon notice from the mortgagee, who has ever since remained in possession, and the mortgagor did not claim any interest in the land for fifteen years, nor pay any interest or taxes, very positive and satisfactory evidence is required to sustain an oral agreement of the mortgagee, alleged to have been made at the time of the mortgage sale, to hold the land indefinitely as a trustee for the sole and exclusive benefit of the mortgagor.

[No. 173.]

Argued January 11, 12, 1898. Decided February 21, 1898.

APPEAL from a decree of the Court of Appeals of the District of Columbia affirming the decree of the Supreme Court of that District dismissing a suit in equity filed by Philip Levis, plaintiff, against Charles R. Kengla *et al.*, to redeem certain land and to enforce a trust therein. *Affirmed.*

See same case below, 8 App. D. C. 230.

The facts are stated in the opinion.

Messrs. **Henry E. Davis** and *H. B. Moulton* for appellant.

Mr. **J. Holdsworth Gordon** for appellees.

Mr. Justice **Gray** delivered the opinion of the court:

This was a bill in equity, filed by the mortgagor of land in the District of Columbia, more than fifteen years after the sale and conveyance of the land under a power in the mortgage, to redeem the land and to enforce a trust therein.

The supreme court of the District of Columbia, after a hearing upon pleadings and proofs, dismissed the bill; and its decree was affirmed by the court of appeals. 8 App. D. C. 230. The plaintiff appealed to this court.

The following facts were either admitted or clearly proved: Philip Levis, being the owner of the land, on October 29, 1875, made a first mortgage thereof to trustees to secure the payment of his note to one Clokey for $2,000, payable in three years with interest at the annual rate of 10 per cent; and on May 13, 1876, made a second mortgage to one Weaver, as trustee, to secure the payment of a promissory note to Charles R. Kengla and George M. Kengla for $300, payable in one year, with like interest. Under this second mortgage, default having been made in the payment of the $300 note, the land was advertised for sale "subject to a prior trust of $2,000;" and on October 29, 1877, was accordingly sold by auction, and was bought by the two Kenglas for [235] the sum of $1,000, subject to the first mortgage for $2,000. The plaintiff remained in possession of the land for about a year after the sale, and then removed upon notice from the Kenglas to quit, and they have ever since remained in possession. On January 17, 1878, Weaver, as trustee under the second mortgage, conveyed the land to the Kenglas, in accordance with the terms of the sale, and received from them the price of $1,000. On May 26, 1879, the Kenglas, with the knowledge of Levis, sold and conveyed part of the land to one Hume for the sum of $2,756.89. Levis never claimed any interest in the land, after the conveyance to the Kenglas on January 17, 1878, until he filed the original bill in this case against them on March 29, 1893.

In the bill, the plaintiff alleged that, when the land was put up for sale by auction on October 29, 1877, there being present no bidders nor any persons interested in the purchase of the property except the defendants, the threatened sale was objected to by the plaintiff, and was only permitted to be made, without protest, upon an oral statement by the defendants that they only desired to obtain out of the property the amount of the encumbrances thereon, and that, if he would permit them to go through the form of a sale, they would take and hold the property for his benefit, and would reconvey it to him, or so much thereof as was left after sufficient had been sold to satisfy their claim, together with the costs of the sale; whereupon, relying upon their promise, he suffered an informal sale of the property to be made to them by the trustee.

The defendants, answering under oath, denied that at any time before the sale to them there was any understanding, agreement, or suggestion, of any kind whatsoever, between them and the plaintiff, to impeach or qualify the absolute purchase of the property by them for their own use and benefit; and alleged that, after that sale, the plaintiff informed them that he believed he could obtain a purchaser for the property at a greater price; that, wishing the plaintiff to obtain as much as possible out of the property, they informed him that if he could obtain such purchaser within two weeks from the day of sale, [236] they would convey the property to such purchaser, and turn over to the plaintiff the increased price obtained; that the plaintiff endeavored to obtain such purchaser, but finally came to them and informed them that he had failed to find a purchaser; whereupon they obtained a deed from the trustee.

Upon a careful consideration of the conflicting testimony introduced at the hearing, this court fully concurs in one of the positions taken by the court of appeals, and stated in its opinion as follows: "The complainant has not established his case by any such preponderance of testimony as is required by the rules of law to overthrow the title of the defendants. On the contrary, the preponderance of testimony is wholly against him. It is unreasonable to suppose that the defendants, having a good security as it stood, would have converted themselves into permanent trustees for an indefinite period for the sole and exclusive benefit of the complainant, the latter never at any time concerning himself with the payment of interest or taxes, or the care of the property in any way, for fifteen years. To establish such an arrangement as this very positive and satisfactory evidence would be required; and without going into any examination of the testimony, it is sufficient for us here to say that, in our opinion, the testimony wholly fails to establish any such arrangement, or any arrangement whatever upon which a court of equity would be justified in acting. It would seem to be a conclusive answer to the complainant's pretensions that when, within a year after the sale, and when they deemed their indulgence to him to have reached its legitimate limit, they gave him notice to quit the premises, and thereby plainly intimated to him that they regarded any interest which he might have had in the premises as at an end, he submitted to the notice without protest and acquiesced in his exclusion from the property. This conduct, coupled with his utter disregard thereafter of any liability either in regard to the property or in regard to the indebtedness, is wholly inconsistent with the existence of any such trust arrangement as that which he claims to have been made between him and the defendants." 8 App. D. C. 237.

This view being decisive of the case, it [237] becomes unnecessary to consider the defense of laches, or that of the statute of frauds; and a discussion of the testimony in detail could

be of no value as a precedent, and would serve no useful purpose. *Harrell* v. *Beall*, 84 U. S. 17 Wall. 590 [21: 692]; *Tyler* v. *Campbell*, 106 U. S. 322 [27: 162].

Decree affirmed.

ELIZABETH WETZEL *et al.*, *Appts.*,
v.
MINNESOTA RAILWAY TRANSFER COMPANY *et al.*

(See S. C. Reporter's ed. 237-242.)

Laches in action to recover land—public interests.

A delay of over forty years after a land warrant issued to a soldier has been sold by the guardian of his heirs and a patent issued to the purchaser for the land, and thirty years after the youngest heir has come of age, in bringing an action by the heirs to impeach the sale and recover the land, constitutes such laches as will defeat the action, where the warrant was sold for its full value and the proceeds were applied to the use of the heirs, and the land was platted and sold to innocent purchasers, and has increased in value from $100 or $200 to over $1,000,000, and is partly covered by houses and business blocks.

The interests of public order and tranquillity demand that parties shall acquaint themselves with their rights within a reasonable time; and although this time may be extended by their actual ignorance or want of means, it is by no means illimitable.

[No. 94.]

Argued January 25, 1898. Decided February 21, 1898.

APPEAL from a decree of the United States Circuit Court of Appeals for the Eighth Circuit affirming the decree of the United States Circuit Court for the District of Minnesota dismissing a suit in equity brought by Elizabeth Wetzel *et al.*, plaintiffs, against the Minnesota Railway Transfer Company *et al.*, to establish title to land in the city of St. Paul. *Affirmed.*

See same case below, 56 Fed. Rep. 919, 27 U. S. App. 594.

Statement by Mr. Justice **Brown:**

This was a bill in equity filed in the United States circuit court for the district of Minnesota, by the widow (since remarried) and heirs at law of George W. Remsen against the Minnesota Railway Transfer Company, and over two hundred other defendants, to establish title to 160 acres of land situate within the corporate limits of the city of St. Paul, which the complainants contended was held in trust for them by the defendants. The land was estimated to be of the value of over $1,000,000.

The facts of the case are substantially as follows: George W. Remsen was a private in Company K, Third Regiment, United States Infantry, and served in the Mexican war. By virtue of his enlistment as a soldier he became entitled, under § 9 of the act of Congress of February 11, 1847 (9 Stat. at L. 123, chap. 8), to locate a quarter section of government land, subject to private entry, under the regulations and restrictions established by the Commissioner of the General Land Office. This section further provided that in case of the death of the *soldier his right under the act should [238 descend to his widow and minor children; and, further, that in the event of the issuance of a land warrant to the minor children of a deceased soldier "then the legally constituted guardian of such minor children shall, in conjunction with such of the children, if any, as may be of full age, upon being duly authorized by the orphans' or other court having probate jurisdiction, have power to sell and dispose of such certificate or warrant for the benefit of those interested."

Remsen died in the military service in October, 1847, and thereafter a land warrant was issued on September 30, 1848, to "Elizabeth Remsen, widow, Harriet A. Remsen, Mary Ann Remsen, John W. Remsen, Elizabeth Remsen, and George W. A. Remsen, children, heirs at law, of George W. Remsen, deceased." On October 6, 1848, Mrs. Remsen qualified as guardian of all the minor children of Remsen (except Harriet A., who was then seventeen years of age), before the orphans' court for the county of Philadelphia, Pennsylvania.

The land warrant issued to the widow and minor children of Remsen was never located by any or either of them, but was sold and assigned on October 11, 1848, to one Nathan C. D. Taylor, of St. Croix county, territory of Minnesota, who subsequently located it upon the land in controversy and to whom a patent was issued by the government on March 20, 1850, and from whom all the defendants in this case, directly or indirectly, claim title.

The sale and assignment of the warrant were made without an order authorizing or confirming it, so far as appears, of the orphans' court appointing Mrs. Remsen as guardian, and was consummated by Mrs. Remsen, acting in her own right and as the guardian of the minor children, with whom was joined Harriet A. Remsen.

It was contended by the complainants in the circuit court, as well as in the circuit court of appeals, that the sale and assignment of the land warrant to Taylor was utterly void as to the interest of all the minor children of George W. Remsen, other that Harriet A., who joined in the assignment, because the sale and assignment made by the mother as *guardian [239 was not authorized by any order or decree of the orphans' court of the county of Philadelphia.

The circuit court dismissed the bill on the ground of laches. 56 Fed. Rep. 919. Upon

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NOTE.—*That neither time nor statue of limitations runs against the state*, see note to Gibson v. Chouteau, 20: 534.

As to effect of state decisions and laws, in regard to statutes of limitation, upon United States courts, see note to Elmendorf v. Taylor, 6: 289.

As to limitation of time in equity cases, see notes to Pratt v. Carroll, 3: 627, and Thomas v. Brockenbrough, 6: 287.

As to laches, when a good defense, see note to Felix v. Patrick, 36: 720.

As to length of time as bar to relief in cases of fraud; statute of limitations as a plea in equity; state claims; cases of undiscovered fraud; when laches bars remedy,—see note to Hammond v. Hopkins, 36: 155.

appeal that decree was affirmed by the circuit court of appeals for the eighth circuit. 27 U. S. App. 594. Whereupon the complainants appealed to this court.

Messrs. **Ernest Howard Hunter, John W. Hinsdale,** and *William C. Mayne*, for appellants:

The complainant's right to relief is not barred by laches or acquiescence.

Sebig v. *Abitol*, 4 Maule & S. 463; *Massie* v. *Heiskell*, 80 Va. 805; *Bryan* v. *Kales*, 134 U. S. 126 (33: 829).

Whether laches is to be imputed to a party seeking the aid of a court of equity depends upon the circumstances of the particular case.

Griswold v. *Hazard*, 141 U. S. 260 (35: 678).

The question of laches does not depend upon the fact that a certain definite time has elapsed since the cause of action accrued, but upon whether, under all the circumstances of the particular case, the plaintiff is chargeable with a want of due diligence in failing to institute proceedings earlier.

Townsend v. *Vanderwerker*, 160 U. S. 171 (40: 383).

Length of time alone is not the test of the staleness of a demand, but the question must be determined by the facts and circumstances of each case and according to right and justice.

Marcotte v. *Hartman*, 46 Minn. 202.

When a party has equitable rights a court will not refuse relief, although the claim has been outstanding for a long time, if the reason for delay is such as not to defeat the party's right to its enforcement upon the ground of laches or acquiescence.

Lunn v. *Johnson*, 3 Ired. Eq. 70; *Mason* v. *Crosby*, 2 Ware (Daveis) 303; *Kimball* v. *Ives*, 17 Vt. 430; *Bancroft* v. *Andrews*, 6 Cush. 493.

It is a rule founded in justice and reason that equity will not refuse relief where there has been a reasonable excuse for the delay.

Bell v. *Hudson*, 73 Cal. 285.

The fact that a party has delayed the enforcement of his right for the statutory period is prima facie evidence, but even this is not decisive, as, if there is a sufficient cause for delay, the court will enforce the right.

Preston v. *Preston*, 95 U. S. 200 (24: 494); *Neely's Appeal*, 85 Pa. 387; *Reed* v *West*, 47 Tex. 240; *Rogan* v. *Walker*, 1 Wis. 631; *Lawrence* v. *Rokes*, 61 Me. 38; *McKnight* v. *Taylor*, 42 U. S. 1 How. 161 (11: 86).

The poverty of the vendor, added to the other circumstances, is also a material ingredient in such a case.

Bell v. *Hudson*, 73 Cal. 285.

Absence of complainant from the state, and late discovery of the fraud, are excuses for delay.

Hallett v. *Collins*, 51 U. S. 10 How. 174 (13: 376); *Scherer* v. *Ingerman*, 110 Ind. 428; *State, Sleeth*, v. *Gordon*, 87 Ind. 171; *Earle* v. *Earle*, 91 Ind. 27; *Johnston* v. *Standard Min. Co.* 148 U. S. 360 (37: 480).

There can be no laches in failing to assert the rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend.

Halstead v. *Grinnan*, 152 U. S. 412 (38: 495).

Parties ignorant of their rights cannot be charged with laches.

Hannon v. *Hounihan*, 85 Va. 429.

Acquiescence imports full knowledge (*Life Asso. of Scotland* v. *Siddal*, 3 De G. F. & J. 74); therefore a party will not be held to acquiesce in acts which he did not know he had any right to dispute.

Marquis Cholmondeley v. *Lord Clinton*, 2 Meriv. 171, 361; *Charter* v. *Trevelyan*, 11 Clark & F. 714; *Bennett* v. *Colley*, 1 Myl. & K. 225.

Where fraud is relied on in cases of trust, there can be no laches by reason of anything done or neglected, where the party seeking relief has, without any fault of his own, remained in ignorance of his rights.

Rolfe v. *Gregory*, 13 Week. Rep. 355; *Savery* v. *King*, 5 H. L. Cas. 626, 665; *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221.

Messrs. **C. K. Davis,** *Frank B. Kellogg*, and *C. A. Severance*, for appellees:

The right of appellants to relief, if they ever had any, is barred by their laches and by that of their ancestors.

Laches has been held to be a bar in nearly every conceivable case falling within the general doctrine in the following decisions:

Burk v. *Western Land Asso.* 40 Minn 506; *St. Paul, S. & T. F. R. Co.* v. *Sage*, 4 U. S. App. 160, 49 Fed. Rep. 315, 1 C. C. A. 256; *Wagner* v. *Baird*, 48 U. S. 7 How. 234 (12: 681); *United States* v. *Moore*, 53 U. S. 12 How. 209 (13: 958); *Badger* v. *Badger*, 69 U. S. 2 Wall. 87 (17: 837); *Godden* v. *Kimmell*, 99 U. S. 201 (25: 431); *Crosby* v. *Beale* (*Hume* v. *Beale*), 84 U. S. 17 Wall. 336 (21: 602); *Russell* v. *Transylvania University*, 14 U. S. 1 Wheat. 332 (4: 129); *McQuiddy* v. *Ware*, 87 U. S. 20 Wall. 14 (22: 311); *Marsh* v. *Whitmore*, 88 U. S. 21 Wall. 178 (22: 482); *Kieley* v. *McGlynn* (*Case of Broderick's Will*), 88 U. S. 21 Wall. 503 (22: 599); *Fletcher* v. *Fuller*, 120 U. S. 534 (30: 759); *Felix* v. *Patrick*, 145 U. S. 317 (36: 719); *McKnight* v. *Taylor*, 42 U. S. 1 How. 161 (11: 86); *Brown* v. *Buena Vista County*, 95 U. S. 157, 160, 161 (24: 422, 423); *Speidel* v. *Henrici*, 120 U. S. 377 (30: 718), 15 Fed. Rep. 753; *Richards* v. *Mackall*, 124 U. S. 183 (31: 396); *Elmendorf* v. *Taylor*, 23 U. S. 10 Wheat. 152 (6: 289); *Boone County* v. *Burlington & M. River R. Co.* 139 U. S. 684, 692, 693 (35: 319, 322, 323); *Harwood* v. *Cincinnati & C. Air Line R. Co.* 84 U. S. 17 Wall. 78, 80, 81 (21: 558, 559); *Holgate* v. *Eaton*, 116 U. S. 33, 39 (29: 538, 540); *Mackall* v. *Casilear*, 137 U. S. 556, 566 (34: 776, 779); *United States* v. *Flint*, 4 Sawy. 58; *Fuller* v. *Melrose*, 1 Allen, 166; *Peabody* v. *Flint*, 6 Allen, 52; *Royal Bank* v. *Grand Junction R. & Depot Co.* 125 Mass. 490, 494, 495; *United States* v. *Beebee*, 17 Fed. Rep. 36; *Campau* v. *Van Dyke*, 15 Mich. 378; *Wilbur* v. *Flood*, 16 Mich. 40, 93 Am. Dec. 203; *Hubbardston Lumber Co.* v. *Bates*, 31 Mich. 158, 168; *Follansbe* v. *Kilbreth*, 17 Ill. 522, 65 Am. Dec. 691; *Evans* v. *Bacon*, 99 Mass. 213; *Ashhurst's Appeal*, 60 Pa. 290; *Kane* v. *Bloodgood*, 7 Johns. Ch. 90, 113, 11 Am. Dec. 417; *Leavenworth County Comrs* v. *Chicago, R. I. & P. R. Co.* 18 Fed. Rep. 209; *Foster* v. *Mansfield, C. & L. M. R. Co.* 146 U. S. 88 (36: 899); *Johnston* v. *Standard Min. Co.* 148 U. S. 360 (37: 480).

Mr. Justice Brown delivered the opinion of the court:

The circuit court dismissed this bill on the ground of laches, and the circuit court of appeals affirmed its action. There can be no doubt whatever of the correctness of this conclusion. Indeed, a stronger case for the application of the doctrine of laches can scarcely be imagined. The warrant, which was issued in 1848, entitled the widow and minor children of Remsen to a grant of 160 acres of public lands. This warrant was never located by the persons to whom it was issued, who appeared to have lived in Philadelphia, and to have been in straitened circumstances.

The warrant was sold by them in 1848 to Nathan C. D. Taylor, and there is nothing to show that it did not realize for the widow and heirs its market value. Indeed, the court of appeals found that it was sold for its full value and the widow testified that the proceeds were applied to the support of herself and the minor children of the deceased soldier. No fraud in the transaction was alleged or proved. Nothing appears to impeach the validity of the sale except the fact that the widow, who had been appointed guardian of all the minor children, except the eldest, did not procure the consent of the orphans' court in Philadelphia to [240] make the sale, as required by *the statute. This was doubtless a technical defect; but it did not show that the warrant was not actually transferred by the widow, acting for herself and her children (except one who consented in her own behalf), or that they did not receive full consideration for such transfer.

It is true that the locator and his grantees in possession may have been in law chargeable with the knowledge that an order of the orphans' court was never obtained; but in view of the fact that the widow and heirs of Remsen lived in Philadelphia, a thousand miles from St. Paul, it is scarcely a matter of surprise that they did not investigate this subject with that care which they probably would have exercised had that court been more accessible. Particularly is this so, when it is considered that the officers of the land department, subsequently and after a full review of the facts, decided the warrant to have been properly transferred to Taylor, and issued a patent to him.

It was not the foresight of the widow or heirs of Remsen which caused this warrant to be located upon lands so near to the thriving city of St. Paul, but that of Taylor, who appears to have been a resident of Minnesota; and this suit is a manifest attempt of the complainants to take to themselves the benefit of this action, in which they did not participate and of which they were entirely ignorant for over thirty years after the location had been made.

Conceding that the minors were not affected by laches until they became of age, it appears that the youngest of them reached his majority in 1863, at which time the lands were worth about $1,500. Then, if not before, the exercise of diligence became incumbent upon them. It was their duty to have informed themselves and to have acted. It is scarcely possible that they should not have known that their father was a soldier in the Mexican war, and they were chargeable by law with knowledge of the fact that he was entitled to a land warrant. If they did not know this as a matter of fact it was because their mother and elder sister had failed to inform them of it; and it is inequitable to charge upon the defendants the entire consequences of this ignorance.

*Knowledge of the transfer seems to [241] have finally come to them, not through any exertion of their own to inform themselves of the facts, but by an accidental meeting with a lawyer from Minnesota, who had in some way, probably by an examination of the title, become cognizant of the defect in the transfer. It was a mere matter of chance when they would be informed of the defect in the defendants' title, or whether it would ever come to their knowledge at all. To permit them now, after a lapse of forty-four years from the time the warrant was issued, and of thirty years from the time the youngest child became of age, to impeach the transaction, would be an act of the most flagrant injustice to the present holders of the property. This property, which was probably not worth more than one or two hundred dollars at the time of the location of the land warrant, is now estimated to be worth at least a million, and is covered, or partly covered, by houses and business blocks. In the forty-four years that have elapsed since the warrant was issued these lands have been platted and sold in lots to purchasers, who were probably ignorant in fact, if not in law, of any defect in the title, and relied upon the validity of the transfer from the widow and heirs of Remsen, and upon the patent from the United States, which appears to have been regularly issued after an examination of all the facts attending the granting, transfer, and location of the land warrant by the officers of the land department. While the fact that the complainants were ignorant of the defect in the title, and were without means to prosecute an investigation into the facts, may properly be considered by the court, it does not mitigate the hardship to the defendants of unsettling these titles. If the complainants may put forward these excuses for delay after thirty years, there is no reason why they may not allege the same as an excuse after a lapse of sixty. The truth is, there must be some limit of time within which these excuses shall be available, or titles might forever be insecure. The interests of public order and tranquillity demand that parties shall acquaint themselves with their rights within a reasonable time, and although this time may be extended by their actual ignorance, or want of means, it is by no means illimitable.

*If any authority were needed for the [242] action of the courts below in dismissing the bill upon the ground of laches, it would be found in *Felix* v. *Patrick*, 145 U. S. 317 [36: 719]. In that case a half-breed woman, belonging to the Sioux nation, received in 1857 a certificate of land scrip, issued under the then existing law, which provided that no "transfer or conveyance of any of said certificates shall be valid." Notwithstanding this provision the woman sold the scrip and executed a blank power of attorney, also a quitclaim deed in blank, in which the name of the attorney, the description of the land, and the name of the

grantee were afterwards filled in by the grantee, who had caused the papers to be executed. The grantee thereafter located a tract of land, and subsequently Congress confirmed his title to the same. The half-breed was ignorant of all these facts until 1887. In 1888, she having died in the meantime, her representatives filed a bill in equity against the grantee, charging him with having fraudulently obtained the power of attorney and the quitclaim deed, but failing to state when and how the frauds were discovered. It was held that as the bill did not state the time when the frauds were discovered, so that the court may clearly see whether they could have been discovered before, the bill was fatally defective; and that, under the circumstances, it would be inequitable to disturb the title of the defendants, who held adversely as against the half-breed woman, and not by virtue of the power of attorney or quitclaim deed, which passed no title, or by the confirmatory act of Congress which granted no additional rights.

Upon the facts disclosed in this record, *it is entirely clear that the decree of the court below was correct, and it is therefore affirmed.*

243] DANIEL DULL *et al.*, *Plffs. in Err.*,
v.
JOHN E. BLACKMAN *et al.*

(See S. C. Reporter's ed. 243-248.)

Decree as to land in another state—service of process without the state—when judgment does not bind grantee.

1. A decree to quiet title to land in another state is purely *in personam*, and binds only the parties who were personally brought before the court and their privies, and does not operate directly upon the land, or affect the title.
2. Service of process without the state, upon a nonresident of the state, is ineffectual to bring him within the jurisdiction of the state court.
3. A grantee of land is not bound by any judgment in an action commenced against his grantor subsequent to the grant.

[No. 192.]

Argued January 18, 19, 1898. Decided February 21, 1898.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment of that court affirming the decree of the District Court of Pottawattamie County, Iowa, quieting the title of Ed. Phelan to certain land as against the other parties to the suit which was commenced by John E. Blackman, plaintiff, against George F. Wright *et al.*, defendants, in which suit said Phelan filed a petition of intervention, making plaintiffs in error and others defendants, praying a decree quieting his title as against all. There was also a motion to dismiss or affirm. *Affirmed.*

Statement by Mr. Justice **Brewer:**

The facts in this case are as follows: On June 25, 1889, plaintiff in error, Daniel Dull, being the owner of the tract of land in controversy, conveyed the same by warranty deed executed by himself and wife to John E. Blackman. Blackman, on August 2, 1889, made a deed of the same land to George F. Wright as security for moneys to be advanced by Wright. On the 29th of February, 1892, Blackman commenced this suit in the district court of Pottawattamie county, Iowa, to compel a reconveyance by Wright on the ground of his failure to advance any money. Prior thereto, and on January 30, 1892, Blackman had executed a deed of the land to Edward Phelan, which conveyance was at first conditional but, by agreement signed by the parties on September 15, 1892, was made absolute. On the 17th of September, 1892, Phelan filed his petition of intervention, setting forth his rights in the matter under the deed of January 30 and the agreement of September 15, and also making plaintiffs in error and others defendants, alleging that they claimed certain interests in the property, and praying a decree quieting his title as against all. On January 24, 1893, plaintiff's counsel withdrew his appearance for Blackman, and, upon his application, was allowed to prosecute the action in the name of Blackman for and in behalf of Phelan, the intervenor. On February 2, 1893, the plaintiffs in error appeared in the suit and filed an answer denying all the allegations in plaintiff's petition and in the petition of intervention. On the 15th of that month they filed an amended answer and a cross petition, in which they set up that Blackman had obtained his deed from them by certain false representations, and that a suit *was pending in the supreme[245 court of the state of New York, in which Daniel Dull was plaintiff, and Blackman, Wright, Phelan and others were defendants, in which the same issues were made and the same relief sought as in the case at bar. On May 29 they filed an amendment to their answer and cross petition setting forth that the case pending in the supreme court of New York had gone to decree, and attached a copy of that decree. The suit in the supreme court of the state of New York was commenced on the 3d of November, 1892 Blackman was served personally within the limits of that state, but the other defendants therein, Wright, Phelan, and Duffie their counsel, were served only by delivering to them in Omaha, Nebraska, a copy of the complaint and summons. No appearance was made by them. Notwithstanding which the decree was entered against them as against Blackman, and was a decree establishing the title of Daniel Dull, setting aside the deed

NOTE.—*That appearance cures all defects in service of process, or its nonservice, except want of jurisdiction of subject-matter; service of summons by party or other improper person, but a mere irregularity,*—see note to Knox v. Summers, 2: 510.

As to cloud on title; removal of; equity jurisdiction, possession essential,—see note to West v. People's Bank (Miss.) 8 L. R. A. 727.

As to who may maintain bill to quiet title or remove cloud, see note to Miller v. Cook (Ill.) 10 L. R. A. 293.

For right of purchaser on execution to set aside fraudulent conveyance, see note to Wagner v. Law (Wash.) 15 L. R. A. 784.

made by him and his wife to Blackman, and enjoining the several defendants from further proseeuting the aetion in the Iowa court. After eertain other pleadings and amendments thereto had been made the case in the distriet court of Pottawattamie county, Iowa, eame on for hearing, and upon the testimony that court entered a deeree quieting Phelan's title to the land as against any and all other parties to the suit, subjeet, however, to eertain mortgage interests whieh were reeognized and proteeted, but which are not in any way pertinent to this eontroversy between Dull and wife and the defendants in error. On appeal to the supreme eourt of the state such deeree was, on January 21, 1896, affirmed, from whieh judgment of affirmanee plaintiffs in error have brought the case here.

Messrs. **Isaac N. Flickinger, Alfred G. Safford,** and *Omri F. Hibbard* for plaintiffs in error.

Mr. **Winfield S. Strawn** for defendants in error.

Mr. Justiee **Brewer** delivered the opinion of the court:

246] *The contention of the plaintiffs in error—and in it is the only question of a Federal nature presented by the record—is that the courts in Iowa did not give that full faith and credit to the deeree rendered in the supreme court of the state of New York to which under the Constitution of the United States it was entitled. From the foregoing statement of facts it appears clearly that although the suit in the Iowa eourt was originally eommenced by Blackman, and though his name was, under the practice prevailing in Iowa, never dropped from the title of the ease, it was, by reason of the intervention of Phelan and the orders of the eourt, simply proseeuted in his name for the benefit of Phelan, the intervener; that this intervention of Phelan, and his petition in support thereof, making the plaintiffs in error and others defendants thereto, was filed on the 17th of September, 1892, nearly two months before the commencement of the suit in New York. It also appears that while Blackman, Phelan, Wright, and others were named as parties defendant to the suit in New York, Blackman was the only one served within the territorial jurisdiction, and the only one appearing in that court. The other defendants were attempted to be brought in by service of summons in the state of Nebraska, and never entered any appearance in the suit. It is true the decree in the supreme eourt of the state of New York was entered before the trial of this ease in the distriet eourt of Iowa, and the record of the proeeedings in the New York court was in evidencc at the trial in the Iowa court. It further appears from the findings of fact made by the trial court in Iowa, and sustained by the supreme court of that state, that the entire right and title had passed from Blaek man to Phelan in September, 1892, nearly two months beforc the commencement of the suit in New York.

Upon these facts we remark that as the land, the subject-matter of this controversy, was situate in Iowa, litigation in respect to its title belonged properly to the courts within that state (*Ellenwood* v. *Marietta Chair Co.* 158 U. S. 105, 107 [39: 913, 914]), although if all the parties interested in the land were brought personally before a court of another state, its decree would be *conclusive upon them and [**247** thus in effect determine the title. The suit in New York was one purely *in personam*. Any decree therein bound simply the parties before the court and their privies, and did not operate directly upon the lands. As said by this court in *Carpenter* v. *Strange*, 141 U. S. 87, 105 [35: 640, 647]:

"The real estate was situated in Tennessee and governed by the law of its situs, and while by means of its power over the person of a party a court of equity may in a proper ease eompel him to aet in relation to property not within its jurisdiction, its deeree does not operate directly upon the property nor affect the title, but is made effectual through the coercion of the defendant, as, for instanee, by direeting a deed to be executed or eanceled by or on behalf of the party. The court 'has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title.'"

In that suit the only party defendant subject to the jurisdiction of the court was Blackman. The other parties were not served with process within the limits of the state of New York, and never entered any appearanee in the case. The service attempted to be made by delivering a eopy of the summons to them in the state of Nebraska was ineffeetual to bring them within the jurisdiction of that court.

"Where the entire objeet of the aetion is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, eonstruetive serviee in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publieation of proeess or notiee within the state where the tribunal sits cannot ereate any greater obligation upon the nonresident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability." *Pennoyer* v. *Neff*, 95 U. S. 714, 727 [24: 565, 571].

"Such a decree, being *in personam* merely, ean only be supported against a person who is not a eitizen or resident of the *state in [**248** which it is rendered, by aetual serviee upon him within its jurisdiction." *Hart* v. *Sansom*, 110 U. S. 151, 155 [28: 101, 103].

We remark again that while a judgment or decree binds, not merely the party or parties subject to the jurisdiction of the court, but also those in privity with them, yet that rule does not avail the plaintiffs in error, for Phelan aequired his rights prior to the institution of the suit in New York, and was therefore not privy to that judgment.

"It is well understood, though not usually stated in express terms in works upon the subjeet, that no one is privy to a judgment whose sueeession to the rights of property thereby affeeted occurred previously to the institution of the suit. A tenant in possession prior to

the commencement of an action of ejectment cannot, therefore, be lawfully dispossessed by the judgment, unless made a party to the suit. . . . No grantee can be bound by any judgment in an action commenced against his grantor subsequent to the grant, otherwise a man having no interest in property could defeat the estate of the true owner. . . . The foreclosure of a mortgage, or of any other lien, is wholly inoperative upon the rights of any person not a party to the suit, whether such person is a grantee, judgment creditor, attachment creditor, or other lienholder. Freem. Judgm. 1st ed. § 162.

As Phelan was not brought within the jurisdiction of the New York court, and as the suit in that court was instituted nearly two months after he had acquired full title to the real estate, the decree of that court did not bind him as a party, nor bind him as in privity with Blackman, his grantor. The supreme court of Iowa did not err in so holding.

The decree is affirmed.

249] UNITED STATES, *Appt's.*
v.
COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE and the City of Louisville.

(See S. C. Reporter's ed. 249-255.)

Claim against government—power of treasury officers—act of February 25, 1893.

1. After the audit of the claim of the city of Louisville against the government under the act of 1890 and the appropriation to pay it by the act of 1891, the officers of the treasury had no power to re examine the correctness of such claim as audited, on the ground that a mistake therein had been made.

2. The subsequent act of February 25, 1893, gave no jurisdiction to interfere with or to review the action of the treasury officials under the act of 1890 or the action of Congress in enacting the act of 1891.

3. The act of 1891 was in the nature of a judgment, final in its character and subject to no appeal; and the duties of the officers of the government were limited to making payment as directed by the act; and Congress, when subsequently providing for the payment of other similar claims, did not intend to open the transactions which had been closed by payment under the act of 1891.

[No. 105.]

Argued January 5, 6, 1898. Decided February 21, 1898.

APPEAL from a judgment of the Court of Claims in favor of the city of Louisville for the recovery of moneys due said city from the government on account of taxes improperly collected. *Affirmed.*

Statement by Mr. Justice **Peckham:**

This is an appeal from a judgment of the court of claims in favor of the city of Louisville, based upon a petition filed in that court for the recovery of seventeen thousand and some odd dollars, alleged to be due the city from the government on account of taxes improperly collected.

It appears that between the years 1862 and 1872 the city of Louisville, Kentucky, owned a large amount of bonds and stock of the Louisville & Nashville Railroad Company, upon which the company paid interest and declared cash dividends, retaining, however, during most of the time an undistributed surplus. Under the internal revenue law (§ 122, act of June 30, 1864), in force during this period, the company paid taxes to the United States upon its gross receipts, its undistributed surplus, the interest payable on its bonds, and its cash dividends. The taxes paid on interest and dividends were deducted from the amounts due as interest and dividends, so that the revenues of the city of Louisville accruing from these sources were diminished to the extent of such deductions; *but these[250 deductions were not known to the Commissioners of the Sinking Fund of the city until the time had expired for an application to the government to be repaid the taxes so deducted.

In 1872, in the case of *United States* v. *Baltimore & O. Railroad Company*, 84 U. S. 17 Wall. 322 [21:597], this court decided that a tax under the above-named § 122 of the internal revenue act, upon the interest on bonds issued by a railroad company, was a tax upon the creditor and not upon the corporation paying it, and that a municipal corporation, being a portion of the sovereign power of a state, was not subject to taxation by Congress upon its municipal revenues.

The time for making application for repayment of the taxes thus illegally obtained having passed (U. S. Rev. Stat. §§ 3220, 3228), resort was had to Congress, which enacted the statute approved June 16, 1890 (26 Stat. at L. 157, chap. 424). The statute authorized and required the Secretary of the Treasury and the Commissioner of Internal Revenue "to audit and adjust the claim of the board of sinking fund commissioners of the city of Louisville, Kentucky, for internal revenue taxes on dividends on shares of stock owned by said board for said city of Louisville in the Louisville & Nashville Railroad Company, to the extent that such taxes were deducted from any dividends due and payable to said board, and to pass upon said claim and render judgment thereon in the same manner and with the same effect as if said claim had been presented and prosecuted within the time limited and fixed by law."

Pursuant to the provisions of this act, the city of Louisville presented to the proper officers of the Treasury Department its claims to recover taxes to the amount of $65,578.32, of which the officers allowed $42,514.03, the latter sum being made up, as stated, of two items, one of $24,801.14, taxes which had been deducted from cash dividends, and $17,712.89, taxes which had been deducted from surplus profits which, on the 17th of November, 1867,

NOTE.—*As to claims against United States; assignment,*—see note to Lopez v. United States (Ct. Cl.) 2 L. R. A. 571.

Limitations of time to present claims, see note to Waddell v. United States (Ct. Cl.) 7 L. R. A. 861.

had been set apart by resolution of the board of directors of the railroad company as the basis of a stock dividend, which was directed to be distributed in February, 1868. The amount **251**] of $42,514.03, having been *audited and allowed, was reported by the Secretary of the Treasury to Congress for its action, there being no appropriation from which the money awarded the city could be paid.

Under the act of March 3, 1891, being an appropriation to supply deficiencies (26 Stat. at L. 862 ,at 867, chap. 540), Congress provided as follows: "Payment to city of Louisville, Kentucky: For payment to the city of Louisville, Kentucky, the amount found due, under the act of Congress approved June 16, 1890, and reported to Congress in House Executive Document No. 260, of the present session, $42,514.03." The amount thus appropriated was duly paid to the city, as directed by Congress.

Subsequently another application was made to Congress, and that body passed the act approved February 25, 1893 (27 Stat. at L. 477, chap. 165), a copy of which is set forth in the margin.†

Under this act the city of Louisville applied to the proper officers of the government for a further refund of $34 667.80 on account of taxes claimed to have been illegally exacted. One item in this last-named claim, amounting **252**] to $3,008.40, the *appellants insist was for taxes collected by the government from the railroad company upon its undistributed surplus in 1868 and 1871, and that this item had been included in the claim presented in 1890, but had not been allowed because, as stated in the determination made by the Commissioner of Internal Revenue, the act of June 16, 1890, under which the application for refunding was made, limited an adjustment of the claim "to the extent that such taxes were deducted from any dividends due and payable," and did not direct the adjustment of the claim to the extent that taxes were deducted from interest or gross receipts.

The Acting Commissioner of Internal Revenue audited and adjusted the claim made under the act of 1893, at its full amount, and as incidental to such audit and adjustment he assumed to re-examine the claim allowed in 1891. The result of such re-examination of the latter claim was a reduction to the extent of $3,548.89, which sum was deducted from the amount allowed under the act of 1893, reducing it to the sum of $31,359.02. When the claim reached the first controller a further sum of $17,633.85 was deducted by him, which consisted principally of the amount allowed and paid in 1891 for taxes on surplus, which left a balance payable to the city of $13,725.17, for which sum the controller directed a draft to be issued. To recover the amount thus deducted from the claim as audited and allowed under the act of 1893, the city of Louisville commenced this proceeding in the court of claims, which rendered judgment in its favor for the amount demanded. The government has brought the case here for review.

Messrs. **Charles C. Binney** and *L. A. Pradt*, Assistant Attorney General, for appellant.

Messrs. **Alphonso Hart** and *Fontaine T. Fox* for appellees.

Mr. Justice **Peckham** delivered the opinion of the court:

The claim here made is that the officers of the government committed an error in auditing and allowing the amount paid in 1891 for taxes on surplus, as those taxes, it is said, were not referred to the act of 1890 and should not have been reported to Congress or ordered paid by it, and that the power to review this action (if not previously existing) was created by the act of 1893, above set forth.

We think the judgment of the court of claims is right. By the payment under the act of 1891 the questions involved were ended. It was not only an auditing and allowance by the proper officers of the Treasury of a claim over which they had jurisdiction, but the amount was paid under the direct commandment of an act of Congress specifically appropriating the particular sum reported to it as due to the city of Louisville and for the payment of which the authority of Congress was needed.

Laying for a moment the act of 1893 out of view, it seems clear to us that there was no power on the part of the officers of the Treasury to re-examine the correctness of the claim paid by virtue of the act of 1891, or to reverse that action on the ground that a mistake of law had been made in the decision reported to Congress upon which it passed the act last named. The officers who acted under the statute of 1890 (the Secretary of the Treasury

†"Chap. 165. An Act for the Benefit of the State of Kentucky, Logan and Simpson Counties, and of Louisville, Kentucky, and of Sumner and Davidson Counties, Tennessee.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, be, and he is hereby, authorized and required to audit and adjust the claims of the sinking fund commissioners of the state of Kentucky, of Logan and Simpson counties in said state, of the city of Louisville, Kentucky, and of Sumner and Davidson counties, Tennessee, for internal revenue taxes collected on railroad dividends on stock and on interest on railroad bonds owned by said counties and city, respectively, in the Louisville & Nashville Railroad Company and of said state for internal revenue taxes collected and interest on railroad bonds of the railroad from Louisville to Lexington, and on dividends on stock of said railroads owned by said state, and due and payable to said boards of sinking fund commissioners, respectively, and to said state, counties, and city, to the extent that such taxes were deducted from any dividends or interest due and payable to such boards, respectively, and which have not been heretofore refunded, and for this purpose, any statute of limitations to the contrary notwithstanding, sections nine hundred and eighty-nine, thirty-two hundred and twenty, thirty-two hundred and twenty-six, thirty-two hundred and twenty-seven, and thirty-two hundred and twenty-eight, of the United States Revised Statutes are hereby made applicable and available with the force and effect as if protest and demand for payment had been made within the time prescribed by said sections; and the amounts, when ascertained, as aforesaid, and not heretofore refunded, shall be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year.

"Approved, February 25, 1893."

and the Commissioner of Internal Revenue) performed their duties in examining, auditing, and allowing the claim as they thought the facts and the law required. It was not the case of an allowance of an ordinary claim against the government by an ordinary accounting officer, any more than was the case of *United States* v. *Kaufman*, 96 U. S. 567–570 [24: 792, 793], or that of *United States* v. *Savings Bank* [*United States* v. *Real Estate Sav. Bank*], 104 U. S. 728 [26: 908]. When the decision of these officials was by the Secretary of the Treasury reported to Congress and **254**] an appropriation made *by that body in 1891 of the specific sum mentioned in the report, with directions to pay the amount thus appropriated to the city of Louisville, the time for examination had passed, and it was the duty of the proper officers of the government to pay the money as directed by the statute.

We also think the subsequent statute of 1893 gave no right to the Treasury officers to interfere with or in any manner to review the action of the government under the statutes of 1890 and 1891. It may be true that a small portion of the claim made by the city under the act of 1893 had theretofore been made under the act of 1890, but that portion had then been rejected and, of course, never audited, allowed, or paid. Because a small sum which had once been rejected was included in the principal claim made by the city in 1893, no sort of foundation was thereby laid for the assertion of a right on the part of the government to review and, in substance, reverse the prior action of the Treasury Department in allowing a claim which had been thereafter affirmed by Congress with a substantial direction to pay the amount thereof, and which had been paid accordingly.

The authority given by the act of 1893 required the officers therein named to audit and adjust the claims of the city of Louisville for internal revenue taxes to the extent that such taxes were deducted from any dividends or interest due and payable to the city *and which had not been theretofore refunded*, and for this purpose the statute of limitations was repealed and certain sections of the Revised Statutes were made applicable, and the amounts, when ascertained and not theretofore refunded, were directed to be paid out of the permanent annual appropriation provided for similar claims allowed within the present fiscal year (1893). We think this provision gave no jurisdiction to interfere with or to review the action of the Treasury officials under the act of 1890, or the action of Congress in enacting the statute of 1891.

The act of 1891 was in the nature of a judgment, final in its character, and subject to no appeal, and the duties of the officers of the government thereafter charged with the payment of the moneys appropriated by that act were **255**] not discretionary, *and were limited to the clerical functions of making payment, as directed by the act. *United States* v. *Jordan*, 113 U. S. 418 [28: 1013]. It cannot be possible that Congress had the least intention, when making provision for the payment of other and further claims of the same character, to in any wise open the transactions which had been closed by the payment of the moneys directed by the act of 1891. We have no doubt whatever that if Congress had any such intention it would have made it clear by the use of far different language from that which is contained in the act of 1893. It would have said, in so many words, that, in proceeding under the statute of 1893, the officers named therein should examine into the correctness of the decisions arrived at in 1890 and 1891.

The judgment of the Court of Claims was right, and it should therefore be affirmed.

COMMISSIONERS OF THE SINKING FUND OF LOGAN COUNTY and the County of Logan, Kentucky, *Appts.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 255–263.)

Tax on railroad company's surplus.

Payment by a railroad company of an internal revenue tax on its undistributed surplus under the act of 1864 is a payment of a tax upon its own property, and is not the payment of a tax upon a stock dividend thereafter declared by the railroad company.

[No. 167.]

Argued January 5, 6, 1898. Decided February 21, 1898.

APPEAL from a judgment of the Court of Claims dismissing the petition of the County of Logan *et al.*, claimants, to recover taxes heretofore paid. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Charles C. Binney** and *L. A. Pradt*, Assistant Attorney General, for appellants.

Messrs. **Alphonso Hart** and *Fontaine T. Fox* for appellee.

*Mr. Justice **Peckham** delivered the[**256** opinion of the court:

This application was made to recover taxes heretofore paid, and, like the one in the preceding case, it is based upon the statement that the tax could not be imposed as against the county of Logan, because it was a municipal corporation, and not subject to taxation by Congress upon its municipal revenues. *United States* v. *Baltimore & O. Railroad Company*, 84 U. S. 17 Wall. 322 [21: 597]. Therefore, if it appear that the railroad company has deducted from the dividend due the county the amount of any tax paid to the government on a stock dividend issued by the company, the appellants are entitled to recover. The facts are quite simple.

On the 14th of March, 1894, the appellants filed their petition in the court of claims for the refunding of taxes which they claimed to be entitled to under the act of February 25, 1893 (27 Stat. at L. 477, chap. 165). The act is set out in full in the margin in the preceding case of *United States* v. *City of Louisville*, 169 U. S. 249 [*ante*, 735]. The claim made herein was for internal revenue taxes alleged to have been illegally assessed, and amounting

to the sum of $17,606.14. Under the provisions of the statute above cited the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, audited and adjusted the claim at the sum of $15,397.75, and in due course of procedure it came to the Controller of the Treasury, who directed a warrant to issue for the sum of $9,533.54 (the total amount withheld from the county on account of taxes on cash dividends), and he refused to include in the warrant the sum of $5,864.21, being the balance of the $15,397.75 which had been audited and adjusted as above mentioned, because, as the Controller held, the claim for taxes paid on account of stock dividends was illegal and unauthorized, and this suit is brought to recover the sum which was rejected by the Controller, and which he refused to pay. The court of claims gave judgment in favor of the government and dismissed the petition of claimants, who have appealed to this court from the judgment of dismissal.

The point first made by the counsel for the 257] claimants is *that the audit and adjustment made by the Commissioner of Internal Revenue, and approved by the Secretary of the Treasury, under the act of Congress of 25th of February, 1893, was an award having all the force of a judgment which could not be questioned either by the Controller of the Treasury or by the courts, except for fraud or mistake. The cases of *United States* v. *Kaufman*, 96 U. S. 567 [24:792], and *United States* v. *Savings Bank* [*United States* v. *Real Estate Sav. Bank*], 104 U. S. 728 [26:908], are cited for the purpose of showing the conclusiveness of the action of the officers above named.

All that those cases hold is, that where in a case somewhat similar to this the claim had been allowed by the officers named in the statute, "the allowance may be used as the basis of an action against the United States in the court of claims, where it will be prima facie evidence of the amount that is due, and put on the government the burden of showing fraud or mistake. This burden is not overcome by proving that some other officer in the subsequent progress of the claim through the department declined to do what the law or treasury regulations required of him before payment could be obtained. The fact of fraud or mistake must be established by competent evidence the same as any other fact in issue. An allowance by the commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an act of Congress." *United States* v. *Savings Bank* [*United States* v. *Real Estate Sav. Bank*], 104 U. S. 728, at 733 [26: 908, at 909]. The question of the conclusiveness of the action of the officers of the government under their general powers is also referred to in *Wisconsin C. R. R.* v. *United States*, 164 U. S. 190 [41:399], and it is there held that the government is not bound by the act of its officers in making an authorized payment under misconstruction of the law. However, the act of the Commissioner of Internal Revenue and the Secretary of the Treasury in approving the claim may be assumed to be prima facie evidence that the amount so approved by them was due the claimant from the government, and the burden therefore rested upon the government of showing that the allowance of *the amount [258 claimed in this proceeding was made through a mistake on the part of those officials. Unless this mistake is made apparent by the findings of the court below, its judgment in refusing to give effect to the allowance of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury, might have to be reversed. If, however, the findings show that those officials did make a mistake in allowing that portion of the claim made which is now in suit, the judgment of the court below, so far as this point is concerned, must be affirmed.

The defense made by the government upon the merits is based on the provisions of the statute of 1893, and upon the allegations that the findings of the court below substantially show there were no taxes paid upon any stock dividends declared in 1867 or 1868. It is added that the claim on the part of the county of Logan was not in reality for any taxes actually paid on "dividends in scrip" or "stock dividends" issued to appellants, but that it was for a certain proportion of the taxes paid by the railroad company on that part of its profits which were not distributed in dividends, and which in fact constituted what the internal revenue acts of 1864 and 1866 called "profits carried to the account of any fund or used for construction," and which funds were taxable under those acts as the property of the corporation.

Counsel insists that a tax upon undistributed profits in the treasury or belonging to the corporation is like a tax on gross earnings, a tax on the corporation on account of its own property, and not to be thereafter recovered by this claimant, either under the act of 1893 or under those sections of the United States Revised Statutes therein alluded to.

It must be remembered that the court of claims under the act of 1893 was simply given jurisdiction to examine a claim which was otherwise barred by the statute of limitations. The act gave no other right and created no claim against the government not otherwise existing. The right of recovery for an illegal tax had been provided for by the Revised Statutes of the United States, § 3220, and that remedy could have been pursued for two years after the payment of *any such tax. [259 U. S. Rev. Stat. § 3228. In this case the time thus limited had expired, and the act of 1893 was passed for the purpose of setting aside the bar of the then existing statute. The right to demand the refunding of the money in dispute must depend, therefore, upon the question whether any tax on a stock dividend had been collected from the company by the government, and a proportionate amount thereof deducted by the company from the dividend otherwise due the county. No deduction of any tax from the scrip dividend due to the claimant was ever made in terms. It is sought to be inferred from the fact that a prior payment of a tax by the company on its undistributed surplus had thereby diminished that fund by the amount of the tax, and that a stock dividend must be assumed to represent

profits not distributed in cash dividends, and that the claimant would have received more stock if the profits had not been diminished by the payment of the tax from which it is said a municipal corporation was exempt under the decision of the Supreme Court in the case of *United States* v. *Baltimore & O. Railroad*, above cited. Of course, the payment of the tax diminished the profits of the company by just that amount. But, at the time when it was paid, the full amount thereof was due the government from the company itself, and not one penny could properly have been deducted from the amount of the tax by reason of the fact that a municipal corporation owned a certain amount of the stock of the company. All taxes which were levied on the property of the company were payable in their full amount by the company, and not a dollar could be legally deducted from such tax on account of the character of any owners of its stock. Consequently, when a stock dividend is declared, the fact that the directors might have chosen to declare a larger one, if it had not been for the payment of the taxes the company had made on its own property, is entirely immaterial. So is the fact, if it be a fact, that the total stock dividend was reduced by the amount which the company had theretofore paid as a tax upon its undistributed surplus.

There is no finding of the court below which in terms shows that the tax in question here **260**] was ever paid on a "stock" or *"scrip" dividend. All that appears is that a stock dividend of 40 per cent on its capital was declared by the railroad company by a resolution adopted on the 16th of November, 1867, which provided that the stock should be issued on February 10, 1868.

The court below did find that prior to the passage of the act of February 25, 1893, certain proceedings had theretofore taken place in the Treasury Department relative to the same taxes paid by the same railroad company. (The court in this finding referred to the proceedings in regard to the claim made by the city of Louisville for a return of taxes, under the circumstances detailed in that case (just decided, 169 U. S. 249 [*ante*, 735]) and which are therein set forth.)

The court then set forth in this case the finding made in the *Louisville Case*, and in that case, after speaking of the fact that cash dividends had been declared upon the stock of the railroad company, and that there existed a large amount of undistributed surplus in the treasury of the railroad company, the finding continued: "These cash dividends and the undistributed surplus which was converted into stock or scrip dividends were held by the officers of the government to be subject to taxation, and taxes were assessed and collected according to the terms of the statute in force at the time of the respective collections."

Taking all the facts as found by the court below, it appears that the only tax paid was paid on the undistributed surplus of the company while it remained such surplus in its hands and while it was a portion of its own property, as much so as anything else owned by it, and that thereafter the company declared a stock dividend of 40 per cent upon its old capital.

By the provisions of the internal revenue act of 1864 (13 Stat. at L. 223, chap. 173, § 122), a stock dividend was subject to a tax of 5 per cent. So far as material the section provides: "That any railroad . . . that may have declared any dividend in scrip, or money due or payable to its stockholders, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used *for construction, shall be subject to and[**261** pay a duty of five per centum on the amount of all such interest or coupons, dividends or profits, whenever the same shall be payable; and said companies are hereby authorized to deduct and withhold from all payments, on account of any interest, or coupons and dividends due and payable as aforesaid, the duty of five per centum," etc.

Under this plain provision of the statute it is perfectly clear that the stock dividend in question was a proper subject of taxation. But, as already mentioned, there is no finding that any such tax has been paid, and, of course, none that any deduction on its account was ever made from any dividend due the county. On the contrary, from the findings that have been made, it appears that the only tax which has been paid was paid by the railroad company upon its undistributed surplus at a time when such fund was its own absolute property. That fact, taken in connection with the declaration of the dividend of 40 per cent upon the amount of the capital of the railroad company, does not show a payment of the tax on the stock dividend declared under the resolution mentioned.

It is plain that this surplus fund, which, at the time it was taxed, belonged to the company, was not distributed to the stockholders, nor was it converted into stock by reason of the stock dividend. If it had been a cash dividend sufficiently large in amount to cover the surplus, then the payment of the dividend would have effected the distribution of the fund. But no distribution could take place by any stock dividend. Such a dividend distributed nothing but stock, which made the stockholder neither richer nor poorer than he was before it was issued.

Although the court finds that the undistributed surplus of the railroad company was held by the officers of the government to be subject to taxation, all taxes were assessed and collected according to the terms of the statute in force in the time of the respective collections, yet such fact does not advance us a step in the direction of showing that any duties were paid on the stock dividend. The tax or duties had been *paid by the company on[**262** a fund which then belonged to it. Unless payment of the tax on this undistributed surplus was in substance a payment of the 5 per cent tax on the stock dividend, then there is no finding that any such payment was ever made. That payment cannot be so regarded because the tax on the undistributed surplus was a tax upon the property of the company, and was paid as such by the company, and if the amount thereof were deducted by the com-

pany from the subsequent stock dividend, that would be an act of the company, and would not render the prior payment of the tax on the undistributed surplus improper even with regard to Logan county. Otherwise all payments of taxes made by a company upon its own property would be subject to a deduction proportioned to the amount of its stock held by states or other corporations of a municipal character. The adoption of a resolution for a stock dividend, together with the issue of the stock, could have absolutely no effect upon the undistributed surplus fund, so far as any distribution thereof was concerned. The shareholder got no more interest in or right to that fund than he had before, and the prior payment of the tax upon it did not thereby decrease the amount of the 40 per cent dividend upon the old capital by a penny. And yet it is only upon the payment of the tax which the company made on its property, in the shape of its undistributed surplus, that the claimants can by this record found their claim to recover their proportion of such tax. If allowed, then the claimant could, upon the same reasoning, recover its proportion of every tax paid by the company upon any other of its property, unless the statute of limitations applied. If the company in fact reduced its stock dividend by the amount of the tax which it had previously paid on the surplus fund belonging to it, such fact gives no support to the claim of the county to recover from the government an amount of a perfectly legal tax. And as before stated, the proof really is that there was no other payment of a tax than one upon the surplus as the property of the company.

An effort is made to show that this payment of a duty or tax on the undistributed fund **263**] might be treated as a payment *of such duty or tax on the stock dividend, under the proviso contained in § 121 of the statute of 1864, which reads: "Provided, That when any dividend is made which includes any part of the surplus or contingent fund of any . . . railroad company, which has been assessed and the duty paid thereon, the amount of duty so paid on that portion of the surplus or contingent fund may be deducted from the duty on such dividend."

It is perfectly apparent that this proviso includes only cash dividends. It is a dividend which is to include for distribution any part of the surplus or contingent fund of a railroad or other company. How can a stock dividend distribute a fund? As already remarked, a stock dividend distributes nothing but stock. Hence, there is no sense in applying the statute to a case where no distribution of a fund is made and where the fact of a double payment on the fund cannot arise. The proviso clearly refers to a case where a surplus has already paid duty and where subsequently to that time it is distributed to the shareholders. Under such circumstances that portion of the dividend which has thus once paid its duty of 5 per cent is not to be taxed again when distributed to the shareholders. But so long as there is no distribution, the tax paid on the surplus as surplus and which belonged to the corporation when the tax was paid, is not to be credited on or deducted from a subsequent tax upon a stock dividend which does not distribute the surplus nor in any manner change its ownership.

We agree, therefore, with the opinion of the court below, and we hold that where a railroad company pays a tax on its undistributed surplus under the act of 1864, it is thereby paying a tax upon its own property, and that such payment cannot be regarded as a payment of the tax upon a stock dividend thereafter declared by the railroad company.

The judgment of the Court of Claims should therefore be affirmed.

A. M. THOMAS and Others, Commis-[**264** sioners of Kay County, etc., *Appts.*,

v.

GAY and Reed *et al.*

GAY and Reed *et al.*, *Appts.*,

v.

A. M. THOMAS and Others, Commissioners of Kay County.

(See S. C. Reporter's ed. 264-284.)

Act of Congress supersedes treaty—law of Oklahoma taxing cattle—not a burden on interstate commerce—not taxation without representation—does not violate uniformity—law-making power.

1. An act of Congress may supersede a prior treaty, and the act of May 2, 1890, creating the territory of Oklahoma, which included the Osage and Kansas Indian lands within the limits of that territory, must prevail against the provisions of the treaty excepting such lands from inclusion within any territory or state.
2. The territorial law of Oklahoma of March 5, 1885, making cattle subject to taxation which are kept or grazed on the Indian reservations in said territory, is not a violation of the rights of the Indians; such taxation is not upon the lands or privileges of the Indians.
3. Such tax law of said territory is not in conflict with the power of Congress to regulate commerce, as such a tax is too remote and indirect to be a tax or burden on interstate commerce, or an interference with the power of Congress.
4. Such taxation is not taxation without representation, or invalid as to nonresident owners of cattle as being without benefit to them, where the unorganized district or reservation has been attached to an organized county.
5. Said territorial law is not invalid because the taxes in question are levied on personal prop-

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NOTE.—*As to construction and operation of treaties*, see note to United States v. The Amistad, 10: 826.

As to Indians and Indian tribes, their status and rights; jurisdiction and control over them,—see note to Worcester v. Georgia, 8: 483.

As to power of Congress to regulate commerce, see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.

As to interstate commerce; regulation of; power of Congress; how far exclusive,—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

As to power of Congress to control commerce; state statute, when invalid as being a regulation of commerce; drummers; vessels; railways; telegraph companies; state tax on commerce, when invalid,—see note to Harmon v. Chicago, 37: 216.

erty only and real property is thus exempted, or because the assessment is to be made at a different time from that provided for in the organized country, and therefore violates uniformity.

6. The law-making power is to determine all questions of discretion or policy in ordering or apportioning taxes, and all necessary rules and regulations for their collection; such questions are not for the courts unless the legislature transcends its functions.

[Nos. 287, 439.]

Argued and Submitted October 21, 22, 1897. Decided February 21, 1898.

APPEALS from a judgment of the Supreme Court of the Territory of Oklahoma affirming the judgment of the District Court of Kay County, in said Territory, holding that all of the levies made for territorial purposes and the county levy for court expenses were valid, and dissolving the injunction as to those levies and as to all of the other county levies making the injunctions perpetual, in actions brought by Gay and Reed *et al.*, plaintiffs, against A. M. Thomas *et al.*, commissioners of Kay County, to obtain injunctions restraining the defendants from collecting certain taxes. Said actions were consolidated into one. *Reversed*, and cause remanded with directions to proceed in conformity with the opinion.

Statement by Mr. Justice **Shiras:**

These are cross-appeals from the supreme court of the territory of Oklahoma. The facts, as stated in the opinion of the court below, were as follows:

The appellants are nonresidents of the territory of Oklahoma and owners of large herds of cattle that were kept and grazed, during a portion of the year 1895, in parts of the Osage Indian reservation in this territory.

The appellees are the board of county commissioners, treasurer, and sheriff of Kay county, Oklahoma territory.

On the 3d Monday in February, 1894, the supreme court of the territory of Oklahoma, by an order entered on the journals of said court, attached to said county of Kay, for judicial purposes, all the Kaw or Kansas Indian reservation and all of the Osage Indian reservation north of the township line dividing townships 25 and 26 north. All of said reservations so attached to said Kay county for judicial purposes **265**] by such *order are without the boundaries of said Kay county as established by the governor, and are not within the boundaries of any organized county of this territory. Said territory so attached to said county of Kay for judicial purposes is comprised wholly of lands owned and occupied by Indian tribes, and consists principally of wild, unimproved, and unallotted lands used for grazing purposes; that plaintiffs in error during the year 1895 and during the month of April of said year drove, transported, and shipped to the ranges and pastures in that part of said Osage Indian reservation attached to said Kay county for judicial purposes, as aforesaid, large herds and numbers of cattle, which were taken to said reservation in pursuance and by virtue and authority of certain leases to plaintiffs in error for grazing purposes made by the Osage tribal government under the supervision of the agent in charge of said tribe and upon the ratification and approval of the commissioner of Indian affairs and of the Secretary of the Interior, and said cattle of said plaintiffs in error were on the 1st day of May kept and grazed on that part of said Indian reservation attached to said Kay county for judicial purposes, as aforesaid.

By an act approved March 5, 1895, the legislative assembly of the territory of Oklahoma amended § 13, art. 2, chap. 70, of the Oklahoma Statutes relating to revenue, so that the same reads as follows: "That when any cattle are kept or grazed or any other personal property is situated in an unorganized country, district, or reservation of this territory, such property shall be subject to taxation in the organized county to which said country, district, or reservation is attached for judicial purposes," and authorized the board of county commissioners of the organized county or counties to which such unorganized country, district, or reservation is attached to appoint a special assessor each year, whose duty it should be to assess such property, and conferred upon such special assessor all the powers and required him to perform all the duties of a township assessor. The assessor so provided for was required to begin and perform his duties between the 1st day of April and the 25th day of May of each year and *to complete his duties and[**266** return his tax lists on or before June 1, and the property therein authorized to be assessed, it was provided, should be valued as of May 1, each year.

In pursuance of the provisions of said act the county commissioners of said Kay county did duly appoint a special assessor for the year 1895 to assess such cattle as were kept and grazed and any other personal property situated in the unorganized country and parts of Indian reservations attached to said Kay county for judicial purposes, and said special assessor did, by virtue of said appointment, assess all the personal property in the territory so attached to the county of Kay for judicial purposes, including all of the cattle of the said appellants kept and grazed in said reservation on the 1st day of May, 1895. The said special assessor assessed the property of these appellants so located on said territory attached to said county of Kay for judicial purposes, as aforesaid, and returned the same upon an assessment roll at the total valuation of $760,469; that thereafter the said sum was, by the clerk of said county, carried into the aggregate assessment for said county, and by him certified to the auditor of the territory; that the territorial board of equalization in acting upon the various assessment of the various counties as certified to said board raised the aggregate valuation of the property returned for taxation upon the tax rolls of said county of Kay 35 per cent, and the county clerk for said county carried out the raised valuation so certified to him by said territorial board of equalization against the property of these appellants and made the aggregate valuation of such property $1,026,634. Thereafter the territorial board of equalization levied and duly certified to the county clerk of the county of Kay tax levies for territorial purposes for the year 1895 as follows: General revenue, three mills on the dollar; university fund, one half mill on the dollar; normal-school fund, one half mill on

the dollar; bond-interest fund, one half mill on the dollar; board of education fund, one half mill on the dollar.

That the board of county commissioners for the county of Kay made the following levies for 267]the year 1895: for salaries, five *mills on the dollar; for contingent expenses, three mills on the dollar; for sinking fund, one and one half mills on the dollar, for court expenses, two and one half mills on the dollar; for county supplies, three mills on the dollar; for road and bridge fund, two mills on the dollar; for poor fund of said county, one mill on the dollar; for county school fund of said county, one mill on the dollar.

The county clerk of said county of Kay carried the valuation of the property of these plaintiffs in error upon the tax rolls of said county, and against the same extended the levies as aforesaid, and charged against the property of these plaintiffs in error in the aggregate the sum of $26,174.16.

Before these taxes became delinquent, plaintiffs in error began to remove or attempted to remove their respective property from the territory attached to Kay county for judicial purposes and beyond the limits of Oklahoma territory. The treasurer of said Kay county issued tax warrants for the several amounts of taxes levied against the property of each of said plaintiffs in error, and delivered the same to the sheriff of said county for execution; said sheriff seized certain property of each of appellants by virtue of such tax warrants. The appellants filed their several petitions in the district court of Kay county, and, on application, obtained injunctions restraining the appellees from making any further attempt to collect such taxes. Afterwards, on motion, the several actions were consolidated into one. To the petition filed in such consolidated action the defendants in error filed a general demurrer. At the hearing, the district court sustained the demurrer in part and overruled it in part, holding that all of the levies made for territorial purposes and the county levy for court expenses were valid, and as to those levies the injunction was dissolved, and as to all of the other county levies such injunctions were made perpetual. From that part of the order and judgment of the court dissolving the injunction as to the territorial taxes and the one county fund levy plaintiffs appealed. From that part perpetuating the injunction as to all of the county levies, except that for court expenses, the defendants appealed and filed their 268]cross petitions in *error, and the case was taken to the supreme court of the territory. In that court the judgment of the district court was affirmed. Three of the four judges, who sat in the case, agreed in holding that the taxes levied for territorial and court-expense funds were valid; two were of opinion that the balance of the taxes were unauthorized; one was of opinion that all the taxes were validly levied, and the fourth judge dissented *in toto*. From that judgment of the supreme court of the territory both parties appealed to this court.

Mr. **J. F. King** for Thomas *et al.*, Board of Commissioners, *et al.*

Messrs. **Henry E. Asp** and **John W. Shartel** for Gay and Reed *et al.*

Mr. Harper S. Cunningham, Attorney General of the Territory of Oklahoma, filed (by leave) a brief on behalf of the said Territory.

Messrs. Jeremiah M. Wilson and *O. F. Goddard* filed a brief for certain owners of cattle.

Mr. Justice Shiras delivered the opinion of the court:

It is claimed that the legislative assembly of the territory of Oklahoma was without power to enact the law of March 5, 1895, providing for the taxing of cattle grazing upon the Indian reservations under leases granted by the Indians, because, both before and since the creation of said territory, exclusive jurisdiction over said Indians and their lands, and over all matters in any way affecting them, or in which they are interested, is in the United States.

It is, indeed, true that the lands in question, constituting the reservations of the Osage and Kansas Indians, are portions of lands previously granted by patent of the United States, in pursuance of the treaty of May 6, 1828 (7 Stat. at L. 311), and of the treaty of December 29, 1835 (7 Stat. at L. 478), to the Cherokee Nation *of Indians, and that it was provided, in[269 those treaties, that the lands so granted should not, without the consent of the Indians, at any future time be "included within the territorial limits or jurisdiction of any state or territory."

In the subsequent treaty with the Cherokees of July 19, 1866 (14 Stat. at L. 799, 804), it was stipulated that the United States might "settle friendly Indians in any part of the Cherokee country west of the 96th degree, to be taken in a compact form in quantity not exceeding 160 acres for each member of each of said tribes thus to be settled; the boundaries of each of said districts to be distinctly marked, and the land conveyed in fee simple to each of said tribes, . . . said lands thus to be disposed of to be paid for to the Cherokee Nation, at such price as may be agreed on between the said parties in interest, subject to the approval of the President."

On the 26th of June, 1866, a treaty was made with the Osage Indians (14 Stat. at L. 687) wherein it was provided that a large part of the reservation then occupied by that tribe in Kansas was sold outright to the government for a certain sum of money, and by article 16 of said treaty it was provided that "if said Indians should agree to remove from the state of Kansas and settle on lands to be provided for them by the United States in the Indian territory on such terms as may be agreed on between the United States and the Indian tribes now residing in said territory, or any of them, then the diminished reservation shall be disposed of by the United States in the same manner and for the same purposes as hereinbefore provided in relation to said trust lands, except that fifty per cent of the proceeds of the sale of said diminished reserve may be used by the United States in the purchase of lands for a suitable home for said Indians in said Indian territory."

On July 15, 1870 (16 Stat. at L. 335, chap. 296), Congress passed an act, providing, in substance, that whenever the Osages should

agree thereto, in such manner as the President should prescribe, said Indians should be removed from their said diminished reservation in the state of Kansas to the lands to be provided for them in the Indian territory, "to con-
270]sist of a tract of land *in compact form, equal in quantity to 160 acres for each member of said tribe, . . . to be paid for out of the proceeds of the sales of their lands in the state of Kansas;" and subsequently the Osages were established upon their present reservation, and the Cherokees were paid therefor the sum of $1,650,600; and by an act approved June 5, 1872 (17 Stat. at L. 228), Congress confirmed this reservation in said Cherokee country.

The history of the transfer of the so-called Kaw or Kansas Indians from their reservation in the state of Kansas to lands bought from the Cherokee Nation, constituting their present reservation, was similar to that of the Osages, and calls for no special narration.

In 1883, sufficient money having been realized from the sales to pay for said lands, a deed was duly executed by the Cherokees conveying all their rights and title in and to the same to the United States for the use of the said Osage and Kansas Indians, which deed is recorded in volume 6 of the Indian Deeds in the office of the commissioner of Indian affairs in the Department of the Interior.

It is alleged that, by no subsequent treaty, have either the Cherokee or the Osage or Kansas Indians consented that the lands here in question should be included within the limits or jurisdiction of the territory of Oklahoma; and it is accordingly now contended that under the provision contained in the Cherokee treaties, the lands therein designated should never be embraced within the limits of a territory or state without the consent of said Indians, the exemption or right thereby created runs with the land, subject to which said lands, or any part thereof, could be conveyed to other Indians, and is not a right belonging solely to the Cherokees, which ceased to exist when the ownership of the Cherokees therein terminated.

Whether, without express stipulation to that effect, the right granted by treaty to the Cherokee Nation, to be exempt as to their lands, from inclusion within the limits of any territory or state, passed with the grant of a portion of such lands to the Osage and Kansas Indians, we need not consider, because, even if such were the law, it is conceded that the United States have, by the act of May 2, 1890 (26
271] Stat. at L. 81), *creating the territory of Oklahoma, included these Osage and Kansas Indian lands within the geographical limits of said territory.

It is well settled that an act of Congress may supersede a prior treaty, and that any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the government.

"It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government. The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress (*Foster & Elam* v. *Neilson*, 27 U. S. 2 Pet. 314 [7: 435]); and an act of Congress may supersede a prior treaty (*Taylor* v. *Morton*, 2 Curt. C. C. 454).

"In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. . . . In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered." *The Cherokee Tobacco* [*207 ¼ lb. Papers Smoking Tobacco* v. *United States*], 78 U. S. 11 Wall. 616 [20: 227].

That was a case where an act of Congress extended the revenue laws as respected tobacco over the Indian territories, regardless of provisions in prior treaties that exempted tobacco raised by Indians on their reservations.

The grant of legislative power to the territory of Oklahoma, contained in the 6th section of the organic act, was as follows:

"The legislative power of the territory shall extend to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed on the property of the United States, nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents, nor shall *any law be passed [272 impairing the right to private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to taxation shall be taxed in proportion to its value."

With the Indian reservations brought, by valid legislation, within the limits of the territory, and with the broad grant of legislative power contained in the section just quoted, we are next to consider objections urged to the validity of the act of the territorial assembly, approved March 5, 1895, wherein it provides that "when any cattle are kept or grazed, or any other personal property is situated in any unorganized country, district, or reservation of this territory, such property shall be subject to taxation in the organized county to which said country, district, or reservation is attached for judicial purposes."

Our attention is called to the following provision contained in the 1st section of the organic act:

"Nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said territory under the laws, agreements, and treaties of the United States, or to impair the rights of person or property pertaining to said Indians, or to affect the authority of the government of the United States to make any regulation or to make any law respecting said Indians, their lands, property, or other rights, which it would have been competent to make or enact if this act had not been passed."

And also to § 3 of the act of February 28, 1891 (26 Stat. at L. 794, chap. 383), as follows:

"Where lands are occupied by Indians who

have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes, in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior."

And the contention is that, irrespective of the question whether said lands are, by the 273] treaties, excluded from the *limits and jurisdiction of the territory of Oklahoma, the taxation of cattle located for grazing purposes upon the reservations, under leases duly authorized by act of Congress, is a violation of the rights of the Indians and an invasion of the jurisdiction and control of the United States over them and their lands.

As to that portion of the argument which claims that, even if the Indians were not interested in any way in the property taxed, the territorial authorities would have no right to tax the property of others than Indians located upon these reservations, it is sufficient to cite the cases of *Utah & N. Railway Company* v. *Fisher*, 116 U. S. 28 [29: 542], and *Maricopa & P. Railroad Co.* v. *Arizona*, 156 U. S. 347 [39: 447], in which it was held that the property of railway companies traversing Indian reservations are subject to taxation by the states and territories in which such reservations are located.

But it is urged that the Indians are directly and vitally interested in the property sought to be taxed, and that their rights of property and person are seriously affected by the legislation complained of; that the money contracted to be paid for the privilege of grazing is paid to the Indians as a tribe, and is used and expended by them for their own purposes, and that if, by reason of this taxation, the conditions existing at the time the leases were executed were changed, or could be changed by the legislature of Oklahoma, at its pleasure, the value of the lands for such purposes would fluctuate or be destroyed altogether according to such conditions.

But it is obvious that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians. A similar contention was urged in the case of *New York, Lake Erie, & W. Railroad Co.* v. *Pennsylvania*, 158 U. S. 431 [39: 1043]. There the state of Pennsylvania had imposed a tax upon a railroad, situated within the borders of that state, but leased to another railroad company engaged in carrying on interstate commerce, and this tax was measured by a reference to the amount of the tolls received by the lessor company from the lessee company. It was claimed that the imposition of a tax on tolls might lead to increasing them in an effort to throw 274]*their burden on the carrying company, and thus, in effect, become a tax or charge upon interstate commerce. But this court held that such a tax upon tolls was too indirect and remote to be regarded as a tax or burden on interstate commerce. A similar view was taken in the case of *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150 [41: 953], where a tax imposed by the state of Kentucky on the intangible property of a company which owned and maintained a bridge over a river between two states was contended to be objectionable as constituting a burden upon interstate commerce, but it was held that the fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls and thus be a burden on interstate commerce, was too remote and incidental to make it a tax on the business transacted. *Adams Exp. Co.* v. *Ohio State Auditor*, 166 U. S. 185 [41: 965].

The suggestion that such a tax on the cattle constitutes a tax on the lands within the reasoning in the case of *Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 429 [39: 759], is purely fanciful. The holding there was that a tax on rents derived from lands was substantially a tax on the lands. To make the present case a similar one the tax should have been levied on the rents received by the Indians, and not on the cattle belonging to third parties.

It is further contended that this tax law of the territory of Oklahoma, in so far as it affects the Indian reservations, is in conflict with the constitutional power of Congress to regulate commerce with the Indian tribes. It is said to interfere with, or imposes a servitude upon, a lawful commercial intercourse with the Indians, over which Congress has absolute control, and in the exercise of which control it has enacted the statute authorizing the leasing by the Indians of their unoccupied lands for grazing purposes.

The unlimited power to Congress to deal with the Indians, their property and commercial transactions, so long as they keep up their tribal organizations, may be conceded; but it is not perceived that local taxation, by a state or territory, of property of others than Indians would be an interference *with Congres [275 sional power. It was decided in *Utah & Northern Railway Co.* v. *Fisher*, 116 U. S. 28 [29: 542], that the lands and railroad of a railway company within the limits of the Fort Hill Indian reservation in the territory of Idaho was lawfully subject to territorial taxation, which might be enforced within the exterior boundaries of the reservation by proper process. The question was similarly decided in *Maricopa & P. Railroad Company* v. *Arizona Territory*, 156 U. S. 347 [39: 447].

The taxes in question here were not imposed on the business of grazing, or on the rents received by the Indians, but on the cattle as property of the lessees, and, as we have heretofore said that such a tax is too remote and indirect to be deemed a tax or burden on interstate commerce, so is it too remote and indirect to be regarded as an interference with the legislative power of Congress.

These views sufficiently dispose of the objections urged against the power of the legislative assembly of Oklahoma to pass laws taxing property within the limits of the Indian reservations and belonging to persons not Indians. We must now consider the objections made to the mode in which that power was exercised in the act of March 5, 1895.

The most fundamental of these objections

is found in the assertion that, so far as nonresident owners of cattle grazing within the Indian reservations are concerned, it is taxation without representation, and that such persons derive no benefit from the expenditure of the moneys accruing from the tax.

The organic act, as we have already seen, extends the exterior boundary of the territory around these Indian reservations. It also provided for the division of the territory into council and representative districts, and for the election of a legislative assembly and of a delegate to Congress. The Indian reservations were not included within any of the council or representative districts. The act provided that there should be seven counties, and fixed the county seats, and under the authority of the act the governor established the boundaries of these counties. The legislature was authorized to change the boundaries of the original counties, but were not given authority to include these Indian reservations, 276]or any lands not then *open to settlement in any of the counties. By §9 it was provided that the territory should be divided into three judicial districts; that the supreme court should define such judicial districts; and that the territory not embraced in organized counties should be attached, for judicial purposes, to such organized county or counties as the supreme court should determine. In May, 1890, the supreme court made an order attaching the several Indian reservations to certain organized counties for judicial purposes, and by an order on February 3, 1894, attached the reservations in question in this case to Kay county for judicial purposes.

As already stated, by the act of March 5, 1895, it was provided that when any cattle are kept or grazed or any other personal property is situated in any unorganized country, district, or reservation, such property shall be subject to taxation in the organized county to which said country, district, or reservation is attached for judicial purposes; and provision was made for the appointment of a special assessor for such unorganized country, district, or reservation. Under this condition of affairs it is contended that the taxing power cannot be lawfully exerted as respects property within these reservations. It is said that those to be affected by the tax have no voice in the election of the legislature to make the laws by which they are to be governed; that they have no school facilities for their children; that they cannot organize towns, so as to have the benefit of the police and sanitary laws of the territory; that the officers of Kay county have no authority to expend any portion of the moneys raised by this taxation in improving roads within the Indian reservation; that they cannot participate in the election of the territorial delegate; and that they are not benefited by the taxes appropriated for salary fund, contingent expense fund, sinking fund, road and bridge fund, poor fund, etc.

Undoubtedly there are general principles, familiar to our systems of state and Federal government, that the people who pay taxes imposed by laws are entitled to have a voice in the election of those who pass the laws, and that taxes must be assessed and collected for public purposes, and that the duty *or[277 obligation to pay taxes by the individual is founded in his participation in the benefits arising from their expenditure. But these principles, as practically administered, do not mean that no person, man, woman, or child, resident or nonresident, shall be taxed, unless he was represented by someone for whom he had actually voted, nor do they mean that no man's property can be taxed unless some benefit to him personally can be pointed out. Thus it has been held that personal allegiance has no necessary connection with the right of taxation; an alien may be taxed as well as a citizen. *Mager* v. *Grima*, 49 U. S. 8 How. 494 [12:1170]; *Witherspoon* v. *Duncan*, 71 U. S. 4 Wall. 210 [18:339]. So, likewise, it is settled law that the property, both real and personal, of nonresidents may be lawfully subjected to the tax laws of the state in which they are situated.

The specific objection made to the validity of these taxes as imposed on personal property located in unorganized counties or in the reservations does not seem to us to be well founded. We have already cited the cases of *Utah & Northern Railway Company* v. *Fisher*, 116 U. S. 28 [29:542], and *Maricopa & P. R. R. Co.* v. *Arizona*, 156 U. S. 347 [39:447], wherein territorial tax laws were held to have a valid operation over property lying within Indian reservations. *Union Pac. R. R. Co.* v. *Peniston*, 85 U. S. 18 Wall. 5 [21:787], was a case where unorganized country was attached by law to an organized county for judicial and revenue purposes, and the law was sustained, as appears in the decision delivered by Mr. Justice Strong, as follows:

"It remains only to notice one other position taken by the complainants. It is, that if the act of the state under which the tax was laid be constitutional in its application to their property within Lincoln county, the property outside of Lincoln county is not lawfully taxable by the authorities of that county under the laws of the state. To this we are unable to give our assent. By the statutes of Nebraska the unorganized territory west of Lincoln county, and the unorganized county of Cheyenne, are attached to the county of Lincoln for judicial and revenue purposes. The authorities of that county, therefore, were the proper authorities to levy the tax upon the property thus placed under their charge for revenue purposes."

*In *Llano Cattle Co.* v. *Faught* [69 Tex. [278 402], 5 S. W. 494, the case was that an unorganized county was attached by law to the organized county of Scurry for judicial purposes. The officers of Scurry county assessed and levied county taxes upon the cattle of the plaintiff, a foreign corporation, kept in the unorganized county, and it was held that the unorganized county, being in effect a part of the county to which it was so attached, the collection of taxes on such personalty of a nonresident may be enforced by the tax collector of the latter county. We are referred to similar decisions in Kansas: *Philpin* v. *McCarty*, 24 Kan. 393; in Ohio: *Kemper* v. *McClelland*, 19 Ohio, 308;

in Iowa: *Hilliard* v. *Griffin* [72 Iowa, 331], 33 N. W. 156; in Michigan: *Township of Comins*, and *Township of Harrisville*, 45 Mich. 442.

It is further contended that, while the taxes assessed for territorial and court-expense funds may be valid, yet that the balance of the taxes, levied for county purposes and expended within the geographical limits of Kay county, are unauthorized, for the reason that the people on these reservations are not interested in such taxes, and receive no benefit from their expenditure. But, as it seems to us, it cannot be maintained that those plaintiffs whose cattle are within the protection of the laws of Oklahoma receive no benefit from the expenditures in Kay county. Certainly they have some advantage in the improvement of the roads within that county, when they journey to and from the towns and settlements in the organized county. They are interested in the prevalence of law and order in the communities adjacent to their property, and in the provision made for the care of the poor and insane. It is to be presumed that they have a right to send their children to the schools in the organized county.

The cases, both state and Federal, are numerous in which it has been held that taxes, otherwise lawful, are not invalidated by the allegation, or even the fact, that the resulting benefits are unequally shared.

In *Kelly* v. *Pittsburgh*, 104 U. S. 78 [26: 658], the complaint was that certain water, street, gas, school, and other taxes were unlawfully assessed against the property of the plain-**279**]tiff, which, *though lying within the city limits, were not benefited by such taxes; but this court, affirming the supreme court of Pennsylvania, said:

"We are unable to see that the taxes levied on this property were not for a public use. Taxes for schools, for the support of the poor, for protection against fire, and for waterworks are the specific taxes found in the list complained of. We think it will not be denied by anyone that these are public purposes in which the whole community have an interest, for which by common consent property owners everywhere in this country are taxed. There are items styled city tax and city buildings, which, in the absence of any explanation, we must suppose to be for the good government of the city, and for the construction of such buildings as are necessary for municipal purposes. . . . It may be true that he does not receive the same amount of benefit from some of these taxes as do citizens living in the heart of the city. It probably is true, from the evidence found in this record, that his tax bears a very unjust relation to the benefits received as compared with its amount. But who can adjust with precise accuracy the amount which each individual in an organized civil community shall contribute to sustain it, or can insure in this respect absolute equality of burdens and fairness in their distribution among those who must bear them?

"We cannot say judicially that Kelly [the plaintiff] received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it. The waterworks will probably reach him some day, and may be near enough to him now to serve him on some occasion. The schools may receive his children, and in this regard he can be in no worse condition than those living in the city who have no children, and yet who pay for the support of the schools. Every man in a county, a town, a city, a state, is deeply interested in the education of the children of the community, because his peace and quiet, his happiness and prosperity, are largely dependent upon the intelligence and moral training which it is the object of public schools to supply to the children of his neighbors and associates, if he has none himself."

*It is no objection to a tax that the party **[280** required to pay it derives no benefit from the particular burden; *e. g.*, a tax for school purposes levied upon a manufacturing corporation. But, in truth, benefits always flow from the appropriation of public moneys to such purposes, which corporations in common with natural persons receive in the additional security to their property and profits. *Amesbury Nail Factory Co.* v. *Weed*, 17 Mass. 53.

In Cooley on Taxation, 16, the result of a wide examination of the cases is thus stated:

"If it were practicable to do so, the taxes levied by any government ought to be apportioned among the people according to the benefit which each receives from the protection the government affords him, but this is manifestly impossible. The value of life and liberty, and of the social and family rights and privileges cannot be measured by any pecuniary standard; and by the general consent of civilized nations, income or the sources of income are almost universally made the basis upon which the ordinary taxes are estimated. This is upon the assumption, never wholly true in point of fact, but sufficiently near the truth for the practical operations of government, that the benefit received from the government is in proportion to the property held, or the revenue enjoyed under its protection; and though this can never be arrived at with accuracy, through the operation of any general rule, and would not be wholly just if it could be, experience has given us no better standard, and it is applied in a great variety of forms, and with more or less approximation to justice and equality. But, as before stated, other considerations are always admissible; what is aimed at is, not taxes strictly just, but such taxes as will best subserve the general welfare of the political society."

The fact that the taxes in question are levied on personal property only, and thus exempts real property, is urged as an objection to the validity of the act. It is claimed that such an exemption operates as an unjust discrimination.

As the owners of the cattle taxed own no real estate within the Indian reservation, this objection, if sound, would render *it im-**[281** possible to tax the cattle at all. But it is the usual course in tax laws to treat personal property as one class and real estate as another, and it has never been supposed that such classification created an illegal discrimination, because there might be some persons who owned only personal property, and others who owned property of both classes. Again, it is complained that this law violates the principle of uniformity, and operates as an unjust discrimination,

because it provides for an assessment of cattle, kept and grazed on the Indian reservations, at a different time from that provided for the assessment of personal property, including cattle, in the organized country.

It is not unusual for tax laws to authorize the assessment of different classes of property at different dates, and even of the same classes of property in different localities at different dates. Such matters of regulation must be supposed to be within the power of the state or territory, and to have their reasons in special facts known to the legislature. We are informed that the revenue laws of Oklahoma provide that real estate shall be valued for taxation on the 1st day of January, and personal property in the organized counties on the 1st day of February of each year, and the personal property upon the reservations on May 1. The gravamen of the complaint is that cattle are fatter and more valuable on May 1 than February 1, and hence there is an inequality in the assessments. On the other hand, it is claimed that if the cattle on the reservations were to be valued for taxation in February, the larger part would escape taxation, as they are not driven to the reservations till April.

A similar objection was urged against the validity of a tax law of the state of Wisconsin, wherein April 1 was fixed as the date for assessing saw logs belonging to nonresidents and May 1 for assessing saw logs of residents. The court said:

"It is claimed, (1) that this law violates the principle of uniformity in providing for an assessment of the logs of a nonresident at a different time than that provided in the case of residents, (2) that for the same reason it discriminates unjustly against the nonresidents. But I [282] am of opinion that the case *does not come within either of these principles. . . . The legislature was aware that the logs of nonresidents as well as resident owners were liable to be floated out of the state in the month of April." *C. N. Nelson Lumber Company* v. *Town of Loraine*, Cir. Ct. of U. S. for Dist. of Wisconsin, 22 Fed. Rep. 54.

In Missouri a statute was held valid which provided that real property should be assessed every two years in all counties outside of St. Louis, and that all property in the city of St. Louis should be assessed every year, for state and municipal taxes, and this although in the particular case it was shown that this difference in the time of the assessments made a considerable difference in the amount of the taxes. *State, Rosenblatt*, v. *New Lindell Hotel Co.* 9 Mo. App. 450.

A law providing different times for assessments for state taxes in the state of New York was held to be legal. *The People, Twenty-third Street R. Co.*, v. *Commissioners of Taxes*, 91 N. Y. 593.

Several other provisions of the act in question are pointed to as creating discriminations against taxpayers whose property is in the unorganized district and reservations, such as these; that city and township assessors are required to be residents and qualified voters in the township or city where elected, but there is no such requirement imposed on the special assessor appointed by the board of county commissioners to assess the personal property in the reservations and unorganized districts; that the several township and city assessors are required to meet at the county seat and agree upon an equal cash basis of valuation of all property that they may be called upon to assess, but in this matter the special assessors do not participate; that the township assessor, clerk, and treasurer are a township board of equalization, and the mayor, city clerk, and city assessor are a city board of equalization, but that, in case of unorganized districts and reservations, the board of county commissioners act as a board of equalization, etc.

Without undertaking to enumerate all the instances in which there is some difference of procedure in respect to property assessed within the organized counties and property assessed in the unorganized districts and reservations, or to *consider minutely the several objec-[283 tions that are urged to such differences, we do not perceive that the questions suggested are for the courts. Clearly these are matters of detail within the legislative discretion. It is the law-making power which is to determine all questions of discretion or policy in ordering and apportioning taxes; which must make all the necessary rules and regulations, and decide upon the agencies by means of which the taxes shall be collected. When, as may sometimes happen, the legislature transcends its functions, and enacts, in the guise of a tax law, a law whereby the property of the citizen is confiscated or taken for private purposes, the judiciary has the right and duty to interpose. But such a case is not presented by this record.

These views dispose of the objections urged against the validity of the act of March 5, 1895, and leave only for consideration error assigned to the action of the territorial board of equalization in adding 35 per cent to the assessment or valuation made by the officer or officers to whom the duty to make the assessment is by the statute expressly committed. It is alleged that this order by the board of equalization was unauthorized and void.

We learn from the opinion of the supreme court of Oklahoma in the present case that this question of the power of the territorial board of equalization to raise the valuation of the properties to be taxed had been, in the previous case of *Wallace* v. *Bullen*, decided affirmatively, and that such decision was followed in the present case.

We are informed, however, by the brief filed in behalf of the petitioners that subsequently, on September 3, 1897, in the case of *Gray* v. *Stiles* (Okla.) 49 Pac. 1083, the subject was again considered and an opposite conclusion reached. It is also asserted in said brief that the question is one of general importance, and that a final decision of it may affect the validity of municipal obligations heretofore issued in the territory.

Such allegations disclose that there are parties not represented before us whose interests are involved in the inquiry. The case was heard in the trial court on a demurrer to the petition, *and the question of the validity of [284 the action of the board of equalization in raising the assessed values throughout the territory was put by the supreme court, without discussion, on its previous decision in the case of

Wallace v. *Bullen*. We are also informed by the briefs that the case just mentioned is now pending before the supreme court on an order for rehearing. Whether the facts pertaining to the action of the board of equalization in this particular were the same in *Gray* v. *Stiles* as those in this case, we cannot say from this record.

In such circumstances, we think it would be premature for this court to determine the question.

As for the reasons before given, the judgment of the supreme court must be reversed, that court will have an opportunity to deal with this question, if it think fit, upon a rehearing.

The judgment of the Supreme Court of Oklahoma is accordingly reversed, and the cause is remanded with directions to proceed in conformity with this opinion.

JOHN W. BAKER, Sheriff of McLennan County, Texas, *Appt.*,

v.

WILLIAM GRICE.

(See S. C. Reporter's ed. 284-291.)

Jurisdiction to issue habeas corpus—interference with state court—duty of state court—ground for discharge upon habeas corpus—ground of urgency.

1. Circuit courts of the United States have jurisdiction to issue the writ of habeas corpus in a case where a person is unlawfully restrained of his liberty by state officers under an unconstitutional statute.
2. Federal courts should not, by habeas corpus, interfere with the regular course of justice in a state court, unless in cases of peculiar urgency.
3. A state court is not bound to decide a constitutional question where there are other grounds for reversing a conviction under the law, upon pain of having its omission furnish a ground for Federal interference.
4. It is no ground for a discharge upon habeas corpus that the state statute which the prisoner is charged with violating is unconstitutional, and that several terms of the court have passed without the case being moved for trial, where he is on bail and has made no effort to obtain a trial.
5. The surrender of a person indicted, by his bail, at his request, and his consequent imprisonment, furnishes in itself no ground of urgency for the interference, by habeas corpus, of a Federal court, where there are no extraordinary and peculiar circumstances.

[No. 336.]

Argued January 26, 1898. Decided February 21, 1898.

APPEAL from an order of the Circuit Court of the United States for the Northern District of Texas discharging William Grice, the petitioner, upon a return to a writ of habeas corpus from the custody of the sheriff of McLennan County, Texas *Reversed*, and case remanded with instructions to set aside the order discharging the prisoner and to enter an order remanding him to the custody of the sheriff.

See same case below, 79 Fed. Rep. 627.

Statement by Mr. Justice **Peckham:**

This appeal is from an order of the United States circuit court for the northern district of Texas, made upon a return to a writ of habeas corpus, issued by that court to inquire into cause for detention of the petitioner, William Grice, who, it was alleged, was unlawfully restrained of his liberty by and held in the custody of J. W. Baker, the sheriff of McLennan county, Texas. After a hearing, the circuit court, on the 22d of February, 1897, discharged the petitioner. 79 Fed. Rep. 627.

The petition for the writ was filed on the 9th of December, 1896, and therein the petitioner, among other things, made the following allegations: That he was unlawfully restrained of his liberty by the sheriff of McLennan county, Texas, having been surrendered by his sureties under a recognizance which he had theretofore given; that he was detained by the sheriff under an indictment preferred against him and other citizens of the United States on the 21st of November, 1894. The indictment charged that William Grice, E. T. Hathaway, and several others, named in the indictment, unlawfully combined and engaged among themselves and with others, who were unknown to the grand jury, in a conspiracy against trade, and that they had created a trust by a combination of their capital, skill, and acts for the purpose of creating and carrying out restrictions in trade. The indictment was based upon an act passed by the legislature of Texas on the 30th of March, 1889, which is generally known and described as the anti-trust act of that state. When the indictment was presented, the defendants (including the petitioner herein) were arrested and brought before the proper court and entered into a recognizance conditioned for their appearance in court from day to day and term to term to answer the indictment. On the 2d of December, 1895, the case was regularly called, and the defendants, pursuant to the provisions of the Code of Criminal *Procedure of the state of Texas, an- [286 nounced a severance, and thereupon E. T. Hathaway, one of the defendants named in the indictment, was placed on trial to answer the charges contained therein. Before proceeding to trial on the merits, he in effect demurred to the indictment on the ground, among others, that the above-named act of the state of Texas was a violation of the Federal Constitution, for reasons which he stated. The demurrer was overruled and the trial of the cause was then proceeded with, and on the 12th of December, 1895, a verdict of guilty as charged in the indictment was rendered, and the jury assessed defendant's punishment at a fine of $50. Hathaway duly took proceedings for the purpose of obtaining a review by the court of

NOTE.—*As to what questions may be considered on habeas corpus*, see note to Re Carll, 27: 288.

For suspension of writ of habeas corpus, see note to Luther v. Borden, 12: 581.

As to jurisdiction of United States courts in habeas corpus, see notes to Re Reinitz (C. C. S. D. N. Y.) 4 L. R. A. 236; and State, Cochran, v. Winters (Kan.) 10 L. R. A. 616.

As to presumption of innocence in habeas corpus proceedings, see note to State v. Jones (N. C.) 23 L. R. A. 678.

criminal appeals of the state of Texas of the various matters raised by the demurrer and in the course of his trial.

Under the law of Texas, one who is convicted of a felony, although the punishment imposed is only a fine, is still necessarily subjected to confinement in the jail pending the determination of any appeal which he may take, and under that provision the defendant Hathaway was subjected to confinement in jail pending the determination of his appeal.

It was argued in the court of criminal appeals on the 29th day of January, 1896, and was not decided until the 24th day of June, 1896, leaving the defendant Hathaway in the meantime incarcerated in the McLennan county jail. On the last-mentioned day the court of criminal appeals decided the case, but did not pass upon the constitutionality of the act under which the indictment was framed, although that question had been raised in the court below and presented to the appellate court on the argument of the appeal. The court decided the appeal upon another ground, which the petitioner herein calls a technical ground of pleading, the court holding that because the indictment presented failed to charge Hathaway with knowingly carrying out as agent the stipulations, purposes, prices, etc., under the alleged conspiracy, the admission of evidence to that effect over the objection of the defendant was unwarranted in law, and the conviction was therefore in-
287 valid. The appellate court thereupon *reversed the judgment and remanded the cause for a trial *de novo*.

Since the rendition of this judgment two terms of the criminal court in the proper county have been held, one of which was drawing near its close at the time that the petitioner filed his petition, December 9, 1896, and the petitioner then makes this allegation: that "while this petitioner, together with his codefendants who have been arrested and placed in recognizance, have stood ready and anxious for trial upon said indictment, yet said case has not even been called by the court for trial, nor has said cause been set for trial, but the same has been permitted to remain upon the docket of said court, subjecting this petitioner and his codefendants, not only to the shame and contumely of an indictment for felony, but denying to him and his codefendants the right to be heard in his defense in said court as a citizen of the United States, and whereby this petitioner, as well as his codefendants, are without remedy in the state courts of Texas for the assertion and vindication of their rights under the Constitution of the United States." It is then shown in the petition that upon the 24th of November, 1896, Hathaway, one of his codefendants, procured from the circuit court of the United States a writ of habeas corpus, requiring the sheriff of McLennan county, who then had him in custody, to produce the body of said Hathaway, and that the writ was served upon the sheriff, who made return that he held his prisoner under the indictment above mentioned.

A hearing before the court was then set for the 7th of December, 1896, and notice thereof was given to the sheriff and prosecuting officers of the county of McLennan, advising them of the proceedings and of the time when the matter would be inquired into. On the 7th of December the state court dismissed the indictment and prosecution as against Hathaway, leaving the same to stand unimpaired as to the petitioner herein and his codefendants. This action on the part of the state court, the petitioner charges, was for the purpose of defeating the jurisdiction of the United States court upon the writ of habeas corpus, which had then been issued, *and to thereby prevent [**288** that court from passing upon the constitutional rights of said Hathaway. After this discharge by the state court, the sheriff made return, setting up that fact and that he claimed no further right or custody over the relator.

The petitioner then avers that the act in question violates the Constitution of the United States for the reasons which he names, and that by reason of the premises "he is without remedy for the assertion and vindication of his rights as a citizen of the United States under the Constitution thereof; that he has stood under indictment for felony, charged with the violation of said alleged statute of the state of Texas, approved March 30, 1889, for the period of two years, without being afforded an opportunity by the state courts of Texas for the assertion of his rights, as aforesaid, as a citizen of the United States. Your petitioner believes, and so avers, that it is the purpose and intent of the state authorities of the state of Texas to prevent, if possible, any appeal by this petitioner to the courts of the United States for the vindication of his rights as aforesaid as a citizen of the United States In view of the premises herein recited and without the interposition of this honorable court for his due protection and the due conservation of his rights, as a citizen of the United States, he is practically remediless by an appeal in regular course or otherwise." The petitioner, therefore, asked for a writ of habeas corpus in order that he might be discharged from custody.

The writ having been duly served, the sheriff made return showing that he held the petitioner by virtue of a writ issued upon the indictment, and he further alleged that the authorities had been anxious and ready to accord all the defendants under the indictment that speedy trial which they were guaranteed under the Constitution and the laws of the state of Texas; that the delay had come in great part from the action of the defendants; that at the first term of court after the indictment was presented, the case was set down for trial on the 14th of March, and was thereafter continued by agreement between the state and the defendants; that at the *succeeding [**289** September term the case was set down for trial on October 4, and on that day it was postponed upon motion of the defendants and set down for the November term, to be tried on the 2d of December, 1895, and that when the cause was called on that day the defendants, including the petitioner, claimed a severance, to which they were entitled under the laws of Texas, and forced the state to try Hathaway alone, thereby avoiding and defeating a trial of the petitioner herein. The sheriff further returned that the purpose of the petitioner and

his codefendants was, as he believed, to defeat the jurisdiction of the courts of Texas in the administration of its laws; and that the relator and his codefendants had agreed among themselves to have their several sureties surrender them into the custody of the sheriff, and that by their own acts and at their own request and by their own procurement the sureties of petitioner and his codefendants did surrender them, and on the day of the surrender and contemporaneously with it a writ of habeas corpus from the circuit court was served upon the sheriff, commanding him to produce before the court *instanter* the body of petitioner.

Attached to the return were the affidavits of the sureties of the petitioner, in which they said in substance that the petitioner wanted them to surrender him to the sheriff on the day named, and that by his request they went to the lawyer's office and met the petitioner and accompanied him to the office of the sheriff, where they surrendered him to the sheriff.

The petitioner filed a replication which was in substance an admission of the truth of many of the allegations made in the return and the accompanying affidavits, but denied their materiality, and claimed that they furnished no answer to the allegations of the petitioner, as contained in his petition. The relator did deny that he had conspired or confederated for the purpose of defeating the jurisdiction of the courts of Texas or the administration of its laws; on the contrary, he alleged that for two years he and his codefendants had submitted to the jurisdiction of the courts of Texas for the purpose of trial, and that when it became evident to the petitioner and his codefendants that a trial was not to be [290] had except at some *indefinite period in the future, if ever, then the petitioner "as a citizen of the United States proceeded to exercise his rights as such citizen and to call upon the courts of the United States to vindicate his rights as he was entitled under the Constitution and laws of the United States, and not for the purpose of defeating the jurisdiction of said courts of Texas, but for the purposes as indicated."

After hearing the parties, the circuit court decided that a proper case had been made out for its interference by virtue of the writ of habeas corpus, and thereupon held that the statute of the state of Texas called the anti-trust law was a violation of the Constitution of the United States, and, consequently, void. The court therefore discharged the petitioner, and from that order this appeal has been taken.

Mr. **M. M. Crane** for appellant.

Messrs. **George Clark, Joseph H. Choate,** *S. C. T. Dodd, John D. Johnson,* and *D. C. Bolinger* for appellee.

Mr. Justice **Peckham** delivered the opinion of the court:

The court below had jurisdiction to issue the writ and to decide the questions which were argued before it. *Ex parte Royall*, 117 U. S. 241 [29: 868]; *Whitten* v. *Tomlinson*, 160 U. S. 231 [40: 406]. In the latter case most of the prior authorities are mentioned. From these cases it clearly appears, as the settled and proper procedure, that while circuit courts of the United States have jurisdiction, under the circumstances set forth in the foregoing statement, to issue the writ of habeas corpus, yet those courts ought not to exercise that jurisdiction by the discharge of a prisoner unless in cases of peculiar urgency, and that instead of discharging they will leave the prisoner to be dealt with by the courts of the state; that after a final determination of the case by the state court, the Federal courts will even then generally leave the petitioner to his remedy by writ of *error from this court. The reason [291] for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a state be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued. Such are the cases *Re Loney* (*Thomas* v. *Loney*), 134 U. S. 372 [33: 949], and *Re Neagle* (*Neagle* v. *Cunningham*), 135 U. S. 1 [34: 55], but the reasons for the interference of the Federal court in each of those cases were extraordinary, and presented what this court regarded as such exceptional facts as to justify the interference of the Federal tribunal. Unless this case be of such an exceptional nature, we ought not to encourage the interference of the Federal court below with the regular course of justice in the state court.

The ground for the discharge of the petitioner in this case, as given by the court below, was because of the opinion of that court that the anti-trust law of the state of Texas violated the Constitution of the United States, and was therefore void. The question of the validity of that act of course exists whether the case be in the state court or a hearing transferred to the Federal court by virtue of the writ of habeas corpus. It is the duty of the state court, as much as it is that of the Federal courts, when the question of the validity of a state statute is necessarily involved as being in alleged violation of any provision of the Federal Constitution, to decide that question, and to hold the law void if it violate that instrument. But the state court is not bound to decide the constitutional question when there are other grounds for reversing a conviction under the law, upon pain of having its omission furnish a ground for Federal interference.

The special circumstances creating what the court below regarded as a necessity for its immediate action, and which made the case one of urgency, are stated in the opinion of the court rendered in discharging the prisoner.

*The first circumstance stated is that [292] the court of criminal appeals did not decide, when it had the opportunity, the question of the constitutionality of the act in question, and that that court, while deciding it was unnecessary to pass upon the constitutional questions raised, "referred favorably to the decisions of

the supreme court of the state in which the anti-trust law had been sustained in this regard." It is matter of common occurrence—indeed, it is almost the undeviating rule of the courts, both state and Federal—not to decide constitutional questions until the necessity for such decision arises in the record before the court. This court has followed that practice from the foundation of the government, and we can see no reason for just criticism upon the action of the state court in refusing to decide the question of the constitutionality of this act, when, at the same time, it held in substance that there was no evidence upon which to sustain the conviction of the defendant upon the indictment then before it, and that therefore the judgment should be reversed. In granting a new trial, it cannot properly be urged that the court failed to fulfil its duty towards the defendant in any degree whatever, because it did not decide the constitutional question as desired by him. The decision of the case was upon such a ground that the probability was that no conviction of the defendant could thereafter be had under that indictment. When the judgment of conviction was reversed the defendant Hathaway gave bail, and remained at large until the proceedings for his discharge were taken some six months after the judgment of reversal had been given.

Criticism is also made upon the fact that the state court did not discharge Hathaway after the decision upon his appeal until the circuit court issued the writ of habeas corpus some six months thereafter. It does not appear that Hathaway had applied to have his case tried, nor to be discharged from the indictment by reason of the decision granting him a new trial. However that may be, *Hathaway's Case* was finished by his actual discharge, and it has no further bearing upon the action of the state court in this case.

It is also said that since the trial of Hathaway [293] and the *granting of a new trial to him the case of the petitioner has not been called for trial, and that two terms of court since the granting of a new trial to Hathaway had come and the second one was about expiring at the time when the petitioner filed his petition in the circuit court for this writ. Here, again, there is no allegation and no proof that any attempt had been made on the part of this petitioner to obtain a trial in the state court, or that he had been refused such trial by that court upon any application which he made. It is the simple case of a failure to call the indictment for trial, the petitioner being in the meantime on bail and making no effort to obtain a trial and evincing no desire by way of a demand that a trial in his case should be had.

We do not say that a refusal to try a person who is on bail can furnish any foundation for a resort to the Federal courts, even in cases in which a trial may involve Federal questions, but in this case no refusal is shown. A mere omission to move the case for trial (the party being on bail) is all that is set up, coupled with the assertion that defendant was eager and anxious for trial, but showing no action whatever on his part which might render such anxiety and eagerness known to the state authorities.

It was also stated that the petitioner could expect little better results on a trial of his case in the state court than obtained upon the trial in the *Hathaway Case*. We think this statement is entirely without proof or even probability. The petitioner was indicted as one of several defendants under the same statute, and it is claimed that those of them mentioned in the indictment who resided in Texas were situated similarly to Hathaway. The probability, therefore, would be exceedingly strong that if the petitioner were tried upon the indictment found against him he would have to be acquitted by direction of the court for lack of evidence, under the decision of the criminal court of appeals in *Hathaway's Case*.

We are of opinion that neither one of the grounds taken by the court below nor all combined furnish any reason for the discharge of petitioner upon the writ issued by that court. The surrender of the petitioner by his bail at his request, and *his consequent impris- [294 onment, furnishes in itself no ground of urgency for the interference of a Federal court. The imprisonment is entirely voluntary, and while the surrender by his bondsmen may be good for the purpose of avoiding any technical objection to the issuing of the writ founded upon the fact that the petitioner was on bail, yet the fact of imprisonment under such circumstances adds nothing to the strength of his case as calling for the interposition of the Federal court. This whole case is clearly nothing but an attempt to obtain the interference of a court of the United States when no extraordinary or peculiar circumstances exist in favor of such interference.

Upon the facts appearing herein, we think no sufficient case was made out for the exercise of the jurisdiction of the circuit court. We come to this decision irrespective of the question of the validity of the state statute and without passing upon the same or expressing any opinion in regard thereto.

If this application had been made subsequently to a trial of the petitioner in the state court and his conviction upon such trial under a holding by that court that the law was constitutional, and where an appeal from such judgment of conviction merely imposing a fine could not be had, excepting upon the condition of the defendant's imprisonment until the hearing and decision of the appeal, a different question would be presented and one which is not decided in this case, and upon which we do not now express any opinion.

The order of the Circuit Court for the Northern District of Texas must be reversed, and the case remanded to that court with instructions to set aside the order discharging the prisoner, and to enter an order remanding him to the custody of the sheriff.

So ordered.

In numbers 337, *Baker* v. *Austin;* 338, *Baker* v. *Hawkins;* and 339, *Baker* v. *Finley*, involving the same question, and argued with this case, the same order is made.

295] EDWARD M. WILLIS and William G. Johnson, Assignee, *Petitioners*,
v.
EASTERN TRUST & BANKING COMPANY.

(See S. C. Reporter's ed. 295-311.)

Summary process to recover possession of land—mortgagee cannot maintain summary proceedings against mortgagor—state construction of statute—relation of landlord and tenant—remedy of mortgagee to recover possession.

1. Summary process to recover possession of land in the city of Washington, under D. C. Rev. Stat. § 684, cannot be maintained unless the conventional relation of landlord and tenant exists between the parties.
2. A mortgagee of land in the District of Columbia under a deed of trust which provides that the mortgagor shall have possession until default, and under which the mortgagee is entitled to possession after condition broken, is not within the scope and effect of said statute, and the mortgagee cannot maintain summary proceedings thereunder to recover possession from the mortgagor who holds over after condition broken, where there has been neither forcible entry nor detainer by force.
3. Where an act of Congress has been taken from a state statute, the known and settled construction which such statute has received in the state before the original enactment of the act of Congress must be considered as having been adopted by Congress with the text thus expounded.
4. A mortgagee does not hold the relation of landlord and tenant to a mortgagor in possession.
5. Until the mortgagee takes actual possession, the mortgagor is not liable, without an express covenant to that effect, to pay rent, and is entitled to take the rents and profits to his own use.
6. Where a mortgagor holds over after condition broken, the mortgagee in order to obtain possession must resort to the appropriate remedy of a writ of ejectment or a bill of foreclosure.

[No. 383.]

Submitted October 13, 1897. Decided February 21, 1898.

ON WRIT OF CERTIORARI to the Court of Appeals of the District of Columbia to review a judgment of that court reversing the judgment of the Supreme Court of that District for the defendants and remanding the case with directions to enter judgment for the plaintiff in summary proceedings to recover possession of land in the city of Washington brought by the Eastern Trust & Banking Company against Edward M. Willis and William G. Johnson. *Judgment of the Court of Appeals reversed*, and case remanded with directions to affirm the judgment of the supreme court of the District

See same case below, 6 App. D. C. 375; also see same case, 167 U. S. 746, mem.

NOTE.—*As to fixtures, as between mortgagor and mortgagee*, see note to Hill v. Farmers' & M. Nat. Bank, 24: 1051.

As to right of mortgagor to income and produce on mortgaged premises, see note to Gilman v. Illinois & M. Teleg. Co. 23: 405.

As to strict foreclosure of mortgage, see note to Clark v. Reyburn, 19: 354.

Statement by Mr. Justice **Gray**:

This was a summary process to recover possession of land in the city of Washington, under § 684 of the Revised Statutes of the District of Columbia, commenced September 17, 1894, by complaint before a justice of the peace, by the Eastern Trust & Banking Company against Edward M. Willis and William G. Johnson, each of whom pleaded title in Johnson; and the case was thereupon certified to the supreme court of the District of Columbia.

In accordance with a general rule of that court, requiring the plaintiff in such a process to file "a declaration making demand for the possession of the premises, with a description thereof, as in ejectment," the plaintiff filed a declaration, demanding possession of the land, describing it by metes and bounds, and alleging that the defendants entered thereon, and unlawfully ejected the plaintiff therefrom, and unlawfully detained the same from the plaintiff.

The parties submitted the case to the determination of the court, without a jury, upon an agreed statement of facts, in substance as follows:

The plaintiff was a corporation organized under a charter granted by the legislature of the state of Maine, by which it *was located[296 at the city of Bangor in the county of Penobscot, and was authorized to establish agencies elsewhere in that state. Johnson was sued as assignee of the American Ice Company, a corporation of Maine, and doing business at Bangor and also at the city of Washington: and Willis was sued as the tenant or lessee of Johnson.

On December 2, 1889, by an indenture, in the nature of a mortgage, executed in Maine, and duly recorded in that state and in the District of Columbia, the American Ice Company conveyed to the Eastern Trust & Banking Company, "and its successors, in trust, with full power of succession to and enjoyment of the franchise of the corporation, all its real estate, wharves, ice houses, boarding house, stables, boilers, elevator, and machinery, situated in the town of Hampden in said county of Penobscot, and in the city of Washington in the District of Columbia, together with all and singular the privileges and appurtenances thereto belonging," to secure the payment of bonds of the ice company to the amount of $40,000, payable to the trust company at its office in Bangor in equal instalments of $5,000 each, in three, four, five, six, seven, eight, nine, and ten years after date, with interest. The deed provided, among other things, as follows:

First. "Until default shall be made in the payment of the principal or interest of said bonds or some of them, or in the maintenance of insurance, or in the payment of taxes or assessments as herein provided, or until default shall be made in respect to something by these presents required to be done by said party of the first part, the American Ice Company shall be permitted and suffered to possess, manage, develop, operate, and enjoy the plant and property herein conveyed, and intended so to be, and to take and use the income, rents, issues, and profits thereof, in the same man-

ner, to the same extent, and with the same effect, as if this deed had not been made."

Second. If the ice company shall pay the principal and interest, and do all other things required to be done on its part, this deed shall be void. But if any default shall be made, and shall continue for ninety days, the whole amount of the bonds, principal and interest, shall be
297] deemed immediately due and *payable, "and it shall be lawful for the trustee to enter into or upon the premises and property hereby granted, or intended so to be, and to take possession of the whole or any part thereof," and to sell and dispose of the same by public auction in Bangor, giving notice, as therein required, in newspapers published in Bangor and in Washington, and "in its own name or in the name of the American Ice Company, to make, execute, acknowledge, and deliver to the purchaser or purchasers at such sale a good and sufficient deed or deeds of conveyance of the property so sold; and any sale made as aforesaid shall be a perpetual bar, both at law and in equity, against the American Ice Company, and all persons claiming by, through, or under it, from claiming the property, rights, interests, and franchises so sold, or any interest therein." The proceeds of the sale, after payment of expenses, shall be paid over ratably to the bondholders, and the remainder, if any, to the ice company.

Third. "The foregoing provision for a sale under the power aforesaid is cumulative with the ordinary remedy of foreclosure by entry or suit therefor; and the trustees thereunder may, upon default being made as aforesaid, institute and carry out proceedings to foreclose this mortgage or deed of trust, by suit or otherwise, in such manner as may be authorized by law for the foreclosure of mortgages of real estate. And the American Ice Company hereby waives any and all rights of sale or redemption, now or hereafter provided by the statutes of Maine or of the United States."

The bonds were duly issued, as recited in the mortgage, and were delivered to and held by purchasers for value in the regular course of business. The first instalment of the bonds, and all interest which fell due on or before December 1, 1892, were paid. The rest of the bonded debt, and the interest thereon, were never paid, and were due and payable at the time of the commencement of this suit.

On October 13, 1893, the ice company executed to Johnson an assignment of all its property for the benefit of its creditors, under the act of Congress of February 24, 1893 (27 Stat. at L. 474, chap. 157). Johnson accepted the as-
298] signment, and assumed *the duties of assignee; and as such on January 29, 1894, executed to Willis a lease in writing of all the ice company's real estate in the city of Washington, for one year from that date, at a monthly rate of $130.

After the default which took place on December 1, 1893, had continued more than ninety days, a majority of the bondholders directed the trust company to proceed in the execution of the trust. In pursuance of that direction, and of the power contained in the mortgage, the trust company advertised and exposed the whole mortgaged property for sale by auction at Bangor on May 4, 1894. The sale was adjourned until September 8, 1894, when the property was sold, and was purchased by a committee of the bondholders, and for their benefit. The terms of the sale have not yet been complied with, nor any deed made to the purchasers, it being understood and agreed between them and the trustee, at the time of the sale, that the trustee should first obtain possession of the property.

The trust company, on July 30, 1894, caused a thirty days' notice to quit to be served on Johnson and on Willis; and on September 17, 1894, commenced this suit to recover possession of the property by causing a seven days' summons to be issued to each of them by a justice of the peace of the District of Columbia; and thereupon subsequent proceedings took place as above stated.

Upon the agreed statement of facts, the supreme court of the District of Columbia gave judgment for the defendants. The plaintiff appealed to the court of appeals, which reversed the judgment, and remanded the case with directions to enter judgment for the plaintiff. 6 App. D. C. 375. The defendants sued out a writ of error from this court which was dismissed for want of jurisdiction. 167 U. S. 76 [*ante*, 83]. They then obtained from this court this writ of certiorari to the court of appeals under the act of March 3, 1897 (29 Stat. at L. 692, chap. 390), 167 U. S. 746, mem.

Messrs. **Calderon Carlisle, William G. Johnson,** and *William A. Maury*, for petitioners:

The relation of landlord and tenant did not exist, and the case was not within the true intent of the meaning of the landlord and tenant act.

Spalding v. *Hall*, 6 D. C. Rep. 123; *Jennings* v. *Webb*, 9 Mackey, 317.

The deed of trust did not create the grantor a tenant, or make the grantee his landlord.

Hastings v. *Pratt*, 8 Cush. 123; *McCombs* v. *Wallace*, 66 N. C. 483; *Burford* v. *Nolan*, 30 Miss. 428; *Sims* v. *Humphrey*, 4 Denio, 185; *Davis* v. *Hemenway*, 27 Vt. 589; *Roe, Burnett*, v. *Doe, Caldwell*, 76 U. S. 9 Wall. 293 (19: 713).

The conventional relation of landlord and tenant must exist to bring a case within the true intent and meaning of landlord and tenant statutes.

Womack v. *Powers*, 50 Ala. 5; *Steiner* v. *Priddy*, 28 Ill. 180; *West* v. *Frederick*, 62 Ill. 192; *Read* v. *Elwell*, 46 Me. 270; *Sawyer* v. *Hanson* 24 Me. 542; *Short* v. *Birdwell*, 15 Ind. 211; *McCombs* v. *Wallace*, 66 N. C. 482; *Hastings* v. *Pratt*, 8 Cush. 121; *Boyle* v. *Boyle*, 121 Mass. 85; *Woodside* v. *Ridgeway*, 126 Mass. 292; *Howard* v. *Merriam*, 5 Cush. 564; *Larned* v. *Clarke*, 8 Cush. 29; *Leavitt* v. *Wallace*, 12 N. H. 493; *Burford* v. *Nolan*, 30 Miss. 427; *Roach* v. *Cosine*, 9 Wend. 232; *People, Mitchell*, v. *Simpson*, 28 N. Y. 56; *Sims* v. *Humphrey*, 4 Denio, 185; *Steele* v. *Bond*, 28 Minn. 267; *People, Ainslee*, v. *Howlett*, 76 N. Y. 574; *Evertson* v. *Sutton*, 5 Wend. 281; *Greer* v. *Wilbar*, 72 N. C. 592; *Johnson* v. *Hauser*, 88 N. C. 388; *Benjamin* v. *Benjamin*, 5 N. Y. 388; *Williams* v. *Bigelow*, 11 How. Pr. 88; *Stockbridge* v. *Nute*, 20 N. H. 273; *People, Stiker*, v. *Hovey*, 4 Lans. 89; *People, Mitchell*, v. *Simpson*, 14 Abb. Pr. 460.

Mr. **B. F. Leighton,** for respondent:

The deed of trust to defendant was duly recorded and acknowledged. Its delivery passed the title to the grantee, *in præsenti*, and, whether recorded or not, was good as against the grantor and his assigns without consideration.

Hastings v. *Vaughn*, 5 Cal. 315; *Doe, Strong,* v. *Smith*, 3 McLean, 362; *Stevenson* v. *Cloud*, 5 Blackf. 92; *Dole* v. *Thurlow*, 12 Met. 157; *Brown* v. *Manter*, 22 N. H. 468; *Jackson* v. *Allen*, 30 Ark. 110; *McMahon* v. *McGraw*, 26 Wis. 614.

The power to dispose of the property to satisfy the debt for which it is pledged is not collateral, but, like the right of redemption, inheres in the subject. It is not an addition to the mortgage, but a part of it; and the mode in which it may be exercised is as proper a subject of agreement, prima facie, as the terms of the mortgage itself.

Lawrence v. *Farmers' Loan & T. Co.* 13 N. Y. 209.

Such a power is sustained by English and American authorities alike.

Croft v. *Powell*, 2 Comyns, Rep. 603; *Corder* v. *Morgan*, 18 Ves. Jr. 344; *Matthie* v. *Edwards*, 2 Colly. Ch. Cas. 465; *Davey* v. *Durrant*, 1 De G. & J. 535; *Montague* v. *Dawes*, 12 Allen, 397; *Elliott* v. *Wood*, 45 N. Y. 71.

The remedies at law and in equity of the *cestuis que trust* are concurrent. The adoption of the one does not exclude the other. Whether they are entitled to obtain possession through their trustee under the proceedings instituted in these causes depends upon the provisions of the deed of trust and the laws of this jurisdiction.

The estate limited in the premises and habendum of the deed of trust is a fee. Both the limiting clauses contain apt and technical language to create that estate.

The power to take possession and sell is found in the deed of trust.

This power of sale is expressly made cumulative with the ordinary remedy of foreclosure by entry, suit, or otherwise.

The clause in the deed of trust permitting the American Ice Company to retain possession of the property until default is similar in language and identical in legal effect with the clause in the deed of trust considered and interpreted by the court of appeals of the District of Columbia in the recent case of *Loring* v. *Bartlett*, 4 App. D. C. 1.

Chief Justice Alvey, speaking for the court, said: "The effect of the deed to the trustees was to vest the fee-simple estate in them from the date of the deed; and but for the express provision or reservation in the deed which we have already recited, whereby the appellee was allowed to retain possession of the property until default made the right of possession would also have vested in the trustees from the date of the deed."

The right of the American Ice Company to the possession of the property embraced in the deed of trust terminated upon default in the payment of the bonds That was one of the events upon the happening of which its right of possession was made to depend. The right of possession immediately accrued to the defendant, and the landlord and tenant act furnished the proper remedy to enforce that right.

In the case of *Loring* v. *Bartlett*, 4 App. D. C. 1, the purchaser from the trustee brought the suit. Here the trustee sues. In all other respects the cases are similar in fact and identical in legal principle. In *Loring* v. *Bartlett* the right of the purchaser from the trustees to sue was put upon the express ground that he held the trustees' title, and was substituted to their right by operation of law. "The property having been sold under the power in the deed after default made by the appellees the purchaser became entitled to all the rights vested in the trustees in regard to the possession of the premises, and is substituted to their rights in that respect, by operation of law." This is the language of the court. The conclusion reached by the court in this case is fortified by numerous decisions.

Wilkinson v. *Hall*, 3 Bing. N. C. 508.

The situation of a lessor on the expiration of a term, and of a mortgagor who has covenanted that the mortgagee may enter upon a certain day, are precisely the same.

Doe, Fisher, v. *Giles*, 5 Bing. N. C. 421; *Georges Creek Coal & I. Co.* v. *Detmold*, 1 Md. 225.

The landlord and tenant act was passed July 4, 1864. The first case on the interpretation of this statute was that of *Spalding* v. *Hall*. The facts in this case were that the defendant was in possession of certain premises under a lease which was to expire June 30, 1864. On the 16th day of June the owner of the premises leased the same to the plaintiff for five years, commencing July 1, 1864. No notice to quit was served on defendant, and he remained in possession after the expiration of his term. Plaintiff brought suit for possession under the landlord and tenant act. The court held that the defendant Hall was a tenant from year to year, and entitled to six months' notice, which was sufficient of itself to dispose of the case; but the court went further, and held that the true intent and meaning of the legislature was to extend this remedy to all persons who by act of the lessor, or by operation of law, were placed in the same relation to the tenant as the original lessor, to wit, the grantees or assignees, devisees, or heirs at law of the lessor.

Spalding v. *Hall*, 6 D. C. Rep. 124.

This case was decided November 21, 1864. Ten years later the case of *Lucas* v. *Jones* was decided. This was an action brought by the plaintiff to recover the possession of the premises in controversy, under the provisions of the act in question. The defendant had encumbered the premises in controversy by a deed of trust in the ordinary form to secure the payment of a debt therein described. Having made default in the payment of said debt, the property was sold by the trustees named in the deed of trust, and purchased by the plaintiff, to whom a conveyance had been made by the trustee. Plaintiff served the defendant with thirty days' notice to quit, on the theory that after the sale he was a statutory tenant by sufferance. The court held that the action would lie. Justice MacArthur in deciding the case said: "I was of opinion then that the relation of landlord and tenant between the parties could not be inferred from these circumstances

so as to bring the cause within the statute upon which it was founded. A careful examination of the language used in the first section has satisfied me that in this respect my construction of the act was erroneous, and all of the judges who heard the case here are of the same opinion. . . . The simple fact of possession where there is no contract is a sufficient circumstance to create such tenancy, and if a man, therefore, holds possession of premises belonging to another, and there is no agreement between them, the relation of landlord and tenant arises by mere operation of the statute."

Luchs v. *Jones*, 1 MacArth. 346.

The case of *Fiske* v. *Bigelow* was similar in its facts, and a like conclusion was reached by the court.

Fiske v. *Bigelow*, 2 MacArth. 431.

The case of *Barber* v. *Harris*, 6 Mackey, 593, was brought to this court by writ of error to reverse a judgment quashing a writ of certiorari to a justice of the peace for the District of Columbia. The plaintiff in error was in possession of a certain house and premises situate in the city of Washington, in said District, as tenant under a certain lease not then expired the terms of which are fully set out in said petition. The leased premises were sold under a certain deed of trust prior in date to that of the lease. The purchaser was the defendant in error, Barber, who served him with a thirty days' notice to quit, and then brought an action for possession under the landlord and tenant act. The justice before whom the suit was brought gave judgment for Barber. The petition averred that the proceedings before the justice were void for want of jurisdiction, because, *inter alia*, the relation of landlord and tenant did not exist between the said Barber and plaintiff in error, by convention, and that his proper remedy was by ejectment. The court below, on motion, quashed the writ of certiorari, and the case came here on error from that judgment. The case was heard on motion to dismiss or affirm. Justice Gray, for the court, said: "But, upon the merits of the case, the judgment below is so clearly right that the motion to affirm must be granted."

Harris v. *Barber*, 129 U. S. 368 (32: 699); *District of Columbia* v. *Rapley*, 6 Mackey, 534.

The adoption by courts of other jurisdictions of the lien theory in respect of mortgages and the incorporation of equitable doctrines into the common law as administered in many of the states (independently of or previous to the adoption of Codes), render the decisions of such states of little or no value in the present case.

It will thus be seen that by virtue of the common law as interpreted and applied in the District of Columbia, and also by the express contract contained in the deed of trust, the American Ice Company became, upon the execution and delivery of the deed, the tenant of the Eastern Trust & Banking Company, and, upon default, the latter became entitled to appeal to the proceedings provided for by the landlord and tenant act to obtain possession.

299] *Mr. Justice **Gray** delivered the opinion of the court:

Sections 680–691 of the Revised Statutes of the District of Columbia, contained in chapter 19, entitled "Landlord and Tenant," are a re enactment of the act of Congress of July 4, 1864, entitled "An Act to Regulate Proceedings in Cases between Landlord and Tenants in the District of Columbia." 13 Stat. at L. 383, chap. 243.

By §§ 681 and 682 (re-enacting § 1 of the act of 1864) "a tenancy at will shall not arise or be created without an express contract or letting to that effect, and all occupation, possession, or holding of any messuage or real estate, without express contract or lease or by such contract or lease the terms of which have expired, shall be deemed and held to be tenancies by sufferance;" and "all estates at will and sufferance may be determined by a notice, in writing, to quit, of thirty days."

By § 684 (re-enacting § 2 of the act of 1864) "when forcible entry is made, or when a peaceable entry is made and the possession unlawfully held by force, or when possession is held without right, after the estate is determined by the terms of the lease by its own limitation, or by notice to quit, or otherwise," then "on written complaint on oath of the person entitled to the premises to a justice of the peace, charging such forcible entry or detainer of real estate, a summons may be issued to a proper officer commanding the person complained of to appear and show cause why judgment should not be rendered against him."

The statute further provides as follows: The summons shall be served at least seven days before the appearance of the party complained of. If it appears by default or upon trial that the plaintiff is entitled to the possession of the premises, he shall have judgment and execution for the possession and costs; if the plaintiff fails to prove his right to possession, the defendant shall have judgment and execution for his costs. If, upon trial, the defendant pleads title in himself, or in another person under whom he claims the premises, the case is *to be certified **[300** to the supreme court of the District of Columbia, and each party is to recognize to the other, the defendant "to pay all intervening damages and costs and reasonable intervening rent for the premises," and the plaintiff to enter the suit and to pay all costs adjudged against him. An appeal to the same court may be taken by either party against whom judgment is rendered by the justice of the peace. Rev. Stat. D. C. §§ 685 689; Act of July 4, 1864 (13 Stat. at L. 383, 384, chap. 243, §§ 2–4).

This plaintiff is the mortgagee of land in the District of Columbia, under a deed of trust to secure the payment of certain bonds, in instalments payable in successive years, with interest; and providing that until default the mortgagor shall be permitted to possess and enjoy the property, and to take and use the income, rents, issues, and profits thereof, "in the same manner, to the same extent, and to the same effect as if this deed had not been made;" but that, if any default be made, and be continued ninety days, the trustee may enter upon the property, and sell the same by public auction, or may pursue the ordinary

remedy of foreclosure by entry or suit as authorized by law.

The mortgagor assigned the property to an assignee for the benefit of creditors; the assignee made a lease in writing thereof for a year at a monthly rent; default was made and continued for ninety days; and the mortgagee after giving the assignee and his lessee thirty days' notice to quit, instituted this process against them to recover possession under the landlord and tenant act of the District of Columbia.

The principal question presented by the record is whether, in a case like this, where there has been neither forcible entry nor detainer by force, a mortgagee entitled to possession after condition broken is within the scope and effect of the statute.

In *Barber* v. *Harris* (1888) 6 Mackey, 586, affirmed by this court in *Harris* v. *Barber* (1889) 129 U. S. 366 [32: 697], cited in support of the judgment below, this question was not and could not be decided. That case arose upon a writ of certiorari to a justice of the peace, **301]** by which his judgment for *possession under the statute was sought to be set aside upon allegations that the plaintiff was a purchaser at a sale under a mortgage, and the conventional relation of landlord and tenant did not exist between the parties, and therefore the justice of the peace has no jurisdiction. The ground on which both the supreme court of the District of Columbia and this court declined to set aside the judgment of the justice of the peace was, that the existence of the relation of landlord and tenant between the parties, and the jurisdiction of the justice of the peace over the case, were sufficiently shown by general allegations in the complaint that the plaintiff was entitled to the possession of the premises and that they were detained from him and held without right by the defendant, tenant thereof by the sufferance of the plaintiff, and whose tenancy and estate therein had been determined by thirty days' notice to quit; and that these allegations could not be contradicted upon the writ of certiorari. See 6 Mackey, 594, 595, 129 U. S. 368, 371 [32: 699, 700].

In *Jennings* v. *Webb* (1892) 20 D. C. 317, 322, in which it was decided that one tenant in common could not maintain this form of proceeding against his cotenant, Justice Cox, speaking for Justices Hagner and James, as well as for himself, said: "There seems to be a little misapprehension of the nature of this proceeding. While our rule requires the plaintiff to file a declaration, as in ejectment, that does not convert the proceeding into an action of ejectment at all, in which the plaintiff recovers upon the strength of his title. In this proceeding, unless he establishes the relation of landlord between himself and the defendant no matter what the form of declaration is, he is not entitled to recover. I have always held that at special term, and that is the opinion that we entertain now. It is still a landlord and tenant proceeding."

In two earlier cases, a purchaser at a sale under a deed of trust in the nature of a mortgage had been declared, by the supreme court of the District of Columbia in general term, to be entitled to maintain this proceeding against the mortgagor, who had remained in possession without the plaintiff's consent, and had been served with a thirty days' notice to quit. But in *the first of those cases this was wholly **[302** *obiter dictum*, the appeal to the general term being dismissed because the judgment in special term was final; and in the other case no question appears to have been raised upon the construction of the statute. *Luchs* v. *Jones* (1874) 1 MacArth. 345; *Fiske* v. *Bigelow* (1876) 2 MacArth. 427.

Afterwards, in *Loring* v. *Bartlett* (1894) 4 App. D. C. 1, the court of appeals, speaking by Chief Justice Alvey, reversing a judgment of the supreme court of the District of Columbia, and quoting from *Birch* v. *Wright*, 1 T. R. 378, 382, 383, refrained from expressing a definite opinion upon the question "whether the simple and ordinary relation of mortgagor and mortgagee involves the relation of landlord and tenant by implication of law, within the meaning and sense of the statute;" and maintained the suit, solely upon the ground that a provision in a trust deed to secure the payment of promissory notes, by which the mortgagee and her heirs and assigns were to be permitted "to use and occupy the said described premises, and the rents, issues, and profits thereof to take, have, and apply, to and for her and their sole use and benefit, until default be made in the payment of said notes or any of them," constituted a redemise from the mortgagee to the mortgagor, which would support a proceeding under the statute. The cases relied on in support of that decision were *Georges Creek & I. Co.* v. *Detmold*, 1 Md. 225, 236, and some English cases, all of which were ordinary actions of ejectment, and none of them under statutes like that now in question.

The decision in *Loring* v. *Bartlett* was followed by the court of appeals in the present case, without further discussion. 6 App. D. C. 375, 383.

Upon full consideration of the terms of the act of Congress, and in view of the existing state of the law in this country at the time of its passage, this court is unable to concur in the conclusion of the court of appeals.

The common saying that a mortgagor in possession is tenant at will to the mortgagee has been often recognized to be a most unsafe guide in defining the relation of mortgagee and *mortgagor, or in construing statutes **[303** authorizing landlords to recover possession against their tenants by summary process before a justice of the peace.

In *Moss* v. *Gallimore* (1779) Lord Mansfield said: "A mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is so only *quodam modo*. Nothing is more apt to confound than a simile. When the court or counsel call a mortgagor a tenant at will it is barely a comparison. He is *like* a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases." 1 Dougl. 279, 282, 283. And in *Birch* v. *Wright* (1786) Mr. Justice Buller said: "He is not a tenant at will, because he is not entitled to the growing crops after the will is determined. He is not considered as a tenant at will in those pro-

ceedings which are in daily use between a mortgagor and mortgagee; I mean in ejectments brought for the recovery of the mortgaged lands." 1 T. R. 378, 383.

Under early statutes of the state of New York, providing that any tenant at will, or at sufferance, or for years, holding over without permission of his landlord after the expiration of his term, or after default in the payment of rent, might be removed from the possession upon a proceeding commenced by the landlord before a justice of the peace, it was constantly held by the supreme court of the state that a mortgagee could not maintain this process against a mortgagor in possession; and Chief Justice Savage said that for some purposes, indeed, the mortgagor, after condition broken, was considered as tenant to the mortgagee; but that the statute "was clearly designed to afford a speedy remedy where the conventional relation of landlord and tenant existed, and not where that relation is created by operation of law;" and "the legislature never intended that the mortgagee should have a right to proceed under this statute to obtain possession of the mortgaged premises after forfeiture." N. Y. Stat. of 1820, chap. 194; 2 Rev. Stat. of 1828, pt. 3, chap. 8, tit. 10, §§ 28 *et seq.*; *Evertson* v. *Sutton* (1830) 5 Wend. 281, 284 [21 Am. Dec. 217]; *Roach* v. *Cosine* (1832) 9 Wend. 227, 231, 232; *Sims* v. *Humphrey* (1847) 4 Denio, 185, 187; *Benjamin* v. *Benjamin* (1851) 5 N. Y. 383, 388; *People, Mitchell*, v. *Simpson* (1863) 28 N. Y. 55, 56.

304] *It is true, as has been heretofore observed by this court, that in the state of New York the courts of law had, by a gradual progress, adopted the views of courts of equity in relation to mortgages, and considered the mortgagor, whilst in possession and before foreclosure, as the real owner, except as against the mortgagee, and as having the right of possession, even as against the mortgagee; whereas, by the law of Maryland, prevailing in the District of Columbia, the legal estate is considered as vested in the mortgagee, and, as soon as the estate in mortgage is created, the mortgagee may enter into possession, though he seldom avails himself of that right. *Van Ness* v. *Hyatt*, 38 U. S. 13 Pet. 294, 299 [10: 168, 170].

But the mortgagee has been equally held not to be entitled to maintain against the mortgagor a summary landlord and tenant process in states where, as in New England, the mortgagee is held to be the owner of the legal title. 1 Jones, Mortg. § 58.

The Revised Statutes of Massachusetts of 1836, chap. 104, §§ 2, 4-9, contained provisions very similar to those of §§ 2-4 of the act of Congress of July 4, 1864, as to the cases in which and the persons by and against whom the proceedings might be instituted, the service of summons, the form of judgment, and the removal of the case, by certificate or by appeal, into a court of record.

In that chapter of the Massachusetts statutes of 1836, § 2 was as follows: "When any forcible entry shall be made, or when an entry shall be made in a peaceable manner, and the possession shall be unlawfully held by force, and also when the lessee of any lands or tenements, or any person holding under such lessee, shall hold possession of the demised premises, without right, after the determination of the lease, either by its own limitation, or by a notice to quit, as provided in the 60th chapter" (§ 26 of which provided that estates at will might be terminated by either party by notice of three months, or by the landlord by fourteen days' notice in case of nonpayment of rent), "the person entitled to the premises may *be restored to the possession thereof, in[305 the manner hereinafter provided." And by § 4, "the person entitled to the possession of the premises" might obtain from a justice of the peace a summons to answer to a complaint charging the defendant with being in possession of the land in question, and holding it unlawfully and against the right of the plaintiff.

It was the settled construction of that statute by the supreme judicial court of Massachusetts, that a mortgagee, even after he had entered for the purpose of foreclosure, could not maintain an action against his mortgagor to recover possession of the mortgaged premises. "Whilst the parties stood in the relation of mortgagor and mortgagee," said Chief Justice Shaw, "the defendant was not lessee, within the meaning of this statute. A mortgagor in possession is sometimes in a loose sense said to be tenant at will to the mortgagee. But he is not liable to rent, or to account for rents and profits; these he holds to his own use. He is like a tenant at will because the mortgagee may enter upon the estate at his will, if he can do so peaceably, when not restrained by covenant." *Larned* v. *Clarke* (1851) 8 Cush. 29, 31. And again: "The present statute contemplates three cases in which this process will lie: 1, forcible entry; 2, forcible detainer; 3, a tenant holding against his landlord, either (1) after the determination of a lease by its own limitation; or (2) after the expiration of a notice to quit duly given; or (3) after a notice of fourteen days, for nonpayment of rent. . . . In the present case, the proof shows no forcible entry, no forcible detainer, no holding over of a tenant of demised premises. These are the only cases contemplated in this statute in which this summary process will lie. Although, in a loose sense, a mortgagor in possession is said to be tenant at will of the mortgagee, yet he is not within the reason or the letter of the Revised Statutes, chap. 104, § 2. He is not lessee, or holding under a lessee, or holding demised premises without right after the determination of the lease. The remedies of a mortgagee are altogether of a different character, clearly marked out by law." *Hastings* v. *Pratt* (1851) [306 8 Cush. 121, 123. See also *Dakin* v. *Allen* (1851) 8 Cush. 33; *Gerrish* v. *Mason* (1855) 4 Gray, 432.

In chapter 137 of the General Statutes of Massachusetts of 1860, the provisions of the Revised Statutes of 1836, above mentioned, were substantially re-enacted, § 2 being put in the following form: "When a forcible entry is made, or when a peaceable entry is made and the possession unlawfully held by force, or when the lessee of land or tenements, or a person holding under such lessee, holds possession without right after the determination of the lease by its own limitation, or by notice

to quit, or otherwise, the person entitled to the premises may be restored to the possession in the manner herelnafter provided." The words "or otherwise" were apparently added in that section, because of its having been decided, under the earlier statute, that "the determlnation of the lease by its own limitation" did not include its determination by the lessor's entry for breach of a condition in the lease. *Fifty Associates* v. *Howland* (1846) 11 Met. 99; *Whitwell* v. *Harris* (1871) 106 Mass. 532.

By § 5 of the statute of 1860 "the person entitled to the possession of the premises" may obtain from a justice of the peace a summons "to answer to the complaint of the plaintiff, for that the defendant is in possession of the lands, . . . which he holds unlawfully and against the right of the plaintiff."

The provision, above quoted, of the statute of 1860, which defines the circumstances under which this summary process may be commenced before a justice of the peace, is almost exactly like the corresponding provision of the act of Congress of 1864. as will appear by putting the two together, with those words of the Massachusetts statute which have been omitted in the act of Congress printed in italics, and the words added in the act of Congress inclosed in brackets, as follows: "When *a* forcible entry is made, or when a peaceable entry is made and the possession unlawfully held by force, or when *the lessee of land or tenements, or a person holding under such lessee, holds* possession [is held] without right after the *determination* [estate is determined by the terms] of the lease by its own limitation, or by notice to quit or otherwise."

307] *This provision, as incorporated in the act of Congress, though somewhat condensed in form, is essentially in the same words, and of precisely the same meaning, as the provision of the statute of Massachusetts. While it omits the words "the lessee or the tenements, or a person holding under such lessee," it still, like the Massachusetts statute (in cases where there is neither forcible entry nor forcible detainer), is restricted to cases in which "the lease" has been determined, and differs in this respect from the provision in the 1st section of the act of Congress, which defines tenancies by sufferance.

The statute of Massachusetts and the act of Congress resemble each other in many other respects. Each authorizes "the person entitled to the premises" to recover possession by complaint to a justice of the peace. Each authorizes the complaint to be in general terms; in Massachusetts, alleging that the defendant is in possession of the land, and holds it unlawfully and against the right of the plaintiff; in the District of Columbia, "charging a forcible entry or detainer of real estate." Each requires the summons to be served seven days before appearance. The provisions as to the form of the judgment of the justice of the peace for either party are exactly alike in both statutes. Each statute provides that when the title is put in issue, the case may be certified to a court of record; that from any judgment of the justice of the peace an appeal may be taken by either party to that court; and that upon such removal, either by certificate or by the defendant's appeal, the defendant shall recognize to the plaintiff, with sufficient securities, to pay intervening rent and damages. Mass. Gen. Stat. of 1860, chap. 137, §§ 6-10; Act of July 4, 1864, chap. 243, §§ 2-4; Rev. Stat. D. C. §§ 684-689.

The resemblance between the provisions of the Massachusetts Statute of 1860 and of the act of Congress of 1864 is so remarkable that it is evident that the latter were taken from the former. This being so, the known and settled construction, which those statutes had received in Massachusetts before the original enactment of the act of Congress, must be considered as having been adopted by Congress with the text thus expounded. **Tucker* v. *Oxley*, 9 U.[**308** S. 5 Cranch, 34, 42 [3: 29, 31]; *Pennock* v. *Dialogue*, 27 U. S. 2 Pet. 1, 18 [7: 327, 333]; *Metropolitan Railroad Co.* v. *Moore*, 121 U. S. 558, 572 [30: 1022, 1026]; *Warner* v. *Texas & Pacific Railway Co.* 164 U. S. 418, 423 [41: 495, 500]. In *Metropolitan Railroad Co.* v. *Moore*, just cited, where provisions of statutes of New York, regulating judicial procedure, had been incorporated by Congress, in substantially the same language, in the legislation concerning the District of Columbia, it was held that Congress must be presumed to have adopted those provisions as then understood in New York and already construed by the courts of that state, and not as affected by the previous practice in Maryland or in the courts of the District of Columbia.

Before the passage of the act of Congress of 1864, the supreme judicial court of Maine had held that a mortgagee could not proceed against his mortgagor under a statute of that state, the leading sections of which provided that "a process of forcible entry and detainer may be commenced against a disseisor, who has not acquired any claim by possession and improvement; and against a tenant holding under a written lease or contract, or person holding under such tenant, at the expiration or forfeiture of the term, without notice; . . . and against a tenant at will, whose tenancy has been terminated" by notice to quit, in which last case "the tenant shall be liable to the process aforesaid without further notice and without proof of any relation of landlord and tenant." Me. Rev. Stat. of 1857, chap. 94; *Reed* v. *Elwell* (1858) 46 Me. 270, 278, 279; *Dunning* v. *Finson* (1859) 46 Me. 546, 553. See also *Sawyer* v. *Hanson* (1845) 24 Me. 542; *Clement* v. *Bennett* (1879) 70 Me. 207.

Similar opinions have been expressed in cases arising in other states under statutes differing in language, but having the same general purpose. *Davis* v. *Hemenway* (1855) 27 Vt. 589; *McCombs* v. *Wallace* (1872) 66 N. C. 481; *Greer* v. *Wilbar* (1875) 72 N. C. 592; *Necklace* v. *West* (1878) 33 Ark. 682; *Nightingale* v. *Barens* (1879) 47 Wis. 389; *Steele* v. *Bond* (1881) 28 Minn. 267; *Chicago, Burlington, & Quincy R. Co.* v. *Skupa* (1884) 16 Neb. 341. We have not been referred to, and are not aware of, a single case in any state in which a summary *process of this kind has been[**309** maintained by a mortgagee against his mortgagor, unless specifically given by distinct provision in the statute.

The view which has been generally, if not universally, entertained by the courts of the several states upon this subject has been well

expressed by the supreme court of Minnesota in *Steele* v. *Bond*, above cited, as follows: "The act concerning forcible entries and unlawful detainers, so far as it affords a remedy for landlords against tenants who unlawfully detain the premises after a default in the payment of the rent, or the expiration of the term, must be construed as similar acts have always been construed by the courts of other states, to apply only to the conventional relation of landlord and tenant. It was not intended as a substitute for the action of ejectment, nor to afford means of enforcing agreements to surrender possession of real estate, where that relation does not exist or has not existed. The foundation fact upon which the jurisdiction rests is that the tenant is in possession of the land in consequence and by virtue of that relation, and unlawfully withholds possession after a default in the performance of the terms upon which he entered, or after his term has expired." 28 Minn. 273.

Considering the terms of the act of Congress, the settled construction, before the passage of that act, of the statute of Massachusetts from which it appears to have been taken, and the general course of decision in this country under statutes on the same subject, the reasonable conclusion is that, in order to sustain this form of proceeding, the conventional relation of landlord and tenant must exist or have existed between the parties.

A mortgagee holds no such relation to a mortgagor in possession. The mortgagor, though loosely called a tenant at will of the mortgagee, is such in no other sense than that his possession may be put an end to whenever the mortgagee pleases. Lord Mansfield, in *Moss* v. *Gallimore*, 1 Dougl. 279, 283; Lord Selborne, in *Lows* v. *Telford*, 1 App. Cas. 414, 426; Shaw, Ch. J., in *Larned* v. *Clarke*, 8 Cush. 29, 31; *Carroll* v. *Ballance*, 26 Ill. 9, 19 [79 Am. Dec. 354]. The mortgagee may take pos-**310**]session *at any time; but, so long as there has been no breach of condition of the mortgage, this right is rarely exercised, and the mortgagor is usually permitted, by oral or tacit agreement with the mortgagee, or by express stipulation in the mortgage, to remain in possession. 2 Bl. Com. 158; *Moss* v. *Gallimore*, above cited; *Colman* v. *Packard*, 16 Mass. 39; *Flagg* v. *Flagg*, 11 Pick. 475, 477; *Jamieson* v. *Bruce*, 6 Gill & J. 72, 75; *Van Ness* v. *Hyatt*, 38 U. S. 13 Pet. 294, 299 [10: 168, 170]. Until the mortgagee takes actual possession, the mortgagor is not liable, without an express covenant to that effect, to pay rent, and is entitled to take the rents and profits to his own use. *Teal* v. *Walker*, 111 U. S. 242, 248-251 [28: 415, 418, 419], and cases cited; *Freedmen's Saving & T. Co.* v. *Shepherd*, 127 U. S. 494, 502 [32: 163, 167]; *Larned* v. *Clarke*, above cited.

When the mortgagor remains in possession with the assent of the mortgagee, without formal agreement, no one would think of saying that there was a lease from the mortgagee to the mortgagor, or that the relation of landlord and tenant existed between them. An express stipulation in the mortgage, that the mortgagor may remain in possession until breach of condition, is intended merely to put in definite and binding form the understanding of the parties as to the exercise of their rights as mortgagor and mortgagee, and not to create between them a distinct relation of tenant and landlord. *Anderson* v. *Strauss*, 98 Ill 485.

That such was the understanding and intention of the parties to the deed of trust in this case is apparent from its terms, by which the American Ice Company mortgages all its real estate, wharves, ice houses, and other buildings and machinery; and it is provided that, until default, the mortgagor "shall be permitted and suffered to possess, manage, develop, operate, and enjoy the plant and property herein conveyed, and intended so to be, and to take and use the income, rents, issues, and profits thereof, in the same manner, to the same extent, and with the same effect, as if this deed had not been made."

The result is, that the plaintiff is not entitled to maintain this process, but must be left, so far as the aid of a court of *justice is [**311** requisite to secure the rights conferred by the mortgage, to the appropriate remedy of a writ of ejectment, or a bill of foreclosure. Comp. Stat. D. C. chap. 48, § 1; chap. 55, § 10; *Hogan* v. *Kurtz*, 94 U. S. 773 [24: 317]; *Hughes* v. *Edwards*, 22 U. S. 9 Wheat. 489 [6: 142].

Judgment of the Court of Appeals reversed, and case remanded with directions to affirm the judgment of the Supreme Court of the District of Columbia.

RICHMOND & ALLEGHANY RAILROAD COMPANY *et al.*, *Plffs. in Err.*, *v.* R. A. PATTERSON TOBACCO COMPANY.

(See S. C. Reporter's ed. 311-316.)

Virginia statute as to liability of carrier—not a regulation of interstate commerce—duty of carrier.

1. The statute of Virginia (Va. Code 1887, § 1295), that "when a common carrier accepts for transportation anything directed to a point of destination beyond his own line he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent,"—is not a regulation of interstate commerce and not in conflict with the Constitution of the United States, or void.

2. The remote effect upon commerce, resulting from the lawful exercise by a state of its power to determine the form in which contracts may

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NOTE.—*As to power of Congress to regulate commerce*, see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.

As to interstate commerce; regulation of; power of Congress, how far exclusive,—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

As to state taxes or penalties as affecting commerce; what includes; right of carriers to land passengers,—see note to Bangor v. Smith (Me.) 13 L. R. A. 686.

be proved, does not amount to a regulation of interstate commerce.

3. The concluding sentences of the said statute, imposing upon a carrier a duty where the loss has not happened on the carrier's own line, to inform the shipper of this fact, is but a regulation manifestly within the power of the state to adopt.

[No. 172.]

Submitted January 4, 1898. Decided February 21, 1898.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a judgment affirming the judgment of the Circuit Court of the City of Richmond in favor of the R. A. Patterson Tobacco Company, plaintiff, against the Richmond & Alleghany Railroad Company *et al.*, for the value of certain tobacco delivered by the plaintiff to said railroad company to be carried to Bayou Sara, Louisiana, from the city of Richmond, which tobacco was lost. *Affirmed.*

The facts are stated in the opinion.

Messrs. **H. T. Wickham** and *Henry Taylor*, Jr., for plaintiffs in error:

Where the subject of a contract is the transportation of articles of commerce from one state to another, the sole and exclusive power to prescribe its terms is vested by the Constitution in Congress, and no power is left in the state by which it can make any regulation; and nonaction on the part of Congress, where the subject is national in its character or admits of uniformity of regulation, means that there shall be no regulation by the state.

Gibbons v. *Ogden*, 22 U. S. 9 Wheat. 1 (6: 23); *Philadelphia & R. R. Co.* v. *Pennsylvania* (*Case of State Freight Tax*), 82 U. S. 15 Wall. 232, 279, 280 (21: 146, 163); *Welton* v. *Missouri*, 91 U. S. 275 (23: 347); *Henderson* v. *Wickham*, 92 U. S. 259, 272 (23: 543, 549); *Hall* v. *De Cuir*, 95 U. S. 485, 490 (24: 547, 549); *Mobile County* v. *Kimball*, 102 U. S. 691 (26: 238); *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203, 204 (39: 158, 162); *Brown* v. *Houston*, 114 U. S. 622 (29: 257); *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465 (31: 700), 1 Inters. Com. Rep 823; *Leisy* v. *Hardin*, 135 U. S. 100 (34: 128), 3 Inters. Com. Rep. 36; *Norfolk & W. R. Co.* v. *Pennsylvania*, 136 U. S. 114 (34: 394), 3 Inters Com Rep. 178; *Walling* v. *Michigan*, 116 U. S. 446, 455 (29: 691, 694).

It is well settled that the state cannot directly regulate the compensation of the common carrier for interstate business.

Wabash, St. L. & P. R. Co. v. *Illinois*, 118 U. S. 557 (30: 244); *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 (24: 527); *Stanley* v. *Wabash, St. L. & P. R. Co.* 100 Mo. 435, 8 L. R. A. 549, 3 Inters. Com. Rep. 176; *Michigan C. R. Co.* v. *Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318 (21: 297); *Ogdensburg & S. C. R. Co.* v. *Pratt*, 89 U. S. 22 Wall. 123 (22: 827); *St. Louis Ins. Co.* v. *St. Louis, V. T. H. & I. R. Co.* 104 U. S. 146 (26: 679); *Michigan C. R. Co.* v. *Myrick* (*Myrick* v. *Michigan C. R. Co.*) 107 U. S. 102 (27: 325); *McConnell* v. *Norfolk & W. R. Co.* 86 Va. 248; *McCann* v. *Eddy*, 133 Mo. 59, 35 L. R. A. 110.

Mr. **A. W. Patterson** for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

In August, 1888, the Patterson Tobacco Company delivered to the Richmond & Alleghany Railroad, which was then in the hands of receivers, a lot of tobacco consigned to Mann and Levy, Bayou Sara, Louisiana. On receiving the tobacco the railroad issued a bill of lading whereby it was expressly stipulated that it should only be liable for the transportation of the goods over its own line, and beyond this was to be responsible solely as a forwarder, that is to say, that all its obligations should be discharged if it safely carried the goods over its own road, and delivered them to a connecting carrier. The limitations on this subject in the bill of lading were full and clear, and there is no question that if the rights of the parties are to be measured by the terms of the bill of lading that the carrier was not liable for a loss happening beyond its line. When this shipment was made there was no law of the state of Virginia forbidding or purporting to forbid a carrier, in receiving goods for interstate shipment, from restricting its liability in accordance with the tenor of the bill of lading in question. In fact, the supreme court of appeals of Virginia in this case expressly held that the Virginia law sanctions a contract made by a carrier to that effect. The bill of lading for the tobacco, issued as above stated, was not signed by the shipper, although at the time the freight was received and when the bill was issued the Code of Virginia contained the following provisions:

"When a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent, and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless, within a reasonable time after demand made, he shall give satisfactory proof *to the [313 consignor that the loss or injury did not occur while the thing was in his charge." § 1295, Virginia Code of 1887.

The tobacco not having been delivered to the consignees, the shippers sued the Richmond & Alleghany Railroad for the value thereof, on the assumption that the railroad was responsible as a common carrier for the nondelivery. The corporation relied for its defense on the contract embodied in the bill of lading, and on the fact that the tobacco had been duly transferred to a connecting carrier, and was thereafter lost. The case was submitted to the trial court on an agreed statement, admitting the receipt of the goods, the issue of the bill of lading, the fact that it was not signed by the shipper, and the loss of the tobacco beyond the lines of the defendant. The plaintiff rested on the statute above quoted, and the defendant company on its claim that the statute was a regulation of interstate commerce and therefore in conflict with the Constitution of the United States. The trial court held the railroad liable, and

from a judgment of the supreme court of appeals of the state of Virginia, affirming its action, this writ of error is prosecuted.

The supreme court of appeals of Virginia in its able opinion, and the counsel of both parties at bar, conceded that an attempt on the part of a state to prohibit a carrier, as to an interstate shipment, from limiting its liability to its own lines would be a regulation of interstate commerce, and therefore void. We shall therefore not examine this question, but shall proceed to a consideration of the case without expressing any opinion upon it. It is manifest that the statute of the state of Virginia in question does not attempt to substantially regulate or control contracts as to interstate shipments, but simply establishes a rule of evidence ordaining the character of proof by which a carrier may show that although it received goods for transportation beyond its own line, nevertheless, by agreement, its liability was limited to its own line. That this is the sole purpose of the statute seems too plain for anything but statement. It leaves the carrier free to make such limitation as to liability on an interstate shipment beyond its own line as it may deem proper, provided **314]** only the *evidence of the contract is in writing and signed by the shipper. The distinction between a law which forbids a contract to be made and one which simply requires the contract when made to be embodied in a particular form is as obvious as is the difference between the sum of the obligations of a contract and the mere instrument by which their existence may be manifested. The contract is the concrete result of the meeting of the minds of the contracting parties. The evidence thereof is but the instrument by which the fact that the will of the parties did meet is shown.

The failure to bear this plain distinction in mind is the fallacy which is involved in all the contentions which are pressed by the plaintiff in error. It is of course elementary that where the object of a contract is the transportation of articles of commerce from one state to another that no power is left in the states to burden or forbid it; but this does not imply that, because such want of power obtains, there is also no authority on the part of the several states to create rules of evidence governing the form in which such contracts when entered into within their borders may be made, at least, until Congress, by general legislation, has undertaken to govern the subject. But it is said, although the learned court below announced, as an abstract principle, that under the law of Virginia a carrier was free when receiving an interstate shipment, to limit his liability to his own line, the conclusion reached by the court was inconsistent with this ruling, and, in effect, substantially repudiated its correctness. The line of reasoning by which this proposition is supported is this: If there had been no statute, it is said, the court admitted that the terms of the bill of lading would have exempted the carrier from liability beyond its own line, but by applying the statute to the bill of lading it did not so exempt the carrier, therefore the statute was so enforced as to prevent the carrier from contracting, and hence its application negatived the power to contract for such exemption. But the inconsequence is in the argument of the plaintiff in error and not in the reasoning or the conclusion of the court. The inadequacy of the bill of lading to protect the carrier from liability beyond *its own line resulted, it is true, **[315** from the statute, but not because the statute forbade the carrier from contracting so as to limit his liability, but because the contract which he did make was not in the form required by law, and therefore was not evidence that there was such a contract. Indeed, the entire argument upon which it is asserted that error was committed by the court below but manifests in varying forms of statement the fallacy already noticed, that is, it comes from obscuring the difference between substance and form, between a power to contract and the asserted right in availing of the authority, to disregard the requisites essential to show a valid contract, and this confusion of thought also marks the difference between the case now presented and the very many adjudged cases cited by the plaintiff in error in support of its proposition.

Of course, in a latitudinarian sense any restriction as to the evidence of a contract, relating to interstate commerce, may be said to be a limitation on the contract itself. But this remote effect, resulting from the lawful exercise by a state of its power to determine the form in which contracts may be proved, does not amount to a regulation of interstate commerce. The principle on this subject has been often stated by this court, and, indeed, has been quite recently so fully reviewed and applied that further elaboration becomes unnecessary. In the case of *Chicago, M. & St. P. Railway Co.* v. *Solan*, 169 U. S. 133 [*ante*, 688], it was said (p. 138 [*ante*, 693]):

"They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits. Such are the grounds upon which it has been held to be within the power of the state to require the engineers and other persons engaged in the driving or management of all railroad trains passing through the state to submit to an *examination by a local board as **[316** to their fitness for their positions; or to prescribe the mode of heating passenger cars in such trains. *Smith* v. *Alabama*, 124 U. S. 465 [31: 508, 1 Inters. Com. Rep. 804]; *Nashville, C. & St. L. Ry. Co.* v. *Alabama*, 128 U. S. 96 [32: 352, 2 Inters. Com. Rep. 238]; *New York, N. H. & H. R. Co.* v. *New York*, 165 U. S. 628 [41: 853]. See also *Western U. Telegraph Co.* v. *James*, 162 U. S. 650 [40: 1105]; *Hennington* v. *Georgia*, 163 U. S. 299 [41: 166]; *Gladson* v. *Minnesota*, 166 U. S. 427 [41: 1064]."

These views dispose of the substantial questions which the case presents, for the contention which arises on the concluding sentences of the statute, imposing upon a carrier a duty where the loss has not happened on the carrier's own line to inform the shipper of this

fact, is but a regulation manifestly within the power of the state to adopt.

Affirmed.

UNITED STATES, *Appt.*,
v.
DIXON N. GARLINGER.

(See S. C. Reporter's ed. 316-323.)

Pay of night inspector—extra pay—treasury regulations—payments, when deemed to be in full.

1. A night inspector in the customs service, who serves both night watches and is not excused from duty the succeeding night, is not entitled to double pay under the Treasury Regulations of 1877; no implied contract arises for full pay for both watches.
2. Under U. S. Rev. Stat. §§ 1764, 1765, no officer can receive extra pay unless the same is authorized by law, and the appropriation therefor expressly states it to be for additional pay.
3. The Secretary of the Treasury cannot, by his regulations dividing a day's service into parts, attach to each part the pay for a full day's work.
4. Payments of compensation to a government employee, frequently made, for a considerable period of time, and received without objection or protest, when there is no pretense of fraud or of duress, will be deemed to be in full, and will preclude any subsequent claim for extra services.

[No. 166.]

Argued January 4, 5, 1898. Decided February 21, 1898.

APPEAL from a decree of the Court of Claims in favor of the claimant Dixon H Garlinger, against the United States for extra services rendered by him as night inspector in the customs service. *Reversed*, and cause remanded with directions to dismiss the action.

See same case below, 30 Ct. Cl. 208.

Statement by Mr. Justice **Shiras:**

This was an action brought by Dixon N. Garlinger, in the court of claims, against the United States, wherein he sought to recover for alleged extra service rendered by him while in the employ of the United States. The trial court found the facts to be as follows:

I. The claimant, a citizen of the United States, was appointed by the collector of the port of Baltimore a night inspector in the customs service at Baltimore in 1882. He took the oath of office and entered upon the discharge of the duties of night inspector of customs on April 1, 1882, and continued in office until August 25, 1886, a period of 1,608 days.

II. During the above-named period the claimant was paid for 1,608 days, of which 1,353 payments were for night service when he was present rendering actual service, and 255 were for night service when he was absent and off duty.

III. During the 1,353 days of night service the claimant was required to perform duty as night inspector from sunset to sunrise and until relieved by the day inspector, the length of the night service consequently varying, and sometimes extending from 5 P. M. of one day until 10 A. M. of the succeeding day. During this time the claimant was not allowed to be off duty on the succeeding night, after having been on duty two watches, except in the 255 instances set forth in finding II., when he was off duty and received pay. That is to say he performed the duties of both the first and second watch on 1,098 nights without additional compensation and without being allowed to be off duty on any alternate night.

IV. The petition not having been filed until August 24, 1888, 144 days of the number last above stated are barred by the statute of limitations, leaving 954 days as the subject of the present suit.

V. The claimant objected to his superior officer, the surveyor of the port, against his being required to perform the duties of both watches in one night without being excused *from the performance of duty on the [318 following night, and he subsequently remonstrated at various times.

VI. At the time of his entering the service as night inspector he was furnished by his superior officers with a copy of the regulations promulgated by the Secretary of the Treasury for his governance and defining his duties. It was customary for the surveyor of the port to furnish such regulations to inspectors and others at the time of their entering the customs service. The regulations hereinafter quoted were among those so given to the claimant.

VII. The Laws and Regulations for the Government of Officers of Customs under the Superintendence and Direction of Surveyor of Ports, 1877, were issued by the Secretary of the Treasury to the customhouse authorities of all ports, including the port of Baltimore, and were in operation in all of the principal ports, except Baltimore, in which the practice of the port at the time of the claimant's appointment was not, and had not been, in accordance with the requirement of the regulations making two night watches and relieving the first watch at midnight. There the surveyor of the port had always required the night inspectors to serve from sunset to sunrise.

VIII. The following are among the regulations given to the claimant when he entered the service, above referred to:

"Art. 420. The night watchmen shall be divided into two watches, as nearly equal as possible, both watches to perform duty every night. The surveyor of the port will, however, make such changes in the division of the watches as he may deem expedient, and will appoint the hours of duty for the different watches.

"Whenever it is necessary to assign a night watchman to a vessel, or to any other 'all-night' charge, the night watchman so assigned must remain on the vessel, or on his charge, until relieved, and he will be excused from performing any duty the following night.

NOTE.—*As to extra pay or compensation to officers*, see note to United States v. Macdaniel, 8: 587.

As to claims against the United States; assignment,—see note to Lopez v. United States (Ct. Cl.) 2 L. R. A. 571.

As to limitation of time to present claims, see note to Waddell v. United States (Ct. Cl.) 7 L. R. A. 861.

"Night watchmen must not quit their charge on being relieved without first making 319] their presence personally known *to the officer relieving them. Night watchmen, when on duty, must wear their official badge."

Upon the foregoing findings of fact, the court decided, as a conclusion of law, that the claimant was entitled to recover $2,862.

Messrs. **George Hines Gorman** and *Louis A. Pradt*, Assistant Attorney General, for appellant.

Messrs. **L. T. Michener, F. P. Deweese,** *W. W. Dudley*, and *R. R. McMahon* for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

Dixon N. Garlinger, the plaintiff in the court below, was employed by the collector of the port of Baltimore as a night inspector in the customs service from April 1, 1882, till August 25, 1886. For his services he was entitled to be paid $3 per day for each day's work actually performed; and it is a conceded fact that he was so paid for each and every day he was in the service.

Two years after he ceased to be so employed he brought this action, claiming to recover additional compensation, and recovered a judgment for the sum of $2,862.

The plaintiff based his claim for additional pay upon two grounds, *viz.*, that by the laws and regulations for the government of officers of customs under the superintendence and direction of surveyors of ports, issued in 1877 by the Secretary of the Treasury, it was, among other things, provided as follows: "The night watchmen shall be divided into two watches, as nearly equal as possible, both watches to perform duty every night. The surveyor of the port will, however, make such changes in the division of the watches as he may deem expedient, and will appoint the hours of duty for the different watches. Whenever it is necessary to assign a night watchman to a vessel, or to any other 'all-night' charge, the night watchman so assigned 320] must remain on the vessel, or *on his charge, until relieved, and he will be excused from performing any duty the following night;" and that, in disregard of this regulation, and of his objections and remonstrances, he was required to perform the duties of both watches in some nights, without being excused from the performance of duty on the following nights.

It is contended that, from these facts, the law will imply a contract between the claimant and the United States, whereby the former will be entitled to be paid for both watches, as if they constituted two days' service.

On the part of the United States it is claimed that the regulation quoted did not constitute an express contract of employment between the parties; that the facts negative any notion of an implied promise to pay any additional sum beyond the statutory rate of $3 per day; that, even if a breach of contract were shown, no recovery could be had beyond the sum already paid; that there is no obligation on the United States because such a regulation, if it is to receive the construction placed upon it by the court below, is in conflict with the law, and therefore null and void; that the construction placed upon the regulation by the court is erroneous; that the regulations of 1877 were repealed and ceased to be in force at any time after March 24, 1883, by reason of subsequent regulations, which should have been applied by the court below.

Section 2733 of the Revised Statutes, under the authority of which the claimant was employed, was as follows:

"Each inspector shall receive, for every day he shall be actually employed in aid of the customs, three dollars; and for every other person that the collector may find it necessary and expedient to employ, as occasional inspector, or in any other way in aid of the revenue, a like sum, when actually so employed, not exceeding three dollars for every day so employed."

Section 1764 of the Revised Statutes provides that "no allowance or compensation shall be made for any extra service whatever, which any officer or clerk may be required to perform, unless expressly authorized by law;" *and [321 § 1765, that "no officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation."

Of these provisions, while they were part of the act of August 23, 1842 (5 Stat. at L. 508, chap. 183), and before they were carried into the Revised Statutes, it was said by this court, in *Hoyt* v. *United States*, 51 U. S. 10 How. 141 [13: 361]: "It [this statute] cuts up by the roots these claims by public officers for extra compensation, on the ground of extra services. There is no discretion left in any officer or tribunal to make the allowance, unless it is authorized by some law of Congress. The prohibition is general, and applies to all public officers, or quasi-public officers, who have a fixed compensation."

Many cases to the same effect, construing these provisions, are collected in *United States* v. *King*, 147 U. S. 676 [37: 328], and in *Mullett's Administratrix* v. *United States*, 150 U. S. 566 [37: 1184], where it was said that, "obviously, the purpose of Congress, as disclosed by these sections, was that every officer or regular employee of the government should be limited in his compensation to such salary or fees as were by law specifically attached to his office or employment. 'Extras,' which are such a fruitful subject of disputes in private contracts, were to be eliminated from the public service."

We are unable to accept the contention that it was competent for the Secretary of the Treasury, by passing regulations, dividing a day's service into parts, to attach to each part the pay for a full day's work. By the word "day" in § 2733, Congress evidently meant the calendar day; and the purpose of Congress in prescribing the pay of $3 for every day, and in forbidding any allowance or compensation for extra services, would be defeated

if the regulation in question were to be construed as providing that a period of twenty-four hours might be so divided as to justify two or 322] more payments,* to the same person, of the amount fixed for the daily compensation.

Nor do we think that such a construction can be properly given to the regulation in question. Nothing is said therein of double pay in case the officer serves both watches. In such a case, the provision is that he will be excused from performing any duty the following night. This express provision negatives the inference that if he serves an all-night watch he will be entitled to double pay, and it certainly does not afford a ground on which to base an implied contract for full pay for both watches.

United States v. *Martin*, 94 U. S. 400 [24: 128], does not help this claimant's case, for there the court was construing a statute of Congress declaring that eight hours should constitute a day's work for all laborers, workmen, and mechanics. Rev. Stat. § 3738. It is not pretended that the present claimant falls within the provisions of that statute. He stands only on the regulation already quoted, and which must be interpreted in such a way as to consist with the statutes mentioned.

It is not found that the claimant himself ever demanded, during the period of his service, the compensation he now seeks. What he complained of was that, after he had performed an all-night service, he was not excused from duty the following night. He was not employed for any specific period, and was at liberty to quit the service if he thought the duties too onerous. He, however, elected to remain during the period above mentioned, and to receive the compensation awarded him by the collector, without any protest as to its insufficiency. It may be fairly presumed that the collector, in paying, and the claimant, in accepting, the money paid, supposed that the payments were in full. Such a course of conduct, we think, brings this claimant within the principle of well-settled cases, that the receipt of payment, purporting to be in full, where there is no fraud or coercion, cannot afterwards be repudiated as insufficient. *Baker* v. *Nachtrieb*, 60 U. S. 19 How. 126 [15: 528]; *United States* v. *Childs*, 79 U. S. 12 Wall. 232 [20: 360]; *De Arnaud* v. *United States*, 151 U. S. 483 [38: 244].

Such a principle is especially applicable to the transaction of the government, whose ex- 323] penditures are met by legislative *appropriations. We do not want to be understood as saying that the mere fact of receiving money in payment will estop a creditor. But where, as in this case, the payments were made frequently, through a considerable period of time, and were received without objection or protest, and where there is no pretense of fraud, or of circumstances constituting duress, it is legitimate to infer that such payments were made and received on the understanding of both parties that they were in full. Such a presumption is very much strengthened by the lapse of two years before the appellee thought fit to make any demand.

These views sufficiently dispose of the case, and render it unnecessary to consider the other contentions urged on behalf of the government.

The decree of the Court of Claims is reversed, and the cause is remanded to that court with directions to dismiss the claimant's petition.

RANSOM PAYNE, *Appt.*,
v.
W. S. ROBERTSON *et al.*

(See S. C. Reporter's ed. 323-330.)

Entering lands in Oklahoma.

A deputy marshal who was in Oklahoma territory as an employee of the government just prior to and at the moment of time when the land first became legally open for settlement was disqualified from entering upon and claiming lands therein as a homestead under § 13 of the act of March 2, 1889, which forbids any person who entered upon and occupied said lands before they were open for settlement from entering any of said lands or acquiring any right thereto.

[No. 20.]

Submitted January 17, 1898. Decided February 28, 1898.

APPEAL from a decree of the Supreme Court of the Territory of Oklahoma affirming the decree of the District Court for the County of Logan, First Judicial District, in said Territory, dismissing a suit in equity brought by Ransom Payne, plaintiff, against W. S. Robertson *et al.* to obtain a decree that defendants might be devested of the legal title to land and that it be vested in the plaintiff. *Affirmed.*

Statement by Mr. Justice **White:**

Payne, the appellant here, filed his bill of complaint in the district court for the county of Logan and territory of Oklahoma, first judicial district, against the present appellees. It was averred in the bill that prior to the passage of the act of Congress of March 2, 1889, providing for opening the Oklahoma lands for settlement, the complainant had been *duly [324 appointed and qualified as a deputy marshal of the United States, and that after the proclamation of the President, on March 23, 1889, declaring that said lands would be open to settlement after noon of the 22d of April, 1889, complainant, in pursuance of orders of his superior officer, the marshal of the United States for the district of Kansas, went into the territory, to the locality where the United States land office at Guthrie was located, for the purpose of preserving public order. That being rightfully in said territory and possessed of all the qualifications required by the act of Congress to authorize an entry of lands in such territory for the purpose of a homestead, complainant, after 12 o'clock noon of said April 22, 1889, settled upon a named quarter section

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands, how construed, see note to Watts v. Lindsey, 5: 423.

of land, at once commenced digging a well thereon, and claimed the same as his homestead, and that on the next day he duly entered said tract of land at the United States land office in Guthrie, paid the necessary charges and expenses connected with such entry, and thereafter fully complied with all other requirements of the homestead law. Though the bill averred that at the time of his going into the territory to perform the duties of deputy marshal, complainant "had formed no purpose or intention in regard to selecting and taking a homestead when said lands should be duly opened to settlement," nevertheless it was averred elsewhere in the bill, that in reliance on certain opinions and assurances of the Commissioner of the General Land Office and the Secretary of the Interior, claimed to have been communicated to parties similarly situated as was the complainant, to the effect that persons so situated were not disqualified from entering a homestead when the lands became opened to settlement, complainant remained in the territory and made the settlement in question. It was further averred that, subsequent to such entry and settlement, the defendant Fitzgerald went upon and claimed said tract of land as a homestead, and that other parties, by force and against the notice and warning of the complainant, proceeded to stake off and occupy a large portion thereof as a town site in violation of law and of the prior superior homestead rights of the complainant. It was also averred that on May 9, 1889, the town-site claimants instituted proceedings in the United States land office at Guthrie, Oklahoma, to obtain a cancelation of the homestead entry of complainant, and that ultimately such entry was canceled, the Secretary of the Interior approving the action of the Commissioner of the General Land Office in ordering such cancelation, on the ground that complainant was disqualified by his presence in the territory prior to the time fixed in the proclamation of the President, from making **325**] the entry. It was further averred *that subsequently the Secretary of the Interior, in pursuance of the provision of the act of May 14, 1890, chap. 207, appointed the defendants Robertson, Foster, and Schnell to prove up and enter the tract of land claimed for a town site, in trust for the inhabitants of a town to be called East Guthrie, and that after final entry by such trustees a patent of the United States was duly issued to them, which it was claimed vested in said defendants the legal title to the land covered by the patent.

In conclusion, complainant averred that he had done all things required by law in order to be entitled to a final patent, and that he was the equitable owner of the land claimed by him; that the Secretary of the Interior had misapplied and misconstrued the law in canceling the entry of complainant; and he prayed that the town-site trustees might be devested of the legal title to the tract in question and it be vested in complainant. The bill was demurred to upon various grounds, and the demurrer being sustained a decree was thereupon entered dismissing the bill. On appeal, this decree was affirmed by the supreme court of the territory, and from the decree of affirmance an appeal was taken to this court.

Messrs. **S. D. Luckett, John W. Daniel,** *Henry N. Copp,* and *Amos Green* for appellant.

Messrs. **John K. Richards,** Solicitor General, **Bayard T. Hainer,** and **Horace Speed** for appellees.

Mr. Justice **White** delivered the opinion of the court:

*In sustaining the demurrer the lower [**326** courts passed upon but one of the grounds stated therein, namely, that which asserted that the complaint did not set forth a cause of action. This contention went to the merits of the case and called for a decision of the question whether the Secretary of the Interior, upon the facts found by him, properly held that Payne was disqualified from making his alleged entry. As this is the pivotal point in the case, and its decision is free from difficulty, we shall confine ourselves, in this opinion, to its consideration.

The ruling of the Secretary of the Interior that the settlement made by complainant was invalid is averred in the bill to have been based upon the following finding of facts:

"Ransom Payne made homestead entry for the N. W. ¼ of section nine (9) on April 23, 1889. Said Ransom Payne was a United States deputy marshal, duly appointed prior to the passage of the act of March 2, 1889 (16 C. L. O. 10, 11), providing for the opening of the territory of Oklahoma to settlement, and prior to the proclamation of the President fixing the day for said opening, and he entered said territory prior to April 22, and was there at noon of that day in obedience to orders issued by his superior officer, and he was there in the discharge of his official duties. Immediately after 12 o'clock noon of April 22 he went upon the land in question and commenced to dig a hole in the ground for a well, and as soon as practicable appeared at the local office and made his entry. So far as his age, citizenship, etc., are concerned he was a qualified homestead claimant, and he bases his claim upon his prior settlement."

The statute which it is claimed was misconstrued and misapplied by the Secretary of the Interior in his decision sustaining the cancelation of Payne's entry, is that portion of § 13 of the Indian appropriation act approved March 2, 1889 (25 Stat. at L. 1004, chap. 412), which, after stipulating for the disposal of lands acquired from the Seminole Indians to actual settlers under the homestead laws only, except as therein otherwise provided, declared that "until said lands are opened for settlement by proclamation of the President, no person *shall be permitted to enter upon and [**327** occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto." It was also claimed that the Secretary misconstrued and misapplied the proclamation of the President of date March 23, 1889 (26 Stat. at L. 1544), fixing the time for the opening of the lands for settlement, particularly that portion which reads as follows:

"Now, therefore, I, Benjamin Harrison, President of the United States, by virtue of the power in me vested by said act of Congress, approved March second, eighteen hun-

dred and eighty-nine aforesaid, do hereby declare and make known, that so much of the lands, as aforesaid, acquired from or conveyed by the Muscogee (or Creek) Nation of Indians, and from or by the Seminole Nation of Indians, respectively, as is contained within the following-described boundaries, *viz.*:

"Will, at and after the hour of twelve o'clock, noon, of the twenty-second day of April next, and not before, be open for settlement, under the terms of, and subject to, all the conditions, limitations, and restrictions contained in said act of Congress, approved March second, eighteen hundred and eighty-nine, and the laws of the United States applicable thereto. . . .

"Warning is hereby again expressly given, that no person entering upon and occupying said lands before said hour of twelve o'clock, noon, of the twenty-second day of April, A. D. eighteen hundred and eighty-nine, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto; and that the officers of the United States will be required to strictly enforce the provision of the act of Congress to the above effect."

The question presented is, therefore, solely this: Was the complainant disqualified by reason of his entry into the territory and his presence there at the hour of the opening of the territory for settlement, under the circumstances stated in the finding of the Secretary, from making a homestead entry immediately upon the lands being opened for settlement?

This question is governed by the case of *Smith* v *Townsend*, 148 U. S. 490 [37:533]. The point **328**] there presented was whether a *railroad section hand, residing with his family on a railroad right of way within the territory, and who by reason of his employment and residence was present therein at the hour of noon on April 22, 1889, could immediately thereafter legally enter upon public land adjoining said right of way and claim the same as a homestead. A construction was rendered necessary of the 2d section of the act of March 1, 1889 (25 Stat. at L. 757, 759, chap. 317), ratifying and confirming an agreement with the Muscogee (or Creek) Indians, whereby a large body of their lands, subsequently included in the territory of Oklahoma, had been ceded to the United States. The section referred to declared the ceded land to be part of the public domain and subject to homestead entry. The concluding sentence of the section read as follows:

"Any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened to settlement by act of Congress shall not be permitted to occupy or to make entry of such lands or lay any claim thereto."

A construction was also required of the substantially similar provision contained in the act of March 2, 1889, heretofore quoted, and of the "warning" notice contained in the proclamation of March 23, 1889, which we have also heretofore referred to. To aid in construing these provisions resort was had to the history of the times, in order to ascertain the reason of the statutes as well as their meaning, and the conclusion was deduced (p. 496 [37: 535]) that the purpose of the legislative provisions referred to was "to secure equality between all who desired to establish settlements in that territory. The language is general and comprehensive: 'Any person who may enter upon any part of said lands . . . prior to the time that the same are opened to settlement . . . shall not be permitted to occupy or to make entry of such lands or lay any claim thereto. . . . Until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands, or acquire any right thereto.' No exception* is made[**329** from the general language of these provisions; and it was evidently the expectation of Congress that they would be enforced in the spirit of equality suggested by the generality of the language."

And, again, at page 500 [37: 536], the court observed:

"The evident intent of Congress was, by this legislation, to put a wall around this entire territory, and disqualify from the right to acquire, under the homestead laws, any tract within its limits, everyone who was not outside of that wall on April 22. When the hour came the wall was thrown down, and it was a race between all outside for the various tracts they might desire to take to themselves as homesteads."

Subsequently, conceding that Smith, the appellant in the case, was lawfully on the right of way of the railroad company, and that he possessed all the qualifications prescribed by the general homestead law, it was said (p. 500 [37: 536]):

"He did not have the qualifications prescribed by this statute; and there is nothing to prevent Congress, when it opens a particular tract for occupation, from placing additional qualifications on those who shall be permitted to take any portion thereof. That is what Congress did in this case. It must be presumed to have known the fact that on this right of way were many persons properly and legally there; it must also have known that many other persons were rightfully in the territory—Indian agents, *deputy marshals*, mail carriers, and many others, and if it intended that these parties, thus rightfully within the territory on the day named, should have special advantage in the entry of tracts they desired for occupancy, it would have been very easy to have said so. The general language used in these sections indicates that it was the intent to make the disqualification universally absolute. It does not say 'any person who may wrongfully enter,' etc., but 'any person who may enter'—'rightfully or wrongfully' is implied. There are special reasons why it must be believed that Congress intended no relaxation of these disqualifications on the part of those on the company's right of way, for it is obvious that, when a railroad runs through unoccupied territory like Oklahoma, which on a given day is opened for settlement, *numbers of settlers will immedi- [**330** ately pour into it, and large cities will shortly grow up along the line of the road; and it cannot be believed that Congress intended that

they who were on this right of way in the employ of the railroad company should have a special advantage of selecting tracts, just outside that right of way, and which would doubtless soon become the sites of towns and cities."

And in concluding its opinion the court held that "one who was within the territorial limits at the hour of noon of April 22 was, within both the letter and spirit of the statute, disqualified to take a homestead therein."

The reasoning of the opinion to which we have referred is fully applicable to the facts of the case under review; indeed, the very character of case now presented was referred to in illustration. In accordance with the views there expressed, we must, therefore, hold that as the appellant was within the territory just prior to and at the moment of time when the land first became legally open to settlement, he was disqualified at that time from entering upon and claiming lands therein as a homestead. Manifestly, Congress did not intend that one authorized to enter the territory in advance of the general public, solely to perform services therein as an employee of the government, should be at liberty, immediately on the arrival of the hour for opening the territory to settlement, to assume the status of a private individual and "actual settler," and make selection of a homestead, thus clearly securing an advantage in selection over those who, obedient to the command of the President, remained without the boundaries until the time had arrived when they might lawfully enter.

Affirmed.

331] UNITED STATES, *Appt.*,

v.

LEWIS A. EATON.

(See S. C. Reporter's ed. 331-352.)

Vacancy in office—appointment of vice consul—power of President—salary—statute as to bonds—when entitled to compensation—services for administering upon estate—disbursements for lights—modifying judgment.

1. A vacancy in the office of consul general and vice consul, which justifies an emergency appointment of a vice consul under the Consular Regulations of 1888, arises when the consul general and vice consul are absent or unable to discharge the duties of the consular office.
2. The temporary inability, from sickness, of one who is both consul general and minister resident in Siam, to perform the duties of his office, does not incapacitate him to make an emergency appointment of a vice consul.
3. Congress can confer upon the President the power to appoint a vice consul under U. S. Const. art. 2, § 2, giving Congress the power to authorize the President to appoint inferior officers.
4. Where Congress has given but one salary to the person who is both minister resident and consul general at Siam, the salary of the vice consul who temporarily discharges the duties of both offices is to be computed upon the basis of the salary of both offices.
5. Statutory provisions as to the giving of a bond by an officer before entering on his duties are directory, and not mandatory.
6. A vice consul who, when he is designated and enters upon his duties, takes the oath of office and at once communicates with the Department of State, and is recognized as consul general, and allowed to perform the duties of that office, is entitled to compensation, although his bond has not been approved.
7. It is the statutory duty of a consul to administer upon the personal estates of citizens of the United States who die within his consulate, and his fees for such services are to be accounted for by him as official fees, and are not to be allowed to him.
8. Disbursement for "lights upon the King's birthday" may be allowed to the vice consul at Bangkok, Siam, when approved by the Department of State.
9. When only one item is erroneously allowed by a judgment, this does not make it necessary to reverse the whole judgment, but only to modify the same as to that item.

[No. 174.]

Submitted January 4, 1898. Decided February 28, 1898.

APPEAL from a judgment of the Court of Claims rejecting the claim of Sempronius H. Boyd, his widow having been substituted as a party plaintiff on his death, for his salary as minister resident and consul general to Siam, and allowing the amount of the claim of Lewis A. Eaton as vice consul at Bangkok, Siam, the two cases having been consolidated. *Modified as to amount, and, as modified, affirmed.*

Statement by Mr. Justice **White**:

In October, 1890, Sempronius H. Boyd was commissioned as minister resident and consul general of the United States to Siam; he qualified and proceeded to his post, and was in June, 1892, engaged in the discharge of his official duties. At that time, being seriously ill, Boyd was granted by the President a leave of absence. Before leaving Bangkok, Siam, Boyd, to quote from the findings of fact, "believing his illness would terminate fatally, and being desirous to protect the interests of the government during his absence and until the then expected arrival from the United States of Robert M. Boyd, whom Sempronius Boyd desired should act as consul general, the latter called to his aid Lewis A. Eaton (now a plaintiff herein, who was then a missionary at Bangkok) and asked *him [332 to take charge of the consulate and its archives. Thereupon the following letter, dated June 21, 1892, was written by Boyd:

U. S. Legation and Consulate General,
Bangkok, June 21, 1892.

Krom Luang Devawongsee Varoprokan,
Minister for Foreign Affairs:

Monsieur Le Ministre: It is with exceeding regret to me to be forced to abandon my diplomatic and consular duties at the court of His Majesty, with the enjoyment, pleasure, comfort, and genuine friendship so marked

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NOTE.—*As to extra pay or compensation to officers*, see note to United States v. Macdaniel, 8: 587.

As to bond to secure public funds, see note to State, Overton County, v. Copeland (Tenn.) 31 L. R. A. 844.

and distinguished, which the representative of the United States fully appreciated and imparted to his government.

All the physicians advise me to go soon to a cold climate. The President has wired me to that effect. In 20 or 30 days I may be strong enough for a sea voyage, of which I will avail myself. I am authorized to designate and do designate L. A. Eaton vice consul general until I am able to assume. If not incompatible with public affairs, I beg you to so regard him.

Monsieur le Ministre, I am too weak and feeble to call in person, which I would so much like to have done, and expressed my thanks and that of my government to the foreign office and attachés.

With assurance of my high consideration, I have the honor to be, Monsieur le Ministre,

Your obedient servant.

Boyd thereupon administered to Eaton an oath to faithfully discharge the duties of the office of vice consul general, etc. The findings state that Boyd believed he had authority for this action. Robert M. Boyd, who is referred to above, was then in the United States, and, although appointed as vice consul, had not qualified. Sempronius H. Boyd remained in Siam until the 12th day of July, 1892, when he left for the United States, and on his departure he turned over to Eaton, as the representative of the government of the United States, all the archives and property of the legation. Boyd arrived at his home, in the state of Missouri, on August 27, 1892, and although his leave of absence expired October 26, 1892, [333] *he did not, on account of illness, return to his post, but remained at his home, where he died June 22, 1894. Eaton, on the departure of Boyd, was the sole person "in charge of the interests of the government at Bangkok, and performed whatever duties were required there of either a minister resident or a consul general, with the knowledge of the Department of State and with that department's approval. The department acknowledged his communications and acted upon them as communications from a person authorized to perform the duties of minister resident and consul general in the emergency then existing." On "September 2, 1892, Eaton executed (under instructions from the Department of State) an official bond, calling himself acting consul general of the United States at Bangkok; this was received at the Department of State and was approved January 3, 1893; subsequently, under instructions from the Department of State, dated January 24, 1893, he executed another bond as vice consul general of the United States at Bangkok, which was approved by the Secretary of State April 23, 1893. Both of these bonds bore date June 13, 1892, with the knowledge and consent of Eaton's sureties thereon, and were so dated because of a pencil memorandum on each bond when received in blank by Eaton from the Department of State, directing him to insert the date of his appointment in the blank space reserved for the date."

On November 2, 1892, the Secretary of State wrote Eaton, inclosing him the commission of Robert Boyd, which had been issued in 1891, as vice consul at Siam. In February, 1893, Robert Boyd appeared in Siam, and, in accordance with the instructions of the Secretary of State, Eaton introduced him as vice consul, and on May 18 he qualified, when Eaton's performance of the duties of the office ceased. The findings below say:

"Eaton rendered to the accounting officers of the Treasury his account for salary for the entire period of his service, in which he charged and claimed one half of the salary of $5,000 per annum, appropriated for said post of minister resident and consul general, from July 12, 1892, to October 26, 1892; that is, from the departure of the minister to and including the *date on which the leave of [334] absence for sixty days (excluding transit time) expired, and the full salary at the rate of $5,000 per annum from October 27, 1892, to May 17, 1893, inclusive.

"Eaton also rendered with his salary account a return of all fees collected during the entire period of his service, both fees official and unofficial, including fees notarial and fees and fines received in the United States consular court at Bangkok, amounting in all to $245.41.

"Eaton also rendered to the Department of State his account of disbursements from the contingent fund of the legation and consulate general from July 1, 1892, to April 30, 1893, which was there approved.

"In the settlement of said accounts by the accounting officers of the Treasury the sum of $5.73, expended by Eaton for candles and lanterns, was suspended for information, which was thereafter furnished, but said sum remains disallowed and unpaid.

"In the settlement of Eaton's salary accounts by the Treasury the total amount of fees received, to wit, $245.41, was charged to him, and covered into the Treasury. The one half salary from July 12, 1892, to October 26, 1892, amounting to $726.90, was suspended for 'further information,' which was thereafter furnished; but this sum remains unpaid. The full salary from October 27, 1892, to May 17, 1893, amounting to $2,792.35, as approved by the Department of State, was allowed and credited. Deducting from this $245.41 leaves in Eaton's favor a balance of $2,546.94; which was certified to his credit by the First Controller December 4, 1893, no part of which has been paid."

It is inferable from the facts found that the amount of compensation which the accounting officers of the government settled and allowed in favor of Eaton, as above stated, was withheld from him because of a claim advanced by Sempronius H. Boyd to the entire salary as minister resident and consul general during a part of the time for which a portion of or the whole of the salary had been allowed Eaton. Indeed, on the 16th of June, 1894, Sempronius H. Boyd sued in the court below to recover his full salary as minister resident and consul general *from July, 1892, to February 11, 1893.[335 Thereupon, in December, 1894, Eaton commenced his action to recover the sums embraced in the following items:

A. For notarial or unofficial fees charged to him in the settlement of his salary account by report No. 162,708, as aforesaid, as per Exhibit C herewith	$177 41
B. For the item of salary suspended in the settlement of his accounts for salary by report No. 162,708, as aforesaid	726 90
C. For the balance of salary found due to the claimant by report No. 162,708, as aforesaid, and certified to his credit	2,546 94
D. For item expended for contingent expenses by claimant, and suspended in the settlement of his account therefor by report No. 162,709, as aforesaid	5 73
	$3,456 98

The court below consolidated the two cases, and on its finding the facts above recited, rejected the claim of Sempronius H. Boyd, his widow having been substituted as a party plaintiff on his death, and allowed the full amount of the claim sued for by Eaton. From this judgment the United States alone appeals.

Messrs. **Louis A. Pradt,** Assistant Attorney General, and **Charles W. Russell,** for appellant.

Messrs. **John C. Chaney** and **John R. Garrison** for appellee.

Mr. Justice **White** delivered the opinion of the court:

The errors relied upon to obtain a reversal rest on three contentions: 1st. That the appointment **336]** of Eaton as acting *vice consul was without warrant of law, and hence not susceptible of ratification by the State Department. 2d. Even if the appointment was authorized by law, the statute conferring the power was in violation of the Constitution of the United States. 3d. Because, even conceding the appointment to have been valid, the court allowed a sum in excess of the amount which the claimant was legally entitled to recover. We will dispose of these contentions in the order stated.

In the third paragraph of § 1674, Revised Statutes, the following definition is found: "'Vice-consuls' and 'vice commercial agents' shall be deemed to denote consular officers, who shall be substituted, temporarily, to fill the places of consuls general, consuls, or commercial agents, when they shall be temporarily absent or relieved from duty." And this definition by Congress of the nature of a vice consulship was not changed by the amendment to § 4130 of the Revised Statutes by the act of February 1, 1876, as the obvious purpose of that act was simply to provide that where the words 'minister,' 'consul,' or 'consul general' were generally used, they should be taken also as embracing the subordinate officers who were to represent the principals in case of absence. In other words, that where a delegation of authority was made to the incumbent of the office, the fact that the name of the principal alone was mentioned should not be considered as excluding the power to exercise such authority by the subordinate and temporary officer, when the lawful occasion for the performance of the duty by him arose. Provision for the appointment and the pay of vice consuls are found in the following sections of the Revised Statutes:

"Sec. 1695. The President is authorized to define the extent of country to be embraced within any consulate or commercial agency, and to provide for the appointment of vice consuls, vice commercial agents, deputy consuls, and consular agents, therein, in such manner and under such regulations as he shall deem proper; but no compensation shall be allowed for the services of any such vice consul, or vice commercial agent, beyond nor except out of the allowance made by law for the principal consular officer in whose place such appointment *shall be made. No vice [**337** consul, vice commercial agent, deputy consul, or consular agent, shall be appointed otherwise than under such regulations as have been or may be prescribed by the President."

"Sec. 1703. Every vice consul and vice commercial agent shall be entitled, as compensation for his services as such, to the whole or so much of the compensation of the principal consular officer in whose place he shall be appointed, as shall be determined by the President, and the residue, if any, shall be paid to such principal consular officer.

The Consular Regulations, promulgated with the approval of the President, contain the rules adopted in execution of the powers expressed in the above provisions. When the appointment in controversy took place, the regulations of 1888 were in force, and in §§ 36, 87, and 471 thereof were found the rules governing the appointments of vice consuls and temporary vice consuls and the manner of their payment. These sections are as follows:

"36. Vice consuls general, deputy consuls general, vice consuls, deputy consuls, vice commercial agents, deputy commercial agents, and consular agents are appointed by the Secretary of State, usually upon the nomination of the principal consular officer, approved by the consul general (if the nomination relates to a consulate or commercial agency), or if there be no consul general, then by the diplomatic representative. If there be no consul general or diplomatic representative, the nomination should be transmitted directly to the Department of State, as should also the nomination for subordinate officers in Mexico, British India, Manitoba, and British Columbia. The nomination for vice consul general and deputy consul general must be submitted to the diplomatic representative for approval, if there be one resident in the country. The privilege of making the nomination for the foregoing subordinate officers must not be construed to limit the authority of the Secretary of State, as provided by law, to appoint these officers without such previous nomination by the principal officer. The statutory power in this respect is reserved, and it will be exercised in all cases in which the interests *of the service or other public [**338** reasons may be deemed to require it."

"87. In case a vacancy occurs in the offices both of consul and vice consul, which requires the appointment of a person to perform

temporarily the duties of the consulate, the diplomatic representative has authority to make such appointment, with the consent of the foreign government and in conformity to law and these regulations, immediate notice being given to the Department of State. In those countries, however, when there are consuls general, to whom the nomination of subordinate officers are required to be submitted for approval, the authority to make such temporary appointments is lodged with them. Immediate notice should be given to the diplomatic representative of the proposed appointment, and, if it can be done within a reasonable time, he should be consulted before the appointment is made. If such a vacancy should occur in a consulate general, the temporary appointment will be made by the diplomatic representative."

"471. The compensation of a vice consul general, vice consul, or vice commercial agent is provided for only from that of the principal officer. The rules in respect to his compensation are as follows, *viz.:*

"1. In case the principal officer is absent on leave for sixty days or less, in any one calendar year, and does not visit the United States, the vice consular officer acting in his place is entitled to one half of the compensation of the office from the date of assuming its duties, unless there is an agreement for a different rate, the principal officer receiving the remainder. But after the expiration of the sixty days, or after the expiration of the principal's leave of absence (if less than sixty days), the vice consular officer is entitled to the full compensation of the office.

"2. If the principal visits the United States on such leave and returns to his post, the foregoing rule will include the time of transit both from and to his post, as explained in paragraph 460. But if the principal does not return to his post, either because of resignation or otherwise the rule will embrace only the time of [339] absence, not exceeding sixty days, together with the time of transit from his post to his residence in the United States."

It is plain that the above sections of the Revised Statutes confer upon the President full power, in his discretion, to appoint vice consuls and fix their compensation; that they forbid any appointment, except in accordance with the regulations adopted by the President, with a limitation, however, that the compensation of these officers, if appointed, should be solely "out of the allowance made by law for the principal consular officer in whose place such appointment shall be made." The regulations just quoted come clearly within the power thus delegated. The legality of the appointment in question is then first to be determined by ascertaining whether it was authorized by the regulations. Before analyzing the text of the regulations their general purpose must be borne in mind. The first section referred to (36) lodges the power in the Secretary of State in all cases to appoint a vice consul or vice consul general. The manifest object of the provision was to prevent the continued performance of consular duties from being interrupted by any temporary cause, such as absence, sickness, or even during an interregnum caused by death and before an incumbent could be appointed. This was secured by the designation in advance of a subordinate and temporary official who, in the event of the happening of the foregoing conditions, would be present to discharge the duties. Section 87 provided for a condition of affairs not embraced in § 36, that is, for the case where there would arise a temporary inability to perform duty on the part of both the consul and vice consul. The two provisions together secure an unbroken performance of consular duties by creating the necessary machinery to have within reach one qualified to perform them, free from any vicissitude which might befall either the regular incumbent of the office of consul or the vice appointee.

In view of the recognition of Eaton by the State Department and the express approval of his bond as vice consul, it would result that, at least from the date of the official action of the Secretary of State, he would be entitled to be treated *as appointed by that officer un- [340 der § 36. But as the sum of the salary allowed by the court below antedated the approval of the bond, we pretermit this question, and come to consider whether Eaton's designation was within the regulation for emergency appointments provided in § 87.

The first requisite for calling the emergency power into play exacted by this regulation was, that there should be a vacancy in the office both of consul general and vice consul. It is clear that the findings establish that there was such vacancy within the meaning of the regulation. The fact that the minister resident and consul general had obtained a leave of absence from the President, and was sick and unable to discharge his duties, and that the vice consul previously appointed had not qualified, and was absent from Siam, did not, it is argued, justify an emergency appointment, because these facts did not create a vacancy in the narrower sense of that word. But the vacancy to which regulation 87 relates cannot be construed in a technical sense without doing violence to both the letter and spirit of the statute which authorized the regulation, and without destroying the true relation and harmonious operation of the two rules on the subject expressed in §§ 36 and 87. That the statute did not contemplate a merely technical vacancy in the office of a consul general, before a vice consul could be appointed, clearly results from the fact that it defines the latter and subordinate officer as one "who shall be substituted temporarily to fill the places of consuls general . . . when they shall be temporarily absent or relieved from duty." The power to make the appointment when the consul general was only temporarily absent of necessity conveyed authority to do so, although there might be no vacancy in the office, but simply an absence of the principal officer. The provision of the statute limiting the pay of the vice consul or temporary officer out of the pay of the principal official, the incumbent, is also susceptible of but one construction, that is, that the temporary officer could be called upon to discharge the duties, even although there was an incumbent, where, from absence or other adequate cause, he ceased temporarily to perform his duties.

341] Regulation 36, adopted in *pursuance of the statute and providing for the appointment of vice consuls simultaneously or concurrently with the appointment of consuls, and regulating their pay, is as clear on this subject as is the statute. As regulation 87 but adds another safeguard to that created by the general terms of 36, by providing for a contingency not contemplated in 36, that is, the case of vacancy in both the consular and vice consular offices, it follows that the word "vacancy" in 87 imports provision for a condition like unto that contemplated by the law and provided for in 36. Looking at the two regulations together, and taking in view their purpose, it is obvious that the appointment of the temporary officer for which they both provide depended, not solely on a technical vacancy, but included a case where there arose a mere absence or inability of the principal and vice officer to discharge the duties of the consular office.

Nor is it true to say that because regulation 87 confers the power to appoint an emergency vice consul general "on the diplomatic representative," therefore Boyd, who was both minister resident and consul general, was without authority to make a temporary appointment to the latter office. The argument by which this proposition is supported is as follows: As Boyd filled both offices, if there was inability to discharge the duties of one, there was also like inability as to the other, and therefore incapacity to designate in one character a temporary officer to fill the duties of the other. The error here lies in assuming that because an official is temporarily prevented from performing the duties of his office thereby he becomes without capacity to make an emergency appointment. There is no essential identity between the two conditions, and it was because of their evident distinction that the regulations caused the existence of one condition, the temporary failure to perform duty, to give rise to the other; that is, the birth of the power to make the temporary appointment. It would lead to an absurd conclusion to construe the regulation as meaning that the very circumstance which generated the power to make the appointment had the necessary effect of preventing the coming into being of the power created.

342] *If the two offices of minister resident and consul general be treated as distinct and separate functions, although vested in the same natural person, the authority was clearly in the minister to appoint the vice consul general. If, on the other hand, the two functions be considered as indivisible the like result follows, since the mere fact that the officer had obtained a leave or was sick and unable to be present in his office and discharge its duties did not deprive him of the capacity to make a temporary appointment. In its ultimate analysis, the proposition we have just considered substantially maintains that in no case where the duties of the minister resident and consul general are united in the one person can an emergency consul general be designated under § 87. It would follow that in every such case where leave of absence was granted or sickness arose, and there was no vice consul general present, the public interest must inevitably suffer in consequence of the closing of the consular office. But the very purpose of the statute and regulations was to guard against such a contingency. The evil consequences to result from admitting the proposition are conceded, but the result is attributed, not to error in the argument, but to a presumed omission in the regulations, which should, it is urged, be corrected, not by judicial construction, but by an amendment or change in the regulations. The error in the proposition, however, cannot be obscured by assigning the consequences which flow from it to a defect in the regulations, when, if a sound rule of interpretation be applied, the supposed omission does not arise.

The construction rendered necessary by a consideration of the text of the statute and the regulations, by the remedy intended to be afforded, and the evil which it was their purpose to frustrate, is that the power to designate in case of the absence or the temporary inability of the consul general was lodged in a superior officer, if there was such officer in the country where the consul discharged his duty, and, if not, on the happening of the conditions contemplated by the rule, the officer highest in rank was authorized to make the temporary appointment. Doubtless it was this construction which caused the Department of State to recognize Eaton's appointment *and the Secretary of State to approve [343 his bond as vice consul general. The interpretation given to the regulations by the department charged with their execution, and by the official who has the power, with the sanction of the President, to amend them, is entitled to the greatest weight, and we see no reason in this case to doubt its correctness.

The claim that Congress was without power to vest in the President the appointment of a subordinate officer called a vice consul, to be charged with the duty of temporarily performing the functions of the consular office, disregards both the letter and spirit of the Constitution. Although art. 2, § 2, of the Constitution requires consuls to be appointed by the President "by and with the advice and consent of the Senate," the word "consul" therein does not embrace a subordinate and temporary officer like that of vice consul as defined in the statute. The appointment of such an officer is within the grant of power expressed in the same section, saying "but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments." Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not hereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered. The manifest purpose of Congress in classifying and defining the grades of consular offices, in the statute to which we have referred, was to so limit the period of duty to be performed

by the vice consuls and thereby to deprive them of the character of consuls in the broader and more permanent sense of that word. A review of the legislation on the subject makes this quite clear. Section 1674, Revised Statutes, took its source in "An Act to Regulate the Diplomatic and Consular Systems of the United States," approved August 18, 1856 (11 Stat. at L. 52, chap. 127). Whilst in the earlier periods of the government, officers known
344] as vice consuls *were appointed by the President and confirmed by the Senate, the officials thus designated were not subordinate and temporary, but were permanent and in reality principal officials. [*Appointment of Consuls*] 7 Ops. Atty. Gen. 247; 3 Jefferson's Writings, 188. During the period, however, whilst the office of vice consul was considered as an independent and separate function, requiring confirmation by the Senate, where a vacancy in a consular office arose by death of the incumbent, and the duties were discharged by a person who acted temporarily, without any appointment whatever, it would seem that the practice prevailed of paying such officials as *de facto* officers. In 1832 the Department of State submitted to Mr. Attorney General Taney the question of whether the son of a deceased consul, who had remained in the consular office and discharged its duties, was entitled to the pay of the office. In replying, the Attorney General said:

"If, after the death of Mr. Coxe, his son performed the services and incurred the expenses of a residence there, and his acts have been recognized by the government, I do not perceive why he should not receive the compensation fixed by law for such services. He was *de facto* consul for the time, and the public received the benefit. . . . The practice of the government sanctions this opinion, as appears by the papers before me; and in several instances similar to this, since the law of 1810, the salary has been paid. . . . The public interest requires that the duties of the office should be discharged by someone; and where, upon the death of the consul, a person who is in possession of the papers of the consulate enters on the discharge of its duties, and fulfils them to the satisfaction of the government, I do not preceive why he should not be recognized as consul for the time he acted as such, and performed the services to the public; and, if he is so recognized, the law of Congress entitles him to his salary." [*Provisions for Widows of Consuls Who Die in Office*] 2 Ops. Atty. Gen. 523 524.

The terms of the law and its construction in practice for more than forty years sustains the theory that a vice consul is a mere subordinate official, and we do not doubt its correctness.

We come, then, to consider the errors assign-
345] ed as to the *amount of the salary Prior to February 26, 1883, the consular official at Bangkok was of the third class, and his salary was $3,000. At the date mentioned (22 Stat. at L. 424, chap. 56) an appropriation was made for minister resident and consul general to Siam, $5,000. It was on this salary, which was reiterated in subsequent appropriations, that the allowance to Eaton was computed by the accounting officer of the Treasury, and adjudged by the court below. It is first claimed that as the vice appointment related only to the consul general's office and not to that of minister resident, there was error in computing the allowance on the basis of the salary of both offices. Although both the statute and the regulations provide for the payment of the vice official from that of the principal officer, and of this fact Congress presumably had knowledge, yet in no case for the appropriation for the salary of the minister resident and consul general to Siam has there been an attribution of a portion thereof to one function and another part to the other. On the contrary, Congress has treated the compensation of the two as an indivisible unit. As the duties of the two offices have thus been inseparably blended by Congress, and presumably the performance of the function of one office embraced of necessity the discharge of the duties of the other, we do not think the accounting officers erred in treating the salary fixed for the joint service as indivisible, and in not attempting an apportionment, when Congress had failed to direct that such division be made, or to furnish the method of making it. Indeed, the finding that Eaton executed all the duties of both offices required of him by the State Department, during his temporary tenure, implies that he performed, at the request of the State Department, as consul general, all the functions of minister resident. Thus the facts bring the case directly within Revised Statutes 1738, which provides that a consular officer may exercise diplomatic functions in the country to which he is appointed, when there is no officer of the United States empowered to discharge such duties therein, and when the consular officer is "expressly authorized by the President to do so." Conclusive cogency results from these considerations when it is borne in mind that *by the treaty between Siam [**346**] and the United States there was but one diplomatic and consular officer of the United States in Siam, and that by the express terms of one of the later treaties with Siam the word "consul general" of the United States, therein used, is defined to include any consular officer of the United States in Siam. 23 Stat. at L. 782, 783.

It is further argued that, as the vice consul is required by law (Rev. Stat. § 1698) before he enters on the execution of his trust to give bond, there was error in allowing Eaton compensation for a period prior to the approval of his bond by the Secretary of State on April 3, 1893. The finding by the court below that Eaton entered on the discharge of his duties when designated, at once communicated with the Department of State, and was recognized as consul general and allowed to perform all the duties of that office, answers this contention. It is settled that statutory provisions of the character of those referred to are directory and not mandatory. In *United States* v. *Bradley*, 35 U. S. 10 Pet. 343 [9: 448], which was a suit upon a bond given by one Hall as paymaster, it was contended that as the bond required by the statute to be executed before an appointee could enter upon the duties of the office had not been furnished,

Hall was not accountable as paymaster for moneys received by him from the government. The court, however, held otherwise, saying, per Story, J. (p. 365 [9:457]): "The giving of the bond was a mere ministerial act for the security of the government, and not a condition precedent to his authority to act as paymaster. Having received the public moneys as paymaster, he must account for them as paymaster." In *United States* v. *Linn*, 40 U. S. 15 Pet. 313 [10:751], suit was brought upon an undertaking executed by Linn as receiver of public moneys, with sureties. A contention was advanced like that made in the *Bradley Case*. The undertaking in question was not executed under seal, while the statute required that the appointee should, before entering upon the duties of the office, execute a "bond." In holding the undertaking enforceable as a common-law obligation, and answering the claim that it was not valid for want of a consideration, the court, per Thompson, J., said (p. 313 [10:751]): "These **347**]emoluments [of the office] were the *considerations allowed him for the execution of the duties of his office; and his appointment and commission entitled him to receive this compensation, whether he gave any security or not. His official rights and duties attached upon his appointment." And, in referring approvingly to the decision in the *Bradley Case*, and in reiterating the reasoning of the opinion in that case to which we have already alluded, the court said (p. 313 [10:751]): "According to this doctrine, which is undoubtedly sound, Linn was a receiver, *de jure*, as well as *de facto*, when the instrument in question was given. And although the law requiring security was directory to the officers intrusted with taking such security, Linn was under a legal as well as a moral obligation to give the security required by law." At page 314 [10:751] it was also observed that it was not the mere appointment of Linn as receiver that formed the consideration of the instrument sued upon, but the emoluments and benefits resulting therefrom.

It is true, as claimed by counsel for the government, that in the opinion delivered in the subsequent case of *United States* v. *Le Baron*, 60 U. S. 19 How. 77 [15:527], expressions are found which appear inconsistent with those to which we have just called attention. But the question presented in the *Le Baron Case* was as to the proper construction of the language of a bond which had been given by a government official, subsequent to his permanent appointment as a deputy postmaster, which bond was executed at the time the appointee was performing the duties of the office under a temporary appointment made during a recess of the Senate. Suit having been brought for a breach of the condition of the bond, it was contended that the terms of the instrument stipulated only for liability for the proper performance of the duties of the office under the first appointment. It was held, however, that as the statute required the giving of bond before the appointee could enter upon the execution of the duties of the office, it could not be presumed that the bond was intended to relate back to an earlier date than the time of its acceptance, and that its terms should be given a prospective, and not a retrospective, operation. In the course of the reasoning on this branch of the *case [**348** general expressions were used to the effect that the appointee could not act and the bond could not take effect until its approval; and in discussing the further contention that the appointee was not in office under the second appointment at the time the bond took effect, because his commission had not been sent to him, and was not actually transmitted until after the death of the President who had made the appointment, it was observed that the acts required by the statute to be performed by the appointee before he could enter on the possession of the office under his appointment were "conditions precedent to the complete investiture of the office;" and that "when the person has performed the required conditions, his title to enter on the possession of the office is also complete." But this general language must be confined to the precise state of facts with reference to which it was used, and does not warrant the inference that it was intended to overrule the doctrine enunciated in the *Bradley* and *Linn Cases*, which were not even referred to. Indeed, that this was not supposed to be the deduction proper to be drawn from the reasoning in the *Le Baron Case*, is shown by the fact that in the later case of *United States* v. *Flanders*, 112 U. S. 88 [28:630], the doctrine of the earlier cases was carried to its legitimate result. In the *Flanders Case* the precise question raised in the case at bar was presented and decided. A collector of internal revenue who was required before entering upon the duties of his office to give bond, and who was also required to take an oath before becoming entitled to the salary or emoluments of the office, failed to give bond or take the oath until more than two months after he had been allowed to enter upon the duties of the office. In a suit upon the bond, credit was claimed for compensation for services performed during the period preceding the taking of the oath and giving of bond, and the allowance was resisted by the government on the ground that under the statutory provisions referred to the right to compensation did not exist. The court, however, held otherwise, saying (p. 91 [28:631]):

"If he [the collector] is appointed, and acts, and collects the moneys, and pays them over and accounts for them, and the govern **[349** ment accepts his services and receives the moneys, his title to the compensation necessarily accrues, unless there is a restriction growing out of the fact that another statute says that he must take the oath 'before being entitled to any of the salary or other emoluments' of the office. But we are of opinion that the statute is satisfied by holding that his title to receive, or retain, or hold, or appropriate, the commissions as compensation does not arise until he takes and subscribes the oath or affirmation, but that, when he does so, his compensation is to be computed on moneys collected by him, from the time when, under his appointment, he began to perform services as collector, which the government accepted, provided he has paid over and accounted for such moneys."

This was evidently the view taken by the

State Department, since on January 24, 1893, when the bond was returned for re execution in another form, Eaton was directed to insert therein the date of his original appointment. These considerations dispose of all the questions presented, except the contention that there was error in awarding to Eaton certain items of fees collected and reported to the Treasury and charged to him, included in which were commissions of $67.91 earned on the settlement of two estates, and the sum of $5.73 disbursed by Eaton for lights upon the birthday of the King of Siam. We need only examine the legality of the two items just mentioned, as the sole objection made to the validity of the others is that Eaton was not entitled to charge them, because he was not lawfully acting as consul general.

It is contended that the fees collected for settlement of estates should not be allowed, because the services were "official," and we are referred to paragraph 508, subdivision 69, of the Consular Regulations of 1888, as supporting this claim. On the part of the appellee, however, it is urged that the point has been held otherwise in *United States* v. *Mosby*, 133 U. S. 273 [33: 625], where it is said a similar objection to like charges was decided to be without merit.

It was held in the *Mosby Case* that the court of claims properly allowed to Mosby—who had **350**] been consul at Hong Kong *from February, 1879, to July, 1885.—the sum of $8 21, as "five per cent commission on the estate of Alice Evans, May, 1881." In disposing of the matter the court said (p. 287 [33: 630]) that "this evidently was a fee in the settlement of a private estate, and was properly allowed." It does not distinctly appear whether the fee there considered was controlled by the Consular Regulations of 1874 or by those of 1881. This is obvious when it is considered that the regulations of 1881 were only promulgated in May of that year. The regulations controlling this case are those of 1888, which in the respect in question are substantially like those of 1881, whilst fees earned prior to May, 1881, were governed by the regulations of 1874, which differed on the subject from those of 1881. Indeed, this difference between the two was referred to in the *Mosby Case*, where it was said (p. 280 [33: 628]):

"Paragraph 321 of the Regulations of 1874 is as follows: '321. All acts are to be regarded as 'official services,' when the consul is required to use his seal and title officially, or either of them; and the fees received therefor are to be accounted for to the Treasury of the United States.' It is to be observed that this paragraph uses the word 'required,' and does not say that all acts are to be regarded as official services when the consul uses his seal and title officially, or either of them."

. . . . . .

"Paragraph 489 of the Regulations of 1881 reads as follows: '489. All acts or services for which a fee is prescribed in the tariff of fees are to be regarded as *official* services, and the fees received therefor are to be reported and accounted for to the Treasury of the United States, except when otherwise expressly stated therein.'"

In view of the fact that it is not certain when the fees in question in the *Mosby Case* were earned and of the difference between the Consular Regulations of 1874 and 1881, we shall not inquire into the correctness of the decision in the *Mosby Case* as applied to the precise facts there considered, but will examine the question here presented in the light of the Consular Regulations of 1888 and as one of first impression.

*By § 1745 of the Revised Statutes, the[**351** President is authorized to prescribe, from time to time, the rates or tariffs of fees to be charged by diplomatic and consular officers for official services, "and to designate what shall be regarded as official services, besides such as are expressly declared by law." Section 1709 of the Revised Statutes makes it the "duty" of consuls and vice consuls to administer upon the personal estate left by any citizen of the United States who shall die within their consulate.

The fact that the statute makes it the duty of a consul to administer on personal estates gives rise to the clearest implication that fees for such services were official fees, and the regulations on the subject promulgated by the President clearly support this view. Thus, in the tariff of consular fees contained in paragraph 508 of the Consular Regulations of 1888 it is provided, in item numbered 56, as follows:

"56. For taking into possession the personal estate of any citizen who shall die within the limits of a consulate, inventorying, selling, and finally settling and preparing or transmitting, according to law, the balance due thereon, five per cent on the gross amount of such estate. If part of such estate shall be delivered over before final settlement, two and one half per cent to be charged on the part so delivered over as is not in money, and five per cent on the gross amount of the residue. If among the effects of the deceased are found certificates of foreign stocks, loans, or other property, two and one half per cent on the amount thereof. No charge will be made for placing the official seal upon the personal property or effects of such deceased citizen, or for breaking or removing the seals."

And, by paragraph 375 of the same regulations, a consular officer is directed to report to the Treasury Department fees of this character, and if he be a salaried officer to hold the same subject to the order of the department. This decisive provision is besides supplemented by paragraph 501 of the regulations, in which it is declared that "all acts or services for which a fee is prescribed in the tariff of fees are to be regarded as *official* services, and the fees charged and received *therefor are to be [**352** reported and accounted for to the Treasury of the United States, except when otherwise expressly stated therein."

As the statute made it the official duty of a consul to administer upon the estate of American citizens dying within the consular district, and the President, by virtue of the power vested in him, has clearly placed such duties in the category of "official services," and required the fees earned therefor to be accounted for as "official fees," it is plain that the accounting officer of the Treasury properly charged Eaton with the amount of such fees, and that

the court of claims erred in its ruling to the contrary.

The ground of objection urged to the allowance by the court of claims of the item of $5.73 is stated in the brief to be that the disbursement "was personal or diplomatic and wholly foreign to consular business." We are unable, however, to say that the court of claims erred in its finding in respect to this item as follows: "The petty item for lights upon the King's birthday was approved by the Department of State, and appears to be a charge within the discretion of that department; it is therefore allowed."

It follows from the foregoing considerations that the only error committed by the court below was in treating the fees for the settlement of estates as unofficial, when they should have been held to be official. But this does not render it necessary to reverse the judgment in its entirety, but only to modify the same. Rev. Stat. § 707; *Ballew* v. *United States*, 160 U. S. 187 [40: 388]. This modification will be effected by deducting from the principal sum of $3,456.98, found due by the court of claims, $67.91, being the amount of the fees improperly allowed. *The judgment of the Court of Claims is therefore modified by reducing the amount thereof to $3,389.07, and as so modified it is affirmed.*

353] JULIUS A. BELEY *et al.*, *Plffs. in Err.*,
v.
JOSEPH NAPHTALY.

(See S. C. Reporter's ed. 353-365.)

Patent for land—act of 1866 to quiet land titles in California—remedial statute—bona fide purchaser—assignment of right—rehearing—record of proof.

1. A patent for land issued by the United States does not preclude an inquiry by the court whether it was issued without authority or contrary to a statute.
2. The words "grantees" and "grants" in the act of 1866, to quiet land titles in California, should not be so construed as to require a formal grant from Mexico, but apply to a claimant who has in good faith and for a valuable consideration purchased from one claiming to be a Mexican grantee or from his assigns, and where there was no adverse claim other than that of the United States.
3. A remedial statute ought not to be so construed as to defeat in part the very purpose of its enactment.
4. Under the statute of 1866 record proof of the existence of a grant was not necessary in order to give the officers of the United States jurisdiction to issue the patent upon being satisfied of the existence of those facts in regard to which it was their province to determine.
5. Whether or not one is such a bona fide purchaser is a question to be determined by the government on issuing the patent; and an inquiry into that question of fact is precluded by the patent itself.
6. The right of a bona fide purchaser from a Mexican grantee to purchase the lands at the minimum price under the act of Congress of July 23, 1866, for quieting land titles in California, is not a mere personal privilege, but may be assigned by him, and his assignee can exercise the right.
7. After a decision refusing the patent, by the Secretary of the Interior, an application for a rehearing may be made to and the patent granted by his successor in office, if it could have been done by the former had he remained in office.

[No. 180.]

Submitted January 5, 1898. Decided February 23, 1898.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment affirming the judgment of the Circuit Court of the United States for the Northern District of California in favor of the plaintiff, Joseph Naphtaly, against the defendants, Julius A. Beley *et al.*, for the recovery of land described in the complaint. *Affirmed.*

See same case below, 44 U. S. App. 232.

Statement by Mr. Justice **Peckham:**

The defendant in error, who was the plaintiff below, brought this action in the circuit court of the United States for the northern district of California to recover the possession of certain lands described in his complaint, and also the value of the rents, issues, and profits; thereof. He alleged that he was the owner in fee of the lands in question and entitled to their possession, and that while such owner the defendants wrongfully entered upon the lands and ousted him therefrom, and have since wrongfully withheld from him the possession thereof. He further alleged that he was the owner of the land by virtue of a patent duly and regularly issued to him by the United *States in the year 1893, under and in **[354** pursuance of the provisions of the act of Congress of April 24, 1820 (3 Stat. at L. 566, chap. 51), entitled "An Act Making Further Provision for the Sale of the Public Lands," and the acts supplemental thereto, and also under the provisions of § 7 of the act of Congress of July 23, 1866 (14 Stat. at L. 218, chap. 219), entitled "An Act to Quiet Land Titles in California," and that the defendants denied the validity of that patent.

The defendants answered, denying the various allegations of the complaint, and the case came to trial without a jury, a jury having been waived by all the parties.

The plaintiff put in evidence the patent issued to him from the United States for the land described in the complaint, and proved that while he was in the peaceable and quiet possession of such land the defendants entered upon it and ousted him therefrom, and have ever since detained the land from him. He also proved its rental value.

The bill of exceptions contains the following:

"It was then admitted by the defendants' counsel that at the time of the issuance of the

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands, how construed, see note to Watts v. Lindsey, 5: 423.

As to land grants to railroads, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

patent hereinbefore described the lands therein and in the complaint described were public lands of the United States, subject to sale under the laws of the United States. It was here conceded by defendants' counsel that defendants did not propose to connect themselves in any manner or form with the title of the United States to the premises described in the complaint herein, or any part thereof, either by certificate of purchase, patent, or anything of the kind.

"The plaintiff then rested."

The plaintiff's action rests primarily upon § 7 of the statute of the United States entitled "An Act to Quiet Land Titles in California," approved July 23, 1866 (14 Stat. at L. 218, 220, chap. 219). That section, so far as material, reads as follows:

"Sec. 7. *And be it further enacted*, That where persons in good faith, and for a valuable consideration, have purchased lands of Mexican grantees or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have [355]*used, improved, and continued in the actual possession of the same as according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchasers may purchase the same, after having such lands surveyed under existing laws, at the minimum price established by law, upon first making proof of the facts as required in this section, under regulations to be provided by the Commissioner of the General Land Office, joint entries being admissible by conterminous proprietors to such an extent as will enable them to adjust their respective boundaries."

To maintain their defense, the defendants then offered in evidence the application made by the plaintiff to purchase the lands from the United States pursuant to the 7th section above quoted. The application and the accompanying papers were offered for the purpose of showing that there had, in fact, never been any grant from the Mexican government to the Romeros, through whom, as supposed Mexican grantees, the plaintiff below derived his claim, and by reason of which claim he had made application to the land office under the provisions of the 7th section of the above-mentioned act of Congress. The papers offered in evidence by defendants showed that while the country was under Mexican rule the Romeros had taken proceedings to obtain a grant of lands, which included the land in question, from the Mexican government, and that such proceedings had certainly gone as far as a final decree by the governor providing for the making of a grant asked for, but there was no record evidence of any actual grant ever having been made. The facts as to the documentary evidence in the case are fully set forth in the report of the case of *Romero* v. *United States*, 68 U. S. 1 Wall. 721 [17: 627].

The evidence so offered by defendants was objected to on the part of the plaintiff as immaterial, incompetent, and irrelevant for the purpose of affecting the validity of the patent under which the plaintiff claimed title to the lands in question. The court sustained the objection and the defendants duly excepted. Thereupon the defendants rested, and the court ordered judgment to be entered in favor of the plaintiff and *against the defend- [356 ants for a recovery of the land in accordance with the prayer of the complaint. This judgment was affirmed by the United States circuit court of appeals for the ninth circuit (44 U. S. App. 232), and the case is brought here for review.

Mr. **Henry F. Crane** for plaintiffs in error.

Messrs. **A. T. Britton** and **A. B. Browne** for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

1. The defendant in error insists that his patent is conclusive evidence that he is a purchaser within the meaning of the 7th section of the statute above quoted, and that, no fraud being alleged, no evidence can be received for the purpose of in any other way invalidating the patent issued to him by the government of the United States.

The patent does not preclude this court from construing the act of 1866, nor does it preclude an inquiry by the court whether the patent was issued without authority or against the expressed will of Congress, as manifested in the statute. *Burfenning* v. *Chicago, St. P. M. & O. Railway Company*, 163 U. S. 321 [41: 175], and cases there cited. If it were so issued, it is the duty of the court to give no weight to it. The proper construction of the act of 1866 is, therefore, the first question to be considered.

In order that a person may avail himself of that act, is it necessary that an actual grant from the Mexican authorities to some grantee through whom the title is derived should be proved? If so, the judgment in favor of the plaintiff in this case must be reversed, as no such grant was proved. We are of opinion, however, that the statute does not require proof of such a grant.

When the United States took possession of that portion of the country in which the lands in question are situated, it is public knowledge that there were many claims made *by [357 private individuals to lands under alleged grants from the preceding Mexican government. In order to ascertain and settle the questions arising thereunder, Congress, on the 3d of March, 1851, passed an act (9 Stat. at L. 631, chap. 41) in which a commission was constituted and before which claims of that character might be proved. The 8th section provided "that each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims; and it shall be the duty of the commissioners, when the case is ready for hearing, to proceed promptly to examine the same upon such evidence, and upon the evidence produced in behalf of the United States, and to decide upon the validity

of the said claim, and, within thirty days after such decision is rendered, to certify the same, with the reasons on which it is founded, to the district attorney of the United States in and for the district in which such decision shall be rendered."

It will be noticed that the jurisdiction here given was only to decide upon the validity of the claim presented, and if the commission decided that the claims were not valid ones, as derived from the Mexican or Spanish government, it was the duty of the commission to reject them. Provision was made for a review of the decision of the commissioners by the district court of the district in which the lands claimed were situated, which court upon such review was authorized and required "to decide on the validity of such claim," and an appeal from the decision of the district court was allowed to be taken to the Supreme Court of the United States.

It appeared from the documents offered in evidence in this action that the Romeros had presented their claim to this commission, which had rejected it as not being a valid claim, and this rejection had been affirmed by the district court and by the Supreme Court in the case in the 1st of Wallace, mentioned above. There must undoubtedly have been, at the time of the enactment of the act of 1866, many cases **358**] existing *in that part of the country, where claims of bona fide purchasers for value founded upon supposed rights or grants derived from the Mexican or Spanish government had been held to be invalid by the commission appointed under the act of 1851, and where, notwithstanding such decision, the claimants had remained in possession of the lands as originally acquired by them, there being no valid adverse right or title to the lands of which they were in possession, excepting that of the United States. This would have been the natural result arising from the difficulty in making formal and sufficient proof before the commission of valid rights and titles derived from the Mexican or Spanish government. It was only valid claims that the commission had power to allow. Where claims had been made and theretofore adjuged invalid by the Supreme Court of the United States, Congress had, in some instances, by private act, permitted those who where bona fide purchasers from the claimant whose claim had been adjudged invalid, or from his assigns, to enter the land so purchased according to the lines of the public surveys then provided for, at $1.25 per acre, to the extent to which the lands had been reduced to possession at the time of the adjudication by the Supreme Court. Such is the act, approved March 3, 1863 (12 Stat. at L. 808, chap. 116) entitled "An Act to Grant the Right of Pre-emption to Certain Purchasers on the 'Soscol Ranch' in the State of California." See also a similar act, approved June 17, 1864 (13 Stat. at L. 136, chap. 133); also the act approved July 2, 1864 (13 Stat. at L. 372, chap. 218); also the act approved March 3, 1865 (13 Stat. at L. 534, chap. 115).

Other acts were also passed by Congress recognizing in effect the equitable rights of parties who were grantees of those who had claimed a right or title under the Mexican or Spanish government, and which right or title had subsequently been held to be invalid by the courts of our own government. The hardship to be relieved from by these special acts and by the general act of 1866 did not solely exist in the fact that there had been a formal grant from the Mexican authorities, which was in some manner defective, so that no valid claim or right could grow out of such grant, but it also existed when a claimant, in possession of land which he *had bona fide and for a[**359** valuable consideration purchased of one who claimed his right or title from the Mexican or Spanish government by way of a grant therefrom, was nevertheless unable to prove such grant, and as a consequence could not prove any valid title or claim in himself. Whether such invalidity were on account of some defect in the proceeding which resulted in a defective grant, or whether it existed by reason of an inability to prove an actual grant, was not material, so long as the claim of title actually rested upon what was in good faith supposed to have been a valid claim under the government of Mexico, and so long as there was no valid adverse right or title other than that of the United States. Persons occupying lands which they possessed under such circumstances and by such a claim were entitled to considerate treatment from the government of the United States. They had in good faith paid a valuable consideration for the lands, of which they were in possession by virtue of such purchase, and they ought to have the first right to make good their title by purchase from the government at the lowest price named.

The defendants on the trial conceded these lands were, when the patent in this case was issued, public lands of the United States, subject to sale under the laws thereof, and that they did not intend to connect themselves in any manner or form with the title of the United States to the lands in question. There is no proof or offer of any proof in the record tending to show the existence of any adverse valid claim to the land, other than the United States, and the admission just alluded to, taken in connection with the absence of such proof, shows that when the patent issued there existed in fact no other adverse valid claim upon the land than that of the United States. Those who could not show actual grants from the Mexican government might nevertheless have equities quite as strong in their favor as those who could show an actual grant which was defective. The act of Congress should not be so construed as to except from its remedial provisions those who were without an actual grant while at the same time filling every other requirement of the act, unless the language used therein is open to no other interpretation.

*Such a construction ought to be put [**360** upon a statute as will best answer the intention which the makers had in view, for *qui hæret in litera, hæret in cortice.* In Bacon's Abridgment, Stat. 1, 5; Puffendorf, bk. 5, chap. 12; Rutherford, pp. 422, 527, and in Smith's Commentaries, 814, many cases are mentioned where it was held that matters embraced in the general words of statutes, nevertheless, were not within the statute, because it could not have been the intention of the lawmakers that they should be included. They were taken out of the statutes by an equitable construction. In some cases

the letter of a legislative act is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter. The equitable construction which restrains the letter of a statute is defined by Aristotle, as frequently quoted, in this manner: *Æquitas est correctio legis generaliter latæ, qua parti deficit. Riggs* v. *Palmer*, 115 N. Y. 506, 510 [5 L. R. A. 340], opinion, Earl, J.

Construing the act of Congress of 1866 under the circumstances above outlined, and in view of the general rules of construction already stated, we hold that the provisions of the 7th section of that act includes such a case as this. The purpose of the act is to quiet titles in California, and, as stated by the court below, it is a remedial statute and one entitled to a liberal construction in order to effect the purpose and object of its enactment. When the act, therefore, speaks of bona fide purchasers for a valuable consideration of lands from Mexican grantees or assigns, which grants have subsequently been rejected, we do not think that the words "grantees" and "grants" should have such a rigid and technical construction as to require the actual existence of a formal grant from the government of Mexico, but we are of opinion the act should be construed in accordance with what we conceive to have been its plain purpose, which was to cover the case of those persons who in good faith and for a valuable consideration have purchased lands (and taken and retained their possession) from those who claimed and were supposed to be Mexican grantees, but whose claims had been subsequently rejected. Otherwise, it seems to us clear **361]** that the purpose for which this *7th section was passed would be so circumscribed as to reduce it to much narrower limits than the known mischief to be remedied called for.

The circumstances existing at the time of the passage of this act necessarily lead to the belief that the purpose of its enactment was to remedy (by purchase of the land from the United States at the lowest rate) a defect in a title supposed to have been derived from the Mexican government, where the claimant had in good faith and for a valuable consideration purchased from one who claimed to be a Mexican grantee, or from his assigns, and where there was no adverse claim other than that of the United States. A remedial statute ought not to be so construed as to defeat in part the very purpose of its enactment. *United States* v. *Hodson*, 77 U. S. 10 Wall. 395 [19: 937].

In the case now before us it appears there had been very strong parol evidence of the existence of an actual grant from the Mexican government, but it was not thought to be strong enough to overcome the absence of any record evidence of such a grant. We think that under the statute of 1866 record proof of the existence of a grant was not necessary in order to give the officers of the United States jurisdiction to issue the patent upon being satisfied of the existence of those facts in regard to which it was their province to determine. The act has received the same construction in the supreme court of California in the case of *Bascomb* v. *Davis*, 56 Cal. 152. The court there construed it so as to include those who in good faith and for a valuable consideration had purchased lands which were supposed to have been granted by the Mexican government, and who had used, improved, and continued in the actual possession of the lands as provided in the act. This construction by the California court is entitled to very high consideration, and especially is this so in a case where the act was directed to a condition of things in existence at the time of its passage and with which the courts of that state would be particularly familiar.

In *Winona & St. Peter Railroad Co.* v. *Barney*, 113 U. S. 618 [28: 1109], this court construed an act of Congress which alluded to lands "granted as aforesaid," as including lands *purporting* to have *been "granted as afore- [**362** said," and this inclusion was made because the court was satisfied, taking all things into consideration, that such construction was what Congress meant. The court simply carried out that intention by supplying a word not found in the act.

For the reasons thus given we think this act includes those persons who in good faith and for a valuable consideration have purchased land from those who claimed and who were thought to be Mexican grantees or assigns, provided they fulfil the other conditions named in the act.

2. Coming to the conclusion we have, there is another objection made to the title on the part of the plaintiffs in error. They urge that the statute requires that the person who purchased the land should have made his purchase from the Mexican grantee or his assignee in good faith, and it is stated that as the defendant in error made his purchase from a remote grantee of the Romeros on the 15th of May, 1876, twenty years after the claim had been rejected by the commissioners appointed under the act of 1851, eighteen years after it had been rejected by the United States district court, and thirteen years after it had been rejected by this court, it was clear as a legal result from these facts that he could not be a purchaser in good faith.

It appears, however, that on the 8th of August, 1859, one S. P. Millett became a grantee and entered into the possession of the lands, used, improved, and cultivated them, and continued in the actual possession thereof according to the lines of the original purchase until 1868, and that the defendant in error claims through Millett by several mesne conveyances. Plaintiffs in error object that Millett was not a purchaser in good faith because he did not purchase until October, 1859, before which time the claim of the Romeros had been rejected by the commissioners and by the United States district court. An appeal from those decisions was pending at the date above mentioned before this court, and it was therein contended that the Romeros had a valid claim under the Mexican government such as should have been recognized by the commissioners and by the district court, and such as ought to be recognized by *the supreme [**363** court. We do not think the facts thus stated show, as matter of law, that Millett could not have been a bona fide purchaser of these lands for a valuable consideration, and whether in fact he were such bona fide purchaser was a question to be determined by the government on issuing the patent, and an inquiry into that

question of fact is precluded by the patent itself.

3. It is also objected that even if Millett were adjudged a purchaser in good faith from a Mexican grantee, he could not convey to another his right under the statute of 1866, but that it was a mere personal privilege which he might exercise to purchase the land at the minimum price established by law. We think that a person who was within the statute and who had the right to purchase land as provided therein was not confined to the actual purchase himself, but that he could assign or convey such right, and that his grantee, or assignee, immediate or remote, could, so far as this point is concerned, exercise the same right of purchase which he had before he conveyed or assigned.

In *Thredgill* v. *Pintard*, 53 U. S. 12 How. 24 [13: 877], the court recognized the right of an individual in possession of land and who was entitled to a pre-emption right therein to convey such right to another.

In *Webster* v. *Luther*, 163 U. S. 331 [41: 179], it was held that persons entitled, under the Revised Statutes, § 2304, to enter a homestead, who may have theretofore entered under the homestead laws a quantity of land less than 160 acres, and who had the right under § 2306 to make an additional entry for the deficiency, could transfer such right by a proper conveyance.

In the above cases the general rule of law which discourages all restraints upon alienation was recognized, and the assignment of a right before entry was held valid, one of the reasons for such holding being that there was no restriction against such assignment contained in the act creating the right. Nor is any such restriction to be found in the act of 1866.

Upon this question it must be assumed that Millett was a purchaser in good faith. Being **364**] such a purchaser he could *assign his right and title to another, and the rights under such assignment were not affected by the fact that the defendant in error did not purchase his title until many years after the final determination by this court that no formal, actual, or valid grant had ever been made by the Mexican government to the Romeros.

4. We are also of opinion that the rejection by the Secretary of the Interior of the first application made by the defendant in error for a patent, and the subsequent granting of a rehearing and the issuing of a patent thereafter by the Secretary, were all acts within the jurisdiction of that officer. The fact that a decision refusing the patent was made by one Secretary of the Interior, and, upon a rehearing, a decision granting the patent was made by another Secretary of the Interior, is not material in a case like this. It is not a personal but an official hearing and decision, and it is made by the Secretary of the Interior as such Secretary, and not by an individual who happens at the time to fill that office, and the application for a rehearing may be made to the successor in office of the person who made the original decision, provided it could have been made to the latter had he remained in office. The Secretary who made the first decision herein could have granted a rehearing and reversed his former ruling.

The case of *United States* v. *Stone* [*Stone* v. *United States*], 69 U. S. 2 Wall. 525 [17: 765], has no bearing adverse to this proposition. In that case it was stated that a patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially; that if he issues a patent for land reserved from sale by law, such patent is void for want of authority, but that one officer of the land office is not competent to cancel or annul the act of his predecessor; that is a judicial act and requires the judgment of a court. The power to cancel or annul in that case meant the power to annul a patent issued by a predecessor, and this court held no such power existed. The officer originally issuing it would have had no greater power to annul the patent than had his successor.

Neither does *Noble* v. *Union River Logging Railroad Company*, 147 U. S. 165 [37: 123], *touch the case. The principle therein de-[**365** cided was in substance the same as in the *Stone Case*, *supra*. The control of the department necessarily ceased the moment the title passed from the government. It was not a question whether a successor was able to do the act which the original officer might have done, but it was the announcement of the principle that no officer, after the title had actually passed, had any power over the matter whatever. After the Secretary of the Interior had approved the map as provided for in the act of Congress under which the proceedings were taken by the company, the 1st section of that act vested the right of way in the company. This was equivalent to a patent, and no revocation could thereafter be permitted. See also *Michigan Land & Lumber Company* v. *Rust*, 168 U. S. 589, at 592 [*ante*, 591, at 592].

We have considered the other questions raised herein but do not think any error was committed in their disposition by the courts below. *The judgment of the Circuit Court of Appeals must be affirmed.*

Mr. Justice **Harlan** dissenting.

JOSIAH S. SMITH, *Appt.*,
v.
JOSEPH NAPHTALY.

(See S. C. Reporter's ed. 365.)

Follows *Beley* v. *Naphtaly*, 169 U. S. 353 [*ante*, 775].

[No. 181.]

Submitted January 5, 1898. Decided February 28, 1898.

APPEAL from a judgment of the United States Circuit Court of Appeals for the Ninth Circuit affirming the judgment of the Circuit Court of the United States for the Northern District of California sustaining a demurrer and dismissing the complaint of Josiah S. Smith, plaintiff, to restrain the defendant, Joseph H. Naphtaly, from setting up

or asserting any right or claim to certain land. *Affirmed.*

The facts are stated in the opinion.

Mr. **Henry F. Crane** for appellant.

Messrs. **A. T. Britton** and **A. B. Browne** for appellee.

Mr. Justice **Peckham** delivered the opinion of the court:

In this case, counsel for the appellant concedes that if the court should hold that the sale of the land mentioned in the patent involved in the foregoing case were a valid sale, then the judgment in this case should be affirmed. As we do so hold, *the judgment herein is therefore affirmed.*

Mr. Justice **Harlan** dissenting.

366] ALBERT F. HOLDEN, *Plff. in Err.*,
v.
HARVEY HARDY, Sheriff, etc.

(See S. C. Reporter's ed. 366-398.)

The right of contract may be limited by the state police power—protection of health and morals—state statute limiting hours of labor in mines and making its violation a misdemeanor is valid—parties to contract.

1. The right of contract is subject to certain limitations which the state may lawfully impose in the exercise of its police power.
2. The protection of the health and morals, as well as of the lives, of citizens, is within the police power of the state legislature.
3. A state statute limiting the period of employment of workmen in underground mines, or in the smelting, reduction, or refining of ores or metals, to eight hours per day, and making its violation a misdemeanor, is a valid exercise of the police power of the state.
4. The fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself.

[Nos. 261, 264.]

Argued October 21, 1897. Decided February 28, 1898.

IN ERROR to the Supreme Court of the State of Utah to review judgments of that court denying application of Albert F. Holden for his discharge upon two writs of habeas corpus and remanding him to the custody of the sheriff of Salt Lake County; he having been convicted of a misdemeanor and sentenced to pay a fine and be imprisoned until the fine was paid for a violation of the Utah law regulating hours of employment in underground mines, etc. *Affirmed.*

See same case below, 14 Utah, 71, 37 L. R. A. 103, 14 Utah, 96, 37 L. R. A. 108.

Statement by Mr. Justice **Brown:**

These were writs of error to review two judgments of the supreme court of the state of Utah, denying applications of the plaintiff in error, Holden, for his discharge upon two writs of habeas corpus, and remanding him to the custody of the sheriff of Salt Lake county.

The facts in case No. 264 were substantially as follows: On June 20, 1896, complaint was made to a justice of the peace of *Salt [367 Lake City that the petitioner Holden had unlawfully employed "one John Anderson to work and labor as a miner in the underground workings of the Old Jordan mine in Bingham cañon, in the county aforesaid, for the period of ten hours each day; and said defendant, on the date aforesaid and continuously since said time, has unlawfully required said John Anderson, under and by virtue of said employment, to work and labor in the underground workings of the mine aforesaid for the period of ten hours each day, and that said employment was not in case of an emergency or where life or property was in imminent danger, contrary," etc.

Defendant Holden, having been arrested upon a warrant issued upon said complaint, admitted the facts set forth therein, but said he was not guilty because he is a native-born citizen of the United States, residing in the state of Utah; that the said John Anderson voluntarily engaged his services for the hours per day alleged, and that the facts charged did not constitute a crime, because the act of the state of Utah, which creates and defines the supposed offense, is repugnant to the Constitution of the United States in these respects:

"It deprives the defendant and all employers and employees of the right to make contracts in a lawful way and for lawful purposes;

"It is class legislation, and not equal or uniform in its provisions;

"It deprives the defendant and employers and employees of the equal protection of the laws; abridges the privileges and immunities of the defendant as a citizen of the United States, and deprives him of his property and liberty without due process of law."

The court, having heard the evidence, found the defendant guilty as charged in the complaint, imposed a fine of $50 and costs, and ordered that the defendant be imprisoned in the county jail for a term of fifty-seven days, or until such fine and costs be paid.

Thereupon petitioner sued out a writ of habeas corpus from the supreme court of the state, annexing a copy of the proceedings before the justice of the peace, and praying his *discharge. The supreme court denied [368 his application, and remanded him to the custody of the sheriff, whereupon he sued out this writ of error, assigning the unconstitutionality of the law.

In the second case the complaint alleged the unlawful employment by Holden of one Will-

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NOTE.—*As to police power of states; instances of its exercise,*—see note to Barbier v. Connolly, 28: 923.

For an elaborate discussion of the relations of the states to the United States and of the particular subjects of contract, obligations, bills of credit, foreign commerce, police power, and the effect of cessions and compacts of the states, see note to "Baldwin's View," 9: 8.3.

As to protection of health within state, see note to State v. Schlemmer (La.) 10 L. R. A. 135.

As to protection of health of employees, see note to People v. Smith (Mich.) 32 L. R. A. 853.

iam Hooley to work and labor in a certain concentrating mill, the same being an institution for the reduction of ores, for the period of twelve hours per day. The proceedings in this case were precisely the same as in the prior case, and it was admitted that there was no distinction in principle between the two cases.

Messrs. **Jeremiah M. Wilson,** *C. W. Bennett, R. Harkness, A. Howat,* and *W. M. Bradley,* for plaintiff in error:

In both of these cases is involved the constitutionality of the same statute of Utah, the only difference being that in one of them the defendant Holden was convicted of a violation of § 1 of said act, while in the other he was prosecuted and convicted under the 2d section. We will, therefore, in this brief, consider them together.

The statute of Utah is entitled "An Act Regulating the Hours of Employment in Underground Mines and in Smelters and Ore Reduction Works."

Utah Sess. Laws 1896, p. 219.

The said statute of Utah involved herein is in conflict with the Constitution of the United States, and is not a valid exercise of the police power of the state.

We ask the attention of the court to some of the most conspicuous of the authorities bearing upon the general question as to the scope of this police power, and as to the subjects relating to which it may properly be invoked.

We have not found in any of the text-books or cases an authoritative statement defining and limiting the exact scope and range of this power. In fact, this court itself in the case of *Stone* v. *Mississippi, Harris*, 101 U. S. 814 (25: 1079), has declined to specifically define it; but in the case of *New York* v. *Miln*, 36 U. S. 11 Pet. 102, 139 (9: 648, 662), will be found probably as concise and comprehensive a general definition of the term as could be given The court says:

"We are aware that it is at all times difficult to define any subject with proper precision and accuracy; if this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering [the police power]. If we were to attempt it, we should say that every law came within this description which concerned the welfare of the whole people of a state, or any individual within it; whether it related to their rights or their duties; whether it respected them as men, or as citizens of the state; whether in their public or private relations; whether it related to the rights of persons or of property of the whole people of a state or of any individual within it." The court, however, is careful to add that this jurisdiction or power can only be exercised where it is not "surrendered or restrained by the Constitution of the United States."

Lake View v. *Rose Hill Cemetery Co.* 70 Ill. 192, 22 Am. Rep 71.

The police power of a state is coextensive with self-protection, and is applicably termed the law of overruling necessity. It is the inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society.

Com. v. *Alger*, 7 Cush. 84; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 (24: 527); *State* v. *Noyes*, 47 Me. 211; *Thorpe* v. *Rutland & B. R. Co.* 27 Vt. 149, 62 Am. Dec. 625; *Re Jacobs*, 98 N. Y. 107, 50 Am. Rep. 636; Cooley, Const. Lim. 719; Potter's Dwarr. Stat. 458; *Austin* v. *Murray*, 16 Pick. 126; *Watertown* v. *Mayo*, 109 Mass. 319, 12 Am. Rep. 694; *Coe* v. *Schultz*, 47 Barb. 64; *Re Cheesebrough*, 78 N. Y. 232.

To be valid, legislation enacted for the purpose of promoting the public health, morals, or welfare must be of such a character that it will affect and be for the benefit of the whole community, or at least the part of it which is brought into contact with the evils sought to be remedied. Such an enactment must not be so limited in its terms that it can and will, as in the present case, operate upon but one of many classes of employers and employees of the same general description, living and doing business under the same general conditions, even though the occupation in which they are engaged to themselves may be injurious. In other words, it must relate and have reference to the result to the health and welfare of the community of the act or omission or the condition sought to be prevented or remedied, and not to the result of such act or omission to the author or person who is responsible for such condition or engaged in the dangerous or injurious occupation—that is, provided such person is *sui juris* and does not come within the class of persons (such as women, children, etc.), over which, as has been held in some of the states, the state has the right, to a limited extent, to exercise control for their own good and welfare, and thus indirectly for the welfare of the public.

It is, therefore, not within the power of the legislature to prevent persons who are *sui juris*, and otherwise perfectly competent to contract, from entering into employment and voluntarily making contracts in relation thereto merely because the employment in which they are to engage, although perfectly legal and proper in itself, may be considered by the legislature to be dangerous or injurious to the health of the employee; and if such right to contract cannot be prevented, it certainly cannot be restricted by the legislature to suit its own ideas of the ability of the employee to stand the physical and mental strain incident to the work. The character of the work to be performed, the number of hours a day in which the employee shall work, and the amount of compensation to be paid therefor are purely and necessarily personal matters between the parties to the contract, and are regulated by the terms thereof and by the will of the employer, influenced by considerations as to the requirements of his business and the condition of the market for his products, etc., and it is clear that, so long as the employment does not interfere with the rights or health of others, the legislature cannot prevent it or regulate any of its terms.

If, for any reason, the condition of the market should become such that there was no sale or demand for the product of an iron mine, for example, and the owner, in consequence of this condition, should find that he was running his business at a loss, it would be ridicu-

tous to say that he would not have a perfect right to lay off some of his hands altogether, or to work them all half time, or arbitrarily to reduce the number of working hours of all to any extent he might think necessary or advisable; and if he could do that, we do not see why he could not, for the purpose of meeting an increased demand for the product of his mines and the competition from other sources, or if for any reason the condition of the market warranted it, increase the number of hours of his workmen to ten or any other number more than eight that they might be willing to work or contract with him for.

A case here directly in point is that of *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, where the court had under consideration a law of New York prohibiting the manufacture of cigars and the preparation of tobacco in any form in tenement houses, etc. In the opinion the court says: "To justify this law it would not be sufficient that the use of tobacco may be injurious to some persons, or that its manipulation may be injurious to those who are engaged in its preparation and manufacture; but it would have to be injurious to the public health."

But, however this may be, it is well settled that, when relating to business enterprises, the business or occupation at which such regulations are directed must be affected with a "public interest," and that the regulation must be for the protection or benefit of the public generally, as we have above contended, and not of an individual or segregated class of individuals under the circumstances we have mentioned.

This court, in the case of *Munn* v. *Illinois*, 94 U. S. 126 (24: 84), defines the property that is subject to policy regulations as follows: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

Tiedeman, Pol. Powers, § 179; Cooley, Const. Lim. 720; *People* v. *Jackson & M. Pl. Road Co.* 9 Mich. 307.

In the case of *United States* v. *Martin*, 94 U. S. 400 (24: 128), in which this court was called upon to construe § 3738 of the Revised Statutes, providing that eight hours shall constitute a day's work for employees of the government, is was held that said statute was "in the nature of a direction from a principal to his agent, that eight hours is deemed to be a proper length of time for a day's labor, and that his contracts shall be based on that theory," but the court distinguishes between such a direction and the principle involved in the case at bar, as follows:

"The English statute books are full of assizes of bread and ale, commencing as early as the reign of Henry II., and regulations of labor and many such are to be found in the statutes of the several states. It is stated by Adam Smith, as the law in his day, that in Sheffield no master cutler or weaver or hatter could have more than two apprentices at a time, and so lately as 8 Geo. III. an act, which remained unrepealed until 1825, was passed, prohibiting, under severe penalties, all master tailors in London, or within 5 miles of it, from giving, or their workmen from accepting, more than two shillings sevenpence halfpenny a day, except in the case of general mourning. Smith, Wealth of Nations, 6th Oxford ed. of 1869, 125. A different theory is now almost universally adopted. Principals, so far as the law can give the power, are entitled to employ as many workmen, and of whatever degree of skill, and at whatever price, they think fit, and, except in some special cases, as of children or orphans, the hours of labor and the price to be paid are left to the determination of the parties interested. The statute of the United States does not interfere with this principle."

An enactment of the legislature, made in pursuance of the police power of a state, or a police regulation, must be for the purpose of enforcing a duty and to punish acts or omissions which may be right or wrong according to the time, place, or manner of doing them; that is, the exercise of what would otherwise be a right at a time, place, or in a manner, injurious to the public, is prohibited. A general criminal law is to punish something wrong in itself, without regard to the time, place, or manner of doing it, and of course such a law, whether enacted by original or delegated authority, is not a police regulation.

The violation of the maxim *sic utere tuo, ut alienum non lædas* covers every case in which the exercise of the police power would be valid or legitimate; and we think no case of a valid police regulation can be found which will not come under this maxim, and which does not refer to the limitation of the exercise of what, under proper circumstances, would be a right, and only becomes a wrong because of its excessive exercise or consequent injury to the health, welfare, or morals of the public. Police regulations are therefore not enacted for the purpose of punishing wrongs, as such, but to enforce duties to the public in respect to matters which can only become wrongs *sub modo*. The right to destroy property to stay a conflagration, and in case of war, etc., is also distinguishable, and is based upon the maxim *salus populi suprema lex*. So of the right of eminent domain; though exercised for a public use, it is based on compensation. In a police regulation, there is only restraint for the public welfare.

The owner of the property or business undoubtedly has the right on his own property and in his own business to work as many hours per day as he chooses, to manufacture whatever articles he may choose to manufacture, to operate a mine, or to do anything which he may deem necessary to the conduct of his business, whether the same be unwholesome or dangerous or not, provided the health, welfare, or morals of the public generally are not injuriously affected thereby.

If, therefore, the Constitution of the state requires the legislature to enact laws respecting the health of miners and others, the law, to be valid, must relate to the duty of the employer to his employees in the respects we have indicated, and must not interfere with the relation of the parties that rests solely on contract.

The present law has no relation to health or safety, either to the public or the persons affected, or, if so, only in a very remote degree; while its direct and principal effect is to interfere with the rights and liberties of the contracting parties.

It is apparent that if the police power extends to matters affecting contract relations and in which the public health, etc., is in no way concerned, there is practically no limit to its exercise, and all business conducted in the states, whether of a quasi public, public, or strictly private nature, could be made subject to such laws regulative thereof as the legislatures of the respective states might see fit to adopt, and the personal liberty of the citizens, secured to him by the Constitution of the United States, would be entirely subverted.

In this connection we desire to suggest that the constitutionality of this statute must be considered in the light of its effect upon the class of persons upon whom it operates, and upon the relation of the prohibition thercin contained to the general public. When this is taken into consideration it is apparent that, even if by any possibility it could fairly be said (as was assumed and said by the court below) that the enforcement of the provisiou contained in said measure could be conducive of the health or welfare of the employees enumerated therein, and in that respect is not unconstitutional, still it is so flagrantly violative of the rights and liberties of the citizens affected thereby—both of the employer and employee—that it is brought in direct conflict with the Constitution of the United States, if not with the Constitution of Utah, and cannot for that reason be allowed to stand.

Henderson v. *Wickham*, 92 U. S. 268 (23: 548); *Rutherford* v. *Greene*, 15 U. S. 2 Wheat. 203 (4: 220).

It is said in the latter case: "Whatever the legislative power may be, its acts ought never to bc so construed as to subvert the rights of property, unless its intention so to do shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object."

Even if this act can fairly be assumed to have been a measure adopted by the legislature of Utah for the protection of the health or welfare of the class of persons affected thereby, it is, nevertheless, unconstitutional, because, when actually applied, it is found to be in contravention of the principles, and destructive of the rights and liberties, of the citizen to which we have above pointed. To repeat the language of this court in *Boyd* v. *United States*, 116 U. S. 635 (29: 753), varying it slightly to suit the circumstances of this case, we have no doubt that the legislature, in enacting this statute, "was actuated by perfectly proper motives," but we presume that "the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

The statute in question abridges privileges and immunities of the plaintiff in error to which he is entitled as a citizen of the United States.

The plaintiff in error in this case is a native-born citizen of the United States, and was at the time of his arrest, and now is, a citizen of the state of Utah, and as such was and is entitled to all the privileges and immunities of citizens of the United States as secured to them by the Constitution.

Among the privileges and immunities secured to the citizen by the 14th Amendment is the right "to pursue unmolested a lawful employment in a lawful manner."

Live Stock Dealers & B. Asso. v. *Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 388, 389.

Incidental to this there is, of course, the further right to enter into contracts relating to the character of the services to be performed, the amount of compensation to be paid and received therefor, and the period of time or the number of hours per day required to perform such labor.

The allowance to the employer of labor, and the working man, of perfect freedom and liberty in this respect is absolutely and manifestly essential in this age of constant progress in business affairs and of great and increasing competition, to enable the employer and laborer, alike, to maintain life and to render any legitimate employment or business in which they may be engaged successful. Whatever may be the wisdom or necessity for enacting laws restrictive of the hours of labor of women, children, or orphans, or the advisability of enacting such laws with reference to the employees in the various kinds of business enterprises that are held to be affected with a public interest, it is perfectly obvious, because of their great diversity and the character and necessities of the different kinds of private business enterprises, that it would be impossible to devise a law or regulation limiting the hours of employment of such employees that would operate with any degree of equality or with anything like justice upon the employers and employees in all private business enterprises, or even those of the same general class.

In the Constitution of the state of Utah itself this distinction is recognized, and only the hours of work of employees of the "state, county, and municipal governments" are attempted to be regulated thereby, the law here in question being claimed to have been authorized and passed under the additional provision that "the legislature shall pass laws to provide for the health and safety of employees in factories, smelters, and mines." The law, however, fails to make any such provision with reference to employees in factories.

As we have seen, such laws as to public employees are regarded by the courts merely as directions from a principal to his agent, and as such are held to be competent; but, in the case of private employment or labor, as so aptly stated by this court, "principals, so far as the law can give the power, are entitled to employ as many workmen, and of whatever degree of skill, and at whatever price, they think fit, and, except in some special cases, as of children or orphans, the hours of labor and the price to be paid are left to the determination of the parties interested."

United States v. *Martin*, 94 U. S. 400 (24: 128).

Applying the principle last stated to the

present case, it cannot be said that an act making it a misdemeanor for a private and independent mine operator to employ his workmen more than eight hours a day, except in cases of emergency where life or property is in imminent danger, and subjecting him to fine and imprisonment in consequence of a violation of such provision, does not infringe or abridge the right of both the employer and laborer, to make contracts which persons and corporations in other lines of business may make, and that it does not abridge the privileges and immunities so secured to them as citizens of the United States.

We now turn to some of the authorities supporting our present contention, from which it will be seen that, while the courts do not attempt specifically and in detail to enumerate and define all of these privileges and immunities, they are practically unanimous in holding that the right to pursue, in a lawful manner, a lawful vocation or trade, unmolested by laws in any way restrictive of that right, is a privilege that is protected and secured to the citizen by the Constitution of the United States.

Ward v. *Maryland*, 79 U. S. 12 Wall. 430 (20: 453); *Slaughter-House Cases*, 83 U. S. 16 Wall. 97 (21: 415).

It is said in the dissenting opinion of Justice Field in the latter case: "The privileges and immunities designated are those which of right belong to the citizens of all free governments Clearly among these must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons."

Butchers' Union S. H. & L. S. L. Co. v. *Crescent City L. S. L. & S. H. Co.* 111 U.S. 746 (28: 585); 1 Adam Smith, Wealth of Nations, chap. 10.

The right to follow any of the ordinary callings of life is one of the privileges of a citizen of the United States.

Ex parte Kuback, 85 Cal. 274, 9 L. R. A. 482.

A city cannot be justified in making it a misdemeanor for any of its citizens to contract with another for services to be rendered because the contract is that he shall work more than a limited number of hours per day.

Ex parte Kuback, 85 Cal 274, 9 L. R. A. 482.

It is not competent for the legislature to single out the mining, manufacturing, and smelting industries of the state and impose upon them restrictions with reference to the hours of their employment from which other employers of labor are exempt.

Re Eight Hours Bill, 21 Colo. 29.

The right of parties to make their own contracts is a right guaranteed by our Bill of Rights and protected by the 14th Amendment of the Constitution of the United States.

Low v. *Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702; *Re House Bill No. 203*, 21 Colo. 27; *Frorer* v. *People*, 141 Ill. 171, 16 L. R. A. 492.

When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, society, or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof.

Leep v. *St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 446, 23 L. R. A. 264; *State* v. *Goodwill*, 33 W. Va. 179, 6 L. R. A. 621; *Wally* v. *Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Godcharles* v. *Wigeman*, 113 Pa. 431; *Com.* v. *Perry*, 155 Mass. 117, 14 L. R. A. 325; *Re Jacobs*, 98 N. Y. 98. 50 Am. Rep 636; *People* v. *Marx*, 99 N. Y. 377, 52 Am. Rep. 34; *People* v. *Gillson*, 109 N. Y. 389; *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869; *Shaver* v. *Pennsylvania Co.* 71 Fed. Rep. 931, 936.

The right to labor is, of all others, after the right to live, the fundamental, inalienable right of man of which he cannot be deprived under the guise of law, or otherwise, except by usurpation or force.

Re Tiburcio Parrott, 1 Fed. Rep. 481.

This statute is also violative of the provision of the 14th Amendment that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

What we have already said is sufficient to show that under the operation of the law all other persons in the state, no matter in what business or occupation they may be engaged, are left entirely at liberty to make whatever contracts they please in respect of the character of the work to be performed, the amount to be paid therefor, and the number of hours that shall constitute a day's work in all occupations which by the law of the land are properly the subjects of contract.

The act in the case at bar, in §§ 1 and 2, says that eight hours shall constitute a day's work only for those who are employed in underground mines or workings, smelters and other institutions for the reduction or refining of ores, and, in § 3, says, that "any person, body corporate, agent, manager, or employer who shall violate any of the provisions of §§ 1 and 2 of this act shall be deemed guilty of a misdemeanor." This comparatively small class of people is in terms singled out by the legislature, made to bear this unjustifiable and unequal burden, and deprived of liberties and rights of property that are enjoyed by every other citizen in the state who is engaged in any of the vast number of employments not enumerated in the act, and which by the law of the land they are protected in the enjoyment of and have the right in the courts to enforce.

This free and unrestricted right to engage in any calling that is permitted under the law, and to make necessary and lawful contracts with reference thereto, is one of the fundamental and inalienable rights of the citizen, without which, of course, no condition of social, commercial, or financial prosperity could exist in a community or state that is in any way dependent on other communities or states for an interchange of commodities or commerce, and must therefore be free in this country to all alike upon the same conditions. The right to pursue "such callings" without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the

United States, and an essential element of that freedom which they claim as their birthright for "the property which every man has is his own labor, and, as it is the original foundation of all other property, so it is the most sacred and inviolable.

Butchers' Union S. H. & L. S. L. Co. v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746 (28: 585); 1 Adam Smith, Wealth of Nations, chap. 10.

It is no reply to this petition to say, as was said by counsel for the state in the court below, that the right of contract of the plaintiff in error is not really abridged by this law because if as much work cannot be accomplished by the same number of laborers in eight hours a day as in ten a greater number of men can be employed, or that two sets of workmen can be employed, the one to begin after the other has completed its allotted time.

Brown v. *Maryland*, 25 U. S. 12 Wheat. 439 (6: 685).

If the legislature can prohibit the employment of laborers in mines and smelters for more than eight hours a day, it can prohibit such employment for more than one or any other number of hours.

Boyd v. *United States*, 116 U. S. 616, 635 (29: 746, 753).

The due process of law of which the plaintiff in error claims to have been denied is the arbitrary deprivation by the legislature, without trial or constitutional right, of those liberties and rights of property which were possessed by him before the passage of the act, and which are possessed by all other citizens of the state engaged in any other business or occupation and in the enjoyment of which they are protected in the courts by the law of the land.

Murray v. *Hoboken Land & Improv. Co.* 59 U. S. 18 How. 276 (15: 372); *Dartmouth College* v. *Woodward*, 17 U. S. 4 Wheat. 581, 582 (4: 645); *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869; *Janes* v. *Reynolds*, 2 Tex. 251; *Wynehamer* v. *People*, 13 N. Y. 432; *Vanzant* v. *Waddel*, 2 Yerg. 269.

Blackstone, in his classification of fundamental rights, says: "The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."

1 Bl. Com. 138; *Pumpelly* v. *Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166, 177 (20: 557, 560); *Wynehamer* v. *People*, 13 N. Y. 378, 398.

All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements, are infringements upon the fundamental rights of liberty, which are under constitutional protection.

People, Manhattan Sav. Inst., v. *Otis*, 90 N. Y. 48; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 515, 30 Am. Rep. 323; *Low* v. *Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702; *Nichols* v. *Walter*, 37 Minn. 264; *State, Randolph*, v. *Wood*, 49 N. J. L. 88; *Ritchie* v. *People*, 155 Ill. 98, 29 L. R. A. 79.

The manner in which the law discriminates against one class of employers and employees and in favor of all others places it in opposition to the guaranties hereinbefore discussed, and renders it invalid.

Ritchie v. *People*, 155 Ill. 98, 29 L. R. A. 79; *Frorer* v. *People*, 141 Ill. 171, 16 L. R. A. 492.

The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B, C, and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract.

Frorer v. *People*, 141 Ill. 171, 16 L. R. A. 492; *Ramsey* v. *People*, 142 Ill. 380, 17 L. R. A. 853; *Braceville Coal Co.* v *People*, 147 Ill. 66, 22 L. R. A. 340; *State* v. *Loomis*, 115 Mo. 307, 21 L. R. A. 789; *Austin* v. *Murray*, 16 Pick. 121.

From the above it will be seen that in Colorado, Nebraska, California, and Illinois laws substantially similar to that in question have been held unconstitutional and void by the highest courts of those states, and that in Massachusetts, New York, Pennsylvania, Illinois, Ohio, Missouri, West Virginia, Maryland, Arkansas, Texas, Vermont, and many of the remaining states of the Union, laws so nearly analogous in principle to this statute that we deem them conclusive of the question have likewise been so held.

Indeed, the three essential and indispensable elements of that perfectly free and unrestricted right of the citizen to contract with reference to all lawful pursuits in which he may desire to engage, which is guaranteed and protected by the Constitution of the United States, and to which we have above pointed, namely, the right of the employer and the employee to agree upon (1) the character of the services to be performed, (2) the amount to be paid for such service, and (3) the number of hours per day during which the service is to continue, are constantly grouped together in the authorities, and are manifestly so inseparably connected with each other that the destruction or abridgment of one is a destruction or abridgment of the whole of said right of contract; and, therefore, any decision holding that such destruction or abridgment of one of these elements is unconstitutional must necessarily apply to and control all questions as to the constitutionality of the others.

We have nowhere found a decision of any court upholding such a law as the one here involved, or any law analogous thereto, except in the cases we have enumerated, and which we contend are clearly distinguishable from the present case, namely: (*a*) cases where the law was enacted for the purpose of limiting the hours of employment of public employees, in which case this court has held that such a law is valid because merely in the nature of a direction from a principal to his agent; (*b*) cases where such laws are enacted with regard to employments affected with a public interest;

and (c) in the case of statutes which, although limiting the hours of employment, are enacted for the protection of the health or safety of women, children, insane persons, and the like, which last are generally, though not universally (*Ritchie* v. *People*, 155 Ill. 98, 29 L. R. A. 79), regarded as a valid exercise of the police power for the reasons we have already stated.

Relying, therefore, upon these authorities, and upon the indication of the opinion of this court above quoted from the case of the *United States* v. *Martin*, 94 U. S. 400 (24: 128), we respectfully submit that the judgment and order of the court below remanding plaintiff in error to the custody of the defendant, and denying his discharge from such custody, should be reversed.

Messrs. **Charles J. Pence** and *John H. Murphy*, for defendant in error:

When the constitutionality of a statute is questioned the presumption always exists in favor of the validity of the law until its unconstitutionality is shown clearly and beyond doubt, and if there be a doubt in the mind of the court it must be determined in favor of the validity of the statute.

The right of the judiciary to declare a statute void and to arrest its execution is one which is coupled with a responsibility so grave that it is never to be exercised except in very clear cases. One department of the government is bound to presume that another has acted rightly. The party who wishes us to pronounce a law unconstitutional takes upon himself the burden of proving beyond a doubt that it is so.

Erie & N. E. R. Co. v. *Casey*, 26 Pa. 287; *Powell* v. *Com.* 114 Pa. 270, 60 Am. Rep. 350; *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 436 (6: 684); *Ogden* v. *Saunders*, 25 U. S. 12 Wheat. 270 (6: 625); *Sharpless* v. *Philadelphia*, 21 Pa. 147, 59 Am. Dec. 782.

"Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained."

Munn v. *Illinois*, 94 U. S. 126 (24: 84); *State* v. *Peel Splint Coal Co.* 36 W. Va. 835, 17 L. R. A. 385; *Pennsylvania R. Co.* v. *Riblet*, 66 Pa. 164, 5 Am. Rep. 360; *University of California* v. *Bernard*, 57 Cal. 612; *Sinking Fund Cases*, 99 U. S. 718 (25: 501); *State* v. *Ah Chew*, 16 Nev. 50, 40 Am. Rep. 490; *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87 (3: 162); *Ah Lim* v. *Territory*, 1 Wash. 159, 9 L. R. A. 395; *State* v. *Addington*, 77 Mo. 110; *State, Harris*, v. *Laughlin*, 75 Mo. 147; *Humes* v. *Missouri P. R. Co.* 82 Mo. 230, 52 Am. Rep. 369; *Leep* v. *St. Louis, I. M. & S. R. Co.* 58 Ark. 414, 23 L. R. A. 264; *Newland* v. *Marsh*, 19 Ill. 385.

That the law may seem unreasonable, oppressive, or absurd, or that there may be objections to its policy or expediency, is not sufficient to justify its judicial repeal. These are matters for which the legislature must shortly answer to its constituents who can correct them. It must be in direct conflict with some expressed prohibition of the Constitution.

New York v. *Miln*, 36 U. S. 11 Pet. 138 (9: 662); Cooley, Const. Lim. 164; *Nathan* v. *Louisiana*, 49 U. S. 8 How. 73 (12: 993); *Passenger Cases*, 48 U. S. 7 How. 287, 402 (12: 704, 752); *Sharpless* v. *Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Patterson* v. *Yuba County Supers.* 13 Cal. 175–182; *Leonard* v. *Wiseman*, 31 Md. 201; *Com., Dysart*, v. *McWilliams*, 11 Pa. 61; *Davis* v. *State*, 3 Lea, 376; *Varick* v. *Smith*, 5 Paige, 160, 28 Am. Dec. 417; *Williams* v. *Cammack*, 27 Miss. 209, 61 Am. Dec. 508; *People* v. *Gillson*, 109 N. Y. 406.

Few laws reach directly the whole community. We have seen no decision holding that a law must reach and affect directly every citizen. Each law is designed and necessarily so framed as to correct some particular evil or to enforce some particular right. While, as a whole, the statutes furnish fair protection against wrong, each statute by itself covers but a small field and directly affects but few persons.

Statutes to remedy a particular evil must, of necessity, apply only to the particular class of persons committing the offense.

Missouri P. R. Co. v. *Mackey*, 127 U. S. 205 (32: 107); *Budd* v. *New York*, 143 U. S. 517 (36: 247), 4 Inters. Com. Rep. 45; *State* v. *Peel Splint Coal Co.* 36 W. Va. 832, 17 L. R. A. 385; *Dent* v. *West Virginia*, 129 U. S. 124 (32: 627); *Leep* v. *St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264; *New York* v. *Miln*, 36 U. S. 11 Pet. 139 (9: 662); *Brimm* v. *Jones*, 11 Utah, 200, 29 L. R. A. 97, 165 U. S. 180 (41: 677).

Nor is it necessary, even where they are engaged in business of the same general description, that the regulation shall apply to both.

St. Louis & S. F. R. Co. v. *Mathews*, 165 U. S. 23 (41: 620); *Hennington* v. *Georgia*, 163 U. S. 299 (41: 166); *Devin* v. *Scott*, 34 Ind. 67; *Curtis* v. *O'Brien*, 20 Iowa, 376, 89 Am. Dec. 543; *Kneetle* v. *Newcomb*, 22 N. Y. 250, 78 Am. Dec. 186; *Bosler* v. *Rheem*, 72 Pa. 54.

The Federal Constitution has no application to statutes of the several states unless such statutes encroach upon one of the powers expressly surrendered to Congress, or are in direct violation of some constitutional restriction upon the state.

License Tax Cases, 72 U. S. 5 Wall. 462 (18: 497); *United States* v. *De Witt*, 76 U. S. 9 Wall. 41 (19: 593).

And after the adoption of the 14th Amendment it was held that no change in this respect was made or intended by that Amendment.

Stone v. *Mississippi*, *Harris*, 101 U. S. 814 (25:1079); *United States* v. *Cruikshank*, 92 U. S. 542 (23: 588); *Barbier* v. *Connolly*, 113 U. S. 27 (28: 923); *Mugler* v. *Kansas*, 123 U. S. 633 (31: 205); *Powell* v. *Pennsylvania*, 127 U. S. 678 (32: 253); *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650 (29: 516); *Patterson* v. *Kentucky*, 97 U. S. 501 (24: 1115).

Counsel argues that though it may be a health regulation it is unconstitutional because "it restricts the earnings of the employee to what he may be able to obtain from his employer for eight hours' work, and prevents him from earning the additional pay which he would be entitled to if he worked more than eight hours a day."

Even if this were the necessary effect of the law it would be a proper health regulation for preserving to a citizen his ability to work and support himself is not only humane but is preventing a burden on the people.

But there is nothing in the Utah statute to prevent his working as many hours as he may wish on the surface.

The private opinions of judges who criticise the policy of regulating the affairs and contracts of persons who are *sui juris* is fully met by the decisions of the courts in the cases cited below in which the law was held to be valid. *Blair* v. *Forehand*, 100 Mass. 136, 1 Am. Rep. 94, 97 Am. Dec. 82; *Woods* v. *State*, 36 Ark. 36, 38 Am. Rep. 22; *Davis* v. *State*, 68 Ala. 58, 44 Am. Rep. 128; *Donnelly* v. *Decker*, 58 Wis. 461, 46 Am. Rep. 637; *Hawthorn* v. *People*, 109 Ill. 302, 50 Am. Rep. 610; *Fry* v. *State*, 63 Ind. 552, 30 Am. Rep. 238; *State* v. *Ah Chew*, 16 Nev. 50, 40 Am. Rep. 488; *Com.* v. *Waite*, 11 Allen, 264, 87 Am. Dec. 711; *Smith* v. *Tyler*, 51 Ind. 512; *Maloney* v. *Newton*, 85 Ind. 565, 44 Am. Rep. 46; *Bauer* v. *Samson Lodge, K. of P.* 102 Ind. 262; *Taylor* v *Saurman*, 110 Pa. 3; *Herdic* v. *Roessler*, 109 N. Y. 127; *Warren* v. *Sohn*, 112 Ind. 213; *Churchman* v. *Martin*, 54 Ind. 380; *Com.* v. *Hamilton Mfg. Co.* 120 Mass. 383; *People* v. *Havnor*, 149 N. Y. 195, 31 L. R. A. 689.

Mr. Justice **Brown** delivered the opinion of the court:

This case involves the constitutionality of an act of the legislature of Utah of March 30, 1896, chap. 72, entitled "An Act Regulating the Hours of Employment in Underground Mines and in Smelters and Ore Reduction Works." The following are the material provisions:

"Sec. 1. The period of employment of workingmen in all underground mines or workings shall be eight hours per day, except in cases of emergency where life or property is in imminent danger.

"Sec. 2. The period of employment of workingmen in smelters and all other institutions for the reduction or refining of ores or metals shall be eight hours per day, except in cases of emergency where life or property is in imminent danger.

"Sec. 3. Any person, body corporate, agent, manager, or employer, who shall violate any of the provisions of sections one and two of this act, shall be guilty of a misdemeanor."

The supreme court of Utah was of opinion that if authority in the legislature were needed for the enactment of the statute in question, it was found in that part of article 16 of the Constitution of the state, which declared that "the **381**]legislature shall *pass laws to provide for the health and safety of employees in factories, smelters, and mines." As the article deals exclusively with the rights of labor, it is here reproduced in full as exhibiting the authority under which the legislature acted, and as throwing light upon its intention in enacting the statute in question (Laws 1896, p. 219):

"Sec. 1. The rights of labor shall have just protection through laws calculated to promote the industrial welfare of the state.

"Sec. 2. The legislature shall provide by law for a board of labor, conciliation, and arbitration which shall fairly represent the interests of both capital and labor. The board shall perform duties and receive compensation as prescribed by law.

"Sec. 3. The legislature shall prohibit:

"1. The employment of women, or of children under the age of fourteen years, in underground mines.

"2. The contracting of convict labor.

"3. The labor of convicts outside prison grounds, except on public works under the direct control of the state.

"4. The political and commercial control of employees.

"Sec. 4. The exchange of blacklists by railroad companies, or other corporations, associations, or persons is prohibited.

"Sec. 5. The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation.

"Sec. 6. Eight hours shall constitute a day's work on all works or undertakings carried on or aided by the state, county, or municipal governments; and the legislature shall pass laws to provide for the health and safety of employees in factories, smelters, and mines.

"Sec. 7. The legislature, by appropriate legislation, shall provide for the enforcement of the provisions of this article."

The validity of the statute in question is, however, challenged upon the ground of an alleged violation of the 14th Amendment to the Constitution of the United States, in that it abridges the privileges or immunities of citizens of the United States; deprives both the employer and the *laborer of his property [**382** without due process of law, and denies to them the equal protection of the laws. As the three questions of abridging their immunities, depriving them of their property, and denying them the protection of the laws, are so connected that the authorities upon each are, to a greater or less extent, pertinent to the others, they may properly be considered together.

Prior to the adoption of the 14th Amendment there was a similar provision against deprivation of life, liberty, or property without due process of law incorporated in the 5th Amendment; but as the first eight amendments to the Constitution were obligatory only upon Congress, the decisions of this court under this amendment have but a partial application to the 14th Amendment, which operates only upon the action of the several states. The 14th Amendment, which was finally adopted July 28, 1868, largely expanded the power of the Federal courts and Congress, and for the first time authorized the former to declare invalid all laws and judicial decisions of the states abridging the rights of citizens or denying them the benefit of due process of law.

This amendment was first called to the attention of this court in 1872, in an attack upon the constitutionality of a law of the state of Louisiana, passed in 1869, vesting in a slaughter-house company therein named the sole and exclusive privilege of conducting and carrying on a live-stock landing and slaughter-house business, within certain limits specified in the act, and requiring all animals intended for sale and slaughter to be landed at their wharves or landing places. *Slaughter-House Cases*, 83 U. S. 16 Wall. 36 [21: 394]. While the court in that case recognized the fact that the primary object of this amendment was to secure to the colored race, then recently emancipated, the full enjoyment of their free-

dom, the further fact that it was not restricted to that purpose was admitted both in the prevailing and dissenting opinions, and the validity of the act was sustained as a proper police regulation for the health and comfort of the people. A majority of the cases, which have since arisen, have turned, not upon a denial to the colored race of rights therein secured to **383**]them, but upon alleged *discriminations in matters entirely outside of the political relations of the parties aggrieved.

These cases may be divided, generally, into two classes: First, where a state legislature, or a state court, is alleged to have unjustly discriminated in favor of or against a particular individual or class of individuals, as distinguished from the rest of the community, or denied them the benefit of due process of law; second, where the legislature has changed its general system of jurisprudence by abolishing what had been previously considered necessary to the proper administration of justice, or the protection of the individual.

Among those of the first class, which, for the sake of brevity, may be termed unjust discriminations, are those wherein the colored race was alleged to have been denied the right of representation upon juries (*Strauder* v. *West Virginia*, 100 U. S. 303 [25: 664]; *Virginia* v. *Rives*, 100 U. S. 313 [25: 667]; *Ex parte Virginia*, 100 U. S. 339 [25: 676]; *Neal* v. *Delaware*, 103 U. S. 370 [26: 567]; *Bush* v. *Kentucky*, 107 U. S. 110 [27: 354]; *Gibson* v. *Mississippi*, 162 U. S. 565 [40: 1075]), as well as those wherein the state was charged with oppressing and unduly discriminating against persons of the Chinese race (*Barbier* v. *Connolly*, 113 U. S. 27 [28: 923]; *Soon Hing* v. *Cowley*, 113 U. S. 703 [28: 1145]; *Yick Wo* v. *Hopkins*, 118 U. S. 356 [30: 220], and *Chy Lung* v. *Freeman*, 92 U. S. 275 [23: 550], and those wherein it was sought under this Amendment to enforce the right of women to suffrage and to admission to the learned professions. *Minor* v. *Happersett*, 88 U. S. 21 Wall. 162 [22: 627]; *Bradwell* v. *Illinois*, 83 U. S. 16 Wall. 130 [21: 442].

To this class are also referable all those cases wherein the state courts were alleged to have denied to particular individuals the benefit of due process of law secured to them by the statutes of the state (*Re Converse*, 137 U. S. 624 [34: 796]; *Arrowsmith* v. *Harmoning*, 118 U. S. 194 [30: 243]), as well as that other large class, to be more specifically mentioned hereafter, wherein the state legislature was charged with having transcended its proper police power in assuming to legislate for the health or morals of the community.

Cases arising under the second class, wherein a state has chosen to change its methods of **384**]trial to meet a popular demand *for simpler and more expeditious forms of administering justice, are much less numerous, though of even greater importance, than the others. A reference to a few of these cases may not be inappropriate in this connection. Thus in *Walker* v. *Sauvinet*, 92 U. S. 90 [23: 678], which was an action brought by a colored man against the keeper of a coffee-house in New Orleans for refusing him refreshments in violation of the Constitution of the state securing to the colored race equal rights and privileges in such cases, a statute of the state provided that such cases should be tried by jury, if either party demanded it, but if the jury failed to agree the case should be submitted to the judge, who should decide the same. It was held that a trial by jury was not a privilege or immunity of citizenship which the states were forbidden to abridge, but the requirement of due process of law was met if the trial was had according to the settled course of judicial proceedings. "Due process of law," said Chief Justice Waite, "is process due according to the law of the land. This process in the states is regulated by the law of the state." This law was held not to be in conflict with the Constitution of the United States.

Similar rulings with regard to the necessity of a jury, or of a judicial trial in special proceedings, were made in *Kennard* v. *Louisiana*, *Morgan*, 92 U. S. 480 [23: 478]; *McMillan* v. *Anderson*, 95 U. S. 37 [24: 335]; *Davidson* v. *New Orleans*, 96 U. S. 97 [24: 616]; *Walston* v. *Nevin*, 128 U. S. 578 [32: 544]; *Ex parte Wall*, 107 U. S. 265 [27: 552].

In *Hurtado* v. *California*, 110 U. S. 516 [28: 232], it was held that due process of law did not necessarily require an indictment by a grand jury in a prosecution by a state for murder. The Constitution of California authorized prosecutions for felonies by information, after examination and commitment by a magistrate, without an indictment by a grand jury, in the discretion of the legislature. It was held that conviction upon such an information, followed by sentence of death, was not illegal under the 14th Amendment.

In *Hayes* v. *Missouri*, 120 U. S. 68 [30: 578], it was held that a statute of a state which provided that, in capital cases, in cities having a population of over 100,000 inhabitants, the state *shall be allowed fifteen peremptory **385** challenges to jurors, while elsewhere in the state it was allowed only eight peremptory challenges, did not deny to a person tried for murder, in a city containing over 100,000 inhabitants, the equal protection of the laws enjoined by the 14th Amendment, and that there was no error in refusing to limit the state's peremptory challenges to eight.

In *Missouri P. Railway Co.* v. *Mackey*, 127 U. S. 205 [32: 107], it was said that a statute in Kansas abolishing the fellow-servant doctrine as applied to railway accidents, did not deny to railroads the equal protection of the laws, and was not in conflict with the 14th Amendment. The same ruling was made with reference to statutes requiring railways to erect and maintain fences and cattle guards, and make them liable in double the amount of damages claimed for the want of them.

In *Hallinger* v. *Davis*, 146 U. S. 314 [36: 986], it was held that a state statute conferring upon an accused person the right to waive a trial by jury and to elect to be tried by the court, and conferring power upon the court to try the accused in such case, was not a violation of the due process clause of the 14th Amendment.

So, in *Re Kemmler*, 136 U. S. 436 [34: 519], it was held that the law providing for capital punishment by electricity was not repugnant to this Amendment. And in *Duncan* v. *Mis-*

souri, 152 U. S. 377 [38:485], it was said that the prescribing of different modes of procedure and the abolition of courts, and the creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds persons accused of crime, are not considered within the constitutional inhibition. See also *Re Medley, Petitioner*, 134 U. S. 160 [33:835], and *Holden* v. *Minnesota*, 137 U. S. 484 [34:734].

An examination of both these classes of cases under the 14th Amendment will demonstrate that, in passing upon the validity of state legislation under that Amendment, this court has not failed to recognize the fact that the law is to a certain extent a progressive science; that in some of the states methods of procedure which, at the time the Constitution was 386] *adopted, were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection. Even before the adoption of the Constitution, much had been done toward mitigating the severity of the common law, particularly in the administration of its criminal branch. The number of capital crimes in this country, at least, had been largely decreased. Trial by ordeal and by battle had never existed here, and had fallen into disuse in England. The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But to the credit of her American colonies let it be said, that so oppressive a doctrine had never obtained a foothold there.

The present century has originated legal reforms of no less importance. The whole fabric of special pleading, once thought to be necessary to the elimination of the real issue between the parties, has crumbled to pieces. The ancient tenures of real estate have been largely swept away, and land is now transferred almost as easily and cheaply as personal property. Married women have been emancipated from the control of their husbands and placed upon a practical equality with them with respect to the acquisition, possession, and transmission of property. Imprisonment for debt has been abolished. Exemptions from execution have been largely added to, and in most of the states homesteads are rendered incapable of seizure and sale upon forced process. Witnesses are no longer incompetent by reason of interest, even though they be parties to the litigation. Indictments have been simplified, and an indictment for the most serious of crimes is now the simplest of all. In 387] several of the states grand *juries, formerly the only safeguard against a malicious prosecution, have been largely abolished, and in others the rule of unanimity, so far as applied to civil cases, has given way to verdicts rendered by a three-fourths majority. This case does not call for an expression of opinion as to the wisdom of these changes, or their validity under the 14th Amendment, although the substitution of prosecution by information in lieu of indictment was recognized as valid in *Hurtado* v. *California*, 110 U. S. 516 [28:232]. They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.

Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that, from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and, particularly, to the new relations between employers and employees, as they arise.

Similar views have been heretofore expressed by this court. Thus in the case of *Missouri* v. *Lewis*, 101 U. S. 22, 31 [25:989, 992], it was said by Mr. Justice Bradley: "We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York city and the surrounding counties, and the common law and its methods of procedure for the rest of the *state, there is nothing in the [388 Constitution of the United States to prevent its doing so. This would not of itself, within the meaning of the 14th Amendment, be a denial to any person of the equal protection of the laws. . . . The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other no such right. Each state prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same state."

The same subject was also elaborately discussed by Mr. Justice Matthews in delivering the opinion of this court in *Hurtado* v. *California*, 110 U. S. 516, 530 [28:232, 237]: "This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the com-

mon law. . . . The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*suum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every foun-
389 tain of justice, we* are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experience of our own situation and system will mould and shape it into new and not less useful forms." We have seen no reason to doubt the soundness of these views. In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system, which represented the growth of generations of inhabitants, a jurisprudence with which they had had no previous acquaintance or sympathy.

We do not wish, however, to be understood as holding that this power is unlimited. While the people of the state may doubtless adopt such systems of laws as best conform to their own traditions and customs, the people of the entire country have laid down in the Constitution of the United States certain fundamental principles to which each member of the Union is bound to accede as a condition of its admission as a state. Thus, the United States are bound to guarantee to each state a republican form of government, and the 10th section of the 1st article contains certain other specified limitations upon the power of the several states, the object of which was to secure to Congress paramount authority with respect to matters of universal concern. In addition, the 14th Amendment contains a sweeping provision forbidding the states from abridging the privileges and immunities of citizens of the United States, and denying them the benefit of due process or equal protection of the laws.

This court has never attempted to define with precision the words "due process of law," nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard,* as that no man[**390** shall be condemned in his person or property without due notice and an opportunity of being heard in his defense. What shall constitute due process of law was perhaps as well stated by Mr. Justice Curtis in *Den, Murray's Lessees*, v. *Hoboken Land & Improv. Co.* 59 U. S. 18 How. 272, 276 [15:372, 374], as anywhere. He said: "The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

It was said by Mr. Justice Miller, in delivering the opinion of this court in *Davidson* v. *New Orleans*, 96 U. S. 97 [24:616], that the words "law of the land," as used in Magna Charta, implied a conformity with the "ancient and customary laws of the English people," and that it was wiser to ascertain their intent and application by the "gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." Recognizing the difficulty in defining, with exactness, the phrase "due process of law," it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation; and *that[**391** no one shall be condemned in his person or property without an opportunity of being heard in his own defense.

As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law, which undertakes to deprive any class of persons of the general power to acquire property, would also be obnoxious to the same provision. Indeed, we may go a step further, and say that as property can only be legally acquired as between living persons by contract, that a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid.

The latest utterance of this court upon this subject is contained in the case of *Allgeyer* v.

Louisiana, 165 U. S. 578, 591 [41: 832, 836], in which it was held that an act of Louisiana which prohibited individuals within the state from making contracts of insurance with corporations doing business in New York, was a violation of the 14th Amendment. In delivering the opinion of the court, Mr. Justice Peckham remarked: "In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the state as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the state, and which are also to be performed outside of such jurisdiction."

This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of em-**392**]ployees as to demand *special precaution for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases of *Davidson* v. *New Orleans*, 96 U. S. 97 [24: 616], and *Yick Wo* v. *Hopkins*, 118 U. S. 356 [30: 220], that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion "is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." *Lawton* v. *Steele*, 152 U. S. 133, 136 [38: 385, 388].

The extent and limitations upon this power are admirably stated by Chief Justice Shaw in the following extract from his opinion in *Commonwealth* v. *Alger*, 7 Cush. 84:

"We think it a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as will prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient."

This power legitimately exercised can neither be limited by contract nor bartered away by legislation.

While this power is necessarily inherent in every form of government, it was, prior to the adoption of the Constitution, but sparingly used in this country. As we were then almost *purely an agricultural people, the occa-[**393** sion for any special protection of a particular class did not exist. Certain profitable employments, such as lotteries and the sale of intoxicating liquors, which where then considered to be legitimate, have since fallen under the ban of public opinion, and are now either altogether prohibited, or made subject to stringent police regulations. The power to do this has been repeatedly affirmed by this court. *Stone* v. *Mississippi*, *Harris*, 101 U. S. 814 [25: 1079]; *Douglas* v. *Kentucky*, 168 U. S. 488 [*ante*, 189]; *Giozza* v. *Tiernan*, 148 U. S. 657 [37: 599]; *Kidd* v. *Pearson*, 128 U. S. 1 [32: 346, 2 Inters. Com. Rep. 232]; *Crowley* v. *Christensen*, 137 U. S. 86 [34: 620].

While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina, and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way and by such primitive methods that no special laws were considered necessary, prior to the adoption of the Constitution, for the protection of the operatives, but, in the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them, without special protection against the dangers necessarily incident to these employments. In consequence of this, laws have been enacted in most of the states designed to meet these exigencies and to secure the safety of persons peculiarly exposed to these dangers. Within this general catagory are ordinances providing for fire escapes for hotels, theaters, factories, and other large buildings, a municipal inspection of boilers, and appliances designed to secure passengers upon railways and steamboats against the dangers necessarily incident to these methods of transportation. In states where manufacturing is carried on to a large extent, provision is made for the protection of dangerous machinery against accidental contact, for the cleanliness and ventilation of working rooms, for the guarding of well holes, stairways, elevator shafts, and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shoring up of dangerous walls, for ventilation shafts, bore holes, escapement shafts, means of signaling the surface, for *the supply of fresh air and the elimi-[**394** nation, as far as possible, of dangerous gases, for safe means of hoisting and lowering cages, for a limitation upon the number of persons permitted to enter a cage, that cages shall be covered, and that there shall be fences and gates around the top of shafts, besides other similar precautions. Digest of Stats. of Arkansas, 1149; California Rev. Stat. §§ 5045-5662; Colorado

Mills's Anno. Stat. Supp. chap. 85; Gen. Stat. of Connecticut 1888, §§ 2645-2647, 2263-2272; Rev. Stat. of Illinois 1889, p. 980; Thornton's Indiana Stat. 1897, chap. 98, p. 1652; Gen. Stat. of Kansas, 1897, vol. 2, pp. 813-824; Kentucky Stat. (Barbour & Carroll) chap. 88, p. 951; Sup. Pub. Stat. of Massachusetts, 1889-1895, pp. 582, 746, 1163; Michigan Howells' Anno. Stat. §§ 9209*b et seq.*; Gen. Stat. of New Jersey, vol. 3, pp. 1900 *et seq.*; Rev. Stat. Code and Gen. Laws of New York, vol. 2, p. 2069; Brightly's Purdon's Digest Supp. Pennsylvania, pp. 2241 *et seq.*

These statutes have been repeatedly enforced by the courts of the several states; their validity assumed, and, so far as we are informed, they have been uniformly held to be constitutional.

In *Daniels* v. *Hilgard*, 77 Ill. 640, it was held that the legislature had power under the Constitution to establish reasonable police regulations for the operating of mines and collieries, and that an act providing for the health and safety of persons employed in coal mines, which requires the owner or agent of every coal mine or colliery employing ten men or more, to make or cause to be made an accurate map or plan of the workings of such coal mine or colliery, was not unconstitutional; and that the question whether certain requirements are a part of a system of police regulations adopted to aid in the protection of life and health, was properly one of legislative determination, and that a court should not lightly interfere with such determination unless the legislature had manifestly transcended its province. See also *Litchfield Coal Co.* v. *Taylor*, 81 Ill. 590.

In *Commonwealth, Williams*, v. *Bonnell et* **395**]*al.* 8 Phila. 534, a law, *providing for the ventilation of coal mines, for speaking tubes, and the protection of cages was held to be constitutional and subject to strict enforcement. *Commonwealth* v. *Conyngham*, 66 Pa. 99; *Durant* v. *Lexington Coal Min. Co.* 97 Mo. 62.

But if it be within the power of a legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals. It is as much for the interest of the state that the public health should be preserved as that life should be made secure. With this end in view quarantine laws have been enacted, in most if not all of the states; insane asylums, public hospitals, and institutions for the care and education of the blind established, and special measures taken for the exclusion of infected cattle, rags, and decayed fruit. In other states laws have been enacted limiting the hours during which women and children shall be employed in factories; and while their constitutionality, at least as applied to women, has been doubted in some of the states, they have been generally upheld. Thus, in the case of *Commonwealth* v. *Hamilton Manufacturing Co.* 120 Mass. 383, it was held that a statute prohibiting the employment of all persons under the age of eighteen, and of all women laboring in any manufacturing establishment more than sixty hours per week, violates no contract of the commonwealth implied in the granting of a charter to a manufacturing company nor any right reserved under the Constitution to any individual citizen, and may be maintained as a health or police regulation.

Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the state. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores or metals. These employments when too long pursued the legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts.

*While the general experience of man-[**396** kind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, when the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting.

We concur in the following observations of the supreme court of Utah [14 Utah, 98, 37 L. R. A. 108] in this connection:

"The conditions with respect to health of laborers in underground mines doubtless differ from those in which they labor in smelters and other reduction works on the surface. Unquestionably, the atmospheric and other conditions in mines and reduction works differ. Poisonous gases, dust, and impalpable substances arise and float in the air in stamp mills, smelters, and other works in which ores containing metals, combined with arsenic or other poisonous elements or agencies, are treated, reduced, and refined, and there can be no doubt that prolonged effort day after day, subject to such conditions and agencies, will produce morbid, noxious, and often deadly effects in the human system. Some organisms and systems will resist and endure such conditions and effects longer than others. It may be said that labor in such conditions must be performed. Granting this, the period of labor each day should be of a reasonable length. Twelve hours per day would be less injurious than fourteen, ten than twelve, and eight than ten. The legislature has named eight. Such a period was deemed reasonable. . . . The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. The law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore, it is not necessary to discuss or decide whether the legislature can fix the hours of labor *in other employ-[**397** ments. Though reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety, or comfort of the people, or to secure good order, or promote the general welfare, we must resolve them in

favor of the right of that department of government."

The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may promptly interpose its authority.

It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently under the statute is the only one liable, his defense is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employees, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. "The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer."

We have no disposition to criticise the many **398**] authorities* which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employees, and there are reasonable grounds for believing that such determination is supported by the facts. The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class. The distinction between these two different classes of enactments cannot be better stated than by a comparison of the views of this court found in the opinion in *Barbier* v. *Connolly*, 113 U. S. 27 [28: 923], and *Soon Hing* v. *Crowley*, 113 U. S. 703 [28: 1145], with those later expressed in *Yick Wo* v. *Hopkins*, 118 U. S. 356 [30: 220].

We are of opinion that the act in question was a valid exercise of the police power of the state, and *the judgments of the Supreme Court of Utah are therefore affirmed.*

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissented.

SMITHSONIAN INSTITUTION, *Appt.*,
v.
LEVI W. MEECH *et al.*

(See S. C. Reporter's ed. 398-415.)

Evidence of trust in real estate—express agreement—land purchased by husband and deeded to wife—condition in will against contesting it—effect of contest.

1. There is no arbitrary rule requiring the direct testimony of any particular number of witnesses to the ultimate fact of an oral agreement for a trust in real estate, but the evidence of a single witness, corroborated in various ways, is sufficient, if it produces certainty in the mind that the agreement was made.
2. Where property conveyed to the wife is paid for by the husband, the existence of an express agreement, made prior to the vesting of title, which became a part of and controlled the conveyance, and nullified the presumption of an advancement, and indicated the disposition that was intended to be made of the property, does not destroy the resulting trust.
3. The doctrine of implied and resulting trusts applies to a purchase of land paid for by the husband but conveyed to his wife; and though there

NOTE.—*As to resulting trusts, when trusts result to one who pays the consideration for land and the title is taken in the name of another; resulting trusts in chattels; where there are joint purchasers; trusts result eo instanti; trusts in personal property, fiduciary character; parol agreement alone will not create trust; trusts by acts of agents; proof of trusts by parol; laches.*—see note to Ducie v. Ford, 34: 1091.

As to gifts by will as affected by promises made to the testator, and by secret trusts,—see note to Gove v. Clarke (S. C.) 20 L. R. A. 465.

Of conditions in a will against contesting any of the provisions thereof.

Chief Justice Marshall said: "Clauses of this description have always received such judicial construction as would comport with the reasonable intention of the testator. Even when the forfeiture of the legacy has been declared to be the penalty of not conforming to the injunction of the will, courts have considered it, if the legacy be not given over, rather as an effort to effect a desired object by intimidation, than as concluding the rights of the parties. If an unreasonable use be made of the power, one not foreseen, and which could not be intended, by the testator, it has been considered as a case in which the general power of courts of justice to decide on the rights of parties ought to be exercised." Pray v. Belt, 26 U. S. 1 Pet. 680 (7: 313.)

There cannot be such a construction given to a clause of a will providing that a majority of the executors shall "decide in all cases, in case of any dispute or contention" and their decision "shall be final and conclusive without any resort to a court of justice," as will prevent a party who considers himself injured by the construction, from submitting his case to a court of justice. *Idem.*

A condition that a legatee shall not dispute the will is generally considered merely *in terrorem*, and will not operate as a forfeiture, by reason of the legatee having disputed the validity (see Powell v. Morgan, 2 Vern. 91; Loyd v. Spillet, 3 P. Wms. 344) of the will; but it is otherwise if the legacy on breach of such a condition be given over to another person. Cleaver v. Spurling, 2 P. Wms. 528.

A devise to a widow of the testator, during her widowhood and life: Held that such intention being *in terrorem*, the widow was entitled, there being

is a presumption that it was intended as an advancement to her, yet such presumption may be overthrown by proof of an agreement that such was not the purpose of the conveyance.

4. The condition in a will that "the legatees acquiesce in" the will which expressly declares that certain real estate belongs to the testator, and it is devised by the will, although the title stands in his wife's name, is broken by legatees who contest the devise of that property on the ground that the testator did not own it.

5. When a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, no legatee can, without compliance with that condition, receive his bounty or be put in a position to use it in the effort to thwart his expressed purposes.

[No. 191.]

Argued January 12, 1898. Decided February 28, 1898.

APPEAL from a decree of the Court of Appeals of the District of Columbia reversing the decree of the Supreme Court of that District and remanding the case with directions to dismiss a suit in equity brought by the Smithsonian Institution, plaintiff, against Levi W. Meech *et al.* to enforce certain rights claimed under the will of Robert S. Avery. *Reversed*, and case remanded with instructions to enter a decree in conformity with the opinion of this court.

See same case below, 8 App. D. C. 490.

Statement by Mr. Justice **Brewer**:

On June 4, 1895, the appellant, as plaintiff, filed its bill in the supreme court of the District of Columbia to enforce certain rights claimed under a will made by Robert S. Avery, on July 22, 1893. In this will, after sundry bequests to his own relatives, is the following:

"I bequeath to the sister and brothers of my late wife one thousand dollars (1,000) to be equally divided between them. I have already given these last over a thousand dollars which my wife inherited from her father, also clothing and other gifts, thus equalizing substantially my gifts to her family and to mine. These bequests are all made upon the condition that the legatees acquiesce in this will, and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named.

"All the rest and residue of my estate, of whatsoever nature, real, personal, or mixed, and wheresoever situate, I hereby give, devise, and bequeath unto the Smithsonian Institute, a body corporate by virtue of the laws of the

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no devise over. Parsons v. Winslow, 6 Mass. 169, 4 Am. Dec. 107; Precedents of Wills, 416.

Sometimes a testator imposes on a devisee or legatee a condition that he shall not dispute the will. Such a condition is regarded as *in terrorem* only, at least where the subject of disposition is personal estate; and therefore, a legatee will not, by having contested the validity or effect of the will, forfeit his legacy, where there was *probabilis causa litigandi*; (a) unless it seems the legacy be given over upon breach of the condition; (b) this doctrine has never been applied to devises of real estate. 1 Jarman, Wills, 850, citing Powell v. Morgan, 2 Vern. 90; Loyd v. Spillet, 3 P. Wms. 344; Morris v. Burroughs, 1 Atk. 404; Cleaver v. Spurling, 2 P. Wms. 528. As to what amounts to a compliance with particular requisitions, see Duke Montague v. Lord Beaulieu, 3 Bro. P. C. Tomlins' ed. 227; Roe, Sampson, v. Down, 2 Chitty, 529; Doe, Duke Norfolk, v. Hawke, 2 East. 481. Whether neglect amounts to refusal, see 2 East, 487, and Lord Ellenborough's judgment in Doe, Kenrick, v. Lord Beauclerk, 11 East, 667.

Legatees opposing probate of a will which provides that any beneficiary opposing it, or making controversy concerning it, shall forfeit his interest, are not thus deprived of their bequests, it not appearing but that the opposition was in good faith and not vexatious. Jackson v. Westerfield, 61 How. Pr. 399, citing Rhodes v. Muswell Hill Land Co. 29 Beav. 560; Powell v. Morgan, 2 Vern. 90; Morris v. Burroughs, 1 Atk. 404; Loyd v. Spillet, 3 P. Wms. 345.

Clauses in wills which impose restraints upon proper inquiry into testamentary capacity, and the legality and validity of the dispositions of property, should not be favored. *Idem.*

A condition not to contest the will is valid as regards realty, with or without a gift over upon breach; as regards personalty, it is valid if there is a gift over; if not, it is considered *in terrorem* and void. 29 Am. & Eng. Enc. Law, 483, citing Cooke v. Turner, 15 Mees. & W. 727; Thompson v. Gaut, 14 Lea, 310; Bradford v. Bradford, 19 Ohio St. 546, 2 Am. Rep. 419; Mallet v. Smith, 6 Rich. Eq. 12, 60 Am. Dec. 107; Hoit v. Hoit, 42 N. J. Eq. 388, 59 Am. Rep. 43; 2 Jarman, Wills, 5th ed. 59; Theobald, Wills, 2d ed. 455; Powell v. Morgan, 2 Vern. 90; Loyd v. Spillet, 3 P. Wms. 344; Morris v. Burroughs, 1 Atk. 399; Cleaver v. Spurling, 2 P. Wms. 528; Cage v. Russel, 2 Vent. 352; Stevenson v. Abington, 11 Week. Rep. 935; Donegan v. Wade, 70 Ala. 501.

In Chew's Appeal, 45 Pa. 232, the court, by Thompson, J., said, in speaking of a condition affecting both real and personal property: "It seems to be well settled that where such a provision is merely denounced against disputing a will or its provisions without a devise over, it will only be considered *in terrorem*, and not as fixing on the devisee's share intestacy; and this shows the tendency of the law against giving efficiency to such provisions. But where there is a devise over, in case of a violation of the provisions, to some person named, or that the share thus limited shall fall into the residue of the estate for distribution, the share so limited will pass to its intended devisee, or to the estate upon breach of the conditions. 2 Wms. Exrs. 1147; 1 Russell, Legacies, 795. It also seems to be the result of authorities that if there exist *probabilis causa litigandi*, that the nonobservance of the conditions will not be forfeitures. Russell, Legacies, 795. Undoubtedly, I think, no provision could be formed to oust the supervisory power of the law over such conditions and limitations, to control them within their legitimate sphere, which is generally to prevent vexatious litigation."

In Thompson v. Gaut, 14 Lea, 315, and Bradford v. Bradford, 19 Ohio St. 546, 2 Am. Rep. 419, it was held that the condition was good both as to real and personal property, whether there was a gift over or not.

Under such a condition, one who aids and advises in a suit instituted by another forfeits his interest. Donegan v. Wade, 70 Ala. 501.

A will expressed as a condition to the payment of legacies to the beneficiaries thereunder, that neither of them should, directly or indirectly, institute or become an acting party to any proceeding to set aside, "interfere with," or make null any provision of the will or the codicils, and that any such act or proceeding by him should deprive him of his legacy. On the hearing of a petition by a

United States, of which institution Samuel P. Langley is now secretary, having its legal residence in the District of Columbia, unto it and its successors forever.

"Having always had a love for the sciences, and having acquired most of my property while toiling in humble capacities to extend and diffuse knowledge, I have concluded that 400] *the residuary gift above made to the Smithsonian Institution will best express my interest in science. As my labors have been directed to the invention and use of phonetic type, I desire, but do not require, that the income derived by the Smithsonian Institution from this gift may be applied, so far as it may determine, to promoting publications in such type of scientific publication, especially of such publications as may relate to phonetic type and printing. I also desire, but by no means require, that such part of said income as the said institution shall determine shall be applied to the publication of lectures and treatises upon and concerning those mechanical laws governing an etherial medium which are treated of in atomic chemistry, and which are supposed to govern phenomena of electricity, magnetism, light, and heat. Prizes might be given for essays on these subjects and upon such other kindred subjects as may meet the approval of the institution. I would like, however, to have published first the multiplying table and also IV-plate logarithms, publication of the table of squares, cubes, square roots, cube roots, reciprocals, prime numbers, and factors, some of which I have written out. If the institution shall approve, the fund derived from the residuary bequest shall be called 'the Avery fund' or 'the fund contributed by Robert S. Avery and his wife Lydia T. Avery, for the extension of the sciences,' and all publications made from the fund shall bear this inscription.

"The property known as part of lot 2 (two) in square 787 in the city of Washington, D. C., being premises No. 326 A street S. E., is my property, although the title stands in my wife's name. I include it in the residuary bequest to the Smithsonian Institution."

The testator died childless on September 12, 1894. The will was probated February 2, 1895. He and his wife had lived for many years in Washington, he being in the employ of the government in the coast survey office. During these years he lived a quiet and retired life, devoting himself to scientific research, and experimenting chiefly in the matter of

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legatee to revoke the probate of the will, it appeared that after the commencement of the proceedings certain legatees and next of kin of the testatrix, not including the petitioner and other contestants, had executed an agreement, the object of which was stated to be to avoid any controversy between themselves in relation to testatrix's estate, and the obvious purpose of which was to secure their legacies to the legatees signing it, and to the contestants, in case the will should be set aside. Held, that the condition in the will against contesting it was valid; that a legatee executing the agreement became thereby a party to the proceeding to set the will aside, thus depriving herself of her legacy in case the will should be sustained. *Re* Stewart, 1 Connoly, 412; Bank v. Camp, 3 Dem. 278; Grote's Estate, 2 How. Pr. N. S. 140.

A testator gave bequests to his grandchildren and to some of his children, and the residue he gave equally to his children and grandchildren. A codicil stated that he was not indebted to any of his children, and that if any of them presented a claim against his estate, neither the child nor his descendants should share in the estate. A son presented a claim against the estate and it was allowed. Held, that the condition of the codicil was unreasonable; that it was a condition subsequent and did not defeat the legacy to the son, nor that to his children, for the reason that a valid provision for infants could not be defeated because their father did not observe the condition. *Re* Vandevort, 62 Hun, 612.

Appearing at the probate of a will, filing objections thereto, and cross-examining witnesses upon subjects which it is the surrogate's duty to inquire into, by a legatee, does not work a forfeiture of his legacy, although the will provides that if he "prevents or opposes the execution" of the will the legacy shall go elsewhere. *Re* Bratt, 10 Misc. 491.

A legatee under a will providing that if he "prevents or opposes" its execution the legacy shall go elsewhere forfeits his legacy by commencing an action against the executor individually for the conversion of property bequeathed to other legatees, although he establishes his ownership in the action. *Re* Bratt, 10 Misc. 491.

A legatee under a will providing that if he "prevents or opposes" its execution the legacy shall go elsewhere forfeits such legacy by failing to comply with a direction of the testatrix in relation to her place and manner of burial, with which he has ample opportunity to comply after learning thereof. *Re* Bratt, 10 Misc. 491.

A devisee under a will providing that anyone who opposes its provisions shall forfeit all claims to participation therein does not, by filing a bill for its true construction and the enforcement of his rights thereunder, seek to thwart the designs of the testatrix so as to forfeit his claims under the will. Black v. Herring, 79 Md. 146.

A provision of a will that, should any legatee be dissatisfied with any gift therein made, the gift shall be wholly withheld, is inoperative to forfeit a legacy to one who files objections to the probate. *Re* Jackson, 47 N. Y. S. R. 443.

A condition subsequently devesting an estate given to testator's grandson if any attempt is made to remove him from the custody of the executors is imperative in the absence of a limitation over, where testator was aided in preparation of the will by counsel. *Re* White, 2 Pa. Dist. R. 207.

A clause of a will declaring that testator is in no wise indebted to any of his children, and providing that any bequests or devises to any son or daughter shall be null and void if such son or daughter presents any claim against the estate, is inoperative to create a forfeiture of a legacy to a son who presents a claim against the estate for a valid debt, —especially where there is no gift over. *Re* Vandevort, 62 Hun, 612.

An infant's right under a will which provides for forfeiture of the right of any beneficiary who contests it is not forfeited by a contest instituted by a guardian ad litem, although the infant is personally present and testifies as a witness. Bryant v. Tracy, 27 Abb. N. C. 183.

A bequest to a son of testator's wife by a former marriage, upon condition that she shall elect to take under the will, and not take under the intestate laws, is made on a condition precedent, and is not *in terrorem* as to her or against public policy. Carr's Estate, 138 Pa. 352.

A legacy to infants, otherwise valid, cannot be forfeited by a provision that it shall be null and void if their father fails to observe a direction of the will. *Re* Vandevort, 62 Hun, 612.

phonetic type. His wife was younger than he, and was, until shortly before her death, on 401]November 18, 1890, in apparently *good health. While they were both living, and on April 20, 1885, the real estate described in the last paragraph quoted from the will was purchased, the title being conveyed to Mrs. Avery.

The bill alleged that the lot was paid for with the money of Robert Avery; that the title was taken in the name of Mrs. Avery because it was supposed that she would outlive her husband and upon an understanding and agreement that the property should, after their deaths, pass to the Smithsonian Institution in pursuance of a mutual desire to make their gift to this institution as large as possible; that notwithstanding these facts the defendants, other than the executrix, claimed title to the property as the heirs of Mrs. Avery, and had demanded possession. The prayer was for a finding and decree that the equitable title was in Robert Avery, and passed to the plaintiff by his last will; that the defendants be enjoined from claiming any title thereto, and that the executrix be directed to treat the $1,000 bequeathed to the sister and brothers as forfeited for breach of condition annexed to said legacy and as having fallen into the residuum. After answer, testimony was taken and the case was heard before Justice Hagner of the supreme court, who rendered a decree in accordance with the prayer of the bill, so far as respects the lot, but denying the relief sought as to the legacy on condition of the defendants executing a release of all claims to the realty. On appeal by all of the defendants, except the executrix, the court of appeals reversed the decree of the supreme court and remanded the case with directions to dismiss the bill. 8 App. D. C. 490. Whereupon the plaintiff appealed to this court.

Mr. **Frank W. Hackett** for appellant.
Mr. **Franklin H. Mackey** for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

The legal title to this property passed by the 402]conveyance *in 1885 to Mrs. Avery. She died without will. Prima facie, therefore, the title then passed to her heirs, the appellees. The plaintiff insists that in fact the purchase price was paid by Mr. Avery and paid under an oral agreement, whereby a resulting trust was created which changed the course of the title, and the first questions are, Whose money paid for the lot? and Was there such an agreement, and, if so, What were its terms?

That the money which was used in making payment for the lot was the money of Mr. Avery is not seriously questioned. Both Mr. and Mrs. Avery lived very economically, and this money was accumulated out of savings from the salary he received from the government. At the time of their marriage Mrs. Avery had a small amount of money on deposit in a savings bank in Connecticut, and the books of the bank showed that no part of that amount was drawn out at or near the time of this conveyance. Her repeated declarations were to the same effect, and that Mr. Avery's money had paid for the property.

The trial court also found that there was an oral agreement—an agreement made at the time the property was conveyed to Mrs. Avery—that she should hold the property during her lifetime, and that she should make a will by which it should pass at her death to the Smithsonian Institution. The court of appeals held that the testimony did not establish the alleged agreement so clearly as to justify a court of equity in recognizing it as against the legal effect of the conveyance. We are constrained to differ with the court of appeals and to agree with the justice of the supreme court. In a careful and exhaustive opinion Justice Hagner reviewed the evidence, and his conclusions therefrom commend themselves to our judgment. In view of this opinion it seems unnecessary to recapitulate all the testimony, and we shall content ourselves with stating the salient features thereof.

Mr. Avery was for some thirty-two years in the employ of the government, and an enthusiast in the scientific studies which he was pursuing in connection with such service. Prior to the purchase of the lot in controversy, and on September *13, 1882, he had made 403]a will, in which, after giving to his "wife Lydia T. Avery, if she outlives me, in trust while she lives, all my real estate and personal property . . . to hold and to use for her support as long as she lives, and to keep in good condition for its final disposition," he declared:

"Having always had a love for the sciences, and having acquired most of my property while toiling in humble capacities to extend and diffuse knowledge, I have concluded to giving all my real and personal property, with such exceptions as I may make hereafter in this will or in codicils annexed thereto, to the Board of Regents of the Smithsonian Institution to provide for its safe keeping and to use the income from it in extending the sciences by publishing," etc.

And again:

"This fund may be called 'the Avery fund, or 'the fund contributed by Robert S. Avery and his wife Lydia T. Avery for the extension of the sciences,' and all publications made with this fund must have a note thereon stating that they have been thus published.

"After the death of my wife, the Board of Regents of the Smithsonian Institution will be expected to select an executor of this will and provide for making the fund as useful as possible, limiting its use as much as they can to the objects specified."

His wife was fifteen or twenty years younger than he, and the expectation of both was that she would outlive him, though in fact she died some four years before he did, he living to be 86 years of age. After her death, and on December 20, 1892, he prepared a codicil to the will of 1882, in which he recited that the conveyance of the property in question was made to his wife with his consent and upon the express understanding and condition that she should make a will in his favor, and that he had as evidence of this filed several affidavits of her statements in respect to the matter. Subsequently he executed the will of July 22, 1893, under which this suit was brought. The wills and codicil above referred to furnish indisputable evidence that prior to the purchase of

404] *the real estate in controversy Mr. Avery intended that all his property, after certain legacies were paid, should go to the Smithsonian Institution, and that he understood that when the deed of this property was made to his wife it was upon the agreement described. That the agreement was made is clearly and positively testified to by one witness, Leland P. Shidy, who was associated in the government service with Mr. Avery, was the intimate friend of both Mr. and Mrs. Avery, living in the house with them from time to time during the years from 1873 to her death. We quote from his testimony:

"*Q.* Do you recollect the circumstance of the purchase by Mr. Avery of the property No. 326 A street southeast, in this city?

"*A.* Yes; I do. I was at their house at the time when they began talking about making the purchase, and they discussed it, in the first place, as to the advisability of getting the property at all, and after that was decided they discussed as to how the deed had better be made out, and Mrs. Avery thought it would be best to put the deed in her name, although her husband's money was paying for it exclusively, and he thought best to do so and had the deed made out in her name.

"*Q.* Did Mrs. Avery state any reason why the deed should be made out in her name?

"*A.* Yes. She wanted it in her name, in the first place, because she wanted to have the control of that property, as it was immediately contiguous to her own home, and then she thought she would be pretty certain to outlive her husband, and that it would be better in case of his death to have the title in her name than in his name.

"*Q.* State what final disposition, if any, was agreed upon by these two persons in your presence.

"*A.* It was agreed that she should have the property during her lifetime, and that she should make a will transferring it at her death to the Smithsonian Institute.

"*Q.* I understand that this conversation which you are now testifying to took place at or about the time of the actual purchase and 405] *the making of the deed Was any reference made to the ownership of this property that you can now recollect subsequent to the date when it was bought?

"*A.* After that they referred to it in a number of interviews while I was present, and every time they alluded to it with the same understanding—that is, that the property was to be hers during her lifetime and was to be disposed of at her death, in accordance with the will of Mr. Avery, with the rest of his property."

In addition there was the testimony of several witnesses of repeated conversations with Mrs. Avery, in which she made statements to the same effect. In a lease of the property made in 1887 Mr. Avery was named as the lessor. The receipts for rent given monthly for several years were signed by him alone, and so signed in her presence. There is nothing to contradict or discredit this evidence. While it may be true that no witness but the one was present at the time the agreement was entered into between Mr. and Mrs. Avery, yet his testimony is corroborated in the various ways to which we have referred. There is no arbitrary rule requiring the direct testimony of any particular number of witnesses to the ultimate fact. It is enough that there be a certainty in respect to it, and that certainty may result from an accumulation of direct and indirect evidences. The law is content if from a perusal of the entire record the mind is sure that there was a distinct agreement as claimed. That Mr. Avery understood that the agreement was made as stated the documentary evidence places beyond doubt; that it was in fact made, Mr. Shidy's testimony attests; and that Mrs. Avery understood that it was so made is evident, not merely from Mr. Shidy's testimony, but from her statements to many others. The will executed in 1882, and before the purchase of this lot, discloses his intent that all his property, save a few specific bequests, should go to the Smithsonian, and that the fund created thereby should bear his wife's as well as his own name, and the evidence makes it clear that she shared in his desire to make this fund as large as possible. While we agree to the proposition that parol testimony to overthrow the legal effect *of conveyances must be clear and satis- [406 factory, yet we think this case comes within the scope of that rule, and that it is certain that just such an agreement was made between husband and wife as the appellant asserts. Even if it were a criminal case, we should not hesitate to hold that the evidence was sufficient to establish the fact beyond a reasonable doubt. It is true Mr. Avery in the codicil speaks of the agreement on the part of Mrs. Avery as one to make a will in his favor, while Mr. Shidy says that the agreement was that she should make a will transferring the property after her death to the Smithsonian, but this slight difference is immaterial and does not discredit the testimony. The Smithsonian was to be the ultimate beneficiary, and the manner in which this should be accomplished was merely a matter of detail, in respect to which the memory of the witnesses might differ. Indeed, Mr. Shidy does not purport to give the exact language used, but merely states the substance of the agreement.

We pass, therefore, to the further question: If it is true that the purchase price was paid by Mr. Avery, and the title conveyed to Mrs. Avery under an oral agreement, such as is described, will equity enforce this as against those claiming the record title?

The court of appeals was of the opinion that the agreement on the part of Mrs. Avery created an express trust, which, resting only in parol, was invalid under the statute of frauds. It recognized the doctrine that an implied or resulting trust arises by operation of law, whenever one person buying and paying for an estate has the title placed in the name of another; but held that when the title is conveyed to a wife or child, or other person for whom the one paying the purchase money is under an obligation, legal or moral, to provide, no presumption of a trust arises, and that it is incumbent on one who claims the existence of such a trust to establish it by clear, positive, and unequivocal proof, and that this had not been done in the present case. It did not substantially disagree with the trial court on the

propositions of law laid down by him, but differed mainly as to the strength and effect of the evidence.

407] *The general proposition is unquestioned that, where upon a purchase of property the conveyance of the legal title is to one person while the consideration is paid by another, an implied or resulting trust immediately arises, and the grantee in the conveyance will be held as trustee for the party from whom the consideration proceeds.

"This rule has its foundation in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the purchase money intends the purchase to be for his own benefit, and not for another, and that the conveyance in the name of another is a matter of convenience and arrangement between the parties for collateral purposes, and this rule is vindicated by the experience of mankind." 1 Perry, Tr. 4th ed. § 126.

The nature of this trust may be shown by parol evidence. This is in express accord with the provisions of the statute of frauds. Comp. Stat. D. C. 231, §§ 8, 9. The 1st of these sections requires that all declarations or creations of trust or confidence in respect to real estate shall be manifested and proved by some writing. Section 9 reads:

"Provided, always, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding."

There is no statute in force in this District, such as is found in some states, putting an end to implied and resulting trusts. It is true that when the consideration is paid by a husband and the conveyance made to his wife there is a presumption that such a conveyance was intended for her benefit; but this is not a presumption of law but of fact, and can be overthrown by proof of the real intent of the parties.

"Whether a purchase in the name of wife or child is an advancement or not is a question of pure intention, though presumed in the first instance to be a provision and settlement; **408**]* therefore, any antecedent or contemporaneous acts or facts may be received, either to rebut or support the presumption, and any acts or facts so immediately after the purchase as to be fairly considered a part of the transaction may be received for the same purpose. And so the declarations of the real purchaser, either before or at the time of the purchase, may be received to show whether he intended it as an advancement or a trust. Such declarations are received, not as declarations of a trust by parol or otherwise, but as evidence to show what the intention was at the time." 1 Perry, Tr. 4th ed. § 147; see also 2 Pom. Eq. Jur. § 1041, and cases cited in notes.

This is in accord with the general proposition, so often enunciated, that the statute of frauds was designed to prevent frauds, and that courts of equity will not permit it to be used to accomplish that which it was designed to prevent. As said in *Wood* v. *Rabe*, 96 N. Y. 414, 425 [48 Am. Rep. 640]:

"There are two principles upon which a court of equity acts in exercising its remedial jurisdiction. . . . One is that it will not permit the statute of frauds to be used as an instrument of fraud, and the other, that when a person through the influence of a confidential relation acquires title to property, or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief."

And in *Haigh* v. *Kaye*, L. R. 7 Ch. 469, 474:

"The words of Lord Justice Turner, in the case of *Lincoln* v. *Wright*, 4 De G. & J. 16, where he said: 'The principle of this court is that the statute of frauds was not made to cover fraud,' express a principle upon which this court has acted in numerous instances, where the court has refused to allow a man to take advantage of the statute of frauds to keep another man's property which he has obtained through fraud."

If Mrs. Avery had, during her lifetime, conveyed this property to her sister and brothers it would have been a fraudulent breach of trust, and the like result follows if, now that she has died without executing a will, her heirs are permitted to take the property which was conveyed to her, not *as an advancement, [**409** but on an agreement that it should subsequently pass to this plaintiff.

The existence of an express agreement does not destroy the resulting trust. It was not an agreement made by one owning and having the legal title to real estate by which an express trust was attempted to be created, but it was an agreement prior to the vesting of title—an agreement which became a part of and controlled the conveyance; and evidence of its terms is offered, not for the purpose of establishing an express trust, but of nullifying the presumption of an advancement and to indicate the disposition which the real owner intended should be made of the property.

In *Robinson* v. *Leflore*, 59 Miss. 148, 151, it was said:

"If the facts make out a case of resulting trust independently of the agreement, relief will not be denied because of the agreement; it being well settled that an invalid agreement cannot destroy an otherwise good cause of action, and this is no less true of resulting trusts than of other legal rights." *Keller* v. *Kunkel*, 46 Md. 565.

It may not be amiss to notice a few of the authorities. *Sherman* v. *Sherman*, 9 Mackey, 330, is in point. In that case the husband made an agreement with his wife to buy real estate in her name, and that she should execute a will devising it to him. He bought one piece of real estate in her name, and she made a will so devising it. Subsequently he, in like manner, bought another piece, and, under the supposition that the will covered this after-acquired property, she made no new will, but died intestate as to that property, and it was ruled that a minor daughter, who inherited the title, held it in trust for him. In *Livingston* v. *Livingston*, 2 Johns. Ch. 537, it appeared that husband and wife agreed orally that he

should purchase a lot in her name and build a house thereon, and that he should be reimbursed the cost thereof out of the proceeds of another house and lot of which she was seised, which should be sold for that purpose. The husband having executed the agreement upon his part, the contract failed by the sudden death of the wife, who left infant children, to whom the legal estate in both lots descended; **410**]and *it was held that the agreement should be carried into effect, and the lot which originally belonged to the wife was ordered to be sold and the husband reimbursed out of the proceeds. In his opinion the chancellor said (p. 539):

"The presumption would undoubtedly be, in the first instance, that the conveyance to the wife was intended as an advancement and provision for her. This presumption was admitted in the case of *Kingdon* v. *Bridges*, 2 Vern. 67, but I do not see why it may not be rebutted, as has been done in this case, by parol proof. In *Finch* v. *Finch*, 15 Ves. Jr. 43, it was held that though, when a purchase is made in the name of a person who does not pay the purchase money, the party paying it is considered in equity as entitled, yet if the person whose name is used be a child of the purchaser, it is, prima facie, an advancement, but that it was competent for the father to show, by proof, that he did not intend advancement, but used the name of his child only as trustee."

Cotton v. *Wood*, 25 Iowa, 43. Here the facts were that the husband purchased a lot and had the same conveyed to his wife under an agreement that she would convey it to him, or to whomsoever he may assign his interest therein, upon his request. The wife died without making any conveyance, and it was held that the husband might maintain a suit to compel a conveyance to him by her heirs, the court saying:

"Where, upon the purchase of property, the consideration is paid by one, and the legal title conveyed to another, a resulting trust is thereby raised, and the person named in the deed will hold the property as trustee of the party paying the consideration. See Hill, Trustees, p. 91, and authorities cited in notes; 2 Story, Eq. Jur. § 1201. But if the person to whom the conveyance is made be one to whom the party paying the consideration is under obligation, natural or moral, to provide, the transaction will be regarded prima facie as an advancement, and the burden will rest on the one who seeks the trust for the benefit of the payee of the consideration, to overcome the presumption in favor of the legal title by sufficient evidence. This presumption, though strong, is not **411**]conclusive. *Hill, Trustees, 97, and notes; *Sunderland* v. *Sunderland*, 19 Iowa, 328; *Livingston* v. *Livingston*, 2 Johns. Ch. 540; 2 Story's Eq. Juris. sec. 1203; 2 Washb. Real Prop. 173, 174, 204; *Welton* v. *Divine*, 20 Barb. 9; *Guthrie* v. *Gardner*, 19 Wend. 414; *Harder* v. *Harder*, 2 Sandf. Ch. 17. See also *Gray* v. *Jordan*, 87 Me. 140; *Milner* v. *Freeman*, 40 Ark. 62; *Hudson* v. *White*, 17 R. I. 519; *Persons* v. *Persons*, 25 N. J. Eq. 250.

Somewhat analogous is *Re Duke of Marlborough* [1894] 2 Ch. 133, in which it appeared that the Duchess of Marlborough conveyed certain property to her husband, that he mortgaged the property for the purpose of raising money with which to pay his debts, she joining in the mortgage. Upon his death the Duchess claimed to be entitled to the property, subject to the mortgage, on the ground that it was part of the arrangement between them that he should reconvey to her, and it was held that she was entitled to such reconveyance.

We think it clear from these authorities and many others that might be cited (see White & Tudor's Leading Cases in Equity, 4th ed. vol. 1, pt. 1, p. 314, and following, where the authorities are collated and the question discussed at length), that the doctrine of an implied and resulting trust applies to a case in which the husband advances the purchase price for property which is conveyed to his wife, and though it be true there is a presumption that the conveyance was intended as an advancement for her benefit, yet such presumption is subject to overthrow by proof of an agreement that such was not the purpose of the conveyance. And so the case comes back to the question of fact in respect to which we have already expressed our conclusions, whether there was sufficiently clear and positive evidence that this conveyance to Mrs. Avery was not intended as an advancement, but was made simply for the purposes of convenience and upon the agreement that this lot, together with other property belonging to Mr. Avery, should pass after both were dead to the Smithsonian Institution.

The remaining question arises upon the condition named in *the will, and its effect [**412** upon the legacy to the sister and brothers of Mrs. Avery. That these legatees did not acquiesce in the will is clear, not alone from the fact that prior to any suit they made demand for the possession of the realty, but also from the further fact that after the decree in the trial court, which, while denying any right to the real estate, at the same time provided for their receipt of the legacy upon filing a written relinquishment of all claims to the real estate, they persisted in carrying on the litigation by appeal to the court of appeals, insisting there as here upon their right to the property. It is obvious that in inserting this condition the testator had in mind the specific property hereinbefore considered. In the first will, made prior to the purchase of the property, no such provision is found. He was under no apprehension of any dispute as to the proposed disposition of his entire estate. But in a second codicil thereto executed after the death of his wife, and when, by her failing to execute a will as agreed upon, it became apparent that some question might be made concerning the ownership of this property, he did incorporate a somewhat similar provision. There is, however, a marked difference between the language there used and that here found. That language was, "these gifts are made on the condition that no attempt be made to break this will, and that if such an attempt be made those who engage in it are to lose their claims to the gifts here made to them." That might be construed to forbid, under the penalty of losing the bequests, a contest of the will, any "disputing of the will," in the ordinary and natural meaning of those words, by denying that

it was a lawful will, duly executed and attested by a testator of sound mind and not acting under undue influence. The language here used is that "these bequests are all made upon the condition that the legatees acquiesce in this will, and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named." In other words, acquiescence in the will as a will, and in all its provisions, is the condition upon which the legatees can take their bequests. It is not confined to mere acquiescence in his se-
413]lection of the residuary *legatee, but in his declaration as to the title to any named property and his devise of that property. No legatee is to receive a bequest who shall controvert that which he has stated to be a fact, or attempt to prevent that specific disposition of any property which he has made. And in case of a failure to comply with this condition the bequest is given over to the residuary legatee. The authorities fully warrant this conclusion.

"When legacies are given to persons upon conditions not to dispute the validity of, or the dispositions in wills or testaments, the conditions are not in general obligatory, but only *in terrorem*. If, therefore, there exist *probabilis causa litigandi*, the nonobservance of the conditions will not be forfeitures. *Powell* v. *Morgan*, 2 Vern. 90; *Morris* v. *Burroughs*, 1 Atk. 404; *Loyd* v. *Spillet*, 3 P. Wms. 344. The reason seems to be this: a court of equity does not consider that the testator meant such a clause to determine his bounty, if the legatee resorted to such a tribunal to ascertain doubtful rights under the will, or how far his other interests might be affected by it; but merely to guard against vexatious litigation. But when the acquiescence of the legatee appears to be a material ingredient in the gift, which is made to determine upon his controverting the will or any of its provisions, and in either of those events the legacy is given over to another person, the restriction no longer continues a condition *in terrorem*, but assumes the character of a conditional limitation. The bequest is only *quousque*, the legatee shall refrain from disturbing the will; and, if he controvert it, his interest will cease and pass to the other legatee." 1 Roper, Legacies, 2d Am. ed. 795.

In *Cooke* v. *Turner*, 14 Sim 493, the testator, after giving to his daughter certain benefits out of his real estate, revoked them and gave the estates over in case his daughter should dispute his will, or his competency to make it, or should refuse to confirm it when required by his executors. The daughter refused to confirm the will, and a suit having been instituted to establish it the daughter disputed its va-
414]lidity and the *competency of her father to make it. It was held that the clause of revocation was valid; that the gift over took effect, and that the benefits given by the will to the daughter were forfeited by that which had taken place.

It is said in 2 Redfield on Wills, p. 298, in treating of the rule as to conditions against disputing the will, that "acceptance of the legacy renders the condition binding on the legatee upon the well-known doctrine of election." Election is thus defined by Sir William Grant, master of the rolls, in *Andrew* v. *Trinity Hall*, 9 Ves. Jr. 525, 533: "Where one legatee under a will insists upon something, by which he would deprive another legatee, under the same will, of the benefit to which he would be entitled, if the first legatee permitted the whole will to operate."

This thought finds apt illustration in the case at bar. These legatees insist that the devise of this particular real estate to the plaintiff shall not stand; that it was not the property of the testator, and could not lawfully be devised by him, and therefore that the plaintiff shall not take the property which the testator proposed to give it. If, however, they had accepted this legacy burdened with the condition named, might it not fairly be said that they elected to acquiesce in the will and in the disposition specifically made by the testator of this property? Redfield in the same volume, on page 370, after citing *Morrison* v. *Bowman*, 29 Cal. 337, in which this subject was considerably discussed, states as one of the propositions therein established:

"Although the testator has no legal power to dispose of the property of another, yet if he assumes to do so by his will, and such person accepts a devise or bequest under the will, it will be a confirmation of such disposition of his own property by the testator."

In *McElfresh* v. *Schley*, 2 Gill, 181, 200 [41 Am. Dec. 415], the court said:

"It is only carrying out a plain intent of the testator, and giving to the residuary devisee that which the testator intended, and forbidding the heir from taking property not designed for him. From the earliest case on the subject the rule is, that a man shall not take a benefit under a will, and *at the same[415 time defeat the provisions of the instrument. If he claims an interest under an instrument, he must give full effect to it, so far as he is able to do so. He cannot take what is devised to him, and at the same time, what is devised to another, although, but for the will, it would be his; hence he is driven to his election to say which he will take." See also 1 Jarman, Wills, 415; 2 Story, Eq. Jur. § 1076.

The propositions thus laid down fully commend themselves to our approval. They are good law and good morals. Experience has shown that often after the death of a testator unexpected difficulties arise, technical rules of law are found to have been trespassed upon, contests are commenced wherein not infrequently are brought to light matters of private life that ought never to be made public, and in respect to which the voice of the testator cannot be heard either in explanation or denial, and as a result the manifest intention of the testator is thwarted. It is not strange, in view of this, that testators have desired to secure compliance with their dispositions of property and have sought to incorporate provisions which should operate most powerfully to accomplish that result. And when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts wisely hold that no legatee shall without compliance with that condition receive his bounty, or be put in a position to use it in the effort to thwart his expressed purposes.

The decree of the Court of Appeals will be reversed, and the case remanded to that court

with instructions to enter a decree in conformity with this opinion.

The CHIEF JUSTICE did not sit in this case, and took no part in its consideration and judgment.

416] *JOHN Q. BROWN, as Assignee of Lafayette and E. B. Baxter, *Plff. in Err.*,

v.

MARION NATIONAL BANK of Lebanon, Kentucky.

(See S. C. Reporter's ed. 416-421.)

Forfeiture by national bank—usurious interest.

1. The forfeiture by a national bank, declared by U. S. Rev. Stat. § 5198, of the entire interest on a note, bill, or evidence of debt, for taking or reserving a greater rate of interest than is allowed by § 5197, is not waived or avoided by giving a separate note for the interest, or by giving a renewal note in which is included the usurious interest.

2. Within the meaning of said § 5198, usurious interest is not paid when included in a renewal note, so as to produce the effect that in a suit on the renewal note calling for interest from its date only the interest accruing on the apparent principal of that note is subject to forfeiture.

[No. 201.]

Submitted January 21, 1898. Decided February 21, 1898.

IN ERROR to the Court of Appeals of the Commonwealth of Kentucky to review a judgment of that court construing certain provisions of the Revised Statutes of the United States relating to National Banks. *Reversed*, and cause remanded for further proceedings.

See same case below, 92 Ky. 607.

The facts are stated in the opinion.

Messrs. **E. J. McDermott** and *H. W. Rives* for plaintiff in error.

Mr. **W. J. Lisle** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This case was twice before the court of appeals of Kentucky. The first judgment of the court of original jurisdiction was reversed in that court, and the cause was remanded for further proceedings. 92 Ky. 607.

The present appeal brings up for review the final judgment rendered by the court of appeals of Kentucky on a second appeal to that court.

The case requires the construction of certain provisions of the Revised Statutes of the United States relating to national banking associations.

Section 5197 authorizes a national banking association to take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the state, territory, or district where the bank is located, and no more, except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state. When no rate is fixed by the laws of the state, territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run.

Section 5198 provides: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided *such action is commenced within [418 two years from the time the usurious transaction occurred. That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

The last section clearly makes a difference between interest which a note, bill, or other evidence of debt held by a national bank, "carries with it or which has been agreed to be paid thereon," and interest which has been "paid." Interest included in a renewal note, or evidenced by a separate note, does not thereby cease to be interest within the meaning of § 5198 and become principal.

If a bank, which violates that section, sues upon the note, bill, or other evidence of debt held by it, the debtor may insist that the entire interest, legal and usurious, included in his written obligation and agreed to be paid, but which has not been actually paid, shall be either credited on the note, or eliminated from it, and judgment given only for the original principal debt, with interest at the legal rate from the commencement of the suit. We say "entire interest," because such are the words of the statute, based on the act of June 30, 1864 (13 Stat. at L. 95, 108, chap. 106, § 30), whereas the prior statute of February 25, 1863 (12 Stat. at L. 665, 678, chap. 58, § 46), declared that the knowingly taking, reserving, or charging a greater rate of interest than was allowed should be held and adjudged a forfeiture of "the debt or demand" on which usurious interest was taken, reserved, or charged.

NOTE.—*As to usury by national banks*, see note to Farmers' & M. Nat. Bank v. Dearing, 23: 196.

That taking interest in advance is not usury, see note to Fleckner v. Bank of United States, 5: 631.

That usury in a substituted security revives original; valid claim is not invalidated by being included in a usurious security, see notes to Newell v. Nixon, 18: 305.

As to new securities for usurious loan, when valid, see note to Walker v. Bank of Washington, 11: 494.

That purchase of obligation at less than face value is not usury, see note to Nichols v. Pearson, 8: 623.

Lex loci as to usury, see note to Slacum v. Pomery, 3: 205.

The forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest, or by giving a renewal note in which is included the usurious interest. No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied on, and the matter is thus brought to the attention of the court, lose the entire interest which the
419] note carries or which *has been agreed to be paid. By no other construction of the statute can effect be given to the clause forfeiting the entire interest which the note, bill, or other evidence of debt carries, or which was agreed to be paid, but which has not been actually paid.

It is said that, within the meaning of the statute, interest is "paid" when included in a renewal note, and when suit is brought upon the last note, calling for interest from its date, only the interest accruing on the apparent principal of *that* note is subject to forfeiture. We think that the statute cannot be so construed. If, within the meaning of the statute, interest is "paid" simply by including it in a renewal note, it would follow that as soon as the usurious interest is included in a renewal note, the borrower or obligor could sue the lender or obligee and "recover back . . . twice the amount of interest thus paid," when he had not, in fact, *paid* the debt nor any part of the interest as such. This cannot be a sound interpretation of the statute. The words "in case the greater rate of interest has been *paid*," in § 5198, refer to interest actually paid, as distinguished from interest included in the note and only "agreed to be paid." If, for instance, one executes his note to a national bank for a named sum as evidence of a loan to him of that amount to be paid in one year at 10 per cent interest, such a rate of interest being illegal, and if renewal notes are executed each year for five successive years, without any money being in fact paid by the borrower —each renewal note including past interest, legal and usurious—the sum included in the last note, in excess of the sum originally loaned, would be *interest* which that note carried or which was agreed to be paid, and not, as to any part of it, interest paid.

It is difficult to tell from the record when there were actual payments of usurious interest as such. Sometimes interest is said to have been paid when it is evident that it was only included in a renewal note. But that, as we have said, was not *payment* within the meaning of the statute. *Driesbach* v. *National Bank*, 104 U. S. 52 [26: 658]. If the note when sued on includes usurious interest, or inter-
420] est upon usurious interest, *agreed to be paid, the holder may, in due time, elect to remit such interest, and it cannot then be said that usurious interest was paid to him. *McBroom* v. *Scottish Mortgage & Land Investment Co.* 153 U. S. 318, 328 [38: 729, 733]; *Stevens* v. *Lincoln*, 7 Met. 525, 528; *Saunders* v. *Lambert*, 7 Gray, 484, 486; *Stedman* v. *Bland*, 4 Ired. L. 296, 299. If at any time the obligee actually pays usurious interest as such, the usurious transaction must be held to have then, and not before, occurred, and he must sue within two years thereafter.

It is proper to state that the judgment before us for review was not in accordance with the views of the court of appeals of Kentucky as expressed when the case was first before that court on appeal. 92 Ky. 607. The ruling then made by that court was not followed in the subsequent case of *Sydner* v. *Mount Sterling National Bank*, 94 Ky. 231, in which the language of Judge Acheson in *Farmers' & Mechanics' Bank of Mercer* v. *Hoagland*, 7 Fed. Rep. 159, 161, was approved, as follows: "By the terms of the act of Congress [the national bank act] the charging of such rates of interest [in excess of the legal rate] worked a forfeiture of the entire interest which the several notes carry with them. Now such forfeiture was not waived by the giving of subsequent notes, although as respects them the agreed rate of interest was a legal rate. They were mere renewals, and given without any new consideration. Nor did the new notes operate as payment of the debts for which they were given. In so far, then, as the notes in suit embrace the forfeited interest, they are without consideration. Moreover, it is an established principle that if there be usury in the original transaction it affects all consecutive securities, however remote, growing out of it; and neither the renewal of an old nor the substitution of a new security between the same parties can efface the usury. The bank incorporated in the new notes usurious interest previously charged, as a part of the new principal, and this illegal consideration pervaded the whole subsequent series of notes. Upon fresh renewal interest was charged upon usurious interest which had entered into the prior notes as principal."

*It was contended in the court of ap- [**421**
peals of Kentucky in the present case that its ruling, when the case was first before it, was different from its subsequent ruling in *Sydner* v. *Mount Sterling National Bank*. That court conceded that the two cases were not in harmony on the question whether the bank could recover the usurious interest embraced in the renewal notes.

"Nevertheless," the court said [18 Ky. L. Rep. 186], "we hold that the judgment on the former appeal is the law of this case." It was the latter view which made it necessary for the appellants to prosecute the present appeal.

As the judgment in this case did not proceed upon the principles herein stated, but rested upon an erroneous interpretation of the statute, it must be reversed. The necessary calculations can be made in the state court.

For the reasons stated the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

Reversed.

SAVINGS & LOAN SOCIETY, *Appt.*,
v.
MULTNOMAH COUNTY, State of Oregon, and Penumbra Kelly, Sheriff Thereof.

(See S. C. Reporter's ed. 421-432.)

Taxation of mortgagee's interest in the land—tax law of Oregon—does not contravene United States Constitution.

1. The taxation of mortgaged real estate by taxing the mortgagee's interest therein to him, and the rest to the mortgagor, is not a double taxation, nor does it make such discrimination between mortgagors and mortgagees, nor between resident and nonresident mortgagees, as to deny the latter the equal protection of the laws.
2. The tax law of Oregon of 1882, by which the mortgage and the debt secured thereby are taxed, as real estate, to the mortgagee, and the mortgagor is entitled to deduct such debt from his assessment, does not, when applied to mortgages owned by citizens of other states and in their possession outside of the state of Oregon, deprive them of their property without due process of law.
3. Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest and by way of security for the debt, this interest, like any other interest, legal or equitable, may be taxed to its owner (whether resident or nonresident) in the state where the land is situated, without contravening any provision of the United States Constitution.

[No. 69.]

Argued October 29, 1897. Decided March 7, 1898.

APPEAL from a decree of the Circuit Court of the United States for the District of Oregon dismissing a suit in equity brought by the Savings & Loan Society against Multnomah County, Oregon, *et al.*, for an injunction against the sale of land for taxes and for a decree that the statute of Oregon, as applied to mortgages owned and held by a person outside of the state, is contrary to the Constitution of the United States. *Affirmed.*

See same case below, 60 Fed. Rep. 31.

The facts are stated in the opinion.

Messrs. **Milton W. Smith** and *Walter S. Perry* for appellant.

Messrs. **John H. Hall,** *W. T. Hume,* and *John H. Mitchell* for appellee.

422] *Mr. Justice **Gray** delivered the opinion of the court:

This was a bill in equity, filed in the circuit court of the United States for the district of Oregon, by the Savings & Loan Society, a corporation and citizen of the state of California, against Multnomah county, a public corporation in the state of Oregon, and one Kelly, the sheriff and *ex officio* the tax collector of that county, and a citizen of that state, showing that in 1891 and 1892 various persons, all citizens of Oregon, severally made their promissory notes to secure the payment of various sums of money, with interest, to the plaintiff at his office in the city of San Francisco and state of California, amounting in all to the sum of $531,000; and to further secure the same debts, executed to the plaintiff mortgages of divers parcels of land owned by them in Multnomah county; that the mortgages were duly recorded in the office of the recorder of conveyances of that county; that the notes and mortgages were immediately delivered to the plaintiff, and have ever since been without the state of Oregon, and in the possession of the plaintiff at San Francisco; that afterwards, in accordance with the statute of Oregon of October 26, 1882, taxes were imposed upon all the taxable property in Multnomah county, including the debts and mortgages aforesaid; that, the taxes upon these debts and mortgages not having been paid, a list thereof was placed in the hands of the sheriff, with a warrant directing him to collect the same as upon execution, and he advertised for sale all the debts and mortgages aforesaid; and that the statute was in violation of the 14th Amendment of the Constitution of the United States, as depriving the plaintiff of its property without due process of law, and denying to it the equal protection of the laws. The bill prayed for an injunction against the sale; and for a decree declaring that the statute was contrary to the provisions of the Constitution of the United States and therefore of no effect, and that all the proceedings before set out were null and void; and for further relief.

The defendants demurred generally; and the court *sustained the demurrer, and dis [**423** missed the bill. 60 Fed. Rep. 31. The plaintiff appealed to this court.

The ground upon which the plaintiff seeks to maintain this suit is that the tax act of the state of Oregon of 1882, as applied to the mortgages owned and held by the plaintiff in California, of lands in Oregon, is contrary to the 14th Amendment of the Constitution of the United States, as depriving the plaintiff of its property without due process of law, and denying to it the equal protection of the laws.

The statute in question makes the following provisions for the taxation of mortgages: By § 1 "a mortgage, deed of trust, contract, or other obligation whereby land and real property situated in no more than one county in this state is made security for the payment of a debt, together with such debt, shall, for the purposes of assessment and taxation, be deemed and treated as land or real property." By § 2 the mortgage, "together with such debt, shall be assessed and taxed to the owner of such security and debt in the county, city, or district in which the land or real property affected by such security is situated;" and may be sold, like other real property, for the payment of taxes due thereon. By § 3 that person is to be deemed the owner who appears to be such on the record of the mortgage, either as the original mortgagee, or as an

NOTE.—*As to what is due process of law,* see note to Pearson v. Yewdall, 24: 436.

As to taxes on judgments owned by citizens, see Kingman County Comrs. v. Leonard (Kan.) 34 L. R. A. 810, and note.

As to tax on money of nonresident deposited in state, see Re Houdayer (N. Y.) 34 L. R. A. 235, and note.

As to place of taxation of trust property, see Richmond County Academy v. Augusta (Ga.) 20 L. R. A. 151, and note.

assignee by transfer made in writing upon the margin of the record. By § 4 no payment on the debt so secured is to be taken into consideration in assessing the tax, unless likewise stated upon the record; and the debt and mortgage are to be assessed for the full amount appearing by the record to be owing, unless in the judgment of the assessor the land is not worth so much, in which case they are to be assessed at their real cash value. By §§ 5, 6, 7, it is made the duty of each county clerk to record, in the margin of the record of any mortgage, when requested so to do by the mortgagee or owner of the mortgage, all assignments thereof and payments thereon; and to deliver annually to the assessor abstracts containing the requisite information as to unsatisfied mortgages recorded in his office. By § 8 a debt secured by mortgage of land **424]** in a county of this state "shall, *for the purposes of taxation, be deemed and considered as indebtedness within this state, and the person or persons owing such debt shall be entitled to deduct the same from his or their assessments in the same manner that other indebtedness within the state is deducted." And by § 9 "no promissory note or other instrument of writing which is the evidence of a debt that is wholly or partly secured by land or real property situated in no more than one county in this state shall be taxed for any purpose in this state, but the debt evidenced thereby, and the instrument by which it is secured, shall, for the purpose of assessment and taxation, be deemed and considered as land or real property, and together be assessed and taxed as hereinbefore provided." Oregon Laws of 1882, p. 64. All these sections are embodied in Hill's Annotated Code of Oregon, §§ 2730, 2735-2738, 2753–2756.

The statute applies only to mortgages of land in not more than one county. By the last clause of § 8, all mortgages, "hereafter executed, whereby land situated in more than one county in this state is made security for the payment of a debt, shall be void." The mortgages now in question were all made since the statute, and were of land in a single county; and it is not suggested in the bill that there existed any untaxed mortgage of lands in more than one county.

The statute, in terms, provides that "no promissory note or other instrument of writing, which is the evidence of" the debt secured by the mortgage, "shall be taxed for any purpose within this state;" but that the debt and mortgage, "shall, for the purpose of assessment and taxation, be deemed and considered as land or real property" in the county in which the land is situated, and be there taxed, not beyond their real cash value, to the person appearing of record to be the owner of the mortgage,

The statute authorizes the amount of the mortgage debt to be deducted from any assessment upon the mortgagor; and does not provide for both taxing to the mortgagee the money secured by the mortgage, and also taxing to the mortgagor the whole mortgaged property, **425]** as did the statutes of other *states, the validity of which was affirmed in *Augusta Bank* v. *Augusta*, 36 Me. 255, 259; *Alabama Gold L. Ins. Co.* v. *Lott*, 54 Ala. 499; *Appeal Tax Court* v. *Rice*, 50 Md. 302; and *Goldgart* v. *People*, *Goar*, 106 Ill. 25.

The right to deduct from his assessment any debts due from him within the state is secured as well to the mortgagee as to the mortgagor, by a provision of the statute of Oregon of October 25, 1880 (unrepealed by the statute of 1882, and evidently assumed by § 8 of this statute to be in force), by which "it shall be the duty of the assessor to deduct the amount of indebtedness, within the state, of any person assessed, from the amount of his or her taxable property." Oregon Laws of 1880, p. 52; Hill's Code, § 2752.

Taking all the provisions of the statute into consideration, its clear intent and effect are as follows: The personal obligation of the mortgagor to the mortgagee is not taxed at all. The mortgage and the debt secured thereby are taxed, as real estate, to the mortgagee, not beyond their real cash value, and only so far as they represent an interest in the real estate mortgaged. The debt is not taxed separately, but only together with the mortgage; and is considered as indebtedness within the state for no other purpose than to enable the mortgagor to deduct the amount thereof from the assessment upon him, in the same manner as other indebtedness within the state is deducted. And the mortgagee, as well as the mortgagor, is entitled to have deducted from his own assessment the amount of his indebtedness within the state.

The result is that nothing is taxed but the real estate mortgaged, the interest of the mortgagee therein being taxed to him, and the rest to the mortgagor. There is no double taxation. Nor is any such discrimination made between mortgagors and mortgagees, or between resident and nonresident mortgagees, as to deny to the latter the equal protection of the laws.

No question between the mortgagee and the mortgagor, arising out of the contract between them, in regard to the payment of taxes, or otherwise, is presented or can be decided upon this record.

*The case, then, reduces itself to the [**426** question whether this tax act, as applied to mortgages owned by citizens of other states and in their possession outside of the state of Oregon, deprives them of their property without due process of law.

By the law of Oregon, indeed, as of some other states of the Union, a mortgage of real property does not convey the legal title to the mortgagee, but creates only a lien or encumbrance as security for the mortgage debt; and the right of possession, as well as the legal title, remains in the mortgagor, both before and after condition broken, until foreclosure. Oregon General Laws of 1843-1872, § 323; Hill's Code, 326; *Anderson* v. *Baxter*, 4 Or. 105, 110; *Semple* v. *Bank of British Columbia*, 5 Sawy. 88, 394; *Teal* v. *Walker*, 111 U. S. 242 [28: 415]; *Sellwood* v. *Gray*, 11 Or. 534; *Watson* v. *Dundee & T. Invest. Co.* 12 Or. 474; *Thompson* v. *Marshall*, 21 Or. 171; *Adair* v. *Adair*, 22 Or. 115.

Notwithstanding this, it has been held, both by the supreme court of the state, and by the circuit court of the United States for the district of Oregon, that the state has the power

to tax [illegible] and held by citizens and residents of other states, of lands in Oregon. *Mumford* v. *Sewall*, 11 Or. 67; *Dundee Mortgage Trust Invest. Co.* v. *School Dist No. 1*, 10 Sawy. 72; *Crawford* v. *Linn County*, 11 Or. 482; *Dundee Mortgage Trust Invest. Co.* v. *Parish* 11 Sawy. 92; *Poppleton* v. *Yamhill County*, 18 Or. 377, 383 [7 L. R. A. 449]; *Savings & Loan Society* v. *Multnomah County*, 60 Fed Rep. 31.

In *Mumford* v. *Sewall*, Judge Waldo, delivering the opinion of the court, said: "All subjects, things as well as persons, over which the power of the state extends, may be taxed. . . . A mortgage, as such, is incorporeal property. It may be the subject of taxation. . . . Concede that the debt accompanies the respondent's person and is without the jurisdiction of the state. But the security she holds is Oregon security. It cannot be enforced in any other jurisdiction. It is local in Oregon absolutely as the land which it binds. . . . Since the power of the state over the mortgage is as exclusive and complete as over the land mortgaged, the mortgage is **427**] subject to *taxation by the state, unless there is constitutional limitation to the contrary." 11 Or. 68, 69.

"In *Mumford* v *Sewall*," said Judge Deady in *Dundee Mortgage-Trust Invest. Co.* v. *School District No. 1*, "the court held that a mortgage upon real property in this state is taxable by the state without reference to the domicil of the owner, or the situs of the debt or note secured thereby. And this conclusion is accepted by this court as the law of this case. Nor do I wish to be understood as having any doubt about the soundness of the decision. A mortgage upon real property in this state whether considered as a conveyance of the same, giving the creditor an interest in or right to the same, or merely a contract giving him a lien thereon for his debt and the power to enforce the payment thereof by the sale of the premises, is a contract affecting real property in the state, and dependent for its existence, maintenance, and enforcement upon the laws and tribunals thereof, and may be taxed here as any other interest in, right to, or power over land. And the mere fact that the instrument has been sent out of the state for the time being, for the purpose of avoiding taxation thereon or otherwise, is immaterial." 10 Sawy. 63, 64.

The authority of every state to tax all property, real and personal, within its jurisdiction, is unquestionable. *M'Culloch* v. *Maryland*, 17 U. S. 4 Wheat. 316, 429 [4: 579, 607]. Personal property, as this court has declared again and again, may be taxed, either at the domicil of its owner, or at the place where the property is situated, even if the owner is neither a citizen nor a resident of the state which imposes the tax. *Tappan* v. *Merchants' Nat. Bank*, 86 U. S. 19 Wall. 490, 499 [22: 189, 193]; *State Railroad Tax Cases* [*Taylor* v. *Secor*], 92 U. S. 575, 607 [23: 669, 671]; *Coe* v. *Errol*, 116 U. S. 517, 524 [29: 715, 717]; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22, 27 [35: 613, 616, 618 [3 Inters. Com. Rep. 595]. The state may tax real estate mortgaged, as it may all other property within its jurisdiction, at its full value. It may do this, either by taxing the whole to the mortgagor, or by taxing to the mortgagee the interest the ein represented by the mortgage, and to the mortgagor the remaining interest in the land. And it may, for the purposes of taxation, either treat the mortgage debt as personal property, to be taxed like other choses in *action, to the creditor at his domicil; or treat the mortgagee's interest in the land as real estate, to be taxed to him, like other real property, at its situs. *Firemen's F. Ins. Co.* v. *Commonwealth*, 137 Mass. 80, 81; *State, Vanatta*, v. *Runyon*, 41 N. J. L. 98, 105; *Darcy* v. *Darcy*, 51 N. J. L. 140, 145 [2 L. R. A. 350]; *People, Jefferson*, v. *Smith*, 88 N. Y. 576, 585; *Common Council* v. *Assessors* [*Detroit* v. *Detroit Bd. of Assessors*], 91 Mich. 78, 92 [16 L. R. A. 59]. **428**

The plaintiff much relied on the opinion delivered by Mr. Justice Field in *Cleveland, Painesville, & Ashtabula Railroad* v. *Pennsylvania*, reported under the name of *Case of the State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 300, 323 [21: 179, 188]. It becomes important therefore to notice exactly what was there decided. In that case, a railroad company, incorporated both in Ohio and in Pennsylvania, had issued bonds secured by a mortgage of its entire road in both states; and the tax imposed by the state of Pennsylvania, which was held by a majority of this court to be invalid, was a tax upon the interest due to the bondholders upon the bonds, and was not a tax upon the railroad, or upon the mortgage thereof, or upon the bondholders solely by reason of their interest in that mortgage. The remarks in the opinion, supported by quotations from opinions of the supreme court of Pennsylvania, that a mortgage, being a mere security for the debt, confers upon the holder of the mortgage no interest in the land, and where held by a nonresident, is as much beyond the jurisdiction of the state as the person of the owner, went beyond what was required for the decision of the case, and cannot be reconciled with other decisions of this court and of the supreme court of Pennsylvania.

This court has always held that a mortgage of real estate, made in good faith by a debtor to secure a private debt, is a conveyance of such an interest in the land as will defeat the priority given to the United States by act of Congress in the distribution of the debtor's estate. *United States* v. *Hooe*, 7 U. S. 3 Cranch, 73 [2: 370]; *Thelusson* v. *Smith*, 15 U. S. 2 Wheat. 396, 426 [4: 271, 278]; *Conard* v. *Atlantic Ins. Co.* 26 U. S. 1 Pet. 386, 441 [7: 189, 213].

In *Hutchins* v. *King*, 68 U. S. 1 Wall. 53, 58 [17: 544, 546], Mr. Justice Field, delivering the opinion of the court, said that "the interest of *the mortgagee is now generally treated [**429** by the courts of law as real estate, only so far as it may be necessary for the protection of the mortgagee and to give him the full benefit of his security." See also *Waterman* v. *Mackenzie*, 138 U. S. 252, 258 [34: 923, 927]. If the law treats the mortgagee's interest in the land as real estate for his protection, it is not easy to see why the law should forbid it to be treated as real estate for the purpose of taxation.

The leading quotation, in 82 U. S. 15 Wall. 323 [21: 188], from the Pennsylvania reports, is this general statement of Mr. Justice Wood-

ward: "The mortgagee has no estate in the land, any more than the judgment creditor. Both have liens upon it, and no more than liens." *Witmer's Appeal*, 45 Pa. 455, 463 [84 Am. Dec. 505]. Yet the same judge, three years later, treated it as unquestionable that a mortgage of real estate in Pennsylvania was taxable there, without regard to the domicil of the mortagee. *Maltby* v. *Reading & Columbia Railroad Co.* 52 Pa. 140, 147.

The effect of a mortgage as a conveyance of an interest in real estate in Pennsylvania has been clearly brought out in two judgments delivered by Mr. Justice Strong, the one in the supreme court of Pennsylvania, and the other in this court.

Speaking for the same judges who decided *Witmer's Appeal*, above cited, and in a case decided less than two months previously, reported in the same volume, and directly presenting the question for adjudication, Mr. Justice Strong said, of mortgages of real estate; "They are in form defeasible sales, and in substance grants of specific security, or interests in land for the purpose of seeurity. Ejectment may be maintained by a mortgagee, or he may hold possession on the footing of ownership, and with all its ineidents. And though it is often decided to be a security or lien, yet, so far as it is necessary to render it effective as a security, there is always a recognition of the fact that it is a transfer of the title." *Britton's Appeal*, 45 Pa. 172, 177, 178. It should be remembered that in the eourts of the state of Pennsylvania, for want of a court of chancery, an equitable title was always held sufficient to **430**]*sustain an action of ejectment. *Simpson* v. *Ammons*, 1 Binn. 175; *Youngman* v. *Elmira & Williamsport Railroad Co.* 65 Pa. 278, 285, and cases there cited.

Again, in an action of ejeetment, eommenced in the circuit eourt of the United States for the district of Pennsylvania, Mr. Justice Strong, delivering the unanimous opinion of this court, said: "It is true that a mortgage is in snbstauce but a security for a debt, or an obligation, to which it is eollateral. As between the mortgagor and all others than the mortgagee, it is a lien, a security, and not an estate. But as between the parties to the instrument, or their privies, it is a grant which operates to transmit the legal title to the mortgagee, and leaves the mortgagor only a right to redeem. . . . Courts of equity," he went on to say, "as fully as courts of law, have always regarded the legal title to be in the mortgagee until redemption, and bills to redeem are entertained upon the principle that the mortgagee holds for the mortgagor when the debt secured by the mortgage has been paid or tendered. And such is the law of Pennsylvania. There, as elsewhere, the mortgagee, after breach of the condition, may enter or maintain ejectment for the land." Applying these principles, it was held that one claiming under the mortgagor, having only an equitable title, could not maintain an action of ejectment against one in possession under the mortgagee, while the mortgage remained in existence, or until there had been a redemption; because an equitable title would not sustain an action of ejectment in the courts of the United States *Brobst* v. *Brock* [*Doe, Brobst*, v. *Roe*], 77 U. S. 10 Wall. 519, 529, 530 [19: 1002, 1004, 1005].

In a later case in Pennsylvania, Chief Justice Agnew, upon a full review of the authorities in that state, said: "Ownership of the debt carries with it that of the mortgage; and its assignment or succession in the event of death vests the right to the mortgage in the assignee or the personal representative of the deceased owner. But there is a manifest differenee between the debt, which is a mere chose in action, and the land which secures its payment. Of the former there can be no possession, except that of the writing which evidences the *obligation to pay; but of [**431** the latter, the land or pledge, there may be. The debt is intangible, the land tangible. The mortgage passes to the mortgagee the title and right of possession to hold till payment shall be made." *Tryon* v. *Munson*, 77 Pa. 250, 262.

In *Kirtland* v. *Hotchkiss* 42 Conn. 426 affirmed by this court in 100 U. S. 491 [25: 558], the point adjudged was that debts to persons residing in one state, secured by mortgage of land in another state, might, for the purposes of taxation, be regarded as situated at the domicil of the creditor. But the question whether the mortgage could be taxed there only was not involved in the case, and was not decided, either by the supreme court of Connecticut or by this court.

In many other cases cited by the appellant, there was no statute expressly taxing mortgages at the situs of the land; and, although the opinions in some of them took a wider range, the only question in judgment in any of them was one of the construction, not of the constitutionality, of a statute—of the intention, not of the power, of the legislature. Such were: *Davenport* v. *Mississippi & Missouri Railroad Co.* 12 Iowa, 539; *Latrobe* v. *Baltimore*, 19 Md. 13; *People* v. *Eastman*, 25 Cal. 601; *State* v. *Earl*, 1 Nev. 394; *Arapahoe County Comrs.* v. *Cutter*, 3 Colo. 349; *People, Jefferson*, v. *Smith*, 88 N. Y. 576; *Grant* v. *Jones*, 39 Ohio St. 506; *State* v. *Smith*, 68 Miss 79; *Holland* v. *Silver Bow County Commissioners*, 15 Mont. 460 [27 L. R. A. 797].

The statute of Oregon, the constitutionality of which is now drawn in question, expressly forbids any taxation of the promissory note, or other instrument of writing, which is the evidence of the debt secured by the mortgage; and, with equal distinctness, provides for the taxation, as real estate, of the mortgage interest in the land. Although the right which the mortgage transfers in the land covered thereby is not the legal title, but only an equitable interest and by way of security for the debt, it appears to us to be clear upon principle, and in accordance with the weight of authority, that this interest, like any other interest, legal or equitable, may be taxed to its owner (whether resident or nonresident) in the state*where[**432** the land is situated, without contravening any provision of the Constitution of the United States.

Decree affirmed.

Mr. Justice **Harlan** and Mr. Justice **White** dissented.

Mr. Justice **McKenna**, not having been a member of the court when this case was argued, took no part in the decision.

CENTRAL NATIONAL BANK OF BOSTON *et al.*, *Plffs. in Err.*,
v.
AARON R. STEVENS *et al.*

(See S. C. Reporter's ed. 432 465.)

Questions reviewable—injunction, when cannot be granted by state court—Federal question—jurisdiction of state court—power to execute decree.

1. Questions as to the time within which, and the grounds upon which, a bill of review can be maintained in a state court, and whether the plaintiffs are chargeable with knowledge of a prior suit, are not reviewable by this court on writ of error to a state court.
2. An injunction against enforcing remedies adjudged by decree of a Federal court cannot be granted by a state court, when the Federal court had complete jurisdiction which attached long before the suit began in the state court.
3. Whether due effect has been given by a state court to a judgment or decree of a Federal court is a Federal question within the jurisdiction of this court, on writ of error to the state court.
4. The jurisdiction of a state court to grant an injunction against enforcing a decree of a circuit court of the United States cannot be based on the fact that after the decree was rendered a judgment of another court, on which the decree was founded, had been set aside for fraud.
5. To deprive a court of the power to execute its decrees is to essentially impair its jurisdiction.

[No. 38.]

Argued October 15, 1897. Decided February 21, 1898.

IN ERROR to the Court of Appeals of the State of New York to review a judgment of that court affirming the judgment of the General Term of the Supreme Court which affirmed the judgment of the Trial Court in favor of the plaintiffs, Aaron R. Stevens *et al.*, against the Central National Bank of Boston *et al.*, in an action brought to obtain a decree that the owners of bonds issued by the Lebanon Springs Railroad Company have a first lien upon said railroad and property, and that a certain mortgage be foreclosed and that certain certificates issued by one VanValkenburg were beyond the power of the court to issue and are of no validity, and for an injunction and receiver to operate said railroad, etc. *Judgment of Supreme Court of New York and of the Court of Appeals of said State reversed*, and cause remanded to that court for further proceedings.

See same case below, 57 Hun, 498, 144 N. Y. 50.

NOTE.—*As to what questions the United States Supreme Court will review on writ of error; bill of exceptions.*—see note to Parks v. Turner, 13: 883.

As to jurisdiction of Federal court not given by consent, see note to Sundry African Slaves v. Madrazo, 7: 74.

As to jurisdiction in United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to injunction on ground of fraud; showing as to injustice and diligence,—see note to Norwegian Plow Co. v. Bollman (Neb.) 31 L. R. A. 747.

Statement by Mr. Justice **Shiras:**

The Lebanon Springs Railroad Company was organized in the year 1852, and, by virtue of various acts of the legislatures of New York and Vermont, was authorized to construct and maintain a railroad extending from Chatham, New York, to Bennington, Vermont. On the 1st day of July, 1867, the said company duly executed and delivered to the Union Trust Company of New York a mortgage of that date on all its property, rights, and franchises, to secure the payment of bonds to the amount of $2,000,000, which bonds were then or soon after sold to a great number of persons. In January, 1870, the Lebanon Springs Railroad Company consolidated with the Bennington & Rutland Railroad Company, under the name and style of the Harlem Extension Railroad Company. The new company, on April 1, 1870, executed and delivered to the said Union Trust Company a mortgage on its road and franchises to secure bonds to the amount of $4,000,000. Of these bonds there were sold to outside parties to the amount of $1,500,000. The *remainding $2,500,000 of [434 bonds were reserved to take up and be exchanged for the $2,000,000 of bonds of the Lebanon Springs Railroad Company and for $500,000 of bonds which had been issued by the Bennington & Rutland Railroad Company, but such exchange never took place, and accordingly only $1,500,000 of the said bonds of the Harlem Extension Railroad Company were ever issued. Both said mortgages were duly recorded in the proper counties in the states of New York and Vermont.

On February 22, 1872, the interest upon the said bonds of the Lebanon Springs Railroad Company falling due after January, 1869, not having been paid, the Union Trust Company of New York began an action in the supreme court of New York to foreclose the mortgage of that company, in which action the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company were made defendants.

On November 15, 1872, the Union Trust Company of New York filed bills in the court of chancery in the state of Vermont to foreclose both of said mortgages, in which actions the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company were made defendants, and said defendants duly appeared in that court prior to December 1, 1872.

While the above-mentioned actions were pending, and on December 18, 1872, the Harlem Extension Railroad Company and the Pine Plains & Albany Railroad Company, a corporation of the state of New York, consolidated their roads, property, and capital stock, under the name of the Harlem Extension Railroad Company; and on December 19, 1872, the New York, Boston, & Northern Railroad Company and the said last-named, the Harlem Extension Railroad Company, duly consolidated their roads, property, and capital stock, and thus formed one company under the name of the New York, Boston, & Montreal Railway Company.

The above-mentioned foreclosure suits were so proceeded with that, in the said action in the supreme court of New York, a judgment

of foreclosure of the said mortgage given by the Lebanon Springs Railroad Company, and for a 435] sale of *its road, property, and franchises within the state of New York, and of all its right, title, and interest to the railroad and franchises within the state of Vermont, was rendered on December 10, 1872; and on January 25, 1873, the property and franchises mentioned were sold to one William Butler Duncan for the price of $100,000 and, on said day, Charles S. Fairchild, the referee appointed by the court to effect the sale, executed and delivered to one James C. Hull his deed of conveyance of the said road, property, and franchises, bearing date the said 25th January, 1873, and said deed was duly recorded in the clerks' offices for the counties of Rensselaer and Columbia.

On the 7th day of December, 1872, decrees of foreclosure of the mortgage of the Lebanon Springs Railroad Company and of the Harlem Extension Railroad Company's mortgage, and directing a sale, were rendered; and in pursuance of such decrees the said road, property, and franchises within the state of Vermont were, by Daniel McEwen, a special master in chancery, appointed by the court for that purpose, sold on January 20, 1873, to one Charles G. Lincoln, for the sum of $50,000 and deeds of conveyance of that date were made and delivered to said Lincoln by the said master in chancery.

On January 28, 1873, Hull and Lincoln, the respective purchasers at the said foreclosure sales, executed and delivered to the said William Butler Duncan and to one Trevor W. Park a bond in the sum of $5,000,000, and a mortgage to secure the same on all the roads, property, and franchises of the Harlem Extension Railroad Company, including those of the Lebanon Springs Railroad Company and of the New York & Vermont Railroad Company.

On January 30, 1873, Hull and wife, by their deed executed and delivered that day, conveyed all said roads, property, and franchises, 436] situated in the *state of New York, to the said, the New York, Boston, & Montreal Railway Company, subject, however, to said mortgage to Duncan and Park; and, on the same day, Lincoln, by a deed executed and delivered by him, conveyed said roads, property, and franchises, situated in the state of Vermont, to the said the New York, Boston, & Montreal Railway Company, subject to the said mortgage to Duncan and Park, and to the said $500,000 mortgage on the old Bennington & Rutland Railroad.

The New York, Boston, & Montreal Railway Company paid the sum of $807,077.05 on account of the moneys due on said bond and mortgage, which had become wholly due and payable on or before February 1, 1875, but has never paid the remainder of the money due on said bond and mortgage.

On March 15, 1873, the New York, Boston, & Montreal Railway Company executed and delivered a certain other mortgage in the amount of $12,250,000 to Seligman, Sherman, and Brown as trustees. This mortgage covered the above-mentioned railroad and other properties. On the 1st day of April, 1873, the New York, Boston, & Montreal Railway Company executed and delivered still another mortgage on the said railroad and other things in the amount of $12,750,000 in which the New York Loan & Indemnity Company was named as trustee. Enough of the bonds of the said last two mortgages were sold to realize $6,000,000, which were received and disbursed by Seligman and Brown. The said railroad was operated by and on behalf of the New York, Boston, & Montreal Railway Company until some time in November, 1873, when said company leased the road to the Central Vermont Railroad Company, by which it was operated until August 20, 1877, when said last-mentioned company withdrew from the possession of and abandoned the road. In the meantime the New York, Boston, & Montreal Railway Company had failed to fulfil its obligations and had become wholly insolvent, and said railroad, when surrendered and abandoned by its lessee, lay unoccupied and unoperated until some time in September, 1877, when it was taken possession of by one Russell C. Root, who subsequently, in November, 1877, delivered possession thereof to a corporation called the Harlem Extension Railroad South Coal Transportation Company, a corporation of the state of New York, and of which said Root was president, *and which continued [437 to operate said railroad until it came into the possession of John W. Vau Valkenburgh as hereinafter stated.

On September 7, 1889, one Marvin Sackett, claiming to be the owner of bonds to the amount of $8,700, issued as before mentioned, by the Lebanon Springs Railroad Company, brought an action in the supreme court of New York against the said Russell C. Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston, & Montreal Railway Company and Daniel Butterfield, as receiver of the said last-mentioned company, praying for the sale of the whole of the said railroad property and franchises. He claimed to bring the action in behalf of himself and all others, bondholders of the Lebanon Springs Railroad Company, similarly situated, who held any of the $2,000,000 of the bonds of said company. He alleged in his complaint the fact of the mortgage, to secure his bonds, among others, to the Union Trust Company of New York, its actions to foreclose the sales under them, the aforesaid sales to Hull and Lincoln, and their mortgage to Park and Duncan, and the conveyance by the latter to the New York, Boston, & Montreal Railway Company, and that Hull and Lincoln and Park and Duncan, acted throughout all those matters as the agents and representatives, and for the use and benefit of the bondholders of the Lebanon Springs Railroad Company.

The summons and complaint were served upon the New York, Boston, & Montreal Railway Company and upon Butterfield as receiver, but they did not appear. Russell C. Root and the Harlem Extension Railroad South Coal Transportation Company were also served, and they put in joint answers on September 25, 1880. On October 1, 1880, the complainant Sackett moved for the appoint-

ment of a receiver, and on October 7, John W. Van Valkenburgh was appointed and filed his bond as receiver.

On November 12, 1880, one Bloodgood and six others, claiming to own a majority of the bonds of the Lebanon Springs Railroad Company, **438**] moved for leave to be made *parties to the action. This motion was, on January 10, 1881, denied, but the plaintiff was directed to serve papers and notices of every kind on one F. L. Westbrook, who was by the owner authorized to appear as counsel of the said Bloodgood and the other six bondholders, upon all trials, hearings, and motions. On November 6, 1880, Park and Duncan made an application to the court to be made parties to the action, alleging that they were the owners of over $300,000 of bonds of the Lebanon Springs Railroad Company, and of over $600,000 of bonds of the Harlem Extension Railroad Company, and that they were the mortgagees under the mortgage made by Hull and Lincoln. This application was not granted. One Henry A. Tilden, who claimed to own thirty of the bonds of the Lebanon Springs Railroad Company, was associated with Sackett in the bringing of said action, and appeared by counsel. On October 11, 1880, the receiver filed a petition, setting forth that he had no funds with which to equip or operate the road, and asking that he might be allowed to borrow $25,000 on certificates for that purpose, and on October 25, 1880, the court made an order authorizing the receiver to borrow $25,000 on certificates, which were declared to be a first lien on the net profits of the railroad company. On February 23, 1881, the receiver filed a petition setting forth that there were large arrears of taxes, for which sales had taken place of portions of the road, that there was a necessity for the purchase of rails and superstructures, and praying that he might be authorized to issue certificates to raise the necessary moneys to redeem such portions of the road as had been sold for taxes and to purchase rails and make other necessary repairs. Notice of this petition was filed on Hamilton Ward, attorney general of the state of New York; on McClellan and Brown, attorneys for Sackett, the plaintiff; on P. W. Ostremder, attorney for R. C. Root, defendant, and on F. W. Westbrook, attorney designated to receive notices on behalf of Bloodgood and others.

On March 5, 1881, the court, after hearing Edward Newcomb, of counsel for said receiver, and F. L. Westbrook, of counsel in opposition thereto, appointed James H. Jones, an **439**]*expert, to examine the rails, ties, bridges, roadbed, trestles, telegraph poles, and all matters pertaining to the running of the Lebanon Springs Railroad, to the end that he should make a report to the court of the true condition of the Lebanon Springs Railroad, with his opinion thereon as to what was necessary and requisite for the protection of said property and the safety and successful running of said railroad; that said report be made to said receiver, and that said receiver should return said report, together with a detailed statement of moneys received and expended by him, with such other information he should have in relation to said railroad; and further directing that said reports and papers should be served on F. L. Westbrook ten days prior to the hearing on said report before the court.

On March 19, 1881, James H. Jones made an elaborate report to the receiver, stating that he had, in pursuance of his appointment, made a careful examination of the said railroad, its rails, ties, bridges, roadbed, trestles, telegraph poles, and all matters appertaining to the running and management thereof; that he found the rails of iron worn to such an extent as to render the running of trains, even at an ordinary rate of speed, extremely dangerous; that to render the track safe for ordinary use would require from 2,500 to 3,000 tons of new rails to replace the poorer conditioned of the old ones; that the ties were badly decayed, to replace which would require about 87,000 new ties; that the road required new ballasting; that the bridges and trestles were in an unsafe condition, all needing repair; that to repair the bridges and trestles and abutments would require an expenditure of some $19,000; that new telegraph poles to the number of 2,030 were required; that, in fine, to put said road in a condition to render its operation safe and successful would require about $320,000. This report was returned to court by the receiver, with a statement of his receipts and expenditures to date, and on April 4, 1881, the court, after considering said reports and hearing counsel for the receiver, and no one appearing in opposition thereto, ordered the receiver to put said road in repair as recommended by the report of James H. Jones, and *author- **[440** ized him to issue receiver's certificates, dated April 2, 1881, with interest at 6 per cent for the aggregate amount of $350,000, the same to be signed by said John W. Van Valkenburgh, as receiver of said Lebanon Springs Railroad Company, and a certificate on each thereof duly to be signed by an officer of the Farmers' Loan & Trust Company of New York city. It was further ordered that the said receiver should negotiate said certificates, and with the money arising therefrom pay and discharge the $25,000 of certificates theretofore authorized by the order of October 25, 1880, and to purchase all necessary materials for the repairs of said road, and pay and discharge all necessary expenses incident to said repairs. It was further ordered that said receiver's certificates of indebtedness should be declared to be a debt of the receiver incurred for the benefit and protection of said Lebanon Springs Railroad and its owners and the bondholders thereof, and said certificates were declared and decreed to be a first lien on the railroad and every kind of property owned by the company, to be recognized as such in any reorganization of the company or in its consolidation with any other company; and in case of any sale of the said railroad, the property in the hands of the receiver, and the franchises, under any decree of the supreme court, the said certificates are to be first paid from the first moneys realized thereupon by the receiver, unless sooner paid and canceled by him from the earnings of the railroad; but in case said railroad and property in the hands of the receiver and franchises, on any sale thereof, does not bring sufficient to pay the full amount and interest then due on

the outstanding negotiated certificates, then such unpaid amount shall remain as a first lien on the road, property, and franchises in the hands of the purchaser.

On January 12, 1885, a final decree of sale was made, appointing George McClellan as referee to make such sale, and providing, among other things, that sale should be made subject to the payment of the undue principal and interest of the receiver's certificates, and that the purchaser of the railroad and franchises should take said railroad, property, and franchises, subject to the unpaid portion of 441] said certificates, *which should be assumed by such purchaser as part of the consideration of the purchase.

On June 29, 1885, George McClellan, the referee, reported to the court that he had effected sale, in accordance with the terms of the decree of sale, to one William Foster, Jr., trustee, for the sum of $155,000, and that, among the terms of the sale, it was stipulated that William Foster, Jr., trustee, should take the property and assets, subject to the payment of the undue principal and interest of the receiver's certificates.

Subsequently, the referee executed and delivered to William Foster, Jr., and Rowland N. Hazard, as purchaser, a deed of conveyance, and received from them $155,000, the amount of their bid; and it appears that, out of the amount of said purchase money, there was then paid about $60,000, the interest then due on said certificates. Afterwards, it appears by the record that Foster and Hazard conveyed the railroad, property, and franchises to the New York, Rutland, & Montreal Railway Company, to which company Reynolds, who had succeeded Van Valkenburgh as receiver, surrendered possession of the railroad. The balance of the purchase money was used and applied as directed by the judgment in the said Sackett suit.

The principal of said certificates became due on the 1st day of April, 1886, and was not paid. Thereupon, in the month of April, 1886, the Central National Bank of Boston brought an action in the supreme court of New York in behalf of itself as well as other holders of receiver's certificates, against William Foster, Jr., Rowland N. Hazard, the New York, Rutland, & Montreal Railway Company, and the American Loan & Trust Company of New York. All of the defendants in said action appeared and answered. After issue was joined, the said action was, on the petition of the defendants, duly removed into the circuit court of the United States for the northern district of New York.

The complaint alleged, in substance, that the plaintiff is a banking association duly organized and incorporated under the laws of the United States, located and doing business in the city of Boston, in the commonwealth of 442] Massachusetts. *It alleged the making of an order on or about April 2, 1881, by the New York supreme court in the Sackett suit, whereby one John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, was authorized and directed to issue under his hand receiver's certificates of indebtedness, dated April 2, 1881, with interest at 6 per cent, of $500 each, payable in five years, interest payable January 1 and July 1 in each year, to the aggregate amount of $350,000, such certificates and the interest coupons thereto attached made payable at the Farmers' Loan & Trust Company in the city of New York, and whereby it was further ordered that the receiver negotiate said certificates to the amount aforesaid, and with the moneys arising thereupon pay and discharge certain previous certificates theretofore authorized by an order of the same court, and from the moneys arising from said certificates, that said receiver purchase all necessary materials for the repairs of said railroad, and to pay and discharge all necessary expenses incident to the repairs thereof, and all other expenses attending the running and successful managing and operating of said railroad, together with such indebtedness as might be found due to claimants by the referee named in said order; that it was further provided in said order that the said receiver's certificates of indebtedness to the amount therein directed to be issued, be and the same were thereby declared to be a debt of the said receiver, incurred for the benefit and protection of the said Lebanon Springs Railroad and its owners and bondholders, and said certificates to the amount of $350,000 were by said order declared to be a first lien on the railroad and all and every kind of property owned by said railroad company or in the possession of the receiver thereof, and that said certificates were to be recognized as such in any reorganization of the company, and that in case of any sale of the railroad, the property in the hands of the receiver, and franchises under any decree of the supreme court, said certificates were to be first paid from the first moneys realized therefrom by said receiver, unless sooner paid and canceled by him from the earnings of said railroad. It was further provided in said order that in case said railroad property in the hands of *the receiver and[443 franchises on any sale thereof should not bring sufficient to pay the full amount of principal and interest then due on the outstanding negotiated certificates in said order authorized to be issued, then the purchaser of said railroad and the property in the hands of the receiver and franchises, should assume, as a first lien thereon, so much of said principal as at that time should remain outstanding and unpaid with interest thereon, referring to the original order or the record thereof.

The complaint further alleged that the said Van Valkenburgh, as receiver, under and in pursuance of said order, did issue and negotiate such certificates of indebtedness in the manner and form by said order provided to the amount of $350,000, and that he duly applied the moneys received from said certificates to the uses and purposes mentioned and in said order authorized; that the plaintiff is now and has for several years last past been the owner and holder of said certificates, amounting in the aggregate to $250,000 of principal thereof, and that the certificates issued and negotiated by the receiver which are not held by plaintiff are held by divers persons and corporations, many of whose names are unknown to the plaintiff.

The complaint further alleged that in the said Sackett suit the plaintiff appeared by its

attorneys on the trial of the issues and made proof in regard to the issuing of said certifi cates and its title thereto, and that such proceedings were had therein that a judgment was rendered on or about January 12, 1885, by which it was, among other things, adjudged and decreed that the said certificates, amount ing in the aggregate to $350,000, were ratified and confirmed and declared to be a first lien on the railroad and its property, as provided in the said order, for the amount of principal and interest unpaid thereon, subject to the payment of certain costs and expenses in said judgment provided for, and whereby it was further adjudged and decreed that the property, franchises, and rights of the said railroad company as described in a certain mortgage therein referred to, and in the judgment in said Sackett suit, and all the rights, title, and interest **444**] of any and *of all the parties to the said action, including all property and assets in the hands of said receiver, be sold at public auction under the direction of a referee therein named, for the benefit of the first-mortgage bondholders of said railroad company issued July 1, 1867, for the amount of $2,000,000, and that said sale be made subject to the payment of the undue principal and interest of the said receiver's certificates, and that the purchaser or purchasers of said railroad property and franchises should take the said railroad property and franchises subject to the unpaid principal and interest on the said receiver's certificates, and should assume, as part of the consideration of the purchase, the payment thereof, and from the avails of said sale, after the payment of certain expenses therein provided for, the said referee should pay the amount of interest due on said receiver's certificates; that under and in pursuance of said judgment, the referee named therein did advertise for sale on the 12th day of June, 1885, and did sell at public auction, the premises, rights, franchises, and property in said judgment mentioned and described, to the defendants, William Foster, Jr., and Rowland N. Hazard, who became the purchasers thereof for the price of $155,000, and that the said William Foster, Jr., acting on behalf of himself and said Hazard, did pay the referee 5 per cent of the purchase price, and did subscribe a certain contract of sale, which was also subscribed by said referee, whereby, among other things, he did, for himself and said Hazard, assume and agree to pay the amount of said principal and interest on said certificates of indebtedness as part of the consideration of said purchase; that the balance of said $155,000 was thereafter paid by the purchasers to the referee, and that the referee did thereafter duly execute and deliver to the defendants Foster and Hazard a deed of said premises and property in said judgment described, and paid from the said $155,000 the interest then due on said certificates, amounting to about $60,000.

Plaintiff further alleged in said complaint that said referee's deed was duly accepted by the defendants Foster and Hazard, and that in and by the deed the grantees therein, the defendants Hazard and Foster, took said premises **445**]and property *subject to the unpaid principal and interest on the receiver's certificates, as required by the judgment aforesaid; that the principal of said certificates with interest from January 1, 1886, became due and payable on the 2d day of April, 1886, and that on that day the said certificates, amounting to $250,000, held by the plaintiff, were duly presented to the Farmer's Loan & Trust Company of the city of New York, where the same were payable, and payment thereof was demanded, but the same was refused, and that the whole of said principal with interest from the 1st day of January, 1886, is now due and unpaid. The complaint then gives a description of the railroad premises mentioned in the judgment in the Sackett suit and in the referee's deed; alleges that the defendants or some of them are now in possession of the property above described, and are using and operating the same for railroad purposes, and that all the defendants have or claim to have some interest in or lien upon said premises or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of said certificates, and that there is now justly due the plaintiff upon said certificates held by it the sum of $250,000, with interest from January 1, 1886.

The complaint then prays that the unpaid principal and interest of said receiver's certificates may be adjudged to be a lien upon said premises; asks for the usual judgment of foreclosure, for a receiver, and for a sale, and that out of the moneys arising from the sale of said premises, plaintiff and other holders of said certificates who may come in and prove their title thereto and the amount due thereon may be paid the amount due on said certificates with interest and costs, so far as the amount of such moneys properly applicable thereto will pay the same, and that the defendants Hazard and Foster may be adjudged to pay any deficiency that may remain after applying said moneys so applicable thereto, and for general relief.

The defendants all appeared and answered. Hazard and Foster answered separately, admitting their purchase substantially as alleged in the complaint, controverting some of the other allegations, and setting up as a distinct defense that they *acquired the property men [**446** tioned in the plaintiff's complaint with notice that the receiver's certificates were outstanding and of the sum justly due therefor, and that they have ever since been and now are ready and willing to pay the sum justly due on account of said receiver's certificates, but that they are advised and believe that the plaintiff is not entitled to receive payment thereof; that when the said property came into the hands of these defendants, it was subject to a lien for the amount actually due from the receiver and his successor in the trust for the amount of said receiver's certificates, but for no other or greater amount; and that these defendants when they acquired the property succeeded to all the rights of the prior owners of the property as well as to their obligations; that in accepting the deed of the premises, they intended only to obligate themselves to pay the amount actually due from the receiver on account of such certificates, with proper interest, and no other or greater sum by way of profit, and defendants aver that they incurred no greater or other obligations in the premises.

The defendant the New York, Rutland, &

Montreal Railway Company also put in a separate answer. It alleged, among other things, that defendants Foster & Hazard had conveyed and transferred to it all of the property and franchises conveyed to them by the referee in the Sackett suit subject to the payment of the sum justly due by said receiver, but not subject to any greater sum, and it controverts the allegations as to the amounts due on the receiver's certificates.

The American Loan & Trust Company also answered separately, setting up that it was the holder of a mortgage executed to it by the New York, Rutland, & Montreal Railway Company, and denying knowledge or information as to the matters charged in the bill.

The case came on for a hearing on pleadings and proofs, and after full argument, on March 24, 1887, a decree was passed, of which the following is a copy (omitting the description of the property, which is the same as that contained in the complaint in *this* action):

"It was ordered, adjudged, and decreed as follows:

447] *"That the certificates of indebtedness issued by John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, under and in pursuance of an order of the supreme court of the state of New York, bearing date the 2d day of April, 1881, made in an action in said supreme court, wherein one Marvin Sackett was plaintiff, and Russell C. Root and others were defendants, amounting in the aggregate to $350,000, are a lien upon the premises and property described in the bill of complaint herein, in the hands of the defendants herein, and of any persons claiming through or under the defendants Rowland N. Hazard and William Foster, Jr., the purchasers of said premises and property, at a sale thereof made under and in pursuance of the judgment rendered in said action in said supreme court on or about the 12th day of January, 1885; and that the complainant, the Central National Bank of Boston, is the holder and owner of certain of said certificates, amounting in the aggregate to $250,000 of principal thereof, upon which there is now due and unpaid to the complainant the said sum of $250,000, with interest at the rate of six per cent per annum thereon from the 1st day of January, 1886.

"That it be referred to William Lansing, Esq., of the city of Albany, who is hereby appointed a master *pro hac vice* in this cause to examine, ascertain, and report who are the holders other than the complainant of said certificates of indebtedness, and how much remains due and unpaid thereon. And the said master is hereby authorized and directed to give notice by advertising in two daily newspapers published in the city of Albany in said district, requiring the holders of said certificates to produce the same before the said master at his office in the city of Albany, at such time as he shall designate (which shall be at least twenty days after the first publication of said notice), and make proof as to their title thereto, and the amount due thereon; and the said master is also authorized and directed to inquire, ascertain, and report what would be the just proportion and amount for the said other holders of said certificates to contribute to the expenses of this suit.

"That the premises and property described in the bill of complaint in this cause, as hereinafter set forth, or such part *thereof as is [448 sufficient to satisfy the amount due and unpaid on such certificates, and expenses of sale and the costs of this suit, and which may be sold separately without material injury to the parties interested, be sold at public auction in the county of Rensselaer, in said district, by or under the direction of Worthington Frothingham, Esq., who is hereby appointed a referee for said purpose; that the said referee give public notice of the time and place of such sale according to law and the practice of this court; that the complainant or any other party to this suit may become a purchaser on such sale, that the said referee execute to the purchaser or purchasers a deed or deeds of the premises and property sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, the said referee pay to the complainant or its solicitors the amount of its costs and disbursements to be taxed herein; that he also pay to the complainant or its solicitors the amount due to it on said certificates as aforesaid, together with the interest thereon from the 1st day of January, 1886; and that he pay to the holders of the other said certificates respectively the amount of principal and interest due thereon, as the same may be found and reported by the said master as aforesaid; but if the moneys arising from such sale, after the payment of said costs and expenses as aforesaid, shall not be sufficient to pay the said certificates with interest in full, then that the said referee pay and distribute the said moneys, after the payment of the fees, expenses, costs, and disbursements above mentioned, to the said certificate holders, including the complainant, *pro rata*, in proportion to the amount of principal and interest due to said certificate holders respectively; that the said referee bring the surplus moneys arising from the said sale, if any there shall be, into court within twenty days after the same be received, to be there subject to the order of the court; that the said referee make a report of such sale, and file the same with the clerk of this court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount due to the complainant as aforesaid, with interest and costs as aforesaid, and also to pay the other certificate holders the amount due to *them respectively, as may be ascer- [449 tained by said master as aforesaid, the said referee specify the amount of such deficiency in his report of sale, and that the defendants Rowland N. Hazard and William Foster, Jr., pay to the complainant, and to the other of said certificate holders, the residue of the indebtedness on said certificates remaining unsatisfied after the sale of said property and the application of the proceeds pursuant to the directions contained herein; and that the complainant and the other of said certificate holders, to be ascertained as aforesaid, have execution thereof; and that the purchaser or purchasers at such sale be let into possession on the production of the said referee's deed and a certified copy of the order or decree confirming the said referee's report of sale.

"And it is further ordered, adjudged, and decreed that the defendants and all persons claiming under them, or any or either of them, after the filing of the notice of pendency of this suit, be forever barred and foreclosed of all right, title, interest, and equity of redemption in the said premises so sold, or any part thereof. The following is a description of the premises and property hereinbefore referred to and thereby directed to be sold, as contained in a certain mortgage made by the said the Labanon Springs Railroad Company to the Union Trust Company, and which were conveyed by the deed executed by George McClellan, referee, to the defendants William Foster, Jr, and Rowland N. Hazard, referred to in the bill of complaint herein.

[Description.]

"Leave is hereby reserved to the complainant and to the other certificate holders above referred to, or any of them, to apply upon the foot of this decree for the appointment of a receiver to take immediate possession of the property above described, and to keep the same until the sale under this decree shall be consummated by the delivery to the purchaser or purchasers at such sale of a referee's deed or deeds, and to deliver the property so sold to such purchaser or purchasers, with the powers usually possessed by receivers in such cases."

Subsequently, in pursuance of the decree, 450]the holders of the *certificates appeared before the special master and made proof of their ownership thereof, and said master, on February 7, 1888, made a report accordingly, finding the names of the holders thereof and the amounts due them respectively.

On March 23, 1892, in pursuance of an order of sale made by the said circuit court of the United States, Worthington Frothingham, as referee, sold the said premises and property described in the complaint (and described in the deed of George McClellan, referee, to Foster and Hazard) to William Foster, Jr., for the sum of $7,500, and on April 25, 1892, executed and delivered a deed therefor to the said William Foster, Jr.

On December 8, 1890, Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglas, as trustee, under the will of W. H. Douglas, deceased, and Ida S. Harrison, for themselves and other holders and owners of bonds issued by the Lebanon Springs Company and the Harlem Extension Railroad Company, filed a petition or bill of complaint in the supreme court of New York against the Union Trust Company of New York, James C. Hull, William Butler Duncan, John G. McCullough, as administrator of the goods, chattels, and credits of Trenor W. Park, deceased; the New York, Boston, & Montreal Railway Company, Jesse Seligman, John Crosby Brown, William Watts Sherman, Daniel Butterfield, as receiver of the property of the New York, Boston, & Montreal Railway Company; Marvin Sackett, Russell C. Root, the Harlem Extension Railroad South Coal Transportation Company, the Central National Bank of Boston, Peter Butler, as receiver of the property of the Pacific National Bank of Boston, the Massachusetts Mutual Life Insurance Company, and others

In this petition there is a history of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, and of the several legal proceedings whereby the roads, property, and franchises of these companies became vested in the New York, Rutland, & Montreal Railway Company, which is substantially the same with that heretofore made in this statement. But the petition assailed the action brought *by Sackett in[451 1880, and which resulted in the sale to Foster and Hazard in 1885, as fraudulent and collusive, and alleged that "the suit by Sackett was brought and conducted, not with the intention of realizing the said property for the benefit of the bondholders or any of them, or of himself as bondholder, but collusively and with the intent that he and others should receive large sums of money from the said property under color of the payment of claims, which, even if valid, were subordinate to said mortgages, and with the intent that said railroad and property should be acquired by others free from the lien of said mortgages, and without realizing anything to the holders of said bond."

The petition further alleged that "afterwards the defendant, the Central National Bank of Boston, claiming to own such certificates to the amount of two hundred and fifty thousand dollars, stated at par of the principal of the same, brought an action in this court against the defendants Foster and Hazard, the New York, Rutland, & Montreal Railway Company and the American Loan & Trust Company; that in that action the plaintiff prayed for the sale of the said railroad and property for the satisfaction of the certificates; that said action was removed into the circuit court of the United States, and such proceedings have been had therein that a decree has passed whereby it is provided that the said railroad and property be sold by a master of that court for the payment of the said certificates."

The prayers for relief were as follows:

"1. That it may be adjudged that the owners of the bonds issued by the Lebanon Springs Railroad Company have a first lien upon the said railroad and property, and the owners of the bonds issued by the Harlem Extension Railroad Company a second lien thereon, in preference of all others. That the bond and mortgage executed by the defendants Hull and Lincoln to the defendant Duncan and the said Park is held for the benefit of the owners of said bonds and represents their interest solely, and that defendants Brown and Seligman redeliver the same.

"2. That the judgment in the action brought in this court *by the defendant the Union[452 Trust Company, and the decrees in the two actions brought by that company in the court of chancery of Vermont, be now specifically enforced, and the mortgage by the said Hull and Lincoln be now foreclosed, and that the said railroad and property be sold under said judgments and decrees, and said mortgage of Hull and Lincoln, for the benefit of this plaintiff and all other of the owners of the Lebanon Springs and Harlem extension bonds, and that all of the defendants in this action be barred and foreclosed of all right, title, interest, and equity of redemption, of, in, and to the said railroad and property and any part of the same.

"3. That it may be adjudged that the certificates issued by the said Van Valkenburgh were beyond the power of this court to issue and are of no validity except to bind the interest represented by the eight bonds of the said Marvin Sackett, and the interests of the defendants in the action brought by said Sackett.

"4. That all of the defendants in this action and all other persons be enjoined, as well temporarily by order as permanently by judgment, from interfering with any part of the said railroad or property.

"5. That a receiver be appointed, with the usual powers of receivers, to take possession of, preserve, and operate said railroad and property until further order of the court.

"6. That the plaintiffs have such other and further relief as to the court shall seem just, besides costs."

To this petition the Central National Bank of Boston filed its separate answer, in which, after admitting certain allegations in the petition, relative to the history of the railroad companies, the said defendant set forth the proceedings in the suit of Sackett, including the appointment of Van Valkenburgh as receiver, the authority given such receiver by the court to issue and negotiate the said certificates, and the purchase by the defendant of $250,000 of said certificates for full value. The answer further alleged, in response to the petition, that the suit was brought by Sackett for himself as bondholder and on behalf of all other 453]bondholders; that other *bondholders, representing all, or nearly all, the bonds issued by the Lebanon Springs Railroad Company, had knowledge of the pendency of said suit by Sackett, and were represented by attorneys and counsel, although not nominally made parties to the action; that Foster and Hazard became purchasers at the sale, and that, by the terms of the sale, they had assumed the payment of the unpaid portion of said certificates as part of the consideration of the purchase; and further alleged that said judgment of the supreme court of New York had never been appealed from, reversed, or in any way vacated or modified, and was binding and conclusive, not only upon the parties to said action, but upon the other holders of said bonds issued by the Lebanon Springs Railroad Company. The answer then proceeded to set forth proceedings in the circuit court of the United States, including the decree of March 24, 1887, and to pray, among other things, that the petition should be dismissed upon the merits, and that a decree may be rendered recognizing the rights of the defendant, the Central National Bank of Boston, as a holder of said certificates as such rights had been theretofore established by the decree of the circuit court of the United States.

The American Loan & Trust Company filed its separate answer, admitting some and denying other allegations of the petition. Hazard and Foster also filed a separate answer on their own behalf, in which they allege that the Sackett suit was brought and pursued in behalf of all the bondholders; that they, Foster and Hazard, had purchased the railroad property and franchises in good faith, and that by the judgment, decree, and sale in said suit all the rights of said bondholders, plaintiffs in this suit, were cut off and barred, and that they, Foster and Hazard, had thereby acquired a good and valid title to said property and franchises, and thereupon they prayed that the complaint be dismissed and that a decree be rendered establishing their rights as purchasers of said road under said judgment and decree.

The New York, Rutland, & Montreal Railway Company likewise filed a separate answer, denying the principal allegations of the petition, and praying that the rights of said company *as purchaser of said road from [454 Foster and Hazard should be confirmed, and that the complaint be dismissed.

Certain other individual defendants, holders of receivers' certificates, likewise answered, denying these allegations of the petition which assailed the validity of the proceedings in the Sackett suit, and praying that the said petition should be dismissed Separate answers were likewise filed by Seligman and Brown, and by William R. Duncan substantially to the same effect.

Upon the first trial of this action judgment was rendered in favor of the defendants, dismissing it on the merits. On appeal that judgment was reversed by the general term and a new trial ordered. *Stevens* v. *Union Trust Co.* 57 Hun, 498.

At the new trial judgment was rendered in favor of the plaintiffs on November 10, 1891, and this judgment, having been affirmed by the general term, was taken on appeal to the court of appeals, whose judgment, rendered November 27, 1894, affirmed that of the court below. 144 N. Y. 50. This writ of error was then sued out.

Upon sale made by John L. Henning, as referee, under the judgment of the supreme court in this case, pending the appeals, there was executed and delivered to said William Foster, Jr., by said referee a deed of conveyance of the railroad, property, and franchises dated May 16, 1892; and, as already stated, on March 23, 1892, the railroad was sold and conveyed to William Foster, Jr., by the referee appointed by the decree of the United States court.

After the judgment of November 10, 1891, William Foster, Jr., brought an action in the supreme court of New York against the Central National Bank and other holders of certificates, seeking to set aside that portion of the decree of the United States circuit court of March 24, 1887, which adjudged that Foster, either alone or with Hazard, pay the Central Bank and other certificate holders the deficiency that might exist in the payment of the certificates after the application of the proceeds of the sale of the road, and to annul and enjoin the decree that execution issue for such deficiency; and that this action, so brought by Foster, has been removed, on *the peti-[455 tion of the Central National Bank, to the circuit court of the United States for the northern district of New York, where it is now pending

Messrs. **Charles E. Patterson, W. S. B. Hopkins,** *Matthew Hale, Henry D. Hyde,*

Alpheus T. Bulkeley, and *William A. Sargent*, for plaintiffs in error:

The court below erred in attempting to enjoin the enforcement of a decree of the circuit court of the United States.

McKim v. *Voorhies*, 7 Cranch, 279 (3:342); *Riggs* v. *Johnson County*, 6 Wall. 166 (18:768); *United States, Moses*, v. *Keokuk*, 6 Wall. 514 (18:933); *Davenport* v. *United States, Lord*, 9 Wall. 409 (19:704); *Washington County Supers.* v. *Durant*, 9 Wall. 415 (19:732); *Amy* v. *The Supervisors*, 11 Wall. 136 (20:101).

Where jurisdiction has once been obtained by a Federal court over property, by being brought within its custody, it continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the state or by any proceedings subsequently commenced in the state court.

Rio Grande R. Co. v. *Gomila*, 132 U. S. 478 (33:400); *Central Nat. Bank* v. *Hazard*, 49 Fed. Rep. 293; *Moran* v. *Sturges*, 154 U. S. 256 (38:981), Reversing *Re Schuyler's Steam Tow Boat Co.* 136 N. Y. 169, 20 L. R. A. 391.

The court below had no right to inquire into the merits of the case which was decided by the circuit court of the United States.

Crescent City L. S. L. & S. H. Co. v. *Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 157, 158 (30:614, 621); *Covell* v. *Heyman*, 111 U. S. 176 (28:390).

The injunction contained in the judgment against the enforcement of the decree of the United States circuit court cannot be sustained upon the ground taken by the court of appeals in its opinion, that the court had authority to control all persons and things within its own territorial limits, and that therefore the court might act *in personam* upon the parties before it, and direct them by injunction to proceed no further with that suit.

Riggs v. *Johnson County Comrs.* 6 Wall. 166 (18:768); *United States, Moses*, v. *Keokuk*, 6 Wall. 514 (18:933).

Mr. **Edward Winslow Paige**, for defendants in error:

The plaintiffs in error are not in the position to question the validity of the injunction.

Brobst v. *Brock*, 10 Wall. 519 (19:1002); *Union Trust Co.* v. *Southern Inland Nav. & Improv. Co.* 130 U. S. 570 (32:1045).

The injunction was correctly adjudged; equity required that the parties to this action should not be permitted to proceed with the sale under the decree of the circuit court of the United States.

New York & N. H. R. Co. v. *Schuyler*, 34 N. Y. 30, 45; *Barry* v. *Brune*, 8 Hun, 395; *New York & N. H. R. Co.* v. *Schuyler*, 17 N. Y. 592, 601.

It was against equity and good conscience that the sale in the Central Bank's suit should proceed.

New York & H. R. Co. v. *Haws*, 56 N. Y. 175, 181; *Hale* v. *Clauson*, 60 N. Y. 339, 341; *King* v. *Duryea*, 76 N. Y. 626; *Chamberlain* v. *Choles*, 35 N. Y. 477.

It being necessary to enjoin the parties in this suit from proceeding with that sale, no embarrassment is occasioned, nor does it make any difference that that sale is under the decree of another court.

New York & N. H. R. Co. v. *Schuyler*, 17 How. Pr. 464, 468; *New York & H. R. Co.* v. *Haws*, 56 N. Y. 175.

Nor does it make any difference that that other court is the court of another sovereign.

Vail v. *Knapp*, 49 Barb. 299; *Claflin* v. *Hamlin*, 62 How. Pr. 284; *Carron Iron Co.* v. *Maclaren*, 5 H. L. Cas. 416; *Cole* v. *Cunningham*, 133 U. S. 107 (33:538); *Embry* v. *Palmer*, 107 U. S. 3 (27:346); *Barry* v. *Brune*, 71 N. Y. 262; *People* v. *Erie R. Co.* 36 How. Pr. 129.

All parties and privies, no matter how remote in the chain of title, by taking title under the Sackett suit, submit themselves to the jurisdiction of the court below.

Hale v. *Clauson*, 60 N. Y. 339, 341.

The judgments and decrees of the circuit court of the United States, sitting in a particular state, in the courts of that state, are to be accorded such effect and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority.

Crescent City L. S. L. & S. H. Co. v. *Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 147 (30:614, 617).

No conflict of jurisdiction or process is possible. There is nothing in this judgment which interferes with the decree, or the process, or the officers of the United States court. They can go on if they like. They have gone on.

Dehon v. *Foster*, 4 Allen, 545, 550, 7 Allen, 57; *Van Gelder* v. *Van Gelder*, 26 Hun, 356, 360.

And the courts of the United States hold the same thing.

Embry v. *Palmer*, 107 U. S. 3 (27:346).

The United States courts hold that they can enjoin parties to actions before them from proceeding in state courts, and they do so enjoin them.

Linton v. *Mosgrove*, 14 Fed. Rep. 543; *The Tolchester*, 42 Fed. Rep. 180; *Dietzsch* v. *Huidekoper*, 103 U. S. 494 (26:497); *French* v. *Hay*, 22 Wall. 250 (22:857); *Baltimore & O. R. Co.* v. *Ford*, 35 Fed. Rep. 170; *Marshall* v. *Holmes*, 141 U. S. 589 (35:870).

Mr. Justice **Shiras** delivered the opinion of the court:

The plaintiffs in error ask us to reverse the decree of the court of appeals affirming that of the supreme court of New York, because the action of Stevens and others as a bill of review, or a bill in the nature of a bill of review, was not brought within the time limited by the practice of the courts for entertaining such bills; that, under the Code of Civil Procedure of the state of New York, bills for review have no place for errors appearing upon the face of the record; that the only remedy for such errors is by appeal; that, in so far as it is contended that the decree in the Sackett case was obtained by a fraudulent assertion or suppression of facts, the party aggrieved must move promptly upon the discovery of the fraud or of new facts; that the bill and the evidence adduced to sustain it do not disclose such a case of fraud or of newly discovered evidence, but do show a case free from actual fraud, and only, at the most, irregular by reason of a failure to include all the proper parties; that the parties complainant are to be visited with a knowledge of the proceedings in the Sackett suit by reason of the protracted and

notorious character of the proceedings, and because knowledge of the proceedings in the Sackett suit must further be imputed to them, because they are represented in the effort to impugn the validity of that decree by counsel who had appeared for Sackett in his suit; and that hence the present suit should, on the well-
456] established *rules regulating bills of review and bills to impeach decrees on the ground of after-discovered evidence, have been dismissed.

Without expressing any opinion on such allegations of error, it is sufficient to say that they raised questions for the consideration of the court of appeals of the state of New York, and that the disposition made of them by that court is binding upon us.

But those assignments of error which allege that the judgment of the supreme court of the state of New York, and of the court of appeals in affirming it erred in failing to give proper effect to the decree of the circuit court of the United States, and in granting a final injunction restraining the appellants from availing themselves of the provisions of such decree, certainly do present questions which are within our jurisdiction to consider.

Referring to the previous somewhat extended statement of the facts, we may briefly recapitulate a few of the principal dates. In August, 1880, Marvin Sackett brought his suit in the supreme court of the state of New York, on behalf of himself and all other holders and owners of bonds of certain railroad companies against Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston, & Montreal Railway Company and David Butterfield, receiver of said company, praying for the appointment of a receiver and for a sale of the railroad and franchises for the benefit of the bondholders. On October 11, 1880, a receiver was appointed and qualified.

On April 2, 1881, on petition of the receiver, and after a report by an expert disclosing the necessity for expenditure to make the road safe and to enable trains to be run, an order was made by the court authorizing the receiver to issue and negotiate $350,000 in certificates, the same to be a first lien. The certificates were sold, and the proceeds expended under the approval of the court. On June 12, 1885, sale was made of the road and deed delivered to Foster and Hazard for $155,000, subject to the payment of the unpaid portion of the principal and interest of the certificates.

457] *On April 9, 1886, the Central National Bank of Boston brought suit in the supreme court of New York, on its own behalf and that of others as owners of the certificates, against Foster, Hazard, the New York, Rutland, & Montreal Railway Company, and the American Loan & Trust Company. On March 24, 1887, the suit having been transferred on the petition of the defendants to the circuit court of the United States, after full hearing and argument the latter court rendered a final decree, establishing the rights of the Central National Bank of Boston and of others as owners of said certificates, declaring the latter to be a first lien, decreeing that Foster and Hazard were liable for any deficiency if sale should fail to realize enough to pay certificates. On March 23, 1892, sale under said decree to Foster for $7,500, and on April 25, 1892, deed of conveyance by referee to Foster. On December 8, 1890, Stevens and others brought their suit in the supreme court of New York against the Central National Bank of Boston, the other holders of certificates, Foster, Hazard, and others, to set aside decree in case of Sackett and to enjoin proceedings in the circuit court of the United States. On November 11, 1891, judgment setting aside sale in the case of Sackett and finally enjoining the Central National Bank of Boston and others, plaintiffs in the circuit court of the United States, from selling under the decree of the Federal court.

On May 16, 1892, sale and conveyance were made by referee under the decree in the present suit to Foster. On May 9, 1893, judgment of the general term, and November 27, 1894, judgment of the court of appeals, was rendered, affirming the judgment of the supreme court.

It will be perceived, on an inspection of these dates, that when the present suit was brought a final judgment had been rendered in the circuit court of the United States, establishing the title and rights of the holders of the certificates, directing a sale by a referee, and adjudging the personal liability of Foster and Hazard for an unpaid portion of said certificates after the application of the proceeds of sale; that when the judgment of the supreme court was entered in the present case, *and without awaiting the result of the[**458**
appeal to the court of appeals, a sale was had in which Foster became the purchaser on a bid of $7,500; and that Foster was likewise the purchaser at the sale on the decree of the circuit court.

The record does not disclose what application was made of the purchase money paid by Foster on his respective purchases at the two sales, but it may be easily conjectured that, after the payment of the costs and of the expenses of the sales, little or nothing would be left applicable to the bonds and certificates. Thus the singular result, thus far reached, of this protracted and expensive litigation, is that Foster, who had with Hazard been the purchaser at the Sackett sale, has become the owner of the railroad upon the payment of a merely nominal sum, and that the bondholders and the owners of the certificates have realized nothing. And it further thus appears that ever since May 16, 1892, the controversy has really been between the holders of the receiver's certificates and Foster, who has, for a trifling sum, become the owner of a railroad as improved by money procured by the sale of the certificates.

It may be that Foster, when he bought under the decree of sale in the present suit, did so in pursuance of some arrangement with the bondholders and as their trustee. But whether Foster, when he bought under the decree of the circuit court of the United States, subjected himself to that feature of the decree that made him personally liable for the unpaid portion of the certificates, and precluded himself from relying on the decree of the supreme court of New York setting aside the Sackett sale, and whether the setting aside the sale in

the Sackett suit would invalidate receiver's certificates issued years before and whose proceeds had gone into the improvement of the property, and whether, in case of Foster's inability to respond to his personal obligation, the unpaid portion of the certificates would be a lien on the railroad in his hands and those of his vendees, are questions for the circuit court of the United States, which cannot be withdrawn from its determination by the subsequent proceedings in the supreme court of New York. Any confusion that might otherwise have arisen by reason of conflicting views [459] between the Federal and state *courts has been prevented by the fact that Foster, who himself originally invoked the jurisdiction of the circuit court of the United States, has become the purchaser of the railroad under the decrees of both courts, whereby the only substantial controversy that remains is between him, as such purchaser, and the holders of the certificates.

Those portions of the decree of the supreme court of New York and of the court of appeals which sought to compel the complainants in the suit pending in the circuit court of the United States to come into the state court and to there relitigate their titles to the certificates and the amounts thereof, and which sought to restrain them by injunction from proceeding under the final decree of sale of the circuit court, and from enforcing the other remedies adjudged to them by that decree, were, in our opinion, erroneous. Due effect was not thereby given to the judgment or decree of the circuit court, at least in so far as that decree had established the ownership and amounts of the certificates, and the injunction was a plain interference with the proceedings in another court which had full and complete jurisdiction over the parties and the subject-matter of the suit, and which jurisdiction had attached long before the suit in the supreme court had been begun.

It will suffice to cite a few of the cases:

"It is a doctrine of law, too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For, if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would pro- [460] duce a conflict extremely *embarrassing to the administration of justice. In the case of *Kennedy* v. *The Earl of Cassillis* [2 Swanst. 321], Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the court of sessions of Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the court of chancery could in that way restrain proceedings in an independent foreign tribunal, the court of sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum." *Peck* v. *Jenness*, per Mr. Justice Grier, 48 U. S. 7 How. 612, 624 [12: 841, 846].

"State courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit courts and state courts act separately and independently of each other, and in their respective spheres of action the process issued by the one is as far beyond the reach of the other as if the line of division between them 'was traced by landmarks and monuments visible to the eye.' Appellate relations exist in a class of cases between the state courts and this court, but there are no such relations between the state courts and the circuit courts. Viewed in any light, therefore, it is obvious that the injunction of a state court is inoperative to control, or in any manner to affect the process or proceedings of a circuit court, not on account of any paramount jurisdiction in the latter courts, but because, in their sphere of action, circuit courts are wholly independent of the state tribunals." *Riggs* v. *Johnson County* [*United States, Riggs*, v. *Johnson County Supers.*], 73 U. S. 6 Wall. 166 [18: 768].

Whether due effect has been given by a state court to a judgment or decree of a court of the United States is a Federal question within the jurisdiction of this court, on a writ of error to the supreme court of the state. *Crescent City Live Stock L. & S. H. Company* v. *Butchers' Union Slaughter-House & L. S. L. Company*, 120 U. S. 141 [30: 614].

The exemption of the authority of the courts of the United *States from interference [461] by legislative or judicial action of the states is essential to their independence and efficiency. *Freeman* v. *Howe*, 65 U. S. 24 How. 450 [16: 749]; *Buck* v. *Colbath*, 70 U. S. 3 Wall. 334 [18: 257]; *Rio Grande R. R. Co.* v. *Gomila* [*Rio Grande R. Co.* v. *Vinet*], 132 U. S. 478 [33:400].

In Story's Equity Jurisprudence, vol. 2, § 900, it is said, referring to the power sometimes exercised by courts of equity, to restrain parties within their jurisdiction from proceeding in foreign courts: "There is one exception to this doctrine which has been long recognized in America, and that is that the state courts cannot enjoin proceedings in the courts of the United States, nor the latter in the former courts."

It is contended by the counsel for the defendants in error, in a supplemental brief, that these principles, so long and so well settled, have been modified by some recent decisions of this court, and the case of *Moran* v. *Sturges*, 154 U. S. 256 [38: 981], and of *Shields* v. *Coleman*, 157 U. S. 168 [39: 660], are cited in support of that contention. Such a conception of the import of those cases must have been formed from a hasty reading, for they are in perfect harmony with the previous cases, and,

indeed, may properly be cited to sustain the reasoning upon which those cases proceeded.

In *Moran* v. *Sturges*, the chief justice, delivering the opinion of the court, cited the cases hereinbefore referred to and others, and stated the general rule to be that state courts cannot enjoin proceedings in the courts of the United States. In that case the supreme court of the state of New York had issued process against certain libellants in the district court of the United States, and had, after hearing, enjoined them from taking any further proceedings on their libels. This judgment of the supreme court being affirmed by the court of appeals, and the judgment of the latter court being remitted to the supreme court and entered there as its judgment, the libellants sued out a writ of error to this court, and it was here held that the state court had no jurisdiction *in personam* over the libellants as holders of maritime liens when the libels were filed; that the question of jurisdiction was one for the district court to decide in the first instance; that the district court had jurisdiction; and **462**] that the judgment under *review was in effect an unlawful interference with the proceedings in that court.

It is true, as the report of the case shows, that two of the judges dissented, but not because of any disapproval of the principles laid down by the court, but because it was thought that the possession of the vessels in question had vested in the state court before the libels were filed in the district court.

In *Shields* v. *Coleman* there was a controversy for possession of certain railroad property, and it was held that a circuit court of the United States has not the power to appoint a receiver of property already in the possession of a receiver duly and previously appointed by a state court, and cannot rightfully take the property out of the hands of the receiver so appointed by the state court. Such a decision, it is scarcely necessary to say, gives no support to the contention of the appellees.

The reasoning of the court of appeals, affirming the judgment of the supreme court of New York, does not seem to us to comport with the law as established by the decisions of this court. It is claimed by the learned judge, who delivered the opinion of that court, that the rule is that "although the courts of one country have no authority to stay proceedings in the courts of another, they have undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are residents within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them by injunction to proceed no further in such suit. In such a case these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of the dispute, they consider the equities between the parties and decree *in personam* according to those equities and enforce obedience to their decrees by process *in personam*."

This language is quoted from Story's Eq. **463**]Jur. § 899; but *the learned judge overlooked the passage immediately following, and hereinbefore quoted: "There is one exception to this doctrine which has been long recognized in America, and that is that the state courts cannot enjoin proceedings in the courts of the United States, nor the latter in the former courts. This exception proceeds upon peculiar grounds of municipal and constitutional law, the respective courts being entirely competent to administer full relief in the suits pending therein." Nor did the decision of this court in *Peck* v. *Jenness*, already cited, receive attention, wherein it was said, after adverting to the proposed distinction between enjoining a court and enjoining suitors therein, "the fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."

Nor are we able to acquiesce in the reasoning of the learned judge when he says that "the setting aside of the judgment in the Sackett suit, upon which the suit in the United States circuit court was founded for fraud, was a *new fact* occurring since the decree in that court which gave jurisdiction in this action to enjoin proceedings thereon." Doubtless there may be facts occurring after the rendition of a judgment which would render its enforcement inequitable; such, for instance, as payment, or a reversal thereof on appeal by a superior court. But surely a judgment and injunction rendered subsequently in another and independent forum cannot constitute such new facts unless we are prepared to concede that, as between two courts of concurrent jurisdiction, it is the judgment of the court whose jurisdiction is *last* invoked which shall be entitled to prevail. This view does not overlook the decision of this court in *Marshall* v. *Holmes*, 141 U. S. 589 [35: 870], where it was held that a circuit court of the United States, in the exercise of its equity powers, and where diverse citizenship gives jurisdiction over the parties, may deprive a party of the benefit of a judgment fraudulently obtained by him in a state court, if the circumstances are such as would authorize relief by a Federal court if the judgment had been rendered *by it and not by a state [**464** court. There the suit to restrain the owner of the judgment from enforcing it was brought in the state court that had rendered the judgment, and was removed into the Federal court on the ground of diverse citizenship, and it was sought to impeach the judgment for the fraud of the party who procured it. In the present case, no fraud of any kind is imputed to the plaintiffs in the circuit court of the United States, nor it is alleged that the action or proceedings in that court were founded in any mistake of facts, or were influenced by any misrepresentation or fraud practised upon the court. But the purpose of this suit was to practically nullify the proceedings in the circuit court, and to enjoin the suitors therein from pursuing their remedy in that court, not for any fraud of theirs used in promoting their cause, but for the alleged fraud of other parties in another court, and in a case in which these appellants were not parties.

It is claimed in the brief for the defendants

in error that whatever may be the rule in ordinary cases there is no necessity in the present case of modifying the decree of the state court, and we are pointed to the statement in the opinion of the court of appeals, that "there is nothing in the judgment at bar that attacks the jurisdiction of the United States circuit court or questions the legality of its decree." We must suppose this language to mean that to enjoin the plaintiffs from proceeding to enforce the decree did not affect the legality or efficacy of the decree. Such must have been the meaning of the learned judge, because he proceeds to assert that "it is clear, both upon principle and authority, that this power [to enjoin the certificate holders] did exist, and that the sale under the decree of the United States circuit court was without force or effect as to the parties in that suit, as they proceeded in violation of the injunction contained in the judgment at bar."

But it has been frequently determined by this court that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until the judgment shall be satisfied. Thus it was said in *Riggs* v. *Johnson County*, [*United States, Riggs,* v. *Johnson County Supers.*], 73 U. S. 6 Wall. 166 [18: 768], that "process subsequent to judgment is as essential **465**]*to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution." And in *Amy* v. *Supervisors* [*Amy* v. *Barkholder*], 78 U. S. 11 Wall. 136 [20: 101], it was said: "The two sets of tribunals—state and national—are as independent as they are separate. Neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees."

"An execution is the end of the law. It gives the successful party the fruits of his judgment." *United States* v. *Nourse*, 34 U. S. 9 Pet. 28 [9: 39]. But it is scarcely necessary to quote authorities to show that to deprive a court of the power to execute its decrees is to essentially impair its jurisdiction. "*Juris effectus in executione consistit.*" Co. Litt. 289.

The conclusions we have reached are that the judgment of the supreme court of New York and of the court of appeals affirming the same are erroneous in so far as they command the Central National Bank of Boston, the Massachusetts Mutual Life Insurance Company, and other holders of the receiver's certificates whose rights, as such holders, were adjudged by the circuit court of the United States, to appear before the referee appointed by the supreme court in the present case, and which enjoin the Central National Bank of Boston and others whose rights have been adjudged by the circuit court of the United States for the northern district of New York from proceeding with the sale under the decree of that court.

The judgment of the Supreme Court of New York and of the Court of Appeals, in these particulars, are accordingly reversed, and the cause is remanded to that court for further proceedings not inconsistent with the opinion of this court.

Mr. Justice **Peckham** dissented.

CONSTANTINE J. SMYTH, Attorney General, *et al.*, Constituting the Board of Transportation of Nebraska *et al.*, *Appts.*, [**466**

v.

OLIVER AMES *et al.*

SAME

v.

GEORGE SMITH *et al.*

SAME

v.

HENRY L. HIGGINSON *et al.*

(See S. C. Reporter's ed. 466-550.)

Right to sue in equity—multiplicity of suits—suit against the state—rates on Union Pacific Railroad—railroad corporation is a person—state law establishing rates, when void—judicial control—Federal Constitution—discrimination in rates—rule for determining—fair value of property—public right—power of government—rule of value—Nebraska law unconstitutional.

1. One who has a right to sue in equity in a Federal court cannot be deprived of that right because he can sue at law in a state court on the same cause of action.
2. Equity may interfere where its general decree would prevent a multiplicity of suits, and give a more certain and efficacious remedy than can be had at law.
3. A suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff is not a suit against the state within the meaning of the 11th Constitutional Amendment.
4. Congress not having exerted the power to fix rates on the Union Pacific Railroad, given by the act of July 1, 1862, a state may prescribe rates for transportation thereon between points within its territory.
5. A railroad corporation is a person within the 14th Amendment forbidding a state to deprive any person of property without due process of law, or to deny any person the equal protection of the laws.
6. A state law, or regulations made thereunder, establishing rates for transportation by railroad that will deprive the carrier of just compensation, is repugnant to the 14th Constitutional Amendment, as depriving the carrier of his property without due process of law, and denying to it the equal protection of the laws.
7. While the state may fix rates of transportation,

NOTE.—*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.

As to equity jurisdiction after trial at law, see note to Smith v. McIver, 6: 152.

As to whether equity will relieve against a mistake of law, see notes to Hunt v. Rhodes, 7: 27; and Hunt v. Rousmanier, 5: 589.

As to regulation of rates by statute, see notes to Winchester & L. Turnp. Road Co. v. Croxton (Ky.) 33 L. R. A. 177, and to Louisville & N. R. Co. v. Com. (Ky.) 33 L. R. A. 209.

As to jurisdiction of suit against state railroad commissioners, and discriminating against foreign railroads, see note to Minnesota, Railroad W. Commission, v. Chicago, St. P. M. & O. R. Co. (Minn.) 3 L. R. A. 238.

As to state power to regulate freights and fares, see note to Cleveland, C. C. & I. R. Co. v. Closser (Ind.) 9 L. R. A. 754.

the question whether the rates are so unreasonably low as to deprive the carrier of its property without such compensation cannot be determined by state statute or regulations thereunder so conclusively that the matter may not become the subject of judicial inquiry.

8. The power given by the Constitution of Nebraska to its legislature to fix reasonable rates for transportation cannot be exerted in derogation of rights secured by the Federal Constitution.

9. Railroads may not discriminate against the people of any one state, but are not necessarily bound to give the same rates to the people of all the states, as the kind and amount and cost of business vary in the several states.

10. The reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it.

11. Railroad rates should be fixed with reference to the fair value of the property used and services rendered, and not merely to pay expenses, interest, and dividends, nor in order to realize profits upon an excessive valuation or a fictitious capitalization.

12. The public have a right to be exempt from unreasonable exactions: and the interest of the corporation is not the sole test of suitable rates.

13. A railroad corporation accepts its rights, privileges, and franchises subject to the power of government by legislation to protect the people against unreasonable charges by it, but cannot be required to use its property for the public without just compensation.

14. To ascertain the value of railroad property, the cost of construction and improvements the amount and value of its bonds and stock, its earning capacity and operating expenses, are to be considered.

15. The Nebraska law of 1893, to regulate railroads, classifying freights, fixing rates, etc., is repugnant to the United States Constitution and void as prohibiting railroads in that state from receiving reasonable and just compensation, and depriving them of property without due process of law and of the equal protection of the laws.

[Nos. 49–51.]

Argued March 4, 5, 1896. Ordered for reargument April 20, 1896. Reargued April 5, 6, 7, 1897. Decided March 7, 1898.

APPEALS from a decree of the Circuit Court of the United States for the District of Nebraska in each of the above cases, perpetually enjoining the railroad companies from making a schedule of rates for transportation reducing them to those prescribed by the state act of Nebraska, approved April 12, 1893, or from conforming to the provision of said act, and restraining the board of transportation of said state *et al.* from hearing or determining any complaint against said railroad companies or either of them for or on account of any act done by them or either of them which is forbidden by said act, and from instituting or prosecuting any action or proceeding for violation of said act, and adjudging said act to be void, etc., in actions brought by the above-named appellees against the said appellants in each of the above named cases, for the relief granted by the said decrees. *Affirmed.*

See same case below, 64 Fed. Rep. 165.

The facts are stated in the opinion.

Messrs. **John L. Webster,** *A. S. Churchill,* Attorney General of Nebraska, and *W. A. Dilworth* for appellants on first argument.

Messrs. **John L. Webster, William J. Bryan,** and *Constantine J. Smyth,* Attorney General of Nebraska, for appellants on reargument.

Messrs. **J. M. Woolworth** and **James C. Carter** for appellees on first argument and on reargument.

Argument of *Mr.* **John L. Webster,** for appellants. *Mr. A. S. Churchill,* Attorney General of Nebraska, was on his brief:

Before taking up the question as to the validity of the act in question, we desire to call the attention of the court to some of the propositions stated by Circuit Judge Brewer in his opinion, filed herein below; for we conceive that these propositions, thus stated, contributed largely to what we believe to be an erroneous conclusion.

In the opinion it is stated: "Property invested in railroads is as much protected from public appropriation as any other. If taken for public use, its value must be paid for. . . . He may have made his fortune dealing in slaves, or, as a lobbyist, or in any other way obnoxious to the public; but, if he has acquired the legal title to the property, he is protected in its possession, and cannot be disturbed until the receipt of its actual cash value. The same rule controls, if railroad property is sought to be appropriated. No inquiry is open as to whether the owner has received gifts from the state or individuals or whether he has, as owner, managed the property well or ill, or so as to acquire a large fortune therefrom. It is enough that he owns the property, has the legal title, and so owning, he must be paid the actual value of that property. . . . These propositions, in respect to condemnation proceedings, are so well settled that no one ever questions them.

We take no exception to this proposition. But it is equally well settled that, where such property is encumbered, the encumbrance cuts no figure in ascertaining the cash value of the property in such condemnation proceedings. The party holding such encumbrance would be entitled to the proceeds to the extent of such encumbrance; provided, it did not exceed the actual cash value so ascertained; but where it did, the property would be discharged of the lien, and the party holding such encumbrance would have to look to the personal liability of the obligor.

Again, it is said in the opinion: "If it be said that the rates must be such as to secure to the owners a reasonable per cent on the money invested, it will be remembered that many things have happened to make the investment far in excess of the actual value of the property—injudicious contracts, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or management of the property. These, and many other things, as is well known, are factors which have largely entered into the investment with which many railroad properties stand charged. Now, if the public was seeking to take title to the railroad by condemnation, the present value of the property,

and not the cost, is that which it would have to pay." Then, indeed, would the loss arising from "injudicious contracts, poor engineering, unusually high cost of material" and the "rascality on the part of those engaged in the construction or management of the property," fall upon those who made the "injudicious contracts" or employed "poor engineering" to be done, or paid 'unusually high cost for material," or engaged rascals in the construction or management of the property. And why should they not? Did not the investors, in either the stock of the company, or in its bonds, take his chances in these respects, just the same as the investor in the stock of any other business corporation, or in the bonds or mortgages upon any other property? Why, may we not ask, should the public bear the burden imposed by "injudicious contracts," or "poor engineering," or the "unusually high price paid for material," or the "rascality on the part of those engaged in the construction or management of the property?" The public had nothing to do with any of these. The public did not invest upon such chances. The public can justly be called upon to pay such reasonable rates as will yield a reasonable compensation for the use of the fair and reasonable value of the property, and not more. If investors put their money into the hands of those who thus manage the property, or in securities upon properties thus constructed, or managed, it was either their misfortune or their folly; but it affords no excuse for burdening the public with high rates, to the profit either of the rascals or to those who trusted in them.

His honor further added in the opinion: "Nevertheless, the amount of money that has gone into the railroad property as the actual investment, as expressed, theoretically at least, by the amount of stock and bonds, is not to be ignored, even though such sum is far in excess of the present value."

Is it possible that the patrons of a railroad, who had nothing to do with the injudicious contract, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or management, must bear all of the burden of these injudicious contracts, poor engineering, and rascality in the construction or management in order that the poor engineers and rascals or those who employed them may reap the benefit? If this be so, then, indeed, the time has actually come when the railroad lord can say to the public: "Ye know I reap where I had sown not, and that I gathered where I had not strewn."

Again, his honor tells us that "the transportation of persons and property by private individuals and corporations has become a business and not a system."

Then, he says: "Now in the carrying on of any private enterprise, increase of business with increase of profits is a stimulating thought, and for this every variety of action is taken. Advancement, solicitation, inducement, favors are all freely resorted to, but with the single purpose of larger business and greater gain. It is not strange that in carrying on of transportation all the characteristics of other kinds of business are found."

There can be no doubt about the correctness of either of these propositions. We admit their truth, and insist that there shall be applied to this business and to these inducements the same rules of law which are applied under similar circumstances to other business and to like inducements in the management of other business enterprises.

Without any statute regulating rates, a common carrier of persons or property, in the absence of a specific contract, is, at common law, bound to carry either persons or property for a reasonable compensation.

So, in the absence of a specific contract, a tenant is bound to pay a reasonable rental for the use of the leased premises.

Thus, a large number of instances might be cited where the law would imply a reasonable compensation for the use of property or persons, or both; yet, we know of no instance where, in arriving at what is a just or reasonable compensation, either the encumbrance upon the property, or the unusually high price paid for material, or the lack of skill in the mechanic who constructed the property or the racality of those in charge of the construction or management was taken into consideration, by any court, in determining what was a reasonable compensation. These propositions are elementary. It needs no citation of authorities to support them.

Then, if railroading is a business, and no one would dispute it, we can see no reason why it should not be governed by the same rules of law as other business is in determining what is and what is not a reasonable compensation.

Wellman v. *Chicago & G. T. R. Co.* 83 Mich. 592.

Every presumption is in favor of the validity of the act in question.

The act will not be presumed to be repugnant to the Constitution of the United States, or of the state.

It must be made to appear affirmatively that the act in question is repugnant to the Constitution of the United States.

In *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 362–395 (38:1014–1022, 4 Inters. Com. Rep. 560), it is said: "It is not to be supposed that the legislature of any state, or a commission appointed under the authority of any state, will ever engage in a deliberate attempt to cripple or destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals."

This being so, then it must be made clearly to appear from the pleadings and the evidence that the legislature, in passing the act in question, did not, in fact, do justice to the several railroads affected by the act; and that by reason thereof the plaintiffs below were injured in their property rights as stockholders in such company or companies.

Then it must follow that, before the decree below can be sustained, the following propositions of fact must have been established by competent evidence:

1. That the plaintiffs below were stockholders in the respective corporations, as alleged.

2. That each of the railroads are operated in a prudent and economical manner.

8. That when so managed, the reduction of rates provided for in the act, when taken in connection with all the other earnings of the several companies, will deprive such company of a just or reasonable compensation for the services so performed.

4. The plaintiffs below attacked the constitutionality of the act; the burden, therefore, was upon them to cstsblish every essential element of fact necessary to show the invalidity of the act.

The answer of appellants puts in issue every one of the above questions of fact, save the one as to the plaintiffs below being stock holders, which is admitted.

We call the court's attention, then, to the fact that there is wanting any competent evidence tending to show that either of these railroads are prudently or economically managed.

Neither is there any evidence tending to show the income from all the business of the several companies from all sources.

As to the necessity of the entire earnings of these roads appearing in evidence before the act can be declared invalid, see *Com.* v. *Covington & C. Bridge Co.* 14 Ky. L. Rep. 836.

This case was reversed by this court, 154 U. S. 204 (38: 962, 4 Inters. Com. Rep. 649), but not upon this ground.

As to the operating expenses see *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 339, 345 (36: 176, 180).

The entire business of the consolidated company as a whole must be considered in determining reasonable rates.

St. Louis & S. F. R. Co. v. *Gill*, 156 U. S. 649, 665, 666 (39: 567, 573).

After paying expenses of operation, who is to determine what are reasonable rates?

Lord Ellenborough, in *Allnutt* v. *Inglis*, 12 East, 527, on 537, said: "There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it, but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms." This is cited with approval in *Munn* v. *Illinois*, 94 U. S. 127 (24: 85), and it is said in the latter case, on 132 (24:86): "Certainly, if any business can be clothed 'with a public interest, and ceases to be *juris privati* only,' this has been."

If a warehouse can "cease to be *juris privati*," certainly the "business" of railroading must.

If it be true that railroad property ceases to be *juris privati*, and is clothed with a quasi-public use, whenever the operation of such railroad is undertaken, then it must follow as a corollary thereto that all parties dealing with such property, or taking security upon such property, must take such property or security thereon with notice of such quasi-public use. In *Reagan* v. *Mercantile Trust Co.* 154 U. S. 413, 416 (38: 1028, 1030, 4 Inters. Com. Rep. 575), in the opinion it is said: "By the act of incorporation Congress authorized the company to build its road through the state of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the state to other points also within the state, and that in so doing it would engage in a business, control of which is nowhere by the Federal Constitution given to Congress. It must have been known that, in the nature of things, the control of that business would be exercised by the state. . . . Had Congress deemed it necessary, to the further security of the government bonds, that this road would be exempt from state control, it would have said so. Not having done so, it is manifest Congress expected such business to be regulated by state legislation."

The right, then, of the government under its bonds is subject to and inferior to the right of the state in its control of freigh' rates as to purely Nebraska freights. For this right exists by virtue of the law permitting regulation and control of purely domestic business by the state, and the law enters into and forms a part of the contract.

If this presumption of knowledge is true of Congress and as to the holders of the bonds of the Union Pacific company, it must be equally true of the holders of bonds of each of the other companies to these actions. It follows then:

1. The right of the state to fix a reasonable maximum freight rate upon all freight shipped from one point in the state to another point in the state is paramount to any right which is or may be acquired by any bondholder, whether that bondholder be the government or a private individual.

2. The right of the state being a superior right in determining what is a reasonable rate, the interest of such bondholder cannot be set up or considered as against the interest of the state.

3. In determining the reasonableness of the rates it cannot be other than such a rate as will pay the expense of operation, when prudently and economically managed, and something more, at least, for the use of the company.

The next question which naturally arises is, Who is to determine what such excess above operating expenses shall be? Is it a question for the courts, or is it a question of public policy, and therefore a question for the legislature.

It is stated in the opinion of the *Railroad Commission Cases*, 116 U. S. 307 (29: 636), that "this power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." This quotation is copied by Justice Brewer in *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 398 (38: 1024, 4 Inters. Com. Rep. 560), with approval.

The exception to legislative control must then be by reason of the legislation itself operating to destroy the property, or the limitation, fixed by the statute, must be equivalent to confiscation, or require the railroad corporation to carry persons or property without just reward, or the act itself must operate to do that which in law amounts to a taking

of private property for public use, without just compensation or without due process of law. The legislation in question does not amount to the taking of the actual property of the railroad company. It does not seek to take the property; neither does it purport to seek to require the railway company to carry either persons or property without reward.

Hence it cannot be said that the act in question seeks to take private property for public use without just compensation; nor can it be said that the act in question requires these railroad corporations to carry the property without reward.

Dow v. *Beidelman*, 125 U. S. 680, 691 (31: 841 844, 2 Inters. Com. Rep. 56); *Chicago, B. & Q. R. Co.* v. *Iowa*, 94 U. S. 155 (24: 94); *Railroad Commission Cases*, 116 U. S. 335 (29:646).

If these decisions are based upon sound principles of law, it must follow that so long as the act is constitutional in all other respects, and does provide a rate sufficient to more than pay operating expenses, it is a question of legislative policy and one which the courts cannot inquire into.

Then the question is, Who is to determine the question of reasonableness? Is it the courts, or is it the legislature? It seems to us that if the legislation does not actually deprive the corporation of its property, nor require it to carry persons or property without reward sufficient to more than pay operating expenses economically administered, it is purely a question of public policy into which the courts cannot inquire.

No question is more firmly settled in the jurisprudence of this country than is the one that what is and what is not public policy is one for the legislature, and not for the courts.

Brass v. *North Dakota, Stœser*, 153 U. S. 401, 405 (38: 761).

So we say, if the rate, fixed by law, is such as to provide for a rate which will pay more than operating expenses where the roads are managed and operated with economy, it is not for the courts to say what that income shall be, when it applies to all alike who are alike situated in that business.

A careful review of all the cases, both state and Federal, we think, will show the true rule to be that, so long as the legislation itself does not operate to deprive the individual or corporation of his or its property, nor require the actual use of the property of the individual or corporation without compensation, then such legislation cannot be said to be in conflict with either state or Federal Constitution. What such compensation shall be, after paying operating expenses, is purely a question of public policy to be determined by the legislature and not by the courts. If this be true, certainly there was error in the circuit courts, decreeing a perpetual injunction against the law in question. The evidence establishes beyond question that the rates fixed under this law will produce an income considerably more than sufficient to pay operating expenses.

The Constitution of the United States is of a limited scope. It does not profess and was not designed to prevent all possible unwise and unjust legislation.

The hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity; and the remedy for evils of that character is to be sought from state legislatures.

Missouri P. R. Co. v. *Humes*, 115 U. S. 512, 520 (29: 463, 466).

The Constitution itself contains no provision restricting the power of the states as to such legislation. It has, indeed, been contended that, where such legislation was applied to a corporation, it constituted a violation of a contract with the state embodied in the charter, and was thus brought within the provisions of article 1, § 10. But this argument has been rejected by the supreme court, even when the charter contained no express power of amendment and repeal. See *Ruggles* v. *Illinois*, 108 U. S. 526 (27: 812). It was early decided that the first eight amendments did not limit the power of the states (*Barron* v. *Baltimore*, 7 Pet. 243 (8: 672)), and it may now be assumed that the power of the states in this respect is unlimited, so far as the Federal Constitution is concerned, unless restricted by the provision of the 14th Amendment, that no state shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The question is, in fact, therefore, purely of the construction and scope of that Amendment.

It cannot be successfully contended that regulations of trade, even if carried to the point of prohibiting an industry, infringes the constitutional guaranty of liberty.

It is equally true that such regulations do not constitute a denial of the equal protection of the laws. The scope of the latter provision was considered by the Supreme Court in *Barbier* v. *Connolly*, 113 U. S. 27 (28: 924), and was said to mean that equal protection should be extended to all under like circumstances; that no restraints or burdens should be put upon anyone, except such as were imposed on others in the same calling and condition.

To render a state law invalid, as inconsistent with the provision of the 14th Amendment now in question, it must be shown that some right of property is infringed.

In the case of *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649 (39: 567), Justice Shiras, speaking for the whole court, in reviewing the prior decision on page 657 (39: 570) thus sums up what had been determined: "This court has declared, in several cases, that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws." We take it, then, that this is as far as the courts have gone.

The legislation, then, must be shown by the evidence to be such as to deprive the companies of their property without due process of law, or as to deprive them of the equal protection of the laws. But it is said in this

case, at page 663 (39: 572): "The opinion of this court on appeal was that while it was within the power of a court of equity in such case to decree that the rates so established by the commission were unreasonable and unjust, and to restrain their enforcement, it was not within its power to establish rates itself, or to restrain the commission from again establishing rates." If it is not, then, within the power of the court to establish rates itself, it must exist within the legislative power, restricted only so far as not to fix such rates so low as to deny the companies the right of property or the equal protection of the law. It must follow, then, that so long as the rate fixed by the law will pay the operating expenses when economically administered, and something in addition thereto, the power of the court ends, and the extent to which rates must produce profits is one of political policy.

The real objection to the law in question on the part of the complainants below, and of the several railway companies, does not consist so much in the amount of the reduction of their earnings as it does in the fact that this law, if held valid, will deprive the companies of the possibility of making preference to favored parties and friendly localities, and make up such deficit by charging higher rates to less favored parties and communities.

Argument of *Mr.* **William J. Bryan,** for appellants:

Appellants contend: First. That the several states have the right to fix, either directly through an act of the legislature or indirectly through a commission, reasonable maximum freight and passenger rates upon traffic wholly within their borders.

Chicago, B. & Q. R. Co. v. *Iowa*, 94 U.S. 155 (24: 94); *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 164 (24: 97); *Chicago, M. & St. P. R. Co.* v. *Ackley*, 94 U. S. 179 (24: 99); *Winona & St. P. R. Co.* v. *Blake*, 94 U. S. 180 (24: 99); *Illinois C. R. Co.* v. *Illinois*, 108 U. S. 541 (27: 818); *Railroad Commission Cases*, 116 U. S. 307 (29: 636); *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557 (30: 244); *Dow* v. *Beidelman*, 125 U. S. 680 (31: 841, 2 Inters. Com. Rep. 56); *Covington & L. Turnp. Road Co.* v. *Sandford*, 164 U. S. 578 (41: 560).

Second. That as a general rule, the power of the courts to suspend the enforcement of a schedule of rates fixed by a state legislature or by a railroad commission can only be invoked when such rates yield an income so small as to leave absolutely nothing above operating expenses.

Chicago, M. & St. P. R. Co. v. *Minnesota*, 134 U. S. 418 (33: 970, 3 Inters. Com. Rep. 209); *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 339 (36: 176); *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 362 (38: 1014, 4 Inters. Com. Rep. 560); *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649 (39: 567); *Covington & L. Turnp. Road Co.* v. *Sandford*, 164 U. S. 578 (41: 560).

In *Chicago & N. W. R. Co.* v. *Dey*, 35 Fed. Rep. 878, 1 L. R. A. 744, 2 Inters. Com. Rep. 325, Mr. Justice Brewer said: "Counsel for complainants urge that the lowest rates the legislature may establish must be such as will secure to the owners of the railroad property a profit on their investment at least equal to the lowest current rate of interest, say 3 per cent. Decisions of the supreme court seem to forbid such a limit to the power of the legislature in respect to that which they apparently recognize as a right of the owners of the railroad property to some reward; and the right of judicial interference exists only when the schedule of rates established will fail to secure to the owners of the property some compensation or income from their investment. As to the amount of such compensation, if some compensation or reward is in fact secured, the legislature is the sole judge."

Such was also the principle established in the *Granger Cases* in 94 U. S. 178 (24: 98), where the court said: "Where property has been clothed with a public interest, the legislature may fix a limit to that which in law shall be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change." This doctrine was reaffirmed in *Dow* v. *Beidelman*, 125 U. S. 680 (31: 841, 2 Inters. Com. Rep. 56).

Third. That there may be special instances in which the courts will refuse to interfere, even though the rates fixed do not yield enough to pay operating expenses.

Chicago & G. T. R. Co. v. *Wellman*, 143 U. S. 339 (36: 176); *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 362 (38: 1014, 4 Inters. Com. Rep. 560); *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649 (39:567); *Covington & L. Turnp. Road Co.* v. *Sandford*, 164 U. S. 578 (41: 560).

In *Chicago & G. T. R. Co.* v. *Wellman*, Mr. Justice Brewer said: "It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of extravagant salaries,—$50,000 to $100,000 to the president, and in like proportion to subordinate officers? Surely, before the courts are called upon to adjudge an act of the legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be fully advised as to what is done with the receipts and earnings of the company; for if so advised it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'"

The above language was quoted with approval by Mr. Justice Shiras in delivering the opinion of the court in *St. Louis & S. F. R. Co.* v. *Gill*.

In *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 362 (38: 1014, 4 Inters. Com. Rep. 560), Mr. Justice Brewer said: "It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust

and unreasonable. And yet justice demands that everyone should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries; unjust discrimination as between individuals and shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is not sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road."

Fourth. The evidence in the cases at bar shows that the rates allowed by the Nebraska statute will yield to each and every railroad in the state a profit upon its investments over and above operating expenses.

Fifth. Upon the foregoing propositions of law and fact the judgment of the court below should be reversed and the rates fixed by statute allowed to stand.

Sixth. But in case this court shall hold that it has the right to pass upon the reasonableness of the profit allowed to the railroads of Nebraska by the statute under consideration, then, in such case, appellants contend—

A. That the present value of the roads, as measured by the cost of production, is the basis upon which profit should be computed.

In endeavoring to establish a reasonable rule we are bound to consider the conditions which surround other occupations. Railroads are built, owned, and operated by corporations; corporations are fictitious persons created by law; laws are made by the people through their representatives. It cannot be assumed that natural persons would intentionally create fictitious persons and endow them with rights and privileges greater than they themselves enjoy. Neither can it be assumed that the natural persons who make the laws desired to exempt corporations, the creatures of law, from the vicissitudes which surround themselves. The ordinary business man cannot avail himself of watered stock or fictitious capitalization, nor can he protect himself from falling prices. If his property rises in value, he profits thereby; so do the owners of a railroad under similar conditions. If his property falls in value, he loses thereby; so must the owners of a railroad under similar conditions unless it can be shown that railroad property deserves more protection than other forms of property. Can it be said that the railroad which carries the farmers' stuff to market merits greater consideration than the farmer who raises the crops? Can it be said that the railroad which carries a manufactured product to market merits greater consideration than the manufacturer? Can it be said that the common carrier is deserving of greater consideration than the ordinary business man whose merchandise gives the railroad a reason for existence? Is the man who carries property from producer to consumer a more important factor in society than both producer and consumer?

Such a rule does not do injustice to stockholders and those who desire to purchase stock. If the owners of the road have bonded the road for enough money to cover its present value, their stock does not represent value. The owners of such a road stand in the same position as the owner of a farm who has encumbered it for all it is worth; his equity of redemption is a legal title without a market value. They stand in the same position as the owner of a business block or of a stock of merchandise who has obtained the entire value of his property from a mortgagee.

Such a rule does not do injustice to the holders of railroad bonds; if their bonds do not exceed the present value of the property, they can expect an interest; if their bonds exceed in amount the present value of the property, they stand in the position of any other mortgagee who loans upon insufficient security or whose security diminishes in value after the loan is made. The only recourse the mortgagee usually has if his security becomes insufficient is to take the title to the property. If the first-mortgage bonds equal or exceed the value of the property, then the holders of subsequent liens stand in the same position as the man who invests in a second mortgage when the first mortgage covers the value of the property.

There can be no distinction made between bondholders and stockholders. If the states have a right to regulate rates, stockholders cannot resist the demand for reasonable rates by building the road with borrowed money. The stockholder invests in railroad stock, knowing that the road can only charge a reasonable rate and earn a reasonable return. The man who loans money to a railroad stands upon an equal footing with the stockholder, and, as against the state or the patrons, can assert no greater right than that possessed by the stockholders. Bondholders may foreclose their lien and become owners of the road. As against the state or the patrons they can have no higher privileges as bondholders before becoming owners than they have later as owners if it becomes necessary to take the road to satisfy their lien.

In support of the proposition that railroads should be placed upon the same footing as an ordinary business enterprise, it may be suggested that it is against public policy to raise up in any community or country a few persons, natural or corporate, and exempt them from the dangers and liabilities which must be encountered by the people in general. Those who are in possession of a monopoly are apt to be indifferent, if not actually hostile, to the interests of those who are immediately affected by a change in the business conditions of the country. If, for instance, railroad owners can demand a return upon capital never actually invested in the construction of the road or upon the original cost when the property has decreased in value, they not only have an unfair advantage over those who are subjected to competition, but may actually profit by conditions which are disastrous to others. An unrestrained monopoly preys upon all those who are so situated that they cannot themselves enter into a monopoly.

An additional reason why the court should

not enforce the demands of the railroads for returns upon inflated stocks and bonds is to be found in the fact that such action on the part of the courts would greatly embarrass, if not entirely defeat, the effort which is being made in various states to prevent the overcapitalization of railroads. The Constitution of Nebraska, article 11, § 5, contains the following provision:

"No railroad corporation shall issue any stock or bonds, except for money, labor, or property actually received and applied to the purposes for which such corporation was created; and all stock, dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void."

No one will question the wisdom of this constitutional restriction, and yet it will be impotent to protect the people from watered stock if the courts establish a rule which will enable the railroad companies to collect an income upon overcapitalization.

In comparing the rights of the patrons of the road with the rights of the holders of stocks and bonds, it must be remembered that the patron relies upon the law which compels common carriers to offer their services for reasonable compensation, while the purchaser of railroad stock or bonds only suffers from his own negligence if he fails to learn whether the money represented by those stocks and bonds actually went into the road or found its way into the pockets of railway promoters. If a person contemplates purchasing railroad bonds, he can inquire whether the railroad's indebtedness exceeds the cost of reproducing it; if he fails to make such inquiry, he ought to have no standing in a court of equity. He may be an innocent purchaser of bonds in the sense that the railroads issuing the bonds cannot make a legal defense to his claim, but he is not an innocent purchaser in the sense that the court must give actual value to his investment. In like manner the purchaser of stock can inquire whether the stock represents actual value. If he fails to inquire, or buys with knowledge that the debts exceed the cost of reproducing the road, he has no equity which a court can enforce.

The evidence shows that the railroads of Nebraska can be reproduced complete for about $20,000 per mile.

The following table, taken from the brief of associate counsel, shows the amount of stock and bonds issued by the various railroads which are parties to this suit:

	Capital Stock per mile.	Funded debt per mile.	Total per mile.
C. B. & Q.	$14,439	$22,034	$36,473
C., St. P., M. & O.	25,103	17,504	42,608
F. E. & M. V.	23,352	16,238	39,590
U. P. Ry.	33,318	70,468	103,786
O. & R. V.	5,021	12,324	17,345
St. J. & G. I.	18,322	34,768	53,060
K. C. & O.	22,769	14,007	36,007
Mo. Pacific	44,746	48,462	93,208
Pacific R. R. in Neb.	15,010	15,009	30,010
K. & B. H.	14,175	13,496	27,625
C. R. I. & P.	16,822	19,545	36,368

This table shows upon how large an amount of fictitious capital the road will collect an income if allowed to collect from patrons enough money to pay interest upon all bonds and dividends upon all stock issued.

B. The rates fixed in the statute under consideration allow to the railroads of Nebraska a reasonable profit upon the present value of the roads. The evidence in support of this proposition will be discussed by associate counsel.

Seventh. Counsel for appellees insists that competition gives to the patrons of a railroad full and complete protection from extortionate rates. This argument is sufficiently answered by the decisions already rendered by this court, wherein it has repeatedly affirmed the right of the state to regulate railroad rates, but it may be added that a railroad is to a certain extent a monopoly; it is only because it is a monopoly that it can collect unreasonable rates. Competition can only act within certain limits. If a railroad is built between two points, no other road can be built between those points (unless it mortgages the future) until the first road is realizing an income practically double a reasonable return upon the value of the road, because a new road would require an investment equal to the value of the first road, and until transportation rates on business done would pay running expenses and a reasonable profit on both investments competition would be prohibited. When two roads are built they must necessarily collect more in tolls than one road would be justified in collecting. The evidence in this case shows that the Union Pacific Railroad is capitalized (including both stock and bonds) at more than five times the cost of reproducing that portion of the road which lies within the state of Nebraska. If it should attempt to realize upon all of this capitalization it would probably encourage the building of a parallel line, but it can charge rates grossly excessive without fear of competition as to local traffic. The very existence of the road prevents the building of a new road capitalized at present cost, and, even if a new road should be built, commerce would be compelled to bear a higher burden than it would if this road were limited to charges which would produce a reasonable return upon the actual value of the road.

Chicago, R. I. & P. R. Co. v. *Union P. R. Co.* 47 Fed. Rep. 15.

In the above case the court clearly points out the expensiveness of competition as a means of regulating railroad rates.

Eighth. Counsel for appellees insist that the rates fixed by railroad companies may be unreasonable and yet not unreasonable enough to give state legislatures a right to lower them; he divides rates into reasonable, not reasonable and unreasonable. Under the head of reasonable rates he includes what they should charge; under the head of not reasonable rates he includes those which the railroads may charge, but should not; under the head of unreasonable rates he includes those which the road must not charge. This division is not supported by authority. The law which requires carriers to transport goods at a reasonable compensation is an absolute one and does not depend upon the motive of the carrier. There is no twilight period between reasonable rates and unreasonable rates; rates which are reasonable may be charged; rates which are not reasonable cannot be charged.

Argument of *Mr.* **J. M. Woolworth,** for appellees:

1. These decrees were right because the rates of charge prescribed and limited in the act known as "House Roll 33" were insufficient to yield to the companies reasonable compensation for their services in transporting property from one point to another within the state.

The doctrine has been firmly established by a long series of the judgments of this court, beginning with the *Granger Cases* decided in the year 1876, 94 U. S. 178 (24: 98), that the legislature may prescribe and limit the charges which railroad companies may make for their services in transporting persons and goods for the public. But this doctrine has been qualified and restrained. It has been again and again declared by this court that the power of the legislature in this matter is not unlimited; that it cannot be carried so far as to require them to carry persons or property without reward, because the imposition of such charges would operate the taking of private property for public use without just compensation and without due process of law.

In the *Railroad Commission Cases*, 116 U. S. 307, 331 (29: 636, 644), Mr. Justice Waite, speaking for the court, while sustaining the legislative power to fix rates to be charged by railroad companies, in order to guard against any unjust application of the doctrine, took the precaution to say:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

In *Dow* v. *Beidelman*, 125 U. S. 680, 689 (31: 841, 844, 2 Inters. Com. Rep. 56), Mr. Justice Gray, speaking for the court, quoted this language with approval.

In *Georgia R. & Bkg. Co.* v. *Smith*, 128 U. S. 174, 179 (32: 377, 380), Mr. Justice Field, delivering the opinion of the court, said that the power of the legislature to prescribe the charges of a railroad company for the carriage of persons and merchandise is "subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation."

In *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 458 (33: 970, 982, 3 Inters. Com. Rep. 209), Mr. Justice Blatchford, speaking for the court, said:

"If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

In *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 339 (36: 176), Mr. Justice Brewer delivering the opinion of the court, after reiterating the principle that an act of the legislature was not necessarily unconstitutional which fixed rates, said:

"The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates," that is, against unreasonable rates prescribed and limited by an act of the legislature.

In *Budd* v. *New York*, 143 U. S. 517 (36: 247, 4 Inters. Com. Rep. 45), Mr. Justice Blatchford said that the legislative "power of limitation or regulation is not without limit, and is not a power to destroy, or a power to compel the doing of the services without reward, or to take private property for public use without just compensation or without due process of law."

In *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 362, 399 (38: 1014, 1024, 4 Inters. Com. Rep. 560), Mr. Justice Brewer, again speaking for the court, said:

"In every Constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

In *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649 (39: 567), Mr. Justice Shiras, delivering the opinion of the court, said in the course of it, "that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws."

And at this term, in *Covington & L. Turnp. Road Co.* v. *Sandford*, 164 U. S. 578, 594 (41: 560, 566), Mr. Justice Harlan, delivering the opinion of the court, reviewed many of the cases above cited and said:

"A statute which, by its necessary operation, compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from keeping its road in proper repair and from earning any dividends whatever for stockholders, is as obnoxious to the Constitution of the United States as

would be a similar statute relating to the business of a railroad corporation having authority, under its charter, to collect and receive tolls for passengers and freight."

The question of fact remains whether House Roll 33 limited the charges which railroad companies may make for the carriage of goods so that their earnings would not cover the cost of doing the business and some compensation therefor.

One method of determining whether rates prescribed by the legislature are reasonable is to put them in force for one, two, or three years, and at the end of a proper period ascertain from the accounts of the business what the companies earned or lost. This method, however, is open to an obvious objection. If after statutory rates have been in operation a certain period it appears that the companies have not realized any compensation for their services, the loss sustained by them cannot in any way be made good.

To enforce statutory rates which are unreasonable in order to try their effect, and force upon the companies the loss or the contingency of loss which they would sustain while the rates were being put to the test, and without any possibility of being reimbursed, is the worst conceivable case of taking private property without compensation. The pretense that parties must submit to such method of testing the reasonableness of rates shocks the conscience of an honest man It is no better than hanging a man for murder and trying him afterwards.

There is another method of testing the reasonableness of statutory rates; it is to take the business for one, two, three, or more years immediately before the passage of the act and, by applying the rates to it, ascertain what they would have yielded. For instance, suppose the case of a road with a paid-up capital of $4,000,000, earning in the year just before the statutory rates were prescribed, $1,000,000 per annum, of which 60 per cent or $600,000 went to cost of operation, and 40 per cent or $400,000 to dividends. Now suppose the rates charged by the company were reduced by statute so that had they been in force the year before, its earnings would have been only $500,000, while its operating expenses continued to be $600,000, so that not only would the stockholders receive no dividend, but the company would sustain an actual loss of $100,000. Let this process be applied not only to the business of one year immediately preceding the passage of the statute, but to the second and the third years and as far back as the inquiry could be carried, with the same result. This method would amount almost to a demonstration that the statutory rates will not in the future yield a reasonable return for the services rendered by the company. This method is just as legitimate as the other; in one, as well as the other, actual figures taken from the accounts of the company are dealt with, and no guesses or estimates or calculation of contingencies are indulged, while the process of computation is exactly the same.

It is true that this method of testing the reasonableness of statutory rates by applying them to the business of past years does not and cannot take into account changes in circumstances and conditions which may afterwards take place; under their influence rates reasonable before the passage of the act may possibly become unreasonable; they may become unreasonably high or unreasonably low; but that is equally true when rates are tested by putting them in force for a limited time, and, if then found to be unreasonable, restraining the enforcement of the act in the future.

But these cases were heard at the circuit more than a year and a half after the act complained of was passed. That act was passed on the 12th of April, 1893, and Mr. Justice Brewer's opinion was filed on the 12th of November, 1894, and the decree entered on the 23d of that month. This period was quite sufficient for any changes of conditions or circumstances to be developed or to manifest themselves; and whatever they were, they could have been shown upon this record. Such changes did take place; they were very radical and the facts were shown in the proofs.

I shall begin the inquiry whether House Roll 33, had it been put in force during any one of three years immediately preceding its passage, would have yielded any compensation to the companies for their services; and I shall give figures about which there is no room for disagreement and which are least favorable to our contention. I propose to show, not that the statutory rates would not have yielded to the companies reasonable compensation for their services, but that they would not have yielded even cost of the business. I shall not complicate the inquiry by showing that these rates would have yielded nothing to apply on the interest of the debts of the companies, or on the cost or value of the road, or any returns, by way of dividends or otherwise, to the stockholders. I lay interest on bonds and mortgages and debts however evidenced and dividends to stockholders entirely out of view.

The first important fact testified to is that House Roll 33 reduces the charges made by the companies 29½ per cent.

The following table gives the percentage of expenses to earnings of the several companies for the years ending June 30, 1891, 1892, and 1893:

NAME OF ROAD.	Reductions by the bill.	Cost of doing all business.	Extra cost of local business.	Total.
1891.				
B. & M.	29 50	66.24	10	105.74
C. St. P. M. & O.	29.50	70 78	10	110.28
F. E. & M. V.	29 50	49.87	10	89.37
U. P. Ry.	29.50	68.94	10	108.44
O. & R. V.	29.50	120.26	10	159.76
St. J. & G. I.	29.50	96.44	10	135.94
K. C. & O.	29.50	99.54	10	139.04
1892.				
B. & M.	29.50	64.23	10	103.73
C. St. P. M. & O.	29.50	65.96	10	105.46
F. E. & M. V.	29.50	70.71	10	110.21
U. P. Ry.	29.50	56.44	10	95.94
O. & R. V.	29 50	93.12	10	132.62
St. J. & G. I.	29.50	74.23	10	113.73
K. C. & O.	29.50	75.19	10	114.69
1893.				
B. & M.	29.50	65.51	10	105.01
C. St. P. M. & O.	29.50	64.58	10	104.08
F. E. & M. V.	29.50	53.66	10	93.16
U. P. Ry.	29.50	58.51	10	98.01
O. & R. V.	29.50	94 14	10	133.64
St. J. & G. I.	29.50	62.05	10	101.55
K. C. & O.	29.50	76.50	10	116.00

This table shows that not one of these roads would have realized the cost of its local business in the three years ending June 30, 1891, 1892, and 1893, had their rates been those fixed by House Roll 33, except the Fremont, Elkhorn, & Missouri Valley in 1891 and in 1893, and the Union Pacific in 1892 and 1893; the Fremont Company would have earned 10.63 per cent in 1891, and in 1893, 6.84 per cent; and the Union Pacific 4.06 in 1892, and 1.99 in 1893.

The same result may be reached by another process. Instead of taking percentages, we may take figures in dollars and cents.

In order to present the whole at a glance the figures are thrown into the following table:

NAME OF ROAD.	Total Amount Received for Tons Carried Locally.	Total Amount of Reduction Caused by H. R. 33.	Expenses of all Business.	10 % for Extra Cost of Local Business.	Total Deductions.	Gain or Loss.
1891.						
B. & M.	1,066,871	314,726	706,695	106,687	1,128,108	—61,237
C. St. P. M. & O.	110,933	37,725	78,518	11,093	127,336	—16,403
F. E. & M. V.	348,408	102,780	173,751	34,840	311,371	+37,037
U. P.	278,211	82,072	191,798	27,821	301,691	—23,480
O. & R. V.	75,581	22,296	90,893	7,558	120,747	—45,166
St. J. & G. I.	21,817	6,436	21,040	2,181	29,657	—7,840
K. C. & O.	6,732	1,985	6,751	673	9,359	—2,627
1892.						
B. & M.	1,237,884	365,175	795,093	123,788	1,284,056	—46,172
C. St. P. M. & O.	123,033	36,294	81,152	12,303	129,749	—6,716
F. E. & M. V.	336,714	99,310	238,090	33,671	371,071	—34,357
U. P.	398,262	117,487	224,779	39,826	382,092	+16,170
O. & R. V.	88,335	26,043	82,257	8,833	117,133	—28,798
St. J. & G. I.	31,004	8,836	23,014	3,100	34,950	—3,946
K. C. & O.	6,630	1,889	4,985	663	7,537	—907
1893.						
B. & M.	1,242,416	366,512	813,906	124,241	1,304,659	—62,243
C. St. P. M. & O.	142,542	42,049	92,053	14,254	148,356	—5,814
F. E. & M. V.	424,437	125,208	227,752	42,443	395,403	+29,034
U. P.	413,714	122,045	242,064	41,371	405,480	+8,234
O. & R. V.	80,519	23,753	75,800	8,051	107,604	—27,085
St. J. & G. I.	33,802	9,971	20,974	3,380	34,325	—523
K. C. & O.	9,445	2,786	7,225	944	10,955	—1,510

These figures given us by one of the defendants and one of their solicitors, whose competency to speak is asserted and shown by them, and these calculations upon both percentages and dollars and cents, demonstrate in a very simple way what we set out to prove; that the rates limited by House Roll 33 would not, if in force in any one of three years before the passage of the act, have yielded returns which would have paid the cost of doing the business.

Mr. Taylor, the auditor of the company, who in one capacity or another has been in the accounting department ever since the construction of the road was begun, says that the same cost, $74,616,523.02, included original construction, betterments, etc. He also says that the mileage of the Burlington is 2,253.07 (page 584), which would give about $33,000 per mile.

There is no suggestion in the record that the road was not honestly and economically built.

There is no direct proof of present value, but Mr. Taylor says that some of the properties are worth much more now than they were when acquired.

Mr. Morgan was an engineer, called to their assistance by the Patterson Commission which was charged by Congress with the examination, among other things, of the condition and value of the road. From his report several extracts are made, and one is an estimate of the cost of reproducing the road, which shows the cost per mile to be $26,814. This does not include terminals.

Mr. House, who was one of the original corps of engineers, affirms that estimate.

Mr. Calvert, who had been at first resident and afterwards chief engineer of the Burlington, in Nebraska, and was superintendent of

that road when he testified, says that the cost and value of a road which had become mature by time and expenditure was from 33⅓ to 50 per cent greater than the one just built which would increase the estimate of Mr. House and Mr. Morgan to from $35,752 to $40,221.

To this a large sum should be added for terminals, which Mr. Morgan estimates at $10,000,000. Mr. House estimates them at $3,973,912. Either sum swells the cost of reproduction very largely.

The testimony is imperfect as to the present value and cost of these roads. It will be found on pages 1547–1580. It is definite enough for the Omaha terminals, and can only be estimated for the rest of the property.

The provisions of the Constitution of the state of Nebraska limit the competency of the legislature to fix railroad rates. Under those provisions, statutory rates must yield, not only cost and compensation the least possible, but in all contingencies cost and a fair profit.

In *State Board of Transportation* v. *Missouri P. R. Co.* 29 Neb. 550, 560, that court held that one object of this clause was the protection of the companies against oppressive legislation.

When the state undertakes to fix railroad rates, it is bound to fix rates which yield cost and some compensation.

Mr. Justice Woods in *Tilley* v. *Savannah, F. & W. R. Co.* 5 Fed. Rep. 641, said that "the question, What are just and reasonable rates? is one which presents different phases from month to month, upon every road in the state, and in reference to all the innumerable articles and products that are the subject of transportation;" for which reason he held that a legislature composed of a large number of members, sitting for a limited time and at long intervals, is incompetent to respond to that question. And in *Chicago & N. W. R. Co.* v. *Dey*, 35 Fed. Rep. 866, 1 L. R. A. 744, 2 Inters. Com. Rep. 325, Judge Brewer said what "would be fair and reasonable to-day, six months or a year hence may be either too high or too low," and that a legislature convened once in two years cannot make rates which will continue to be fair during so long a period.

Boston & L. R. Corp. v. *Salem & L. R. Co.* 2 Gray, 1, was a bill by one company to restrain another from entering upon and using its tracks under an act authorizing it, but not providing compensation.

Mr. Chief Justice Shaw, in an elaborate opinion, held that in order to the validity of the act, compensation must be provided in such a case as well as in any other.

See also *Jersey City & B. R. Co.* v. *Jersey City & H. Horse R. Co.* 20 N. J. Eq. 61.

The state may, if it please, assume the risks; it may do so by providing for the payment to the road, or by agreeing to pay the road what it may lose if the earnings on high-class do not cover the losses on low-class freight. It may, perhaps, do so in some other way. But it cannot throw the risks on the road. It must provide compensation, or speedy, certain, and ample remedy to recover it.

Connecticut River R. Co. v. *Franklin County Comrs.* 127 Mass. 50, 34 Am. Rep. 338.

House Roll 88 is unconstitutional because it attempts to fix and limit the rate which the Union Pacific Railway Company may charge for transportation of freight on its lines between points within the state. That company is within the language of the act, and the Board of Transportation so construes it.

The Union Pacific Railroad Company was incorporated by an act of Congress passed in 1862 (12 Stat. at L. 489). An act amendatory of the charter was passed in 1864 (13 Stat. at L. 356). This act authorized any or all of the companies mentioned therein to consolidate their organizations (§ 16). Under this authority the Union Pacific Railroad Company, the Kansas Pacific Railway Company (at one time known as the Leavenworth, Pawnee, & Western, and afterwards as the Union Pacific Railroad Company, Eastern Division), and the Denver Pacific Railway & Telegraph Company, became consolidated under the name and style of the Union Pacific Railway Company.

The object of the incorporation of the company is stated in the original act to be "to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores" (§ 3), and "to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order; and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes." § 18.

The service which the company was required to render the government was to "at all times transmit despatches over said telegraph line, and transport mails, troops, munitions of war, supplies, and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid, at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service" § 6.

The declared objects of the acts, their explicit directions for the construction of the roads, the services to be rendered, the powers reserved over the properties, and various other provisions, impress upon the Union Pacific Company the character of an agency of the government in its most vital parts.

It is too late in the day to take a moment's time to prove that the states cannot interfere with any of the operations of the general government. And in administering its affairs that government may act directly by its own officers, or it may make use of any appropriate agency. In proper cases Congress may create a corporation to render certain services to the government. At one time it created a bank to be the fiscal agent of the government, and this court held that such a corporation was a proper means to effect its legitimate objects. *McCulloch* v. *Maryland*, 4 Wheat. 316 (4: 579); *Osborn* v. *Bank of United States*, 9 Wheat. 738 (6: 204).

And such an instrumentality, when once adopted by Congress for such purposes, is in its operations as far beyond any interference by a state as the Army or Navy or the post-office. Attempts were made by two several

states to tax the operations of the bank, but this court held such attempts futile. In the Pacific railroad acts of 1862 and 1864 Congress granted to the Central Pacific Company some of the franchises which we have seen it granted to the Union Pacific Company, and the state of California attempted to tax them. This court held that for the state to lay such a tax was "not only derogatory to the dignity of the Federal government, but was repugnant to its paramount sovereignty."

California v. *Central P. R. Co.* 127 U. S. 1 (32: 150, 2 Inters. Com. Rep. 153).

To be sure, that was a case of taxation and this is one of regulation; but as Mr. Justice Miller said in *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 570 (30: 244, 249), it is impossible to see any distinction between a statute which regulates the charges for transportation and a statute which levies a tax.

It is true that this court has supported a tax upon the property of this company.

Thomson v. *Union P. R. Co.* 9 Wall. 579 (19: 792); *Union P. R. Co.* v. *Peniston*, 18 Wall. 5 (21: 787).

We know that a state cannot tax bonds of the United States.

Weston v. *Charleston*, 2 Pet. 449 (7: 481).

Nor can the state of Nebraska disable this instrument of the government to maintain its road in efficient operation, so as to be ready at all times to answer its call for the transportation of its mails, stores, troops, and munitions of war.

We submit, therefore, that Congress reserved to itself control over the rates to be charged by the company for the transportation of freight as well as passengers. The reservation may have been subject to a remote contingency; but that was a matter for the discretion of Congress, doubtless wise at the time. That, however, does not qualify the purpose to insist upon the whole power of control over rates. That is as large as if the provision had been simply that Congress could fix them at its pleasure.

It need hardly be stated that the reservation to the United States of the power in any contingency and in any degree is incompatible with its exercise by the state. No man can serve two masters; and this company cannot be subject at the same time to the United States and the state.

We submit that it has been demonstrated that House Roll 33 is inoperative so far as the Union Pacific Railway Company is concerned. But that is not the whole reach and effect of the proposition which has been established; nor is it the more interesting aspect of the case.

The provisions of House Roll 33 apply to all railroad corporations doing business within the state of Nebraska, and include the Union Pacific, the Chicago, Burlington, & Quincy, the Chicago & Northwestern, the Missouri Pacific, and the Elkhorn companies. The Federal corporation not being subject to the jurisdiction of the state in this respect; the result is that the act is unconstitutional and void, not only in respect of that company but in its whole scope and reach. It was beyond the competency of the legislature to enact the law in the words of it, and therefore it must fall.

The contention may be shortly stated thus: The legislature said the provisions of this act shall apply to all Railroad Companies doing business in this state. When it spoke in terms within whose circumscription are companies chartered, one by Congress and others by legislatures of the states, the whole provision falls.

United States v. *Reese*, 92 U. S. 214 (23: 563); *Trade-Mark Cases*, 100 U. S. 82 (25: 550); *Baldwin* v. *Franks*, 120 U. S. 678 (30: 766); *Virginia Coupon Cases*, 114 U. S. 270, 805 (29: 185, 198).

Applying the doctrine illustrated by these cases to House Roll 33, its general provisions applicable to all railroads being unconstitutional as to the Union Pacific Railway Company, it is void in its full reach and effect.

House Roll 33 is unconstitutional because it unjustly discriminates against certain of the roads in the state in favor of another.

It has been an elementary principle of the civil polity of this country from the earliest period in its history, that all citizens stand upon an equal footing before the law.

Holden v. *James*, 11 Mass. 396, 6 Am. Dec. 174; *Bull* v. *Conroe*, 13 Wis. 238; *Re Picquet*, 5 Pick. 65; *Louis* v. *Webb*, 3 Me. 326; *Durham* v. *Lewiston*, 4 Me. 140; *Santa Clara R. Tax Case*, 9 Sawy. 165, 118 U. S. 394 (30: 118); *State, Richards*, v. *Hammer*, 42 N. J. L. 435; *State, Anderson*, v. *Trenton*, 42 N. J. L. 486; *State, Rutgers*, v. *New Brunswick*, 42 N. J. L. 51; *State, Skinner*, v. *Bogert*, 42 N. J. L. 407; *State, Van Riper*, v. *Parsons*, 40 N. J. L. 1; *State, Harris*, v. *Herrmann*, 75 Mo. 340; *State, Atty. Gen.*, v. *Miller*, 100 Mo. 439.

This case is within the jurisdiction of the court, whether it be considered as a court of the United States or as a court of equity.

Re Atty. Gen. 40 Neb. 402; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418 (33: 970, 3 Inters. Com. Rep. 209); *Louisville & N. R. Co.* v. *Railroad Commission*, 19 Fed. Rep. 679; *Farmers' Loan & T. Co.* v. *Stone*, 20 Fed. Rep. 270; *Chicago & N. W. R. Co.* v. *Dey*, 35 Fed. Rep. 866, 1 L. R. A. 744, 2 Inters. Com. Rep. 325.

Argument of **Mr. James C. Carter**, for appellees:

A general statement of some of the claims asserted in defense of the Nebraska act:

1. That railroads are allowed to be built for the public benefit, and must therefore be made to subserve the benefit of the people; and that any private interest which may be involved is of secondary importance.

2. That all people having occasion to need the services of a railroad are entitled to them; and that the compensation required of them must be made to depend, not upon what the railroad can afford to render the services for, but upon what they can afford to pay.

3. That while it may be impossible to ascertain what the cost is for any particular service, it is possible to ascertain the average cost of the whole service rendered by a road, and fair to treat this average as the cost of any particular service; and consequently to assume that the cost of each particular service is everywhere the same.

4. That all persons have an equal right to the services of a railroad upon the same terms, notwithstanding that the actual cost of the

service demanded by one may be much greater than that of the same service demanded by another.

5. That in fixing rates the value of the service to the one who demands it is unimportant; but that the one who needs it most, and who obtains the greatest benefit from it, should pay no more for it than he who needs it least and obtains the least benefit from it.

6. That the carriage of goods to and from large and compact communities which furnish large amounts of transportation and thus enable the service to be performed at much less cost are not entitled to the benefit of this natural advantage, but that all parts of the state must be put upon an equality.

There are many other claims upon which this legislation is defended, but the above are sufficient for the only purpose for which they are now stated, namely, to point out the first necessity of this discussion; namely, a clear understanding of what railroad business really is, and had become, under and in pursuance of the contracts between the public and the railroad companies at the time when this legislation assumed to deal with it.

The leading features of the railroad system of the United States, as it has thus grown up and been established under every sanction of law and public sentiment, are these:

First. That the prices of carriage are everywhere fixed, not by the railroads nor by shippers, but by the same imperious power which fixes the price of all other articles or services, namely, the pressure of competition. Against this determination it is irrelevant to argue justice or injustice; or, to speak more correctly, the decision of this power is always just. We do not complain of the decision in the case of food and clothing. We have no more right to complain of it in the case of the carriage of goods.

Second. Railroads charge the highest price they can profitably get, as everyone else does who has goods to sell; and in some instances, where they have no competitors other than teams, they may be under the temptation to charge an excessive price. This they could not do permanently, but they might do it temporarily, and before the forces of competition could be brought into play. An excessive price is that indisputably unusual charge for services rendered under similar conditions which reasonable men would declare extortionate. Against this danger there are two sufficient protections:

1. A plain regard for self-interest will and does prevent it. Moderate charges yield more profit by the greatly increased business they draw. No railroad could make money by the practice of extortion. A sound policy, perfectly well known to railroad managers, advises them that it is best to tempt and draw out a large traffic by low prices than to try to make a large profit on a small business.

2. No one need pay an excessive charge. The service can be exacted at a reasonable price.

It may, indeed, cost a lawsuit; but so do all other social and business wrongs. The wrong cannot be very great which does not provoke resistance. The extremely small number of actual contests on this point are good evidence of the fact that this abuse is not frequent or extensive.

Third. Railroad rates exhibit great diversity and the reason of many of them is not apparent to the observer who does not think of the conditions which free competition works out, and of the way in which the railroad system has grown up.

The cost of the service in particular cases has little to do with the making of the charge. What necessarily determines the carrier's conclusion in any case where he is called upon to say whether he will take new traffic offered at a certain price is how much, if any cost in addition to what he is then under he will incur if he takes it.

His final aim is to get such an average rate for all his traffic as will yield him a profit. The proportions in which all his customers contribute to that average are settled by causes absolutely beyond either his or their will. A grocer's customer, who uses much tea and little sugar, would not say to him that he is doing a great injustice by exacting from him a profit of 25 per cent on the tea he buys, and at the same time selling his neighbor sugar at a profit of only 5 per cent.

Fourth. There is a common phrase that railroad rates are arranged so as to "get all the traffic will bear;" and this is true; although not in the odious sense which imputes a design to take advantage of supposed necessities in order to exact an excessive compensation. In its real meaning it simply indicates to railroad managers the stern necessity which limits them to low rates in order to gain or to save traffic. When, in ways already indicated, they seek to gain traffic by competition with water carriage, they ascertain the rate which it is necessary for them to meet in order to secure it. They must take this rate or give up the struggle for the business; for it is "all the traffic will bear." At points where there is no competition except with other forms of land carriage, and little traffic at that, they fix rates calculated to build up the country and increase business; for such rates are "all the traffic will bear." If the great agricultural products are so low that farmers can make nothing by raising them and sending them to a market, the railroad man is obliged to make his rates such that the farmer can make something, or he will cease to attempt to raise such products, and the railroad will lose its chief business. He may find it necessary for his own interest to carry the traffic at actual cost, and sometimes even for less, for this is "all the traffic will bear."

Fifth. In saying that railroad business is subject, like ordinary industries, to the stress of competition we do not express the whole truth. They are peculiarly sensitive to it, and much more than most other industries. Resorting to the just analogy heretofore suggested, that a railroad company may be regarded as the manufacturer and seller of transportation, some peculiarities which distinguish this from other manufactures should be noted.

In the first place the expense of manufacturing as compared with the price of the product is much larger than in other industries. In other industries this expense depends very largely upon the amount of business done; but

in this it goes on and cannot be greatly reduced when little business is transacted. Again, the commodity produced by railroads cannot, for want of a sufficient demand, be stored away and kept for a better market. If it is not sold to-day, because no fair price can be obtained for it, it can never be sold, and yet a large percentage of its cost which has already been incurred and paid must be lost.

These conditions put the managers of railroads under the constant spur of a desire to sell what they have on hand so as not to lose the expense it has already cost. Sellers of other goods always have the alternative, when the price is thought too low, of holding on to them with little additional expense for a better market.

Sixth. The operation of the laws of free competition in railroad, as in other business, are not unattended with possible mischiefs, but they are infinitely less than would flow from any attempt to dispense with such laws. These mischiefs, so far as prices are concerned, are really reducible to two.

1. There is a possibility that competing roads may combine in order to prevent or mitigate the effects of competition. This in the case of railroads is an imaginary danger only. The combination may, indeed, be made, and sometimes even be absolutely necessary to prevent self-destruction. But the combination must always find its real interest in an increase of traffic by low rates rather than making a large profit by high rates on a decreased traffic. And should an unwise policy (never followed in present times) tempt the imposition of high rates, it would speedily be baffled by the appearance in the field of new roads and new competitors supplied with capital attracted from other less profitable pursuits. That is to say, competition cannot be really escaped by combination in the large businesses which are open to all. Where nature has limited the supply of a commodity,—as in the case of mines producing the necessaries of life, coal, etc.,—a combination among all the proprietors may be made effective in raising the price. This is the case of true monopolies, which railroads are not.

Perhaps a practical unification of ownership of all great trunk lines of railway may be brought about and all existing competitions be thus destroyed, and there might not be boldness enough on the part of other capitalists to prompt them to arrange a struggle with the new giant, as is supposed to be true with the great unified interests of sugar and petroleum. But combination on such a scale is without mischief so far as prices are concerned. Self-interest in such cases can be promoted only by tempting an increase of consumption by offering the lowest possible price.

2. The other possible mischief is the conversion of open into secret competition; that is by secretly obtaining traffic by giving to some better terms than to others. This is exhibited in the paying of rebates, or making special private contracts, and thus giving to some advantages not shared by all.

Sometimes this practice is entirely proper and hurts no one, indeed, benefits all; as in the case where shippers of bulky articles like lumber may be induced to withhold shipments until the winter season, when other traffic is slack, and not send it when the roads are crowded. The case is different, however, when secret bargains are made merely to carry traffic for one shipper at lower rates than for others. This is an unqualified abuse and public and private outrage. It is the last resort in a desperate and deadly competition. All railroad managers abominate it, but there is no rectitude which will not submit to it rather than die.

In respect to both these possible mischiefs the law provides protection. Both practices are, when not justified by reasonable and fair purposes, crimes, and punishable as such. It may be said that they are often not easy to be discovered, and therefore, that the criminal law is not a sure safeguard; but this is, to a greater or less degree, the case with all crimes. The fear of punishment will be sufficient to restrain within moderate limits the commission of the offense. It can never become general; and so can never defeat the general beneficent operation of free competition.

The present general condition of the law on the questions involved in the present controversy is believed to be as follows:

1. That it is within the scope of the legislative power to establish maximum rates for railroad charges.

2. That this power is not unlimited; and that the ascertainment and declaration of its limits are within the province of the judicial power.

3. What these limits are is as yet an open question except in one particular; namely the regulations must be reasonable.

4. That they transcend this limit and become unreasonable whenever they operate so as to take away the property of the railroad companies.

5. What rules or principles must be observed in the framing of maximum rates in order to make them reasonable, other than the one above mentioned, that they must not take away property, is as yet an open question.

6. In particular, the question whether they are not unreasonable, if they impair a contract between the railroad companies and the state, and take away rights resting in contract is an open question.

7. What rights, resting in contract, railroad companies have, as against the state, is an open question.

8. Whether the state can determine by legislation the reasonable value of railroad service as between railroad and shipper, so as to oust or to cripple the jurisdiction of the courts to determine, in some form, that reasonable value, is an open question.

Reagan v. *Farmers' Loan & T. Co.* 154 U. S. 362 (38: 1014, 4 Inters. Com. Rep. 560); *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649 (39: 567).

It is believed that the present legislation is clearly shown by the proofs in this case to be invalid within the principles already established by this court. The rates are unreasonable because they take away property without due process of law; and, therefore, it is not necessary to determine either of the points above mentioned as being still open. But, at the same time, it is true that those points are directly raised and involved, and a discussion

of them is relevant, and cannot with propriety be passed.

The business of a common carrier of goods at all times before the introduction of railroads, and ever since, has been the carriage of goods for hire. The law attached to this business the duty on the part of the carrier to carry all goods which anyone might require him to carry. It gave him a corresponding right to charge for his services a reasonable compensation. What was in fact a reasonable compensation is, from its very nature, a judicial question, and has always been so treated.

The carrier had, in addition, the common right of all citizens, namely, to agree with his customer concerning the amount of his reward. In cases of such agreement, the question of reasonableness would necessarily disappear. If there be any exception to this it is confined to cases where the parties stand on such an unequal footing that extortion can be practised, as where one needs a cab in a city on a rainy night, and there is but one at hand. Such situations call for suitable police regulations.

One can become a carrier by railroad only by the permission of the state. What the rights of such a carrier are, as against the state, depend upon the terms of his contract with the state by which he acquires the right. Under our system, which allows all to construct and operate railroads upon the same terms, the contract is made by a public offer, and its acceptance, by performing the consideration.

The nature of the right gained by the acceptance of such offers is ascertained by the simple inquiry what the offer is. In the case of a railroad, where there are no special conditions or limitations modifying the substance of the offer (and in general, and in our particular cases, there are none), the offer is of the right to carry on (with the structure) the business of a common carrier as it is ordinarily carried on. And to whatever conditions, either by way of legistative regulation or otherwise, that business is ordinarily subject, it becomes subject when acquired by a railroad carrier in the manner above pointed out; and it becomes subject, undoubtedly, to such further governmental regulation as the new instrumentality employed may, in the public interest, reasonably require.

In the discussions, judicial as well as forensic, concerning the power of state legislatures to regulate railroad rates and other similar charges, while the existence of the power has been affirmed, the nature of the power, the place to which it is assignable in the just scheme of government, and the conditions under which it may properly be exercised, have not received the attention to which they are entitled. References have been made to certain employments, such as those of millers, bakers, ferrymen, innkeepers, etc., the charges in which have been made from time to time from an early period the subjects of legislative regulation, and it has been impliedly accepted as law, that these employments are, under all circumstances, subject to the interference of government, while other employments and businesses are not; but the reasons why this should be so have not been fully sifted. It is time this element which has been served as the foundation of the most momentous conclusions should be scrutinized and measured.

We affirm the moderate proposition that this governmental power upon which alone this class of regulation can be defended is the police power.

Munn v. *Illinois*, 94 U. S. 113, 125 (24:77, 84).

The law in question is not an exercise of the police power at all, and therefore necessarily a nullity.

A law in order to be an exercise of the police power must exhibit the characteristics of that power. It must recognize the existence of a real mischief, and separate it from the innocent, useful, and necessary acts of life, must not convert innocence into crime, and must employ remedies designed to reach only the recognized mischief.

This act exhibits no one of these characteristics. There was no occasion for any such exercise of police power. It does not employ the methods of the police power.

It is not the exercise of the police power to regulate monopolies; for there is no monopoly, and none can be pretended; and if there were, the principles upon which monopolies may be prevented from exacting extortionate charges are in no respect different from those of any other exercise of that power for the same purpose.

We assert that this legislation is unconstitutional for the following reasons:

First. It takes away the contract rights granted to, and vested in, the railroad companies by the public contracts under which they expended their capital in the construction of their roads.

Second. It immediately takes away the property of those companies without compensation, and without due process of law.

Third. It denies to them the equal protection of the laws.

A right once granted and vested under a contract cannot by any exercise of this power be taken away. The right to carry on the business of a common carrier as it is ordinarily carried on is the very thing fully vested in a railroad company when it accepts the invitation of the state and builds a railroad.

Sinking Fund Cases, 99 U. S. 700, 719, 721 (25:496, 501, 502); *New Orleans, S. F. & L. R. Co.* v. *Delamare*, 114 U. S. 501 (29:244); *Fletcher* v. *Peck*, 6 Cranch, 87, 135 (3:162, 177); *People* v. *O'Brien*, 111 N. Y. 1, 2 L. R. A. 255.

This whole controversy may be made to turn upon another single proposition, based substantially upon the same grounds, but differing in form from those already asserted; namely, the rates established by the act are not maximum rates, such as the legislature had power to establish.

The Nebraska act is invalid and void within the principles now fully recognized by this court, for the reason that while on its face it pretends to regulate rates on Nebraska business alone it necessarily affects the business done in other states, and the rates of that business. Rates so regulated are, in very absolute sense, unreasonable.

The business of transportation by rail in Nebraska consists in the performance of innumerable distinct items of carriage service for an innumerable number of persons and

under every diversity of circumstance affecting the question of reasonable price for the service. It is submitted that the legislature of that state cannot, in any single instance, impose a rate which would preclude the railroad from a recovery before a court and jury of what the court and jury might find to be the reasonable value of that service. This act utterly denies that right.

No one can deny, in view of the uniform decisions of this court, and especially in view of the last one on this subject, that the power of a state legislature to establish rates is not unlimited, but is subject to some sort of review in the courts. Upon any view of the province of the courts this act is invalid.

The present condition of the decisions of this court upon the question of the authority of a legislature to establish maximum rates leaves open for discussion, to say the least, every proposition advanced in this brief. No judgment of this court is opposed to any of them; and the manifest tendency of the later decisions is to support them all.

Munn v. *Illinois*, 94 U. S. 113 (24: 77); *Chicago, B. & Q. R. Co.* v. *Iowa*, 94 U. S. 155 (24: 94); *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 164 (24: 97).

When the above questions are properly settled, our law in respect to maximum rates for railroad and other services will be brought into a more consistent form, which will at once secure individual rights and not unduly limit legislative powers; and then the propositions which this brief endeavors to support will be found to be just.

But without solving any of the questions above asserted as open and upon the law as now established, the Nebraska act is unconstitutional and invalid for the reason that the rates are so low as to leave no real compensation to the railroad, and amount therefore to a taking of property without due process of law, and to a denial to the railroads of the equal protection of the laws.

Mr. Justice **Harlan** delivered the opinion of the court:

The appellees in the first of the above cases were the plaintiffs below, and are citizens of Massachusetts and stockholders of the Union Pacific Railway Company. They sued on behalf of themselves and all others similarly situated. The defendants are the Union Pacific Railway Company, the St. Joseph & Grand Island Railroad Company, the Omaha & Republican Valley Railroad Company, and the Kansas City & Omaha Railroad Company—corporations of Nebraska under the control of the Union Pacific Railway Company; certain persons, citizens of Nebraska, who hold the offices, respectively, of attorney general, secretary of state, auditor of public accounts, state treasurer, and commissioner of public lands and buildings, and constitute the state board of transportation; and James C. Dahlman, Joseph W. Edgerton, and Gilbert L. Laws, citizens of Nebraska and secretaries of that board. By a supplemental bill in the same suit, certain persons, receivers of the Union Pacific Railway Company, were made defendants.

In the second case, some of the plaintiffs, appellees here, are subjects of Queen Victoria, while the others are citizens of Massachusetts. They are all stockholders of the Chicago & Northwestern Railroad Company, a corporation organized and existing under the laws of Illinois, Wisconsin, and Iowa, and have sued in that capacity on behalf of themselves and all others similarly situated. The defendants are the Chicago & Northwestern Railroad Company; the Fremont, Elkhorn, & Missouri Valley Railroad Company, a Nebraska corporation, and the Chicago, St. Paul, Minneapolis, & Omaha Railway Company, a corporation organized under the laws of Minnesota and Nebraska, both under the control of the Chicago & Northwestern Railroad Company; and the above officers constituting the state board of transportation, as well as those holding the positions of secretaries of that board.

In the third case, the appellees, Henry L. Higginson and others, citizens of Massachusetts, were the plaintiffs below. They sued on behalf of themselves and all other stockholders *of the Chicago, Burlington, & [470 Quincy Railroad Company, a corporation organized and existing under the laws of Illinois and Iowa, and whose lines west of the Missouri river are known as the Burlington & Missouri Road. The defendants are the Chicago, Burlington, & Quincy Railroad Company, the persons composing the Nebraska state board of transportation, and the secretaries of that board.

For the sake of brevity, the Union Pacific Railway Company will be called the Union Pacific Company; the St. Joseph & Grand Island Railroad Company, the St. Joseph Company; the Omaha & Republican Valley Railroad Company, the Omaha Company; the Kansas City & Omaha Railroad Company, the Kansas City Company; the Fremont, Elkhorn, & Missouri Valley Railroad Company, the Fremont Company; the Chicago, St. Paul, Minneapolis, & Omaha Railway Company, the St. Paul Company; and the Chicago, Burlington, & Quincy Railroad Company, the Burlington Company.

Each of these suits was brought July 28, 1893, and involves the constitutionality of an act of the legislature of Nebraska, approved by the governor April 12, 1893, and which took effect August 1, 1893. It was an act "To Regulate Railroads, to Classify Freights, to Fix Reasonable Maximum Rates to be Charged for the Transportation of Freights upon Each of the Railroads in the State of Nebraska, and to Provide Penalties for the Violation of This Act." Acts of Neb. 1893, chap. 24; Compiled Statutes of Nebraska 1893, chap. 72, art. 12. The act is referred to in the record as House Roll 33.

Prior to the enactment of that statute, the legislature passed an act to regulate railroads, prevent unjust discrimination, provide for a board of transportation, and define its duties, and repeal articles 5 and 8 of chapter 72, entitled "Railroads," of the Revised Statutes of Nebraska, and all acts and parts of acts in conflict therewith—the same being chapter 60 of the Session Laws of 1887, and now article 8 of chapter 72 of the Compiled Statutes of Nebraska of 1893. By that act the attorney general, secretary of state, auditor of public accounts, state treasurer, and commissioner of public lands *and buildings were constituted a[471

board of transportation, with power to appoint three secretaries to assist in the performance of its duties, and with authority to inquire into the management of the business of all common carriers subject to its provisions and obtain from them the full and complete information necessary to enable the board to perform its duties and carry out the objects for which it was created. It was also provided that, for the purposes of the act, the board should have power to require the attendance and testimony of witnesses and the production of all books, papers, contracts, agreements, and documents relating to any matter under investigation, and to that end could invoke the aid of any of the district courts or of the supreme court of the state; and that any court of competent jurisdiction in which such inquiry was carried on could, in case of contumacy or refusal to obey a subpœna issued to any common carrier or person subject to the provisions of the act, issue an order requiring such carrier or other person to appear before the board (and produce books and papers if ordered), and give evidence touching the matter in question; and any failure to obey the order was punishable by the court as for contempt. The claim that any testimony or evidence might tend to criminate the person giving evidence would not excuse the witness from testifying, but such evidence or testimony could not be used against him on the trial of any criminal proceeding.

The power to enact the statute whose validity is now assailed, that is, the above statute of August 1, 1893, regulating railroads, classifying freights, fixing reasonable maximum rates, etc., in Nebraska, was referred by counsel to the general legislative power of the state as well as to the 4th section of article 11 of the state Constitution, which provides: "Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers [472] and freight on *the different railroads in this state. The liability of railroad corporations as common carriers shall never be limited."

By the 1st section of that statute it is declared that, except as therein otherwise provided, its provisions shall apply to all railroad corporations, railroad companies, and common carriers engaged in Nebraska in the transportation of freight by railroad therein, and also to shipments of property made from any point within the state to any other point within its limits. That section provides: "The term 'railroad,' as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation, receiver, trustee, or other person operating a railroad whether owned or operated under contract, agreement, lease, or otherwise, and the term 'transportation' shall include all instrumentalities of shipment or carriage, and the term 'railroad corporation' contained in this act shall be deemed and taken to mean all corporations, companies, or individuals, now owning or operating, or which may hereafter own or operate, any railroad, in whole or in part, in this state, and the provisions of this act, except as in this act otherwise provided, shall apply to all persons, firms, and companies, and to all associations of persons, whether incorporated or otherwise, that shall do business as common carriers of freight upon any of the lines of railway in this state, the same as to railroad corporations herein mentioned." § 1.

The 2d section provides that all freight or property to be transported by any railroad company or companies mentioned in the 1st section, "from any point in the state of Nebraska to any other point in said state, shall be classified as hereinafter in this section provided, and any other or different classification of freight, which would raise the rates on class or commodity of freights above the rates prescribed in this act, except as hereinafter otherwise provided, is prohibited and declared to be unlawful. The classification established by this act shall be known as the 'Nebraska Classification.' Freights shall be billed at the actual weight unless otherwise directed in the classification—20,000 pounds shall *be a car [473] load, and all excessive weights shall be at the same rate per 100 pounds, except in carloads of light and bulky articles, and unless otherwise specified in the classification. When the classification makes an article 'released' or 'owner's risk,' the same at carrier's risk will be the next highest rate higher, unless otherwise provided in the classification. Articles rated first class, 'released' or owner's risk, if taken at 'carrier's risk,' will be one and one half times first class unless otherwise provided in the classification. All articles carried according to this classification at 'owner's risk' of fire, leakage, damage, or breakage must be so receipted for by agents of the railroad, and so considered by owners and shippers. Signing a release contract by a shipper shall not release the railroad company for loss or damages caused by carelessness or negligence of its employees." § 2

Following this section, in the body of the statute, are tables of the classification of freights

The 3d section is in these words: "That each of the railroads in the state of Nebraska shall charge for the transportation of freight from any point in said state to any other point in said state, no higher or greater rate of charge than is by this act fixed as the reasonable maximum rate for the distance hauled, and the reasonable maximum rates for the transportation of freight by railroad from any point in the state of Nebraska to any other point in said state are declared and established to be as hereinafter in this section fixed for the distance named, and any higher or greater rate for the distance hauled than that herein fixed and established is prohibited and declared to be unlawful; and the reasonable maximum rate herein fixed and established shall be known as the Nebraska Schedule of Reasonable Maximum Rates." § 3.

Here follow tables of the rates prescribed by the statute.

That the full scope of the act may appear, its remaining sections are given as follows:

"Sec. 4. All railroads or parts thereof which

have been built in this state since the 1st day of January, 1889, or may be built before the 31st
474]day of December, 1899, shall be *exempt from the provisions of this act until the 31st day of December, 1899.

"Sec. 5. Whenever any railroad company or companies in this state shall in a proper action show by competent testimony that the schedule of rates prescribed by the act are unjust and unreasonable, such railroad or railroads shall be exempt therefrom as hereinafter provided. All such actions shall be brought before the supreme court, in the name of the railroad company or companies bringing the same, and against the state of Nebraska, and upon the hearing thereof, if the court shall become satisfied that the rates herein prescribed are unjust in so far as they relate to the railroad bringing the action, [it] may issue their [its] order directing the board of transportation to permit such railroad to raise its rates to any sum in the discretion of the board: Provided, That in no case shall the rates so raised be fixed at a higher sum than that charged by such railroad on the 1st day of January, 1893. Whenever any railroad company in this state shall claim the benefit of the provisions of this section, it shall be the duty of such railroad company to show to the court all matters pertaining to the management thereof, and if it shall appear that said railroad company is operating branch lines of railroad in connection with its main line, and all included in one system, then, in that case, it shall be the duty of the railroad company to show to the court upon which branch or branches, or upon which portion of such system, the schedule of rates prescribed in this act is unjust and unreasonable, and only such portions shall be exempted from the provisions thereof: Provided, That in no case shall a railroad company be allowed to pool the earnings of all the lines operated under one management, where more than one line is so operated, for the purpose of lowering the general average.

"Sec. 6. That the board of transportation is hereby empowered and directed to reduce the rates on any class or commodity in the schedule of rates fixed in this act, whenever it shall seem just and reasonable to a majority of said board so to reduce any rate; and said board of transportation is hereby empowered and direct-
475]ed to revise said classification of *freight as hereinbefore in this act established, whenever it shall appear to a majority of said board just and reasonable to revise said classification: Provided, That said board of transportation shall never change the classification in the act established, so that by such change or classification the rates on any freight will become higher or greater than in this act fixed. When any reduction of rates or revision of classification shall be made by said board, it shall be the duty of said board to cause notice thereof to be published two successive weeks in some public newspaper, published in the city of Lincoln, in this state, which notice shall state the date of the taking effect of such change of rate or classification, and said change of rate or classification so made by the said board and published in said notice shall take effect at the time so stated in said notice.

"Sec. 7. That articles not enumerated in said classification in § 2 of this act established, not rated in said schedule of rates in § 3 of this act, shall be classed with analogous articles in said classification, and where there is any conflict between said classification and said schedule of maximum rates, said rates shall govern.

"Sec. 8. That in case any common carrier subject to the provisions of this act shall do, or cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby, for all damages sustained in consequence of any such violation of the provisions of this act together with cost of suit and a reasonable counsel or attorney's fee, to be fixed by the court in which the same is heard on appeal or otherwise, which shall be taxed and collected as part of the costs in the case: Provided, That in all cases demand in writing on said common carrier shall be made for the money damages sustained before suit is brought for recovery under this section, and that no suit shall be brought until the expiration of fifteen days after such demand.

"Sec. 9. That in case any common carrier subject to the provisions *of this act shall[476
do, or cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall, upon conviction thereof, be fined in any sum not less than one thousand dollars, nor more than five thousand dollars for the first offense; and for the second offense not less than five thousand dollars, nor more than ten thousand dollars; and for the third offense, not less than ten thousand dollars, nor more than twenty thousand dollars; and for every subsequent offense and conviction thereof, shall be liable to a fine of twenty-five thousand dollars: Provided, That in all cases under this act either party shall have the right of trial by jury.

"Sec. 10. All acts and parts of acts inconsistent herewith are repealed."

These cases were heard at the same time, and in the one in which the Union Pacific Company, the St. Joseph Company, the Omaha Company, and the Kansas City Company were defendants, it was adjudged in the circuit court—Mr. Justice Brewer presiding—as follows: "That the said railroad companies and each and every of them, and said receivers, be perpetually enjoined and restrained from making or publishing a schedule of rates to be charged by them or any or either of them for the transportation of freight on and over their respective roads in this state from one point to another therein, whereby such rate shall be reduced to those prescribed by the act of the legislature of this state, called in the bill filed therein, 'House Roll 33,' and entitled 'An Act to Regulate Railroads, to Classify Freights, to Fix Reasonable Maximum Rates to be Charged for the Transportation of Freight upon Each of the Railroads in the State of Nebraska, and to Provide Penalties for the Violation of This Act,' approved April 12, 1893, and below those now charged by said companies or either of them or their receivers, or in any wise obeying,

observing, or conforming to the provisions, commands, injunctions, and prohibitions of said alleged act; and that the board of transportation of said state and the members and sec-[477]retaries *of said board be in like manner perpetually enjoined and restrained from entertaining, hearing, or determining any complaint to it against said railroad companies or any or either of them or their receivers, for or on account of any act or thing by either of said companies or their receivers, their officers, agents, servants, or employees, done, suffered, or omitted, which may be forbidden or commanded by said alleged act, and from instituting or prosecuting or causing to be instituted or prosecuted any action or proceeding, civil or criminal, against either of said companies or their receivers for any act or thing done, suffered, or omitted, which may be forbidden or commanded by said act, and particularly from reducing its present rates of charges for transportation of freight to those prescribed in said act, and that the attorney general of this state be in like manner enjoined from bringing, aiding in bringing, or causing to be brought, any proceeding by way of injunction, mandamus, civil action, or indictment against said companies or either of them or their receivers for or on account of any action or omission on their part commanded or forbidden by the said act. And that a writ of injunction issue out of this court and under the seal thereof, directed to the said defendants, commanding, enjoining, and restraining them as hereinbefore set forth, which injunction shall be perpetual save as hereinafter provided. And it is further declared, adjudged, and decreed that the act above entitled is repugnant to the Constitution of the United States, forasmuch as by the provisions of said act the said defendant railroad companies may not exact for the transportation of freight from one point to another within this state, charges which yield to the said companies, or either of them, reasonable compensation for such services. It is further ordered, adjudged, and decreed that the defendants, members of the board of transportation of said state, may hereafter, when the circumstances have changed so that the rates fixed in the said act shall yield to the said companies reasonable compensation for the services aforesaid, apply to this court, by supplemental bill or otherwise, as they may be advised, for a further order in that behalf. It is further ordered, ad-[478]judged, and *decreed that the plaintiffs recover of the said defendants their costs to be taxed by the clerk."

The above decree was in accordance with the prayer for relief. A similar decree was rendered in each of the other cases.

The present appeals were prosecuted by the defendants constituting the state board of transportation, as well as by the defendants who are secretaries of that board.

The first question to be considered is one common to all the cases. While it was not objected at the argument that there had been any departure from the 94th equity rule, it was contended that the plaintiffs had an adequate remedy at law, and that the circuit court of the United States, sitting in equity, was therefore without jurisdiction. This objection is *based upon the 5th section of the Ne-[516]braska statute authorizing any railroad company to show, in a proper action brought in the supreme court of the state, that the rates therein prescribed are unreasonable and unjust, and, if that court found such to be the fact, to obtain an order upon the board of transportation permitting the rates to be raised to any sum in the discretion of that board, provided that in no case should they be fixed at a higher sum than was charged by the company on the 1st day of January, 1893. This section, it is contended, took from the circuit court of the United States its equity jurisdiction in respect of the rates prescribed and required the dismissal of the bills.

We cannot accept this view of the equity jurisdiction of the circuit courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the Federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a state may be administered by the circuit courts of the United States. *Case of Broderick's Will* [*Kieley* v. *McGlynn*], 88 U. S. 21 Wall. 503, 520 [22:599, 606]; *Holland* v. *Challen*, 110 U. S. 15, 24 [28:52, 56]; *Dick* v. *Foraker*, 155 U. S. 404, 415 [39:201, 205]; *Bardon* v. *Land & River Improv. Co.* 157 U. S. 327, 330 [39:719, 721]; *Rich* v. *Braxton*, 158 U. S. 375, 405 [39:1022, 1032]. But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction. *Payne* v. *Hook*, 74 U. S. 7 Wall. 425, 430 [19:260, 262]; *McConihay* v. *Wright*, 121 U. S. 201, 205 [30:932, 933]. A party by going into a national court does not, this court has said, lose any right or appropriate remedy of which he *might have availed[517] himself in the state courts of the same locality; that the wise policy of the Constitution gives him a choice of tribunals. *Davis* v. *Gray*, 83 U. S. 16 Wall. 203, 221 [21:447, 453]; *Cowley* v. *Northern Pacific Railroad Co.* 159 U. S. 569, 583 [40:263, 267]. So, "wherever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts." *Reagan* v. *Farmers' Loan & Trust Co.* (No. 1), 154 U. S. 362, 391 [38:1014, 1021, 4 Inters. Com. Rep. 560]; *Mississippi Mills* v. *Cohn*, 150 U. S. 202, 204 [37:1052, 1053]; *Cowles* v. *Mercer County* [*Mercer County Supers.* v. *Cowles*], 74 U. S. 7 Wall. 118 [19:86];

Lincoln County v. *Luning*, 133 U. S. 529 [33: 766]; *Scott* v. *Neely*, 140 U. S. 106 [35: 358]; *Chicot County* v. *Sherwood*, 148 U. S. 529 [37: 546]; *Cates* v. *Allen*, 149 U. S. 451 [37: 801].

In these cases the plaintiffs, stockholders in the corporations named, ask a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the Constitution of the United States. Under the principles which in the Federal system distinguish cases in law from those in equity, the circuit court of the United States, sitting in equity, can make a comprehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that would inevitably arise under the statute. The carrier is made liable, not only to individual persons for every act, matter, or thing prohibited by the statute, and for every omission to do any act, matter, or thing required to be done, but to a fine of from one thousand to five thousand dollars for the first offense, from five thousand to ten thousand dollars for the second offense, from ten thousand to twenty thousand dollars for the third offense, and twenty-five thousand dollars for every subsequent offense. The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a mul-[518]tiplicity *of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all and without a multiplicity of suits, matters that affect, not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained.

Another question of a preliminary character must be here noticed. The answer of the officers of the state in each case insists that the real party in interest is the state, and that these suits are, in effect, suits against the state, of which the circuit court of the United States cannot take jurisdiction, consistently with the 11th Amendment of the Constitution of the United States. This point is, perhaps, covered by the general assignments of error, but it was not discussed at the bar by the representatives of the state board. It would therefore be sufficient to say that these are cases of which, so far as the plaintiffs are concerned, the circuit court has jurisdiction, not only upon the ground of the diverse citizenship or alienage of the parties, but upon the further ground that, as the statute of Nebraska under which the state board of transportation proceeds is assailed as being repugnant to rights secured to the plaintiffs by the Constitution of the United States, the cases may be regarded as arising under that instrument. But to prevent misapprehension, we add that within the meaning of the 11th Amendment of the Constitution the suits are not against the state but against certain individuals charged with the administration of a state enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals for *the purpose of [519] preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that Amendment. *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10 [35: 363, 365]; *Re Tyler*, 149 U. S. 164, 190 [37: 689, 698]; *Scott* v. *Donald* (No. 1), 165 U. S. 58, 68 [41: 632, 633]; *Tindal* v. *Wesley*, 167 U. S. 204, 220 [42: 137, 142].

An important question is presented that relates only to the Union Pacific Company. That company is a corporation formed by the consolidation of several companies under the authority of the acts of Congress, one of the constituent companies being the Union Pacific Railroad Company incorporated by the act of July 1, 1862 (12 Stat. at L. 489, chap. 120). *United States* v. *Union Pacific Railway Company*, 160 U. S. 1, 6 [40: 319, 321]. Neither that company nor the Union Pacific Railroad Company is named in the Nebraska statute, but the statute is interpreted by the state board of transportation as embracing the present defendant corporation. It is contended that the state is without power to fix or limit the rates that the Union Pacific Company may charge for the transportation of freight on its lines between points within Nebraska. This contention rests: 1. Upon the provisions of the acts of Congress showing that the Union Pacific Railroad Company was created for the accomplishment of national objects, namely to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores of the United States; 2. Upon the 18th section of the above act of July 1, 1862 (12 Stat. at L. 489, 497, chap. 120), providing that "whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs, and the furnishing, running, and managing of said road, shall exceed 10 per centum upon its cost exclusive of the 5 per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law." The argument is that Congress by this enactment has reserved to itself exclusive control of rates, interstate and local, to be charged on the Union Pacific Railroad. As this view, if maintained, would require *an affirmance of the decree so far [520] as the Union Pacific Company is concerned, whether the Nebraska statute of 1893 be constitutional or not as to the other railroad corporations, it cannot properly be passed without examination.

In *Reagan* v. *Mercantile Trust Company* (No. 1), 154 U. S. 413 [38: 1028, 4 Inters. Com. Rep. 575], the question arose whether the Texas & Pacific Railway Company, a corporation or-

ganized under the laws of the United States, was subject to the laws of Texas with respect to rates for transportation wholly within that state. The ground upon which exemption from state control was there asserted by the company was that it received all its franchises from Congress, including the franchise to charge and collect tolls. This court, conceding, for the purposes of that case, that Congress had power to remove the corporation in all its operations from state control, held that the act creating it did not show an intention upon the part of Congress to exempt it from the duty to conform to such reasonable rates for local transportation as the state might prescribe, and that the enforcement by the state of reasonable rates for such transportation would not disable the corporation from performing the duties and exercising the powers imposed upon it by Congress. The court said: "By the act of incorporation Congress authorized the company to build its road through the state of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the state to other points also within the state, and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given to Congress. It must have been known that, in the nature of things, the control of that business would be exercised by the state, and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from state control, it would unquestionably have expressed such intention in language whose meaning would be clear. Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the state, it intended that it should be **521**] subjected to the ordinary control *exercised by the state over such business. Without, therefore, relying at all upon any acceptance by the railroad corporation of the act of the legislature of the state, passed in 1873 in respect to it, we are of opinion that the Texas & Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates, and other police regulations."

This conclusion, as may be observed from the opinion, was based in part upon the reasoning in *Thomson* v. *Pacific Railroad Co.* 76 U. S. 9 Wall. 579 [19: 792], and in *Union P. Railroad Company* v. *Peniston*, 85 U. S. 18 Wall. 5 [21: 787], in which cases it was held that the property of certain railroad companies was not exempt from state taxation by reason alone of the fact that they were organized under acts of Congress for the accomplishment of national objects, and that the imposition of such taxes was not, in a constitutional sense, an obstruction to the exercise of the powers of the general government, nor an interference with the discharge of the duties required of the companies by their charters.

In the present case the question is more difficult of solution by reason of the declaration in the above act of July 1, 1862 (no similar declaration being made in the act incorporating the Texas & Pacific Railway Company), that Congress may reduce the rates of fare on the Union Pacific Railroad if unreasonable in amount, and may fix and establish the same by law whenever the net earnings of the entire road and telegraph, ascertained upon a named basis, should exceed 10 per cent upon its cost, exclusive of the 5 per cent to be paid to the United States.

Undoubtedly Congress intended by that act to reserve such power as was necessary to prevent the corporation from exacting rates that were unreasonable. But this is not equivalent to a declaration that the states through which the railroad might be constructed should not regulate rates for transportation begun and completed within their respective limits.

It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, *between points[**522** wholly within the limits of a state, is a subject primarily within the control of that state. And it ought not to be supposed that Congress intended that, so long as it forbore to establish rates on the Union Pacific Railroad, the corporation itself could fix such rates for transportation as it saw proper independently of the right of the states through which the road was constructed to prescribe regulations for transportation beginning and ending within their respective limits. On the contrary, the better interpretation of the act of July 1, 1862, is that the question of rates for wholly local business was left under the control of the respective states through which the Union Pacific Railroad might pass, with power reserved to Congress to intervene under certain circumstances and fix the rates that the corporation could reasonably charge and collect. Congress not having exerted this power, we do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a state prescribing rates for transporting property on that road wholly between points within its territory. Until Congress, in the exercise either of the power specifically reserved by the 18th section of the act of 1862 or its power under the general reservation made of authority to add to, alter, amend, or repeal that act, prescribes rates to be charged by the railroad company, it remains with the states through which the road passes to fix rates for transportation beginning and ending within their respective limits.

We are now to inquire whether the Nebraska statute is repugnant to the Constitution of the United States.

By the 14th Amendment it is provided that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. That corporations are persons within the meaning of this Amendment is now settled. *Santa Clara County* v. *Southern Pacific Railroad Co.* 118 U. S. 394, 396 [30: 118]; *Charlotte, C. & A. Railroad* v. *Gibbes*, 142 U. S. 386, 391 [35: 1051, 1054]; *Gulf, Colorado, & Santa Fé Ry. Co.* v. *Ellis*, 165 U. S. 150, 154 [41: 666, 668]. What amounts to deprivation of property without due process of law, or what is a denial of the equal *protec- [**523** tion of the laws, is often difficult to determine, especially where the question relates to the property of a quasi-public corporation and the extent to which it may be subjected to public

control. But this court, speaking by Chief Justice Waite, has said that, while a state has power to fix the charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by valid contract, or unless what is done amounts to a regulation of foreign or interstate commerce, such power is not without limit; and that, "under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." *Railroad Commission Cases* [*Stone* v. *Farmers' Loan & T. Co.*], 116 U. S. 307, 325, 331 [29: 636, 642, 644]. This principle was recognized in *Dow* v. *Beidelman*, 125 U. S. 680, 689 [31: 841, 844, 2 Inters. Com. Rep. 56], and has been reaffirmed in other cases. In *Georgia R. & Banking Company* v. *Smith*, 128 U. S. 174, 179 [32: 377, 380], it was said that the power of the state to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits—in the absence of any provision in the charter of the company constituting a contract vesting it with authority over those matters—was "subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation; and that what is done does not amount to a regulation of foreign or interstate commerce." In *Chicago, M. & St. Paul Railway Co.* v. *Minnesota* [*Chicago, M. & St. P. R. Co.* v. *Minnesota Railroad & W. Commission*], 134 U. S. 418, 458 [33: 970, 982, 3 Inters. Com. Rep. 209], it was said: "If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the 524]equal protection of the laws." In *Chicago & G. T. Railway Co.* v. *Wellman*, 143 U. S. 339, 344 [36: 176, 179], the court, in answer to the suggestion that the legislature had no authority to prescribe maximum rates for railroad transportation, said that "the legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates." In *Budd* v. *New York*, 143 U. S. 517 [36: 247, 4 Inters. Com. Rep. 45], the court, while sustaining the power of New York by statute to regulate charges to be exacted at grain elevators and warehouses in that state, took care to state, as a result of former decisions, that such power was not one "to destroy or a power to compel the doing of the services without reward, or to take private property for public use without just compensation or without due process of law."

In *Reagan* v. *Farmers Loan & Trust Co.* (No. 1) 154 U. S. 362, 399 [38: 1014, 1024, 4 Inters. Com. Rep. 560], which involved the validity of certain rates for freights and passengers prescribed by a railroad commission established by an act of the legislature of Texas, this court, after referring to the above cases, said: "These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to devest the other party of any rights of person or property. In every Constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often ob[525 served, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. It was, therefore, within the competency of the circuit court of the United States for the western district of Texas, at the instance of the plaintiff, a citizen of another state, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was in so doing only exercising a power expressly named in the act creating the commission."

So, in *St. Louis & San Francisco Railway Co.* v. *Gill*, 156 U. S. 649, 657 [39: 567, 570], it was said that "there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws." In *Covington & Lexington Turnpike Road Co.* v. *Sandford*, 164 U. S. 578, 584, 594, 595, 597 [41: 560, 562, 566, 567], which involved the validity of a state enactment prescribing rates of toll on a turnpike road, the court said: "A statute which, by its necessary operation, compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will pre-

vent it from keeping its road in proper repair and from earning any dividends whatever for stockholders, is as obnoxious to the Constitution of the United States as would be a similar statute relating to the business of a railroad corporation having authority, under its charter, to collect and receive tolls for passengers and 526]freight." *And in *Chicago, Burlington, & Q. Railroad Co.* v. *Chicago*, 166 U. S. 226, 241 [41: 979, 986], it was held that "a judgment of a state court, even if it be authorized by statute, whereby private property is taken by the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

In view of the adjudications these principles must be regarded as settled.

1. A railroad corporation is a person within the meaning of the 14th Amendment declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would therefore be repugnant to the 14th Amendment of the Constitution of the United States.

3. While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, can not be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.

The cases before us directly present the important question last stated.

Before entering upon its examination, it may be observed that the grant to the legislature in 527] the Constitution of *Nebraska of the power to establish maximum rates for the transportation of passengers and freight on railroads in that state has reference to "reasonable" maximum rates. These words strongly imply that it was not intended to give a power to fix maximum rates without regard to their reasonableness. Be this as it may, it cannot be admitted that the power granted may be exerted in derogation of rights secured by the Constitution of the United States, or that the judiciary may not, when its jurisdiction is properly invoked, protect those rights.

What are the considerations to which weight must be given when we seek to ascertain the compensation that a railroad company is entitled to receive, and a prohibition upon the receiving of which may be fairly deemed a deprivation by legislative decree of property without due process of law? Undoubtedly that question could be more easily determined by a commission composed of persons whose special skill, observation, and experience qualify them to so handle great problems of transportation as to do justice both to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people. But, despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a state enactment is in harmony with that law simply because the legislature of the state has declared such to be the case; for that would make the state legislature the final judge of the validity of its enactment, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding. Art. 6. The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their *jurisdiction is[528 properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land.

We turn now to the evidence in the voluminous record before us for the purpose of ascertaining whether—looking at the cases in the light of the facts as they existed when the decrees were rendered—the Nebraska statute, if enforced, would, by its necessary operation, have deprived the companies, whose stockholders and bondholders here complain, of the right to obtain just compensation for the services rendered by them.

The first and most important contention of the plaintiffs is that, if the statute had been in force during any one of the three years preceding its passage, the defendant companies would have been compelled to use their property for the public substantially without reward or without the just compensation to which it was entitled. We think this mode of calculation for ascertaining the probable effect of the Nebraska statute upon the railroad companies in question is one that may be properly used.

The conclusion reached by the circuit court was that the reduction made by the Nebraska statute in the rates for local freight was so unjust and unreasonable as to require a decree staying the enforcement of such rates against the companies named in the bill. *Ames* v. *Union Pacific Ry. Co.* 64 Fed. Rep. 165, 189.

That conclusion was based largely upon the figures presented by Mr. Dilworth, while he was secretary of the state board of transportation, as well as a defendant and one of the solicitors of the defendants in these causes. He was a principal witness for the board. His general fairness and his competency to speak of the facts upon which the question before us depends are apparent on the record. He stated that the average reduction made by the statute on all the "commodities of local 529]rates" was 29.50 per cent; and this *estimate seems to have been accepted by the parties as correct. He estimated that the percentage of operating expenses on local business would exceed the percentage of operating expenses on all business by at least 10 per cent, and that it might go as high as 20 per cent, or higher. And this view is more than sustained by the evidence of witnesses possessing special knowledge of railroad transportation and of the cost of doing local business as compared with what is called through business. Indeed, one of those witnesses states that the cost of carrying local freight is four times as much as the cost of through freight per ton per mile; another, that the cost of the short haul is "reasonably double the long haul." If due regard he had to the testimony—and we have no other basis for our judgment—we are not permitted to place 530]*the extra cost of local business at less than 10 per cent greater than the percentage of the cost of all business.

In answer to questions propounded to him by the defendants constituting the state board of transportation, Mr. Dilworth stated that he had prepared himself with an estimate showing the number of tons of freight, commonly spoken of as local freight, hauled on the respective railways in Nebraska, and the amount received by the railway companies by way of tariff on tons of freight hauled, including through as well as local freight, and was qualified to speak as to the amount received by the companies for both passengers and freight within the state, and the deduction that would take place in rates under the statute in question. He presented various tables showing the results of his investigations. One is known as Exhibit 4, and is an "Estimate of Local Business, and the effect of House Roll 33" on the Burlington, St. Paul, Fremont, Union Pacific, Omaha, St. Joseph, and Kansas City Companies for the year 1892. Another is called Exhibit 19, and is a like estimate in respect of the same companies for the years 1891 and 1893. Another is known as Exhibit 20, and shows "Tons carried, Tonnage per Mile, and Percentage of Expenses for the years ending June 30, 1891, 1892, and 1893 (Nebraska.)" These exhibits are as follows:

Exhibit "4."

Estimate of Local Business and the effect of House Roll 33 on the following-named Railroads:

1892.	Number of tons hauled locally.	Average amount received for each ton hauled.	Total amount received for tons hauled locally.	Total amount of reduction caused by H. R. 33.	Amount received from passenger business.	Amount received for freight hauled in Nebraska including through and local.	Total amount realized on all business done in the state.	Per cent of reduction on all business done in the state by H. R. 33.
Burlington Co.	574,653	$2.15416	$1,237,884	$365,175	$2,369,714	$5,538,766	$7,908,242	.044
St. Paul Co.	65,762	1.87089	123,033	36,294	263,458	472,051	763,509	.047
Fremont Co.	158,350	2.12533	336,714	99,310	598,219	1,495,468	2,093,687	.047
Union Pacific Co.	192,865	2.06498	398,262	117,487	977,264	4,284,793	5,262,057	.022
Omaha Co.	63,999	1.38026	88,335	26,043	305,668	955,626	1,261,294	.023
St. Joseph Co.	39,657	.63051	31,004	8,836	71,083	216,395	287,478	.030
Kansas City Co.	10,823	.61261	6,630	1,889	41,123	125,530	166,653	.011

531]*

Exhibit "19."

Estimate of Local Business and the effect of House Roll 33 on the following-named Railroads for the years ending June 30, 1891 and 1893.

	Number of tons carried locally.	Average amount received per each ton.	Total amount received per ton [for tons] carried locally.	Total amount of reduction caused by H. R. No. 33.	Amount received from passenger business.	Amount received from freight carried in Nebraska including local and through.	Total amount received on all business done in the state.	Per cent of reduction on all business done in the state by H. R. 33.
1891.								
Burlington Co.	538,824	$1.98	$1,066,871	$314,726	$2,321,983	$3,942,078	$6,264,061	.05
St. Paul Co.	64,496	1.72	110,933	37,725	225,264	506,470	731,734	.044
Fremont Co.	141,056	2.47	348,408	102,780	876,583	1,969,242	2,845,825	.036
Union Pacific Co.	152,028	1.83	278,211	82,072	1,509,331	3,791,849	5,301,180	.015
Omaha Co.	61,448	1.23	75,581	22,296	311,130	580,834	891,964	.025
St. Joseph Co.	25,078	.87	21,817	6,245	86,036	178,529	264,565	.024
Kansas City Co.	8,743	.77	6,732	1,985	41,837	67.946	109,783	.018
1893.								
Burlington Co.	583,294	2.13	1,242,416	366,512	2,581,564	5,973,356	8,554,920	.042
St. Paul Co.	78,753	1.81	142,542	42,049	267,535	650,109	917,644	.045
Fremont Co.	177,804	2.26	424,437	125,208	816,239	2,237,044	3,053,283	.041
Union Pacific Co.	220,061	1.88	413,714	122,045	1,551,877	4,313,204	5,865,081	.020
Omaha Co.	68,237	1.18	80,519	23,753	332,497	887,616	1,220,113	.019
St. Joseph Co.	50,452	.67	33,802	9,971	99,396	263,516	362,912	.027
Kansas City Co.	15,484	.61	9,445	2,786	41,667	135,824	177,491	.015

532]* **Exhibit "20."**

Tons carried, Tonnage per Mile, and Percentage of Expenses for Years ending June 30, 1891, 1892, and 1893. (Nebraska).

NAME OF ROAD.	No. of tons carried locally.	No. of tons of interstate freight carried.	No. of tons of local freight carried 1 mile.	No. of tons of interstate freight carried 1 mile.	Total number of tons, local & interstate, carried 1 mile.	Total number of passengers, local and interstate, carried 1 mile.	Percentage of expenses to earnings.
1891.							
Burlington Co.	538,824	1,448,229	73,075,310	106,415,962	269,491,272	69,594,747	66.24
St. Paul Co.	64,496	228,671	10,267,118	36,397,629	46,664,747	7,403,263	70.78
Fremont Co.	141,056	654,400	21,863,680	101,644,999	123,508,679	24,898,729	49.87
Union Pacific Co.	152,028	1,908,045	28,908,124	362,966,694	391,874,818	66,072,597	68.94
Omaha Co.	61,448	409,270	4,579,104	30,499,041	35,078,145	10,295,137	120.26
St. Joseph Co.	25,078	178,169	1,497,658	10,640,979	12,138,637	2,308,918	96.44
Kansas City Co.	8,743	78,694	403,751	3,634,082	4,037,833	912,210	99.54
1892.							
Burlington Co.	574,653	1,996,437	91,139,965	316,552,193	407,692,158	70,038,243	64.23
St. Paul Co.	65,762	264,403	11,028,287	44,321,384	55,349,671	8,833,405	65.96
Fremont Co.	158,350	846,312	24,069,200	128,425,903	152,495,103	21,874,987	70.71
Union Pacific Co.	192,865	1,882,112	42,970,322	419,300,773	462,271,095	56,926,269	56.44
Omaha Co.	63,999	628,351	4,659,127	45,745,647	50,404,774	10,058,442	93.12
St. Joseph Co.	39,657	303,550	2,005,851	15,355,015	17,360,866	2,472,538	74.23
Kansas City Co.	10,823	194,089	481,515	8,635,016	9,116,531	864,030	75.19
1893.							
Burlington Co.	583,294	2,221,005	93,703,675	357,131,753	450,925,428	83,091,413	65.51
St. Paul Co.	78,753	279,218	12,848,551	45,554,417	58,402,968	9,074,093	64.58
Fremont Co.	187,804	800,158	26,855,972	114,511,328	141,367,300	23,209,212	53.66
Union Pacific Co.	220,061	2,068,568	45,948,736	431,949,561	477,898,297	63,422,117	58.51
Omaha Co.	68,237	683,868	4,257,988	42,706,297	46,964,285	11,028,131	94.14
St. Joseph Co.	50,452	337,647	2,774,860	18,576,845	21,351,705	2,834,109	62.05
Kansas City Co.	15,484	205,725	658,534	8,750,126	9,408,660	875,415	76.50

533] *It may be here stated that the words in these exhibits, "number of tons hauled locally," refer to freight that started and ended in the state; the words in Exhibit 4, "amount received for freight hauled in Nebraska, including through and local," and the like words in Exhibit 19, refer, not only to freight starting and ending in the state, but to all freight hauled by the railroad company in Nebraska, regardless of its destination or origin—that is, "freight that begins in the state and goes out of the state, freight that begins out of the state and comes into the state, and freight which begins and ends in the state." The words, "per cent of reduction on all the business done in the state by House Roll 33," in Exhibits 4 and 19, mean the percentage of the total amount of all business, passenger and freight, done in the state, whatever its origin or destination, and do not indicate the percentage of reduction on local business when considered alone. It should be stated also that the words, "percentage of expenses to earnings," in Exhibit 20, refer to all business, through and local, done by the railroad company within the state. Mr. Dilworth, as we have seen, testified that if the local business alone were considered, the percentage of expenses to earnings upon such business would be at least 10 per cent more than the general percentage of expenses to earnings on all business, both through and local. It is important here to note that his estimates are of business from July 1 to the succeeding June 30. So that when allusion is made presently to his estimates for 1891, 1892, and 1893, it will be understood to refer to the years *ending* the 30th days of June, 1891, 1892, and 1893 respectively.

From July 1, 1890, to June 30, 1891, as shown by Exhibit 20, the percentage of expenses to earnings on all business on the Burlington road was 66.24; on the St. Paul road, 70.78; on the Fremont road, 49.87; on the Union Pacific road, 68 94; on the Omaha road, 120.26; on the St. Joseph road, 96.44; and on the Kansas City road, 99.54.

From July 1, 1891, to June 30, 1892, as shown by the same Exhibit the percentage of expenses to earnings on all business on the Burlington road was 64.23; on the St. Paul *road, 65.96; on the Fremont road, 70.71; [534 on the Union Pacific road, 56.44; on the Omaha road, 93.12; on the St. Joseph road, 74.23; and on the Kansas City road, 75.19; and.

From July 1, 1892, to June 30, 1893, as shown by the same Exhibit, the percentage of expenses to earnings on all business on the Burlington road was 65.51; on the St. Paul road, 64.58; on the Fremont road, 53.66; on the Union Pacific road, 58.51; on the Omaha road, 94.14; on the St. Joseph road, 62.05; and on the Kansas City road, 76.50.

In view of the reduction of 29.50 in rates prescribed by the statute and of the extra cost of doing local business, as compared with other business, what do these facts show?

Take the case of the Burlington road from July 1, 1890, to June 30, 1891. Looking at the entire business done on it during that period within the limits of the state, we find that the percentage of operating expenses to earnings on all business—which, as stated, does not include the extra cost of local business—was 66.24. Add to this the extra cost of local business estimated at least 10 per cent, and the result is that, under the rates charged during the period stated, the cost to the Burlington Com-

pany of earning $100 would have been $76.24. Now, if the reduction of 29¼ per cent made by the act of 1893 had been in force prior to July 1, 1891, the company would have received $70.50 as against $100 for the same services, showing that in that year the operating expenses would have exceeded the earnings by $5.74 in every $100 of the amount actually received by it.

By like calculations, it will appear that each of the railroad companies would have conducted their local business at a loss during the periods stated, except that in the year ending June 30, 1891, and in the year ending June 30, 1893, the earnings of the Fremont Company, and in the years ending the 30th days of June, 1892 and 1893, respectively, the earnings of the Union Pacific Company, would have slightly exceeded their operating expenses.

Under the rates prescribed by the act of 1893 the cost to the respective companies of local business in Nebraska would have exceeded the earnings for the years ending June *30, [535 1891, 1892, and 1893, respectively, in every $100 of the amount actually received, as follows: To the Burlington Company, by $5.74, $3.73, and $5.01; to the St. Paul Company, by $10.28, $5.46, and $4.08; to the Omaha Company, $59.76, $32.62, and $33.64; to the St. Joseph Company, by $35.94, $13.73, and $1.55; and to the Kansas City Company, by $39.04, $14.69, and $16. The cost to the Union Pacific Company for the year ending June 30, 1891, of its local business, under the rates prescribed by the statute of 1893, would have caused a loss of $3.44 in every $100 of the amount actually received.

In order to show these results at a glance the following table is inserted upon the basis of one hundred as representing the amounts actually charged and received by the respective railroad companies for the years given:

*[536

Name.	Cost by percentage of all business.	Extra cost of local business.	Total cost of local business.	Earnings as reduced by act of 1893.	Loss.	Gain.
1891.						
Burlington Company	66.24	10	76.24	70.50	5.74	
St. Paul Company	70.78	10	80.78	70.50	10.28	
Fremont Company	49.87	10	59.87	70 50	-----	10.63
Union Pacific Company	68.94	10	78.94	70.50	8.44	
Omaha Company	120.26	10	130.26	70.50	59.76	
St. Joseph Company	96.44	10	106.44	70.50	35.94	
Kansas City Company	99.54	10	109.54	70.50	39.04	
1892.						
Burlington Company	64.23	10	74.23	70.50	3.73	
St. Paul Company	65.96	10	75.96	70 50	5.46	
Fremont Company	70.71	10	80.71	70 50	10.21	
Union Pacific Company	56.44	10	66.44	70.50	-----	4.06
Omaha Company	93.12	10	103.12	70.50	32.62	
St. Joseph Company	74.23	10	84.23	70.50	13.73	
Kansas City Company	75.19	10	85.19	70.50	14.69	
1893.						
Burlington Company	65.51	10	75.51	70.50	5.01	
St. Paul Company	64.58	10	74.58	70.50	4.08	
Fremont Company	53 66	10	63.66	70.50	-----	6.84
Union Pacific Company	58.51	10	68.51	70.50	-----	1.99
Omaha Company	94.14	10	104.14	70.50	33.64	
St. Joseph Company	62.05	10	72.05	70.50	1.55	
Kansas City Company	76.50	10	86.50	70.50	16.00	

There are other views of the case suggested by the above exhibits and table which show the same results.

In the year ending June 30, 1891, under the rates then in force, the Burlington Company received $1,066,871 for tons carried locally. If the business had been done under the rates prescribed by the act of 1893, it would have received 29¼ per cent less, that is, only $752,145 or $314, 726 less than it did receive. The percentage of expenses to earnings, including the extra cost of local business, was 76.24; that is, it cost $813,382 to earn $1,066,871. So that the difference between $813,382 and $752,145 shows that, if the rates prescribed by the statute of 1893 had been in force during the year ending June 30, 1891, the amount received would have been less than the operating expenses of the Burlington Company by $61,237.

During the year ending June 30, 1892, the same company received for tons carried locally $1,237,884. If the act of 1893 had been in force, it would have received, because of the reduced rates prescribed by that act, only $872,709—less by $365,175 than it did receive. The percentage of expenses to earnings, including the extra cost of local business, was 74.23; that is, the $872,709 would have been earned at a cost of $918,881. So that under the rates prescribed by the act of 1893 the loss during the period named would have been $46,172.

During the year ending June 30, 1893, that company received $1,242,416 for tons carried locally; whereas, under the 29¼ per cent reduction prescribed by the statute of that year, it would have received only $875,905, that is, less by $366,512 than it did receive. The percentage of its expenses to earnings in that year, including the extra cost of local business, was 75.51; that is, under the statutory rates $875,905 would have been earned at a cost of $938, 147, which would have been a loss of $62,243.

*By the same mode of calculation, it [537 will be found that if the statute of 1893 had been enforced during the years ending the 30th days of June, 1891, 1892, and 1893, respectively, the other companies would have lost, that is, their expenses would have exceeded their earnings during those years by, the following amounts: The St. Paul Company, $11,403, $6,716, and $5,814; the Fremont Company, $34,377 for the year ending June 30, 1892; the Union Pacific Company, $23,480, for the year ending June 30, 1891; the Omaha Company, $45,166,

$28,813, and $27,085; the St. Joseph Company, $7,840, $4,256, and $523; and the Kansas City Company, $2,627, $974, and $1,510; while the earnings of the Union Pacific Company would have exceeded its expenses for the years ending the 30th days of June, 1892 and 1893 respectively by $16,170 and $8,234; and those of the Fremont Company by $37,037 and $29,036 for the years ending the 30th days of June, 1891 and 1893 respectively.

These results will be seen in the following table, based upon the above exhibits, and assuming that 10 per cent was the very lowest amount of the extra cost of business beginning and ending in the state:

538]*

NAME OF ROAD.	Total amount received for tons carried locally.	Total amount of reduction by act of 1893, 29½ per cent.	What would have been received under rates fixed by act of 1893.	Amount to be deducted to pay expenses (reckoned by per cent of cost of all business).	Amount to be taken out of earnings to pay ten per cent extra cost of local business.	Total expense of local business.	Gain.	Loss.
1891.								
Burlington Co.	$1,066,871	$314,726	$752,145	$706,695	$106,687	$813,382	.....	$61,237
St. Paul Co.	110,933	32,725	78,208	78,518	11,093	89,611	.....	11,403
Fremont Co.	348,408	102,780	245,628	173,751	34,840	208,591	$37,037	.....
Union Pacific Co.	278,211	82,072	196,139	191,798	27,821	219,619	.....	23,480
Omaha Co.	75,581	22,296	53,285	90,893	7,558	98,451	.....	45,166
St. Joseph Co.	21,817	6,436	15,381	21,040	2,181	23,221	.....	7,840
Kansas City Co.	6,732	1,985	4,747	6,701	673	7,374	.....	2,627
1892.								
Burlington Co.	1,237,884	365,175	872,709	795,093	123,788	918,881	.....	46,172
St. Paul Co.	123,033	36,294	86,739	81,152	12,303	93,455	.....	6,716
Fremont Co.	336,714	99,330	237,384	238,090	33,671	271,761	.....	34,377
Union Pacific Co.	398,262	117,487	280,775	224,779	39,826	264,605	16,170	.....
Omaha Co.	88,335	26,058	62,277	82,257	8,833	91,090	.....	28,813
St. Joseph Co.	31,004	9,146	21,858	23,014	3,100	26,114	.....	4,256
Kansas City Co.	6,630	1,955	4,674	4,985	663	5,648	.....	974
1893.								
Burlington Co.	1,242,416	366,512	875,904	813,906	124,241	938,147	.....	62,243
St. Paul Co.	142,542	42,049	100,493	92,053	14,254	106,307	.....	5,814
Fremont Co.	424,437	125,208	299,229	227,750	42,443	270,193	29,036	.....
Union Pacific Co.	413,714	122,045	291,669	242,064	41,371	283,435	8,234	.....
Omaha Co.	80,519	23,753	56,766	75,800	8,051	83,851	.....	27,085
St. Joseph Co.	33,802	9,971	23,831	20,974	3,380	24,354	.....	523
Kansas City Co.	9,445	2,786	6,659	7,225	944	8,169	.....	1,510

Counsel for the appellants contend that the railroad companies in Nebraska derived a profit from their local tonnage of nearly 100 per cent over and above operating expenses. This contention is based upon the evidence given by William Randall, freight and ticket agent as well as auditor of the Burlington road in Nebraska, on his first examination as a witness. He then stated that the earnings of the company for the year 1892—meaning for the year beginning January 1, 1892,—upon freight starting and ending within the state were $1,853,036.59, and that the operating expenses, including taxes, on that business were $972,183.70. These figures, counsel say, show that "there was a clear profit over operating expenses, including taxes, of nearly one hundred per cent on the local business of the Burlington Company in 1892." But counsel overlook the fact that, upon his second examination, Mr. Randall stated that his first figures were not correct, and that the operating expenses on local

539] business in 1892* were $1,221,748.84, and not $972,183.70. This agrees with the figures given by Mr. Taylor, another auditor of the Burlington Company. Now, if the act of 1893 had been in force during 1892, the earnings in the latter year, $1,853,036.59, would have been reduced by 29½ per cent, that is, by $546,645.79, leaving $1,306,390.80 as the total receipts on local business, which, after deducting operating expenses, $1,221,742.84, would leave a profit of $84,567.97. If, as counsel for appellees contend, 10 per cent be added as the extra cost of local business, the result would show an actual loss on that business during the whole of 1892. But if that mode of calculation be not adopted, the utmost that can be said to be established by the evidence of Taylor and Randall would be that if the rates fixed by the act of 1893 had been in force during 1892, the company would have received on local business, in the latter year, $84,647.96 over and above operating expenses, or a little over 6 per cent of the amount of those expenses. The difference between the figures of Dilworth and Taylor and Randall, as to the earnings of the Burlington Company, arises, so far as we can perceive, from the fact that their calculations cover different periods. Dilworth gave the earnings from July 1, 1891, to June 30, 1892, and speaks of them as the earnings of 1892, while Taylor and Randall gave the earnings from January 1, 1892, to December 31, 1892. There may have been an unusual amount of business during the last six months of 1892 embraced in the estimates of Taylor and Randall, and not embraced by Dilworth's estimates. We cannot, therefore, say that the testimony of Taylor and Randall overthrows the estimates of Dilworth.

It is said by the appellants that the local

rates established by the Nebraska statute are much higher than in the state of Iowa, and that fact shows that the Nebraska rates are reasonable. This contention was thus met by the circuit court: "It is, however, urged by the defendants that, in the general tariffs of these companies, there is an inequality; that the rates in Nebraska are higher than those in adjoining states; and that the reduction by House Roll 33 simply establishes an equality between Nebraska **540**] and the other states through *which the roads run. The question is asked, Are not the people of Nebraska entitled to as cheap rates as the people of Iowa? Of course, relatively they are. That is, the roads may not discriminate against the people of any one state. . . . [But they are not necessarily bound to give absolutely the same rates to the people of all the states], for the kind and amount of business, and the cost thereof, are factors which determine largely the question of rates, and these vary in the several states. The volume of business in one state may be greater per mile, while the cost of construction and of maintenance is less. Hence, to enforce the same rates in both states might result in one great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two states, are of little value, unless all of the elements that enter into the problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are 40 per cent higher than similar rates in the state of Iowa. But it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are 230 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence, a mere difference between the rates in two states is of comparatively little significance." 64 Fed. Rep. 165. In these views we concur, and it is unnecessary to add anything to what was said by the circuit court on this point.

It is further said, in behalf of the appellants, that the reasonableness of the rates established by the Nebraska statute is not to be determined by the inquiry whether such rates would leave a reasonable net profit from the local business affected thereby, but that the court should take into consideration, among other things, the whole business of the company, that is, all its business, passenger and freight, interstate and domestic. If it be found upon investigation that the profits derived by a railroad company from its interstate business alone are sufficient to cover operating expenses on its entire line, and also to meet interest, and justify a liberal dividend upon its stock, may the legislature **541**] prescribe rates for domestic *business that would bring no reward and be less than the services rendered are reasonably worth? Or, must the rates for such transportation as begins and ends in the state be established with reference solely to the amount of business done by the carrier wholly within such state, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interstate business, and the value of the property employed in it? If we do not misapprehend counsel, their argument leads to the conclusion that the state of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and all its business, interstate and domestic. We cannot concur in this view. In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for out of, a common fund; and that its capitalization is on its entire line, within and without *the state,—can have no ap- [**542** plication where the state is without authority over rates on its entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business.

Touching the suggestion that the reduction on rates made by the state law was reasonable, if regard be had to all the business, through and local, done in the state by the railroad companies, the circuit court said:

"But again, as Mr. Dilworth testified, the average reduction on local rates caused by House Roll 33 is 29½ per cent. The tariff which was in force at the time of the passage of this act had been for some three or more years fixed by the voluntary action of the railroad companies, and the reduction of 29½ per cent was from its rates. It must be remembered that these roads are competing roads; that competition tends to a reduction of rates, sometimes, as the history of the country has shown, below that which affords any remuneration to those who own the property. Can it be possible that any business so carried on can suffer a reduction of 29½ per cent in its receipts without ruin? What would any business man, engaged in any business of a private character, think of a compulsory reduction of his receipts to the amount of 29½ per cent? The effect of this testimony is not destroyed by the table offered of the percentage of reduction on the total amount of business done by these companies in the state, as follows:

B. & M. R.....4.2 per cent.
C., St. P., M. & O.....4.5 per cent.
F., E. & M. V.....4.1 per cent.
Union Pacific.....2.0 per cent.
O. & R. V.....1.9 per cent.
St. J. & G. I.....2.7 per cent.
K. C. & O.....1.5 per cent.

"For such a table only indicates, as is further shown by defendants' Exhibit 4, how small a proportion of the total amount of business done in the state comes from purely local freight. Nor is it weakened by any comparison between the amount of reduction and the total receipts
543] from all business. *It may be as stated by counsel, that the annual earnings of the Chicago, Burlington, & Quincy Company are $27,916,128, and that the total amount of reduction caused by this House Roll 33 is only $365,175. It may be that the capital stock of the company is $76,407,500, and that $365,175 distributed among the stockholders may not be, for any of them, a great sum; but the entire earnings of the Chicago, Burlington, & Quincy are more than 20 times the receipts from local freight in Nebraska, and to reduce such earnings by 20 times $365,175 would make a startling difference in their amount. The fact that the state of Nebraska can reach only one twentieth of the total earnings gives it no greater right to make a reduction in respect to that one twentieth than it would have, had it the power over the total earnings, and attempted in them a like per cent of reduction. If it would be unreasonable to reduce the total earnings of these roads 29½ per cent, it is, prima facie at least, equally unreasonable to so reduce any single fractional part of such earnings."

It appears, from what has been said, that if the rates prescribed by the act of 1893 had been in force during the years ending June 30, 1891, 1892, and 1893, the Fremont Company, in the years ending June 30, 1891, and June 30, 1893, and the Union Pacific Company, in the years ending June 30, 1892, and June 30, 1893, would each have received more than enough to pay operating expenses. Do those facts affect the general conclusion as to the probable effect of the act of 1893? In the discussion of this question, the plaintiffs contended that a railroad company is entitled to exact such charges for transportation as will enable it, at all times, not only to pay operating expenses, but also to meet the interest regularly accruing upon all its outstanding obligations, and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to *all* those ends will deprive it of its property without due process of law, and deny to it the equal protection of the laws. This contention was the subject of elaborate discussion; and, as it bears upon each case in its important aspects, it should not be passed without examination.

544] *In our opinion, the broad proposition advanced by counsel involves some misconception of the relations between the public and a railroad corporation. It is unsound in that it practically excludes from consideration the fair value of the property used, omits altogether any consideration of the right of the public to be exempt from unreasonable exactions, and makes the interests of the corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed as between it and the public. A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the state. Such a corporation was created for public purposes. It performs a function of the state. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the guaranties for the protection of its property. *Olcott* v. *Fond du Lac County Supervisors*, 83 U. S. 16 Wall. 678, 694 [21: 382, 388]; *Sinking Fund Cases* [*Union P. R. Co.* v. *United States*], 99 U. S. 700, 719 [25: 496, 501]; *Cherokee Nation* v. *Southern Kansas Railway Co.* 135 U. S. 641, 657 [34: 295, 302]. It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders.

If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its *stocks, bonds, and obligations, is [**545** not alone to be considered when determining the rates that may be reasonably charged. What was said in *Covington & L. Turnpike Co.* v. *Sandford*, 164 U. S. 578, 596, 597 [41: 560, 566, 567], is pertinent to the question under consideration. It was there observed: "It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. . . . The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority, in every case where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and

maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon payment of such tolls as in view of the nature and value of the service rendered by the company are reasonable is an element in the general inquiry whether the rates established by law are unjust and unreasonable."

A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may by legislation protect the people against unreason-
546]able *charges for the services rendered by it. It cannot be assumed that any railroad corporation, accepting franchises, rights, and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its benefit, without regard to the rights of the public. But it is equally true that the corporation performing such public services and the people financially interested in its business and affairs, have rights that may not be invaded by legislative enactment in disregard of the fundamental guaranties for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question. As said in the case last cited: "Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. . . . The utmost that any corporation, operating a public highway, can rightfully demand at the hands of the legislature when exerting its general powers is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public."

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascer-
547]tain that value, the *original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. But even upon this basis, and determining the probable effect of the act of 1893 by ascertaining what could have been its effect if it had been in operation during the three years immediately preceding its passage, we perceive no ground on the record for reversing the decree of the circuit court. On the contrary, we are of opinion that as to most of the companies in question there would have been, under such rates as were established by the act of 1893, an actual loss in each of the years ending June 30, 1891, 1892, and 1893; and that, in the exceptional cases above stated, when two of the companies would have earned something above operating expenses, in particular years, the receipts or gains, above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the Constitution. Under the evidence there is no ground for saying that the operating expenses of any of the companies were greater than necessary.

In concluding this opinion, it may not be inappropriate to say that the conclusions reached by us as to the effect of the Nebraska statute find some support in the report of the board of secretaries of the Nebraska board of transportation made in September, 1891, to the board itself, and signed by Mr. Dilworth *and [548
his colleagues. That report was made pursuant to a resolution of the board requiring the secretaries to prepare a statement of facts in reference to the rates of transportation in Nebraska. It contains a brief history of what it characterizes as "the controversy on the question of freight rates between the people and the railroads of the state," and embodies such facts, figures, and arguments as the secretaries gathered from both sides. The report says: "The present controversy between the people and the railroads of this state originally grew out of the question, not of rates or reduction of rates, but of control. The people, recognizing the railroads as common carriers, not entitled under the state Constitution to the same broad liberty of action in business that the individual citizen has, wanted to control the roads. The roads, impatient of interference, wanted to control themselves and manage the business in their own way." It further states: "We have given you in the foregoing a brief history of the rate matter as we have found it,

and from that history and from the evidence and reports on file in our office we beg leave to submit in conclusion the following findings of fact: First, we find, from the evidence and sworn statements and reports on file in our office, and from personal inspection, that the railroads in this state could not be duplicated for a less sum than $30,000 per mile, taking into consideration their equipments and depot and terminal facilities." Here follow a mass of figures and calculations, and the report concludes: "We further find that the railroads are not in a condition to stand, nor do their earnings, figured on a basis cost of $30,000 per mile and not what they claim they cost, justify any cut in local rates of this state at the present time; and further, that a reduction in the local rates in this state would increase the through rates to market for our grain and would be a blow at the industry of the state. This last finding is fully established by the fact that the board of transportation reduced the local rates on hard coal 60 per cent. and yet the price to the consumer was not lowered nor the price at the mines raised, which shows conclusively that the through rates must have been raised. In submitting this report we have presented the [549] facts *and figures as we find them from evidence obtainable from sworn reports now on file in our office. And we would respectfully recommend that no action be taken that will in any way jeopardize the interests of the producers of Nebraska, but that all interests be protected in the fullest manner possible, as provided by the foregoing findings."

To this report of the secretaries is appended the "Findings of the Board," from which we make this extract: "After a careful and quite thorough investigation of the question of freight rates in Nebraska, which has occupied much time, and has taken a wide range, the state board of transportation has arrived at the conclusion that the rates now in force in this state cannot be generally reduced without doing violence to the business interests of the state, and at the same time injuring the shipping and producing classes. We have come to this conclusion, not by taking the cost of construction and equipments, nor the amount of stock and bonds issued per mile, but by making our computations upon the basis of what it would cost to duplicate the property at the present time. It has been our endeavor to deal fairly and justly with the question, and in arriving at a conclusion we have been governed only by the evidence, statements, and facts produced for our consideration. A candid examination and comparison of the figures presented to us in the unanimous report of the board of secretaries, in the opinion of this board, fully justifies the conclusion reached: That a general reduction of rates, as now in force over the state, is not practical at this time."

So that we have the judgment of the state board of transportation, as constituted in 1891, that a general reduction of rates could not then have been made without injury to the business of the state, to say nothing of the interests of those whose means were invested in railroad property. We are unable to find from the record before us that the situation in Nebraska had so changed in 1893 as to justify that being done in that year which it was not safe or just to do in 1891.

But it may be added that the conditions of business, so far as railroad corporations are concerned, have probably changed *for [550 the better since the decree below, and that the rates prescribed by the statute of 1893 may now afford all the compensation to which the railroad companies in Nebraska are entitled as between them and the public. In anticipation, perhaps, of such a change of circumstances, and the exceptional character of the litigation, the circuit court wisely provided in its final decree that the defendants, members of the board of transportation, might, "when the circumstances have changed so that the rates fixed in the said act of 1893 shall yield to the said companies reasonable compensation for the services aforesaid," apply to the court, by bill or otherwise, as they might be advised, for a further order in that behalf. Of this provision of the final decree the state board of transportation, if so advised, can avail itself. In that event, if the circuit court finds that the present condition of business is such as to admit of the application of the statute to the railroad companies in question without depriving them of just compensation, it will be its duty to discharge the injunction heretofore granted, and to make whatever order is necessary to remove any obstruction placed by the decrees in these cases in the way of the enforcement of the statute.

Perceiving no error on the record in the light of the facts presented to the circuit court, *the decree in each case must be affirmed.*

It is so ordered.

The *Chief Justice* and Mr. Justice **McKenna** took no part in the decision in these cases.

JAMES P. MERRITT *et al., Appts.,* [551
v.
PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE *et al.*

(See S. C. Reporter's ed. 551-557.)

Jurisdiction on appeal.

A plea alleging that parties had been improperly or collusively joined to make the case cognizable by the circuit court, and which, if true, shows that that court was without jurisdiction, does not involve the construction or application of the Constitution of the United States, so as to give this court jurisdiction on appeal directly from that court.

[No. 505.]

Submitted January 31, 1898. Decided March 14, 1898.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of California in favor of the plaintiffs, the president and trustees of Bowdoin College

NOTE.—*That only parties to record can be heard on appeal or writ of error,* see note to Harrison v. Nixon, 9: 201.

As to parties in error, who necessary, see note to Owings v. Kincannon, 8: 727.

et al., in an action brought by them against James P. Merritt *et al.*, defendants, to obtain a decree quieting the title of plaintiffs to certain real estate and restraining the defendants from violating certain covenants and agreements and also the specific performance thereof. *On motion to dismiss. Dismissed.*

See same case below, 54 Fed. Rep. 55, 59 Fed. Rep. 6, 63 Fed. Rep. 213, 75 Fed. Rep. 480.

Statement by Mr. Justice **Harlan:**

The plaintiffs in this suit, appellees here, are the president and trustees of Bowdoin College, a corporation of Maine, and a large number of individuals who are citizens of states other than California. They sued on behalf of themselves and of all other beneficiaries under a certain deed of trust made and entered into between Catharine M. Garcelon, of the first part, and John A. Stanly and Stephen W. Purington, trustees, of the second part. The defendants were James P. Merritt and others, including Stanly and Purington. The general object of the suit was to quiet the title of the plaintiffs to the real estate conveyed by the above deed to Stanly and Purington, and to secure an injunction restraining the other defendants from violating certain alleged covenants, promises, and agreements made with the grantor, and also the specific performance of such covenants, promises, and agreements.

The bill contained these allegations as explanatory of the reasons why the suit was not instituted by the trustees Stanly and Purington:

"Your orators and oratrices allege and aver that they have requested the said Stephen W. Purington and John A. Stanly, as trustees as aforesaid, to institute such action, suit, or proceeding against the defendants, the said James [552] P. Merritt *and Frederick A. Merritt, and their confederates, as would be necessary to quiet their title to the real estate so conveyed to them in trust as aforesaid, or to secure a perpetual injunction restraining the said James P. Merritt and Federick A. Merritt and each of them from violating their repeated covenants, promises, and agreements made with the said Catharine M. Garcelon, as is hereinbefore stated, and to secure a specific performance of said covenants, promises, and agreements, and the said Purington and Stanly have declined to accede to this request of your orators and oratrices; that by reason of such refusal your orators and oratrices are compelled to institute this suit, which your orators and oratrices do, not only in their own behalf, but on behalf of all other beneficiaries of said trust who may elect to join your orators and oratrices herein."

The defendants James P. Merritt and Frederick A. Merritt demurred to the bill of complaint, assigning as grounds of demurrer that it appeared from the bill that the plaintiffs were not entitled to the relief prayed against them; had not by the bill made out any title to the relief prayed; that the subject of the suit was not within the jurisdiction of a court of equity; that the court below had no jurisdiction of the suit; that it appeared from the bill that the same was exhibited against the defendants for several distinct and independent matters having no relation to each other or to one another, and in which or in the greater part of which the defendants demurring were not in any way interested or concerned; that the bill was multifarious; that it appeared from the bill that certain persons were not brought before the court who were necessary and proper parties; and that the bill did not show any matter of equity entitling the plaintiffs to the relief asked against the defendants who demurred.

The demurrer was overruled, and the opinion of the court thereon will be found in 54 Fed. Rep. 55.

The case was next heard on the application of the plaintiffs to file a supplemental bill making Harry P. Merritt a party defendant, and for an injunction to restrain the prosecution of an action commenced by him in the superior court of Alameda *county, Cali- [553] fornia Leave to file such a bill was given, and a preliminary injunction was granted. 59 Fed. Rep. 6.

Subsequently the defendant James P. Merritt filed a plea, in which it was stated that all the defendants to the bill (including the defendant Purington who had then recently died) were at the time of the commencement of the action and ever since had been citizens of California; that Stanly and Purington "could not at any time bring or maintain in this court this action or any cause of action alleged in the said bill of complaint; that said last-named defendants for the purpose of bringing and maintaining this action in this court, and to evade the provisions of the Constitution of the United States and the laws giving jurisdiction to this court, brought and maintained this action in the names of the persons named in said bill of complaint as complainants therein, and without any authority thereto by or from said named complainants or any of them; that said named complainants are only nominal parties to said bill of complaint and in this action, and that said last-named defendants John A. Stanly and Stephen W. Purington, claiming to be trustees as aforesaid, have always been in truth and in fact the only real parties complainant in said bill of complaint and in this action, and that they are only nominally and colorably defendants in said bill and in this action;" that "the said John A. Stanly and Stephen W. Purington, claiming to be trustees as aforesaid never were, nor was either of them at any time, nor is the said John A. Stanly, as trustee or otherwise, now in truth or in fact, real or genuine parties defendant or a real or genuine party defendant to said bill of complaint; and that said John A. Stanly and Stephen W. Purington, claiming to be trustees as aforesaid, were, and each of them is, named in said bill of complaint as a party defendant thereto only colorably and by false pretense, for the purpose of making it falsely to appear that he is a party defendant thereto and in truth the real and genuine party complainant therein; that none of the parties named in said bill as complainants therein ever was or is in truth or in fact complainants or a party complainant to said bill of complaint or in this action."

The plea further averred—

*"That the persons named in said bill [554] of complaint as complainants never did, and that none of said persons ever did, in truth or in fact or in good faith, request the said Stephen W. Purington and John A. Stanly, claiming to

be the trustees aforesaid, or in any capacity, or either of them, to institute any suit, action, or proceeding against the defendants, the said James P. Merritt and Frederick A. Merritt, or either of them, or any person or persons whatever, to quiet the title to real estate, or any part thereof, alleged in the said bill of complaint to have been conveyed to said Stephen W. Purington and John A. Stanly in trust, or to secure an injunction restraining the said James P. Merritt and Frederick A. Merritt, or either of them, from violating what is alleged in said bill of complaint to be their covenants, promises, and agreements, alleged in said bill to have been made by them with Catherine M. Garcelon, or from violating any of said alleged covenants, promises, or agreements, or to secure a specific performance of said alleged covenants, promises, or agreements, or any of them, or any action, suit, or proceeding whatever; that said Stephen W. Purington and John A. Stanly claiming to be trustees as aforesaid, or in any capacity, never, in truth or in fact or in good faith, declined or refused to bring such or any action; that if the persons, or any of them named in said bill of complaint as complainants therein, ever did request said Stephen W. Purington and John A. Stanly, claiming to be trustees as aforesaid, or either of them, to institute any action, suit, or proceeding whatever, or if they or either of them ever declined or refused so to do, such request and such declination were not and each of them was not made honestly or in good faith, but at the fraudulent instance and request of said Stephen W. Purington and John A. Stanly, claiming to be trustees as aforesaid, and solely to enable said Stephen W. Purington and John A. Stanly, claiming to be trustees as aforesaid, to feign and falsely pretend to refuse such request, and thereupon to institute falsely fraudulently and prosecute in this court this action against this defendant.

"That in truth and in fact said bill of complaint was prepared and filed in this court by said Stephen W. Purington and John A. Stanly, claiming to be trustees as aforesaid 555] and *by them only, and the same and this action has ever since been and is now being prosecuted by them only. . . .

"That this action is not in truth or in fact a controversy between citizens of different states. That this action is in truth and in fact a controversy solely between citizens of the state of California, that is to say until the death of said Stephen W. Purington, between the said Stephen W. Purington and John A. Stanly, claiming to be trustees as aforesaid, citizens of the state of California, and since his death, by said John A. Stanly, claiming to be such trustee, on the one side, and the said Frederick A. Merritt and this defendant on the other side. That this court has no jurisdiction of the said bill of complaint and no jurisdiction of this cause."

The cause was heard on a motion of the defendant James P. Merritt, to dismiss the suit as a collusive one within the meaning of § 5 of the act of March 3, 1875. It was adjudged that the plea in abatement was not sustained by the evidence and the motion to dismiss was consequently overruled. 63 Fed. Rep. 213. A final decree in favor of the plaintiffs was entered June 18, 1896. From that decree an appeal was prosecuted directly to this court. But on the 24th of May, 1897, the appeal was dismissed upon the authority of *Colvin* v. *Jacksonville*, 158 U. S. 456 [39: 1053]; *The Bayonne*, 159 U. S. 687, 692 [40: 306, 309]; and *Chappell* v. *United States*, 160 U. S. 499, 507, 508 [40: 510, 513]. In the first of the cases cited it was adjudged that when a case is brought here directly from a circuit court of the United States upon the ground that it involves the jurisdiction of that court, the certificate as to jurisdiction must be granted during the term at which the judgment or decree is entered.

Messrs. **William A. Maury, Thomas H. Hubbard, Robert Y. Hayne, George N. Williams,** and **E. S. Pillsbury** for appellees, in favor of motion to dismiss.

Messrs. **A. T. Britton** and **A. B. Browne** for appellants, in opposition to motion.

*Mr. Justice **Harlan** delivered the [556 opinion of the court:

The present appeal was taken on the 28th of June, 1897, and the case is before us on a motion of appellees to dismiss the same for want of jurisdiction in this court.

The object of the plea in abatement was to bring about a dismissal of the suit under the 5th section of the act of March 3, 1875. 18 Stat. at L. 470, chap. 137. That section provides for the dismissal of a suit in a circuit court of the United States if it shall appear to the satisfaction of the court at any time that the parties to it "have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act."

By the act of March 3, 1891 (26 Stat. at L. 826, chap. 517), appeals or writs of error may be taken from the district courts or the circuit courts directly to this court in certain cases, among which are cases in which the "jurisdiction of the court is in issue," and cases that involve "the construction or application of the Constitution of the United States." The former appeal was dismissed upon the ground that a direct appeal to this court would not lie on an issue as to the jurisdiction of the circuit court unless the question of jurisdiction was certified during the term at which the final decree was rendered.

It is now sought to bring the case here by appeal directly from the circuit court upon the ground that it involves the "construction or application of the Constitution of the United States." This position cannot be sustained. When it appears that parties have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under the act of 1875, then the circuit court is, within the meaning of the act of 1891, without jurisdiction to proceed. But the plea in this case raised no question as to the constitutionality of the act of 1875, and called for no order or judgment that would require a construction or application of the Constitution, although an allowance of the plea may have involved the application of an act of Congress. The plea set out certain facts which, if found to be true,

required the dismissal of the suit as one of which the court could not take cognizance under the statute relating to jurisdiction of the circuit 557] courts of *the United States. While the issue involved the jurisdiction of the circuit court, it did not involve or require, within the meaning of the act of March 3, 1891, either the construction or application of the Constitution.

For the reasons stated, the motion to dismiss the present appeal is sustained, and *the appeal is dismissed.*

The Chief Justice did not sit in this case nor participate in its decision.

A. BACKUS, JR., & SONS and Absalom Backus, Jr., *Plffs in Err.*,

v.

FORT STREET UNION DEPOT COMPANY.

(See S. C. Reporter's ed. 557-585.)

Payment before possession in condemnation proceedings—the jury—due process of law—further instructions—state judgment—refusal to hear counsel—Michigan statute.

1. This court may examine the proceedings of a state court for the appropriation of private property for public purposes, to ascertain whether that court prescribed any rule of law in disregard of the owner's right to just compensation.

2. A state may, in condemnation cases, authorize the taking of possession before the final determination of the amount of compensation and the payment thereof, if adequate provision for compensation be made.

3. The Federal Constitution does not secure the right to have the questions of compensation and necessity, in such cases, passed upon by one and the same jury; nor does it forbid, or require, a trial of the question of compensation before an ordinary common-law jury; but it may be determined in the first instance by commissioners or a sheriff's jury.

4. Inquiry as to the amount of compensation, provided for in some appropriate way, before some properly constituted tribunal, constitutes due process of law.

5. When the state courts have construed a state statute as prescribing one form of procedure, their subsequent adjudication that such construction is wrong and that the statute really provides a different mode of procedure, cannot be set aside in the Federal courts as an unjust discrimination, or a denial of the equal protection of the laws.

6. Failure to ask further instructions prevents any complaint of the failure to instruct more fully on a question, if the charge is correct so far as it goes.

7. The omission to give further instructions to a jury, which were not asked, is not a denial of due process of law or of the equal protection of the laws.

8. Refusal to hear counsel as to the question of necessity may be treated as waived, and does not deprive a party of any rights, where he does not

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NOTE.—*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.

Payment for private property taken for public use. Fifth Amendment to Constitution applies only to Federal government, and not to states,—see note to Withers v. Buckley, 15: 816.

As to eminent domain; damages to easements; noise, smoke, etc.: owners of lots abutting on streets; damages to access, light, and air; vibration; depreciation in value; use of street; telegraph poles; what constitutes taking; consequential injury,—see note to D. M. Osborne & Co. v. Missouri P. R. Co. 37: 156.

Damages in cases of eminent domain; consequential damages; additional servitudes; use of streets for railway and electric lines.

The owner of a right of way in land taken for a public street is not entitled to compensation for the taking, as he is not damaged thereby so long as the street is maintained. *Re* One Hundred & Sixteenth Street, 1 App. Div. 436.

A legislature may allow the construction of an electric street railroad across a steam railroad without providing for compensation to the latter for the injury it may suffer thereby. New York, N. H. & H. R. Co. v. Bridgeport Traction Co. 65 Conn. 410, 29 L. R. A. 367.

Property acquired by a railroad for station purposes is not within the provision of N. Y. Laws 1853, chap. 62, authorizing the laying out of highways without compensation across the track of any railroad. Manhattan R. Co. v. New York, 89 Hun, 429.

The extension of the public highway by public authorities across the right of way of a railroad company deprives it in part of its property rights in respect to the portions of the right of way within the lines of such highway, so as to entitle the railroad company to just compensation. Illinois C. R. Co. v. Mattoon Highway Comrs. 161 Ill. 247.

That a bridge was constructed by a bridge company does not relieve a county from liability for consequental damages necessarily resulting therefrom, where it was constructed under the direction of, and according to the plans and specifications furnished by, the board of supervisors, and was accepted by them when completed. Tyler v. Tehama County, 109 Cal. 618.

A disadvantageous change in the shape or size of land remaining after the condemnation of a part thereof is a matter for compensation. Lincoln v. Com. 164 Mass. 368.

The anticipated change in the current of a navigable river from the construction of a government dam therein, and the anticipated increase in danger from fire during the work of construction, are purely consequential injuries, and constitute no actionable claim against the government. High Bridge Lumber Co. v. United States, 37 U. S. App. 234, 69 Fed. Rep. 320, 16 C. C. A. 460.

A city is liable for damages to a building standing on made ground, caused by the construction of a sewer in front thereof, instead of by the condition of the ground. Ladd v. Philadelphia, 171 Pa. 485.

A city is not liable in damages for diminishing the market value of land, obstructing its light and air, and occasioning dust to be blown thereon, by building an embankment and bridge upon land taken from a third person on the opposite side of the street. Rand v. Boston, 164 Mass. 354.

No additional servitude is imposed upon the land under a highway by the construction of a sewer therein under proceedings by the board of sewerage commissioners purporting to take the right to construct, operate, and forever maintain an underground main sewer. Chelsea Dye House & Laundry Co. v. Com. 164 Mass. 350.

An electrical railway is not an additional burden upon a street of such a character as to entitle abutting owners to compensation for interference with other electrical appliances. Sanfleet v. Toledo, 10 Ohio C. C. 460.

object to the finding of the jury on that question.

9. A diminished award of damages on second appraisal of property condemned entitled the petitioner paying the first award to recover from the party to whom it has been paid the difference between the two awards, under 1 How. (Mich.) Anno. Stat. § 3468, although the petitioner is the party appealing and the statute literally provides for judgment against the party appealing.

[No. 55.]

Argued January 17, 18, 1898. Decided March 7, 1898.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment of that court affirming the judgment of the Circuit Court for the County of Wayne in said state in condemnation proceedings instituted by the Fort Street Union Depot Company against A. Backus, Jr., *et al.*, to acquire the right of way to construct and maintain an elevated railroad in and upon a street in the city of Detroit in front of and along certain property of the defendants; said judgment being for the damages assessed by the jury. *Affirmed.*

See same case below, 89 Mich. 210, 92 Mich. 33, 103 Mich. 556.

Statement by Mr. Justice **Brewer:**

The facts in this case are as follows: The defendant in error is a corporation created under the laws of the state of Michigan, for the purpose of constructing a union depot in the city of Detroit. In order to connect this depot with the railroads desiring to enter, it was necessary to place tracks on River street, and some of the way, at least, these tracks had to be elevated above the grade of the street. As a part of its enterprise the Depot company undertook the work of constructing these tracks. The plaintiffs in error were the owners of a manufacturing plant. The individual plaintiff in error held the title in fee to the property and the corporation plaintiff in error was his lessee. This manufacturing plant fronted on River street and fronted on that part of it where the tracks were necessarily on a viaduct far above the surface. No part of the ground actually occupied by the plant was sought to be taken, but under the laws of Michigan the owner of a lot fronting on a street owns to the center of the highway and is entitled to recover damages in case that street is appropriated to the use of a railroad. The third clause in § 4 of the union depot act (1 How. Anno. Stat. § 3461) provides specifically that the amount of these damages shall be ascertained *in the same way as is provided [559 in ordinary cases of condemnation.

The Constitution of Michigan provides:

Article 15, § 9. "The property of no person shall be taken by any corporation for public use without compensation being first made or secured, in such manner as may be prescribed by law."

Article 18, § 2. "When private property is taken for the use or benefit of the public, the necessity for using such property, and the just

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The construction and operation of an elevated railway on land owned in fee, subject to a perpetual easement for a public street, imposes an additional burden on the land, entitling the owner to injunctive relief. Mattlage v. New York Elev. R. Co. 14 Misc. 291.

A railroad company which has once paid a landowner all damages occasioned by the construction and use of its road over his land, even though it was originally constructed on piers, is not liable for further damages on filling up the land between the piers. Hummel v. Cumberland Valley R. Co. 175 Pa. 537.

The jury may properly consider, in estimating damages to land by the construction of a railway in the street in front thereof, the close proximity of the railroad, the danger of fire from sparks, and the annoyance caused by the noise and jarring of passing trains, and by smoke, cinders, and dust from the engines. Chicago, P. & M. R. Co. v. Moore, 63 Ill. App. 163.

A municipal corporation may authorize the construction of a surface street railway without condemnation or consent of the adjacent lotowners, and the latter have no claim for compensation unless the access to their lots is obstructed by embankments, or their rights materially impaired in some other respect. Merrick v. Intramontaine R. Co. 118 N. C. 1081.

A gas company cannot, under Burns's Ind. Rev. Stat. § 5103, construct a natural gas-pipe line in and along a highway without the consent and against the protest of the owners of the abutting land. Consumers' Gas Trust Co. v. Huntsinger, 14 Ind. App. 166.

A property owner cannot recover damages for the closing up of one public way to his property by the construction of a steam railroad in the street, if another public way thereto is left undisturbed. Stephenson v. Missouri P. R. Co. 68 Mo. App. 642.

No recovery can be had by the owner of land for the taking thereof for the construction of a waterworks system, where such taking is invalid and unauthorized by the statute providing for the taking of land in the construction of such waterworks system. Bishop v. North Adams Fire Dist. 167 Mass. 364.

A city grading a street, the fee of which is in the abutting owner, has the right to take from any portion thereof the gravel or other materials situated above the grade line, and use the same to improve any other street, without compensation to the abutting owner. San Antonio v. Mullaly, 11 Tex. Civ. App. 596.

The lessees of a building are "parties interested in the land "within a statute providing for the payment of damages to the owners of or parties interested in, land proposed to be taken, or which may be injured in changing the grade of streets in order to abolish railroad crossings at grade. *Re* Grade Crossing Comrs. 17 App. Div. 54.

When lessee has right to compensation. Lafferty v. Schuykill River East Side R. Co. 124 Pa. 297, 3 L. R. A. 124; Mississippi Levee Comrs. v. Johnson, 66 Miss. 248; Kearney v. Metroplitan Elev. R. Co. 120 N. Y. 76; *Re* New York & B. Bridge, 137 N. Y. 95; Justice v. Philadelphia, 169 Pa. 503; Ellice Twp. v. Hiles, 23 Can. S. C. 429; Gluck v. Baltimore, 81 Md. 315; Corrigan v. Chicago, 144 Ill. 537, 21 L. R. A. 212; Chicago v. Messler, 38 Fed. Rep. 302; Gedye v. Her Majesty's Works & Pub. Bldgs. Comrs. [1891] 2 Ch. 630; Strickland v. Pennsylvania R. Co. 154 Pa. 348, 21 L. R. A. 224.

Lessees of land at the time a railroad right of way thereon is conveyed by the owner are not entitled to compensation from the railroad company for improvements made by them under their lease on the land conveyed as a right of way, where before the termination of the lease the fee is conveyed to them. Olive v. Sabine & E. T. R. Co. 11 Tex. Civ. App. 208.

compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury of twelve freeholders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law."

The Michigan union depot act (act of June 9, 1881, No. 224) was passed in 1881. It prescribes proceedings for the condemnation of private property, substantially similar to those in the Michigan general railroad law, first passed in 1855. Sections 9, 10, and 11 of the depot act, being §§ 3466, 3467, and 3468 of 1 How. Anno. Stat., provide:

Sec. 3466—§ 9. "The commissioners shall take and subscribe the oath prescribed by article 18 of the Constitution. . . . They may view the premises described in the petition, and shall hear the proof and allegations of the parties, and shall reduce the testimony, if any is taken by them, to writing, if requested to do so by either party, and after the testimony is closed in such case, and without any unreasonable delays, and before proceeding to the examination of any other claim, all being present and acting, shall ascertain and determine the necessity of taking and using any such real estate or property for the purposes described; and, if they deem the same necessary to be taken, they shall ascertain and determine the damages or compensation which ought justly to be made by the company therefor to the party or parties owning or interested in the real estate or property appraised by them. . . . They shall make a report to said court or judge signed by them, of the proceedings before them, if any, which *may be filed with the clerk[560 of the court, either in vacation or term time, or the probate court, as the case may be. . . . In case a jury shall have been demanded and ordered by the court, pursuant to § 8 of this act, the said jury shall proceed to ascertain and determine the necessity of taking and using any such real estate or property, and the damage or compensation to be paid by the company therefor, in the same manner and with like effect as is provided in this section in the case of commissioners, and as is further provided in said § 8. . . . The said judge, or a circuit court commissioner to be designated by him, may attend said jury to decide questions of law and administer oaths to witnesses, and he may appoint the sheriff or other proper officer to attend and take charge of said jury while engaged in said proceedings And the jury shall proceed to determine the amount of damages to be awarded, and shall have all the powers hereby conferred upon commissioners; and a report signed by the jury, whether the judge is or is not in attendance, shall be valid and legal. . . .

Sec. 3467—§ 10. "On such report being made by the commissioners or jury, the court, on motion, shall confirm the same on the next or any subsequent day when in session, unless for good cause shown by either party; and when said report is confirmed said court shall make an order containing a recital of the substance of the proceedings in the matter of the appraisal of and a description of the real estate or prop-

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The injuries resulting from the proper construction and maintenance of an improvement under the power of eminent domain are included in the compensation allowed therefor in the original condemnation proceedings. Churchill v. Beethe, 48 Neb. 87, 35 L. R. A. 442.

Damages for the taking of land for a bridge must embrace damages for the change of grade where they occur at the same time, but damages by change of grade occurring at a subsequent time may be recovered by a subsequent action. Rodgers v. Philadelphia, 6 Pa. Dist. R. 71, Affirmed 181 Pa. 243.

The substitution of electric motors with the trolley system for horses on street railways does not *per se* create an additional easement. State, Roebling, v. Trenton Pass. R. Co. 58 N. J. L. 666, 33 L. R. A. 129.

The maintenance of an electric railway operated by the single trolley system does not constitute a new taking of land or of easements in land, entitling abutting landowners whose title extends to the line or to the middle of the street to compensation. Howe v. West End Street R. Co. 167 Mass. 46.

The use of a highway for an electric railway constitutes an additional burden upon the rights of the owners of the fee. Philadelphia & T. R. Co. v. Philadelphia & B. Pass. R. Co. 6 Pa. Dist. R. 269.

The occupation and use of a street for a trolley railroad entitles the owner of the fee of the street in front of her property to compensation for damage caused thereby. Clark v. Middletown-Goshen Traction Co. 10 App. Div. 354.

An additional servitude is not imposed upon a street by an elevated railroad. Doane v. Lake Street Elev. R. Co. 165 Ill. 510, 36 L. R. A. 97.

The construction and operation at grade of a steam railroad on a city street do not impose an additional servitude on the abutting property, or entitle an owner whose title extends to the middle of the street to damages in the absence of injury to his access to or use of the street of a kind different from that shared by the public generally. Stephenson v. Missouri P. R. Co. 68 Mo. App. 642.

One owning the fee in a highway is not entitled to damages for subjecting such highway to an additional public use by laying a water pipe under it. Bishop v. North Adams Fire Dist. 167 Mass. 364.

Water or gas pipes as additional servitude: Gas pipes constitute (Kincaid v. Indianapolis Natural Gas Co. 124 Ind. 577, 8 L. R. A. 602; Sterling's Appeal, 111 Pa. 35, 56 Am. Rep. 246; Mallory v. Bradford, 1 Pa. Dist. R. 670; Consumers' Gas Trust Co. v. Huntsinger, 14 Ind. App. 156). Water pipes constitute (*Re* Newton, 16 N. Y. Supp. 950. *Contra*, Witcher v. Holland Waterworks Co. 66 Hun, 619. See also note to Western R. Co. v. Alabama G. T. R. Co. 96 Ala. 272, 17 L. R. A. 474).

A mortgagee of land who purchases the same at a sale on foreclosure of the mortgage is entitled to an award in proceedings to condemn the land commenced after his purchase. Commercial Nat. Bank v. Johnson, 16 Wash. 536.

A grantor by a deed purporting to convey the land only does not thereby lose her right to maintain an action for damages caused by the location of a railroad on the street in front of the property before the deed was executed. Flickinger v. Omaha Bridge & T. R. Co. 98 Iowa, 358.

The trustees of a cemetery are the proper parties to bring a petition against a railroad company for damages for land taken for a right of way. Packard v. Old Colony R. Co. 168 Mass. 92.

Recovery can be had in proceedings to condemn land for railroad right of way for entire damage caused thereby to the whole of a contiguous compact body of land used for one general purpose, although it had been previously divided into lots and the petition did not refer to all of it. Kansas City Suburban Belt R. Co. v. Norcross, 137 Mo. 415.

erty appraised, for which compensation is to be made, and shall also direct to whom the money is to be paid, or when and where it shall be deposited by the company. Said court, as to the confirmation of such report, shall have the powers usual in other cases.

Sec. 3468—§ 11. "A certified copy of the order so to be made shall be recorded in the office of the register of deeds for said county, in the book of deeds; and thereupon, on the payment or deposit by the said company of the sum to be paid as compensation for such land, franchise, or other property, and for costs, expenses, and counsel fees as aforesaid, and as directed by said order, the company shall be enti-

561] tled to *enter upon and take possession of and use the said land, franchise, and other property for the purpose of its incorporation; and all persons who have been made parties to the proceedings, either by publication or otherwise, shall be devested and barred of all right, estate, and interest in such real estate, franchise, or other property, until such right or title shall be again legally vested in such owner; and all real estate or property whatsoever acquired by any company under and in pursuance of this act, for the purpose of its incorporation, shall be deemed to be acquired for public use: Provided, the said sum to be paid as damages and compensation, and costs, expenses, and counsel fees as aforesaid, shall be paid by the company, or deposited as provided in this act, within sixty days after the confirmation of said report by the said court; and in case said company fail or neglect so to do, such failure or neglect shall be deemed as a waiver and abandonment of the proceedings to acquire any rights in said land or property. Within twenty days after the confirmation of the report of the commissioners or jury, as above provided for, either party may appeal, by notice in writing to the other, to the supreme court, from the appraisal or report of the commissioners or jury; such notice shall specify the objections to the proceedings had in the premises, and the supreme court shall pass on such objections only, and all other objections, if any, shall be deemed to have been waived; such appeal shall be heard by the supreme court at any general or special term thereof, on notice thereof being given according to the rules and practice of the court. On the hearing of such appeal, the court may direct a new appraisal before the same or new commissioners or jury, in its discretion. The second report shall be final and conclusive upon all parties interested. If the amount of the compensation to be allowed is increased by the second report, the difference shall be a lien on the land appraised, and shall be paid by the company to the parties entitled to the same, or shall be deposited as the court shall direct; and in such case, all costs of the appeal shall be paid by the company; but if the amount is diminished, the difference shall be refunded to the company by the party to whom the same may *have been paid, and [562 judgments therefor and for all costs of the appeal shall be rendered against the party so appealing. On the filing of the report, such appeal, when made by any claimant of damages, shall not affect the said report as to the right and interests of any party, except the party appealing; nor shall it affect any part of said report in any case, except the part appealed from; nor shall it affect the possession of such company of the land appraised; and when the same is made by others than the company, it shall not be heard except on a stipulation of the party appealing not to disturb such possession during the pendency of such procedings."

The proceedings were commenced in the usual form by a petition filed by the Depot Company, January 24, 1891, in the circuit court of the county of Wayne, in which county the city of Detroit is situate.

The plaintiffs in error, respondents below, demanded a jury. The first hearing commenced on February 25, 1891, and terminated on March 18, 1891, in a disagreement of the jury upon both issues, that of necessity and that of compensation. A second hearing was had, commencing on June 10, 1891, and resulting on July 16, 1891, in a verdict in favor of the Depot Company on the question of public necessity, and assessing the damages of the re-

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A railroad company is liable to the owner of a building adjoining a street on which its road is constructed for damages to the plastering caused by the jarring of its trains. Louisville Southern R. Co. v. Hooe, 18 Ky. L. Rep. 523.

Recovery of damages for jarring from railroad trains—see Penny v. South Eastern R. Co. 7 El. & Bl. 660; Cohen v. Cleveland, 43 Ohio St. 190; *Re* New York C. & H. R. R. Co. 15 Hun, 63; Croft v. London N. W. R. Co. 3 Best & S. 436.

Railroad company is not liable to owner of property abutting on a street on which its track is located and maintained, for the smoke and noise from its trains, where they are simply incidents of city life. Louisville Southern R. Co. v. Hooe, 18 Ky. L. Rep. 523.

Increased travel over railroad constructed upon a highway is not of itself an additional servitude or special injury entitling the owner of the fee in the highway to equitable relief. Philadelphia & T. R. Co. v. Philadelphia & B. Pass. R. Co. 6 Pa. Dist. R. 487.

The operation of a railway, whether by horse, cable, or electricity, when authorized by law, on a public street, does not impose an additional burden or servitude which will entitle an abutting owner to compensation or to an injunction against such occupation or use. Patterson v. Pittston, 8 Kulp, 530.

Electric railway in village street, forming part of a connecting line between cities for transporting merchandise, personal baggage, mail, and express matter, as well as passengers, constitutes an additional servitude or burden upon the lands of abutting owners for which they are entitled to compensation. Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co. 95 Wis. 561, 37 L. R. A. 856.

Land dedicated by the owner for a street cannot be appropriated without his consent to the use of a railroad; and one to whom the owner of the soil of a street has conveyed a lot abutting thereon and bounded by the lot line acquires the right to use it only for the purpose of a highway, and cannot justify an appropriation thereof for purposes inconsistent therewith. Bowen v. Delaware, L. & W. R. Co. 153 N. Y. 476.

One whose land is taken for the purpose of locating and maintaining a water main from the pumping station of a city to the distributing system in the city is entitled to an additional damage on the erection on such line of telephone poles and wires to connect the two points. Spokane v. Colby, 16 Wash. 610.

spondents as follows: To Absalom Backus, Jr., as the owner of the fee, $17,850; to the corporation, A. Backus, Jr., & Sons, $78,293. At neither of these hearings was the judge of the circuit court present. Upon the motion of the Depot Company the circuit court vacated the award of damages, and ordered that a new jury be impaneled. Thereupon the respondents applied to the supreme court of the state for a writ of mandamus to compel the setting aside of this order. That court, on November 19, 1891, issued a peremptory writ of mandamus, as prayed for. 89 Mich. 210. On November 30, 1891, the circuit court, in compliance with this writ, entered an order which, as amended, confirmed the verdict and award of the jury, and also provided as follows:

"It is further ordered that within sixty days from the date of this order the Fort Street Union Depot Company is required to tender and pay to Absalom Backus, Jr., the sum of
563] *seventeen thousand, eight hundred and fifty dollars, and to A. Backus, Jr., & Sons the sum of seventy eight thousand, two hundred and ninety-three dollars, and to James N. Dean and William H. Davidson, executors, the sum of one dollar, together with their costs and expenses, if the same have been taxed, including an attorney fee of twenty-five dollars; and if the said parties or either of them refuse to accept the tender and payment of said sums, the Fort Street Union Depot Company is required to deposit the same, under the supervision of the clerk of this court, in the Detroit National Bank and to the credit of this cause, including said costs and expenses: provided, that if said costs and expenses have not been taxed within the said sixty days the same to be so deposited within five days after they are taxed.

"Said money shall remain on deposit in said bank, but, at the risk of the petitioner, subject to be drawn therefrom and to be paid to the parties entitled to the same on orders signed by one of the judges of this court and countersigned by the clerk.

"It is further ordered that upon the tender and payment or deposit of said sum of ninety-six thousand, one hundred and forty-four dollars, and of said costs, expenses, and counsel fees, as aforesaid, the Fort Street Union Depot Company shall be entitled to enter upon and take possession of and use the right of way above described for the purpose of its incorporation under its article of association and the Constitution and laws of this state, and that said respondent shall be devested and barred of all right, estate, and interest in such right of way until such right or title shall be again legally vested in them and said right of way shall be deemed to have been acquired by said company for public use."

On December 2, 1891, the Depot Company appealed from the award of the jury, and from the confirmation thereof, to the supreme court of the state. On January 26, 1892, the Depot Company paid to the respondents, and they received, the amounts awarded to them, and thereupon the Depot Company took full possession of the property, constructed its tracks, and has been ever since in possession and use of
564] them. *On March 3, 1892, the appeal was argued in the supreme court, and on June 10, 1892, its decision was announced. 92 Mich. 33. It was held by a majority of the court (the chief justice dissenting) that the opinion expressed on the granting of the mandamus had too narrowly restricted the powers of the circuit court, and it was ordered that the verdict of the jury, while confirmed so far as it determined the question of necessity, should be vacated and set aside so far as it awarded compensation; and that the cause be remanded to the circuit court, with directions to proceed with a new appraisal, the costs of the appeal to abide the event of such appraisal.

It was also held that the fact that the amount of the award and confirmation had been paid to the respondents and the property taken possession of by the Depot Company since the taking of the appeal did not affect the right of the Depot Company to a new trial upon the question of compensation.

When the case was returned to the circuit court the respondents objected to any further proceedings, but the same were overruled, and a jury impaneled. The sessions of this jury were presided over by the circuit judge, and, after hearing the testimony and examining the property, it returned a verdict, assessing the damages of the individual respondent at the sum of $15,000, and of the corporation respondent at the sum of $48,000. Thereupon, on motion of the Depot Company, and on December 28, 1893, the circuit court entered a judgment against the individual respondent for $2,850, the difference between the amount of the first and second awards, and a like judgment against the corporation respondent for $30,293, and also a judgment against both respondents for the costs of the appeal and subsequent proceedings, taxed at $4,168.20. On the 26th of June, 1894, the respondents filed their petition in the supreme court of the state of Michigan, praying for a writ of certiorari. The writ was allowed, whereby the entire record was transferred to that court, which, in an opinion filed on January 8, 1895, affirmed the proceedings below, with costs. 103 Mich. 556. Whereupon the plaintiffs below sued out this writ of error.

Mr. **Don M. Dickinson** for plaintiff in error.

Mr. **Fred A. Baker** for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

Inasmuch as the respondents, both on the trial in the circuit court and in the subsequent proceedings on the certiorari in the supreme court, specifically set up and claimed rights under the Federal Constitution which were denied, the jurisdiction of this court is not open to doubt. They again and again insisted that certain provisions of the Federal Constitution, which they named, stood in the way of any further proceedings against them.

It is also not open to further debate, since the decision in *Chicago, Burlington, & Q. Railroad Co.* v. *Chicago*, 166 U. S. 226 [41: 979], that this court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that

court prescribed any rule of law in disregard of the owner's right to just compensation. But in this respect we quote the restriction placed in the opinion then filed (p. 246 [41: 988]):

"We say, 'in absolute disregard of the company's right to just compensation,' because we do not wish to be understood as holding that every order or ruling of the state court in a case like this may be reviewed here, notwithstanding our jurisdiction, for some purposes, is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied; and in respect of such matters, that which is done or omitted to be done by the state court may constitute only error in the administration of the law under which the proceedings were instituted."

While in cases of this kind coming from the supreme court of a state, questions of fact passed upon in the state courts are not here open to review (*Egan* v. *Hart*, 165 U. S. 188 **566**] [41:680], and *cases cited in the opinion), it may not be inappropriate to notice that the award of compensation as finally sustained gave to the respondents the sum of $63,000. As the valuation they placed upon the plant, outside of the realty, was only $150,000, and of the realty the like sum of $150,000, though the realty cost in 1871 less than $30,000, and as none of the ground upon which the plant stood and the business was carried on was taken by the Depot Company, but only the use of the street in front thereof, and that not so as to exclude them from its use, it is obvious that the award, whether adequate or not, was not one in reckless disregard of their rights.

It is not questioned by counsel that the settled rule of this court in cases of this kind is to accept the construction placed by the supreme court of the state upon its own Constitution and statutes as correct. *Long Island Water Supply Company* v. *Brooklyn*, 166 U. S. 685 [41: 1165]; *Merchants' Bank* v. *Pennsylvania*, 167 U. S. 461 [42:236], and cases cited in those opinions. His contention, however, is that the true construction of the Constitution and laws of the state, as settled by repeated decisions of its supreme court, was wholly disregarded in this case, and that by reason thereof the respondents were denied that equal protection of the laws which is guaranteed by the 14th Amendment to the Federal Constitution. His contentions are grouped under the following heads:

"I. They were denied the fundamental right to have an ascertainment and determination of the amount of compensation and its final payment before being deprived of their property.

"II. They were denied the protection of that guaranty of the state Constitution providing that the questions of compensation and necessity should be passed upon by one and the same jury, and of the settled, uniform, and unreversed construction of the Constitution to that effect by the state judiciary in respect of all other citizens.

"III. They were denied the protection of a trial on the questions of necessity and compen- **567**] sation by the tribunal *guaranteed by the Constitution of the state, in accordance with the settled, uniform, and unreversed construction of that Constitution in respect of all other citizens.

"IV. They were denied that measure of just compensation for their property taken, guaranteed by the Constitutions, Federal and state, as the same was and is accorded to all other persons than themselves.

"V. They were denied a hearing and deprived of a hearing guaranteed by the Constitutions, Federal and state, as 'due process of law,' when summoned into court as appellees to defend their property rights and themselves from imputations upon them.

"VI. Finally, having been deprived of their property sought by the railroad company for its purposes, their personal assets of the value of one hundred and ten thousand ($110,000) dollars were taken from them under the color of a judgment and process unknown to the Constitution and statutes of Michigan, and unknown to jurisprudence, whereby they were deprived of their property without 'due process of law.'"

Attention is called to the fact that while upon the return of the first verdict the respondents moved to confirm it, which motion was denied by the circuit court and the verdict set aside, yet after the decision of the supreme court awarding the writ of mandamus, they did not renew that motion; that the petitioner alone asked for confirmation, though, as expressly stated, for the purpose of taking an appeal to the supreme court; that, after the order of confirmation had been entered, it paid the amount of the award to the respondents, which sum was accepted by them, and that thereupon it took possession of the property and has since continued in undisturbed possession and use. It is insisted that such payment and taking possession created under the Constitution and statutes of Michigan a finality so far as the Depot Company was concerned, and that to this effect had been the repeated adjudications of the supreme court of the state. The argument is that the property owner has a constitutional right to have the amount of his compensation finally determined and paid before yielding posses- [**568** sion; that the party seeking condemnation (in this case the Depot Company) cannot be let into possession until after all question as to the compensation has been finally settled, and the amount thereof paid; that it cannot take advantage of one report or verdict, pay the sum fixed by it, obtain possession, and still litigate the question of amount; that if it does then pay and take possession its right to further litigate is ended. But the supreme court of the state held against this contention, and we must assume therefrom that it is not warranted by the Constitution and statutes of the state. Indeed, the language of that Constitution is, "made or secured." Does this amount to a denial of the right to that protection to property which is guaranteed by the 14th Amendment to the Federal Constitution? In other words, is it beyond the power of a state to authorize in condemnation cases the taking of possession prior to the final determination of the amount of compensation and payment thereof? This question is fully answered by the opinions of this court in *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641

[34: 295], and *Sweet* v. *Rechel*, 159 U. S. 380 [40: 188]. There can be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid and before any final determination thereof.

Neither can it be said that there is any fundamental right secured by the Constitution of the United States to have the questions of compensation and necessity both passed upon by one and the same jury. In many states the question of necessity is never submitted to the jury which passes upon the question of compensation. It is either settled affirmatively by the legislature, or left to the judgment of the corporation invested with the right to take property by condemnation. The question of necessity is not one of a judicial character, but rather one for determination by the lawmaking branch of the government. *Mississippi & Rum River Boom Co.* v. *Patterson*, 98 U. S. 402, 406 [25: 206, 208]; *United States* v. *Jones*, 109 U. S. 513 [27: 1015]; *Cherokee Nation* v. *Southern Kansas Railway Company*, *supra*.

Neither was there anything in the proceed-**569**]ings actually had *before the last jury and in the circuit court which conflicts with any mandate of the Federal Constitution. Counsel say that the respondents were entitled to a trial by a jury of inquest, but were forced to trial before a common-law jury, presided over and controlled by the circuit judge. But the Constitution of the United States does not forbid a trial of the question of the amount of compensation before an ordinary common-law jury, or require, on the other hand, that it must be before such a jury. It is within the power of the state to provide that the amount shall be determined in the first instance by commissioners, subject to an appeal to the courts for trial in the ordinary way; or it may provide that the question shall be settled by a sheriff's jury, as it was constituted at common law, without the presence of a trial judge. These are questions of procedure which do not enter into or form the basis of fundamental right. All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution. *Bauman* v. *Ross*, 167 U. S. 548, 593 [42: 270, 289]. These considerations dispose of all the objections embraced in the first three contentions of counsel so far as those objections run to the validity of the proceedings actually had, providing those proceedings were warranted by the Constitution and statutes of the state.

But it is insisted that those proceedings were not so warranted; that the settled, uniform, and unreversed construction thereof by the supreme court of the state theretofore forbade them, and hence there was a discrimination against the respondents, and they were denied that equal protection of the laws which the Federal Constitution guarantees. Thus, for instance, it is insisted that the previous rulings of the courts, both trial and supreme, had been to the effect that a jury called under these condemnation statutes was a jury of inquest and not a trial jury, whereas in this case the ruling was practically to the contrary, and the respondents were compelled to submit their rights to a trial jury, subject to the control of the presid [**570** ing judge, as in ordinary common-law cases We deem it unnecessary to review the many authorities from the supreme court of Michigan cited by counsel, or determine whether the ruling in this case as to the methods of procedure and the true construction of the statute is or is not in harmony with prior decisions of that court. Accepting the contention of counsel, that in this case the supreme court of the state has put a different construction on the state statutes from that theretofore given, and has sustained modes of procedure different from those which had previously obtained, still it does not follow that this court has a right to interfere and say that the present ruling is erroneous and the prior construction correct, or that the change of construction works a denial of any fundamental rights. There is no vested right in a mode of procedure. Each succeeding legislature may establish a different one, providing only that in each is preserved the essential elements of protection. The fact that one construction has been placed upon a statute by the highest court of the state does not make that construction beyond change. Suppose it were true, in the fullest sense of counsel's contention, that for a series of years the courts had ruled that the jury in condemnation cases was a jury of inquest, or in the nature of a sheriff's jury—one determining for itself all matters of law and fact, and that in this case, for the first time, they held otherwise, and that such jury was a common-law jury, subject to be controlled by the presiding judge, whose duty it was to determine all questions of law, and still, whatever might be thought of the propriety of such a change of construction, there is in it nothing to justify this court in reversing the judgment of the state court and denying the correctness or validity of this last ruling. We fail to see why the presence of the judge with this jury, his assumption of power to control its proceedings, his instructions to it on questions of law, necessarily vitiated the proceedings. Grant that such a course had never been taken before; grant that it had never been held to be a proper proceeding; grant that it was unexpected by counsel,—and yet if the judge's rulings and instructions were in themselves correct, and the propriety of *his presence and control [**571** be held by the supreme court of the state warranted by the statutes, we do not perceive that any right possessed under the Constitution of the United States has been violated.

The question is not presented of a distinct ruling by a state court that one party is entitled to certain rights and the benefits of certain modes of procedure, and that another party similarly situated is not entitled to them. An act of the legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws. But that does not prevent a legislature, which has established a certain rule of procedure, and continued it in force for years, from subsequently repealing the act and establishing an entirely different mode of

procedure. In other words, there is no absolute right vested in the individual as against the power of the legislature to change modes of procedure. And a similar thought controls where the courts of the state have construed a statute as prescribing one form of procedure, and parties have acted under that construction, and then subsequently the same court has held that the statute was theretofore misconstrued, and really provided a different mode of procedure. This last adjudication cannot be set aside in the Federal courts on the ground of an unjust discrimination or a denial of the equal protection of the laws.

We, of course, do not mean to affirm that there has been by the supreme court of the state such a change of adjudication. We simply in this respect accept the contention of counsel for the respondents, and hold that, even if the facts be as claimed by him, they furnish no ground for interference by this court. It should be noticed in passing, however that nearly all, if not absolutely all, of the cases which he cites from the supreme court of Michigan arose under the provisions respecting condemnation in the general railroad act, while these proceedings were had under the union depot act, and, although the two acts may be substantially similar, yet this adjudication is under a different statute from [572] that *under which most, if not all, of the prior decisions were made.

Passing now to the fourth point. Under this it is claimed that the trial judge gave to the jury an improper measure of damages. During the argument of counsel for the respondents this colloquy took place, as appears from the record:

'Court: A question which arises in my mind is this: There is no question but what the Backuses are entitled to full compensation for such damages as they may suffer, but does not the other rule also attach, and that is, that the jury are not in any way to consider any speculative damages or any probable damages?

"Mr. Dickinson: They can only consider the damages which are actually shown, but the other rule follows, may it please your honor, that they are not to estimate those damages for a year, or estimate the present injury done by the railroad, but they must assume that the railroad is running to its maximum capacity, that it has other railroads, that it may double, treble, or quadruple its trains, so far as that is concerned, and they must estimate the damage for the future time, not for a year or three years or five years or ten years.

"Court: That is undoubtedly true to a certain extent, but the question that I have thought about considerably within the last few days is in regard to the testimony which was admitted in the case in regard to their profits, the profits of their business. Do they not come within the rule which applies in regard to speculative damages?"

Afterwards, when the counsel for petitioner was making his argument, he said:

"In other words, if the court please, the question as to what business is carried on there, and as to how profitable an institution it might be, is merely an element to be considered in establishing the market value of the property."

Upon which the judge made this comment:

"In other words, if a profitable business is carried on in connection with a certain site, the profitableness of the business itself must be taken into consideration by the jury in estimating the value?"

*After the arguments were over the [573 judge charged the jury as follows:

"Upon this question, *viz.*, compensation or damages, what I have to say must necessarily be in a broad and the most general way. This is a question for you, and, from the very nature of a proceeding of this character, you are vested with large powers and great discretion. These powers and this discretion should not be exercised arbitrarily, nor without proper regard for substantial justice. You should bear in mind that the greater the power, the more jealous is the law of its careful exercise, and the greater is the responsibility of the persons vested therewith. You should exercise a cool, careful, intelligent, and unbiased judgment. The compensation or damages must be neither inadequate nor excessive, and your award must not furnish a just inference of the existence of undue influence, partiality, bias, and prejudice, or unfaithfulness in the discharge of the duties imposed upon you. You must, however, remember that the respondents' property is taken, or its enjoyment interfered with, under the so-called power of eminent domain, a power somewhat and necessarily arbitrary in its character, and that where this is done the party whose property is taken, or whose enjoyment or use of the property is interfered with, is entitled to full compensation for the injury inflicted. While the allowance to be made should be liberal, still it must not be unreasonably exorbitant or grossly excessive. It should be a fair and liberal allowance and full and adequate compensation for the damages inflicted. You should not allow too little nor should you allow too much. Your award should be based upon that which is real and what is substantial, and not upon what is either fictitious or speculative. You should look at the condition of things as they exist. Under the Constitution and laws the right to take another's property for public uses, the power to exercise the right of eminent domain, is a part of the law of the land, but when this power is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation. *I shall not call attention to any particular [574 part of the testimony in the case; the responsibility of its application and the weight to be given it rest with you, always regarding that which is real and substantial and disregarding that which is fictitious and speculative; treating conditions as they have been shown and as they are, without speculating as to what might possibly happen or occur, taking conditions as you find them, and the natural and probable consequences following such conditions."

And this was all which was said in reference to the measure of compensation. Now, it is insisted by counsel that the profits which the manufacturing plant was making were to be taken into consideration by the jury in awarding compensation, inasmuch as the business of that plant was seriously interrupted, if not

practically destroyed, by this condemnation; that inasmuch as the query was suggested by the judge during the argument whether profits did not come within the rule as to speculative damages, the failure to charge distinctly that they were proper subjects of consideration was equivalent to an instruction that they were not to be considered, and that, therefore, the true rule of compensation was not given to the jury.

It is evident that the judge did not attempt to define the several elements which enter into the general fact of compensation, or the various matters to be considered by the jury. He simply charged generally that as this was an arbitrary taking of the property of the respondents they were entitled to full compensation, and left to the jury the duty of determining what should be such compensation, telling them plainly that they were vested with large powers and great discretion. If it be said that the judge had intimated by his query that the matter of profits came within the rule applicable to speculative damages, it must also be noticed that further on he suggested that the profitableness of a business was to be taken into consideration in estimating the value. It is true he nowhere instructed the jury to make the profits of the business the criterion of value, nor indeed would he have been justified in so doing. The profitableness of the business was undoubtedly a matter to be considered, and so 575]the judge fairly intimated in *these prior colloquies. But the profits of a business are not destroyed unless the business is not only there stopped, but also one which in its nature can not be carried on elsewhere If it can be transferred to a new place and there prosecuted successfully, then the total profits are not appropriated, and the injury is that which flows from the change of location.

But beyond this no special instructions were asked by the respondents at the time of the giving of the charge. The statute (§ 3466) provides that the judge "may attend said jury, to decide questions of law." So far as he gave instructions it is obvious that he stated that which was the law, and the real objection is that he did not go further and enter into a more minute description of the elements which were to be taken into consideration by the jury in fixing the amount of compensation; that they may from the colloquies which had taken place during the arguments have drawn improper inferences as to the limit to which they were warranted in going, and that those inferences he failed to correct by specifically stating what matters they should consider. A sufficient answer is that the respondents did not ask any further instructions. All they did was to except to what had been stated. By well settled rules no appellate court would, under such circumstances, be required to set aside the judgment of the trial court. *Shutte* v. *Thompson*, 82 U. S. 15 Wall. 151, 164 [21: 123, 127]; *Mutual Life Ins. Co.* v. *Snyder*, 93 U. S. 393 [23: 887]; *Texas & Pacific Railway Co.* v. *Volk*, 151 U. S. 73 [38: 78]; *Isaacs* v. *United States*, 159 U. S. 487 [40: 229].

But a more complete and satisfactory answer is that whatever error there may have been affords no ground for the interference of this court. The respondents were not thereby deprived of any rights secured by the Federal Constitution. They were not denied "due process of law." The proceedings were had before a duly constituted tribunal, in accordance with the declared law of the state, with full opportunity to be heard. Nor were they denied "the equal protection of the laws." The rule as to the necessity of asking special instructions was administered in this case no differently than in others. *Marchant* v. *Pennsylvania Railroad Company*, 153 U. S. 380 [38: 751]. *The error, if any there be, was not[576 one "in absolute disregard of their right to just compensation," but was only error in the administration of the law under which those proceedings were instituted. As clearly pointed out in *Chicago, Burlington, & Q. Railroad Co.* v. *Chicago, supra*, it is not every error occurring in a state court in the administration of its law concerning condemnation of private property for public purposes that opens the door to review by this court. We are not called upon to search the record simply to inquire whether there may or may not have been errors in the proceedings. Our limit of interference is reached when it appears that no fundamental rights have been disregarded by the state tribunals.

Under the fifth head counsel present two matters:

"(1.) The denial by the supreme court of the state of a hearing on the substantial and essential question, of whether counsel for plaintiffs in error abused their privilege as counsel by arguing to the jury on the question of necessity that the margin of the depot grounds that belonged to the Michigan Central road could be taken for the elevated structure; and (2) the reversal of the unanimous judgment of the supreme court of the state in 89 Mich. 209, without a rehearing, by the judgment in 92 Mich. 33."

With reference to the first, it is enough to say that the respondents did not appeal to the supreme court, and that under § 3468 it would seem that that court was called upon to consider only such objections as had been particularly specified. "Either party may appeal, by notice in writing;" "such notice shall specify the objections;" "the supreme court shall pass on such objections only, and all other objections, if any, shall be deemed to have been waived." No objection to the finding of the jury as to the question of necessity had been made by the appellant, and therefore was to be treated as waived. Under those circumstances it cannot be said that the supreme court deprived the respondents of any right by refusing to hear counsel in respect to the question of necessity, or connected with its determination.

With regard to the second, technically the decision on the mandamus proceeding and that on the appeal did not conflict. *The writ[577 of mandamus directed the circuit judge to set aside the order which he had entered vacating the award. It thus in effect declared that that judge ought not to have made such an order. On the appeal the supreme court itself ordered that the award be set aside, and a new jury impaneled, and remanded it to the circuit court for such new appraisal. This is within the letter of the statute (§ 3468), "on the hear-

ing of such appeal, the court may direct a new appraisal before the same or new commissioners or jury, in its discretion." The decision by the supreme court that it had power to set aside the verdict and order a new appraisal was not a reversal of a ruling that the circuit court had no such power, although it may suggest consequences somewhat singular. Appreciating that fact, in the last opinion the court declared that in the former decision its language restricting the power of the circuit court had been too strong.

Coming now to the last point, the supreme court held that as upon the second appraisal the damages were less than those awarded on the first, and the amount of the first had been paid to the respondents, the petitioner was entitled to a judgment for the difference. The language of the statute (§ 3468) is "but if the amount is diminished, the difference shall be refunded to the company by the party to whom the same may have been paid, and judgments therefor and for all costs of the appeal shall be rendered against the party so appealing." It may be that this language is not entirely apt, for in this case the party appealing was not the landowner but the Depot Company, and so it cannot be said that judgments were rendered against "the party appealing." But the true intent of the statute is obvious, and at any rate we are bound to accept the construction placed upon it by the supreme court, and hold that it means that if the last appraisal was less than the first and the amount of the first had been paid, the company was entitled to recover the difference from the party to whom it had been paid. Nothing is said, it is true, in the statute about execution, but the supreme court ruled that under the general statutes the recovery of the judgment carried with it a right to an execution.

578] *These are all the questions in this case. We find nothing in them which justifies an interference by this court with the proceedings of the state courts; nothing in which it can be said that any ruling of those courts was in absolute disregard of the respondents' right to compensation. *The judgment must therefore be affirmed.*

Mr. Justice **Brown** took no part in the decision of this case.

Mr. Justice **Harlan** dissenting:

Did the trial court prescribe any rule of law for the guidance of the jury that was in absolute disregard of the right of the plaintiffs in error to such compensation?

In *Chicago, Burlington, & Q. Railroad Co.* v. *Chicago*, 166 U. S. 226, 241 [41: 979, 986], it was held that "a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

Before proceeding with his argument to the jury, Mr. Dickinson, the attorney for the plaintiffs in error, called the attention of the trial court to some of the principles which, in his judgment, should control the ascertainment of the just compensation to which they were entitled. Addressing the court in the presence of the jury, he said: "Now, as to what is compensation, I refer your honor to the case of *Grand Rapids & Indiana Railroad Co.* v. *Heisel*, in 47 Mich. 393: 'It need hardly be said that nothing can be fairly termed compensation which does not put the party injured in as good a condition as he would have been in if the injury had not occurred. Nothing short of this is adequate compensation. In the case of land actually taken, it includes its value, or the amount to which the value of the property from which it is taken is depreciated; and in *Jubb* v. *Hull Dock Co.* 9 Q. B. 443, it was held that where the property taken was a brewery in *operation the damages included the [579 necessary loss in finding another place of business. In cases where damage is by injury aside from actual taking of property, the rule has been to make the party whole as nearly as practicable, and where it affected the rental value or enjoyment the same principle has been applied as in other cases. There is no reason, and, so far as we can discover, no law, which allows the wrong-doer to cast any portion of an actual and appreciable loss on the party whom he injures.' (In this case the same rule of damages would apply as in the *Grand Rapids & Indiana Case*, and the suit was brought for damages, and the question was what was compensation.) 'In such a case as this it is in the power of the company and always has been to have the compensation settled once for all, and to get any benefit which the law attaches to such a method of ascertainment. Until this is done the possession is a continuous wrong.'"

At this point the court interrupted the argument of counsel with this observation: "A question which arises in my mind is this: There is no question but what the Backuses are entitled to full compensation for such damages as they may suffer, but does not the other rule also attach, and that is, that the jury are not in any way to consider any speculative damages or any probable damages?" To this counsel made the following response: "They can only consider the damages which are actually shown, but the other rule follows, may it please your honor, that they are not to estimate those damages for a year, or estimate the present injury done by the railroad, but they must assume that the railroad is running to its maximum capacity, that it has other railroads, that it may double, treble, or quadruple its trains, so far as that is concerned, and they must estimate the damage for the future time, not for a year or three years or five years or ten years." The court then said: "That is undoubtedly true to a certain extent, but the question that I have thought about considerably within the last few days is in regard to the testimony which was admitted in the case in regard to their profits, the profits of their business. Do they not come within the rule which applies in regard to speculative damages?"

*Counsel then observed: "Not at all, [580 your honor. If the profits are shown and the business is destroyed, you can only show it by

the effect upon the business, and upon that point I call your honor's attention to the unanimous opinion of the supreme court delivered by Mr. Justice Campbell in the case of *Grand Rapids & Indiana R. R. Co.* v. *Weiden*, 70 Mich. 393. 'Under our present Constitution there is never any presumption that a railroad is necessary, or that any particular land ought to be given up to its uses. Every landowner, therefore, has a perfect right to object to giving up his land, and is not confined to objections depending upon price or value. . . . And a road already established has no better claim than any other to extend or change its lines. Although railroads are allowed by public policy to condemn lands, because they cannot exist otherwise, nevertheless the enterprise is, under our laws, which prohibit public ownership of railways, one of private interest and emolument, and must show its claims to legal assistance.' Now upon the question of profits: 'We are bound to see that parties are not deprived of their property without necessity, or without full compensation for being compelled to relinquish it. And while respect is due to the honest action of juries, it is not conclusive, and is subject to comparison with the facts in the record. Both of the appellants were using their property in lucrative business, in which the locality and its surroundings had some bearing on its value. Apart from the money value of the property itself, they were entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the change. A business stand is of some value to the owner of the business, whether he owns the fee of the land or not, and a diminution of business facilities may lead to serious results. There may be cases when the loss of a particular location may destroy business altogether, for want of access to any other that is suitable for it. Whatever damage is suffered must be compensated. Appellants are not legally bound to suffer for petitioner's benefit. Petitioner can only be authorized to oust them from their possession by making up to them the whole of their losses.' That goes directly 581] upon the question which *your honor suggests. Now I shall not take time to refer to the other cases."

I cannot doubt, from what passed between the court and counsel in the presence of the jury, that the court meant to characterize profits from the business of the parties owning the real estate as speculative damages.

After the counsel for the parties concluded their argument to the jury upon the whole case the trial judge delivered a carefully prepared charge, in which he said: "The question, and the only question before you for your determination, is that of compensation, and of compensation only. Your duty, and your only duty, is to ascertain and determine what compensation or damages ought justly to be paid by the Fort Street Union Depot Company to the respondents for the real-estate property, franchises, easements, and privileges described in the petition, *viz.*: 1. The amount to be allowed to Absalom Backus, Jr., as the owner of the fee of the land described. 2. The amount to be allowed to A. Backus, Jr., & Sons, a corporation, as tenants in possession of such lands. Upon this question, *viz.*, compensation or damages, what I have to say must necessarily be in a broad and the most general way. This is a question for you, and from the very nature of a proceeding of this character you are vested with large powers and great discretion. These powers and this discretion should not be exercised arbitrarily, nor without proper regard for substantial justice. You should bear in mind that the greater the power the more jealous is the law of its careful exercise, and the greater is the responsibility of the persons vested therewith. You should exercise a cool, careful, intelligent, and unbiased judgment. The compensation or damages must be neither inadequate nor excessive, and your award must not furnish a just inference of the existence of undue influence, partiality, bias, and prejudice, or unfaithfulness in the discharge of the duties imposed upon you. You must, however, remember that the respondents' property is taken or its enjoyment interfered with under the so-called power of eminent domain, a power somewhat and necessarily arbitrary in its character, and that where this is done, the party whose property is taken, *or whose enjoyment[582 or use of the property is interfered with, is entitled to full compensation for the injury inflicted. While the allowance to be made should be liberal, still it must not be unreasonably exorbitant or grossly excessive. It should be a fair and liberal allowance and full and adequate compensation for the damages inflicted. You should not allow too little nor should you allow too much. Your award should be based upon that which is real and what is substantial, and not upon what is either fictitious or speculative. You should look at the conditions of things as they exist. Under the Constitution and laws the right to take another's property for public uses, the power to exercise the right of eminent domain, is a part of the law of the land, but when this power is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation."

Is it not clear that the trial judge, while indulging in very general language as to the duty of the jury not to allow too much or too little compensation, gave the jury to understand that compensation was to be ascertained upon the basis only of the ownership by Absalom Backus, Jr., of the fee in the land described, and of the rights of A. Backus, Jr., & Sons as tenants in possession, excluding damages to the business of the plaintiffs in error, which would arise from the condemnation of their property rights? The jury were, in effect, instructed that the profits derived by them from their business were to be excluded from consideration as being "fictitious or speculative."

That he was so understood by counsel for the plaintiffs in error is manifest from the circumstance that, immediately upon the charge being concluded, he made the following exceptions to it: "We except to that part of the charge of the court wherein he says that the damages are to be confined to the damage to the real estate described and the improvements upon it; whereas, in our view, the damages are to the entire plant, including the injury to the business from the impairment of the mill

as affecting its adjuncts, the lumber yard and 583]*the storehouse. . . . To what is said by the court as to avoiding the giving of speculative damages, in view of what has been said before by the court in regard to taking into consideration the profits. I refer to what has been said upon the records in the course of the testimony and upon the argument, expressing the views of the court against taking into consideration the profits. We except to the refusal of the court to charge as I requested in the language or in the substance, according to the decisions of the Supreme Court which I read in full upon the opening of my argument and called attention of the court to it, especially to the expression of Campbell, J., in delivering the opinion of the court in *Grand Rapids & I. R. Co.* v. *Weiden*, 70 Mich. 390, 395."

If the trial judge did not intend to say to the jury that injury to the business of the plaintiffs in error was to be deemed speculative, and therefore to be excluded from consideration, he would instantly have said that no such impression was intended to be made as that indicated by the exceptions taken to his charge.

The views expressed by counsel for the plaintiffs in error as to the principles which should guide the jury in the matter of compensation were sustained by the authorities. In addition to the cases in 47 and 70 Michigan above referred to, reference may be made to many others decided by the supreme court of Michigan.

In *Detroit Park & B. Commissioners* v. *Chicago, D. & C. G. T. Junction Railroad Co.* 91 Mich. 291, which was a case of the condemnation of the lands of a railroad company, that court said: "If, therefore, their adjoining land is rendered less valuable by the location of a public highway, or another railroad across its property, there is no reason why they should not recover compensation therefor. Situated near this crossing is a small tract of land used for warehouse purposes. It is insisted by the respondents that, by reason of this crossing, this land, with the warehouse thereon, is rendered less available and less valuable for the purposes for which it was constructed and used. This was a proper element of damage, and should have been submitted to the jury.

At the same term the court, in *Detroit Park & B. Commissioners* v. *Moesta*, 91 Mich 154, quoted 584] *with approval what had been said in *Grand Rapids & I. Railroad Co.* v. *Weiden*, 70 Mich. 295, saying: "The constitutional provision entitling the owner of private property, taken for public use, to just compensation, has uniformly been construed to require full and adequate compensation. The rules to be applied in fixing the compensation are not necessarily the same as obtain in fixing damages in actions upon contracts. The correct rule of compensation in such cases is more nearly analogous to the remedy afforded in an action in tort in which property rights have been interfered with without the owner's assent. In such cases damages for the interruption of the owner's business are allowed. *Allison* v. *Chandler*, 11 Mich. 549." In *City of Detroit* v. *John Brennan & Co.* 93 Mich. 338, the court reaffirmed the doctrine of the former cases, that the full measure of compensation and the injury done to the business should be allowed, and said: "The law considers the rights of the property and business carried on by the respondent as of equal consideration, and entitled to as much protection as the right of the city to take the property and interfere with the business; and will not permit the property to be taken and the business to be interfered with unless an actual public necessity exists for the making of the improvement. . . . The elements of damage are: (1) The value of the property taken for the opening of the street; the injury to the works and property not taken, and left in the parcel of land from which the property is taken. (2) The injury to the business of the owner. (3) Compensation for all prospective loss or injury resulting from the opening of the street, and the taking of the property for that purpose."

See also *Grand Rapids, L. & D. Railroad Co.* v. *Chesebro*, 74 Mich. 466, where the court said: "An owner has a right to be indemnified for anything that he may have lost. The farming test which is the one petitioner sought to apply, would be of no particular use in a great many cases of suburban lands. . . . The mere taking of four acres for a right of way could not be regarded, in any sensible point of view, as compensated by one tenth of the value of the forty acres, taking acre for acre. *The damages in such a case must be [585 such as to fully make good all that results, directly or indirectly, to the injury of the owners in the whole premises and interests affected, and not merely the strip taken." Further: "The jury here, as in all cases where no certain measure exists, must trust somewhat to their own judgment. That is one of the purposes for which juries of inquest are provided. They are expected to view the premises and use their own senses. . . . But the purpose throughout is to give all the damages which they reasonably discover, past or present, and to result, but no more. No one can read this record without seeing that the jury did not deal fully with the case. It is manifest that they gave no damages beyond what they assumed to be the price of four acres by the acre. . . . It cannot be said that there is any real conflict as to the damages arising from the cutting off one part from the other of the forty acres, and this was left out altogether, unless they regarded the proofs of value wantonly, which we cannot believe." See also *Pearsall* v. *Eaton County Supervisors*, 74 Mich. 561 [4 L. R. A. 193]; *Barnes* v. *Michigan Air Line R. Co.* 65 Mich. 251; *Grand Rapids* v. *Grand Rapids & I. Railroad Co.* 58 Mich. 641, 648; *Toledo, A. A. & N. M. Railroad* v. *Detroit, L. & N. Railroad Co.* 62 Mich. 564; *Detroit Park & B. Commissioners* v. *Chicago, D. & C. G. T. Junction Railroad Co.* 91 Mich. 291; *Detroit Park & B. Commissioners* v. *Michigan C. Railroad Co.* 90 Mich. 385; *City of Grand Rapids* v. *Bennett*, 106 Mich. 529.

Without referring to other matters discussed at the bar and in the elaborate brief of counsel, I place my dissent from the opinion and judgment of the court upon the ground that the trial court committed error in its charge to the jury as to the principles which should guide them in determining the just compensation to which the plaintiffs in error were en-

titled. The rules laid down by the supreme court of Michigan as to what was just compensation, were, I think, in accord with the principles that obtain in the courts of the Union when determining the just compensation to be made for private property taken for public use.

586] JAMES W. WILSON, *Plff. in Err.*,
v.
STATE OF NORTH CAROLINA, on the Relation of L. C. CALDWELL.

(See S. C. Reporter's ed. 586-600.)

Suspension of state officer—state decision, when conclusive—jury trial—Federal question—departure from fundamental principles—contempt by taking possession of office.

1. The suspension by the governor of a railroad commissioner, under N. C. act 1891, chap. 320, which operates only until the next general assembly determines the question, is not wanting in due process of law, and does not deny the equal protection of the laws, because the governor refuses to produce to the officer the evidence against him, or give him an opportunity to confront his accusers and cross-examine the witnesses.
2. The decision of the highest court of a state that the procedure by which an officer has been suspended or removed from office was regular and was under a constitutional and valid statute must generally be conclusive in this court.
3. A jury trial of charges against an officer is not necessary to constitute due process of law in suspending or removing him.
4. There must be fair color for claiming that rights under the Federal Constitution have been violated, in order to give jurisdiction to this court to review a state judgment.
5. Plain and substantial departure from the fundamental principles upon which our government is based is necessary to make the procedure for the removal of an officer under a state statute obnoxious to the Federal Constitution.

NOTE.—*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.

As to railroad commissioners; authority of.—see note to Railroad Comrs. v. Oregon R. & Nav. Co. (Or.) 2 L. R. A. 195; Cleveland, C. C. & I. R. Co. v. Closser (Ind.) 9 L. R. A. 754.

Due process of law; what constitutes.

Due process of law is shown when an opportunity is conferred to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained. Chicago, B. & Q. R. Co. v. State, Omaha, 47 Neb. 549.

A statute making the receipt of deposits by a banker when insolvent embezzlement, is not unconstitutional as a deprivation of liberty or property without due process of law. Meadowcroft v. People, 163 Ill. 56, 35 L. R. A. 176.

Corporations are persons within the meaning of the constitutional provision forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws. Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578 (41: 560).

A town is not deprived of property without due process of law by a statute making it a part of an incorporated highway or bridge district under the control of commissioners who may draw upon the town for a fixed portion of the expenses of the district. State, Bulkeley, v. Williams, 68 Conn. 131.

The Connecticut statute of 1893, authorizing an action to determine adverse claims to real estate, is not unconstitutional as depriving defendants of due process of law. Miles v. Strong, 68 Conn. 273.

Seizure and destruction of nets by officers in obedience to a statute, in abating a nuisance caused by their voluntary use by the owner in violation of the fishery laws, does not deprive the owner of his property without due process of law. Bittenhaus v. Johnston, 92 Wis. 588, 32 L. R. A. 380.

A statute purporting to set apart tide lands as public grounds is constitutional as to land between high and low water mark, but unconstitutional in purporting to do more, as to a landowner whose boundary extends to low-water mark, as taking his land without compensation. Coburn v. San Mateo County, 75 Fed. Rep. 520.

The taking by a state of the private property of one person or corporation without the owner's consent, for the private use of another, is not due process of law and is a violation of the 14th article of Amendment of the Constitution of the United States. Missouri P. R. Co. v. Nebraska, 164 U. S. 403 (41: 489).

The Illinois statute making a pauper's relatives when able liable for his support is not unconstitutional as a deprivation of property without due process of law. People, Peoria County, v. Hill, 163 Ill. 186, 36 L. R. A. 635.

A statute imposing penalties for the keeping of houses of ill-fame, and declaring that repute in the neighborhood of the character of the house shall be sufficient without proving an overt act of prostitution in the house, is not unconstitutional as depriving the owner of life, liberty, or property without due process of law, or as violating private property. State v. Allen, 3 Ohio N. P. 201.

Due process of law is denied by N. Y. Laws 1888, chap. 543, authorizing the vendor of a monument to remove the same from the cemetery and sell it at public auction upon the failure of the purchaser to pay the purchase price thereof within six months after the service of notice of the filing of a lien with the superintendent of the cemetery, without providing for a hearing as to the fact of payment or nonpayment. Brooks v. Tayntor, 17 Misc. 534.

Indiana Rev. Stat. 1894, § 7257, providing that a mechanic's lien may be acquired by filing in the recorder's office a notice of intention to hold the lien, within sixty days after performing labor or furnishing material, is not unconstitutional as depriving the owner of his property without due process of law. Smith v. Newbaur, 144 Ind. 95, 33 L. R. A. 685.

The owner of property is not deprived thereof, or of its use without due process of law, by Ohio act Feb. 28, 1888, §§ 32, 61, requiring all buildings of three or more stories in height to be provided with fire escapes, and that the owner, upon thirty days' notice by the fire inspectors, put up such escapes, and in case of his noncompliance with such order be punished and fined, or enjoined from using or occupying the building. Cincinnati v. Steinkamp, 54 Ohio St. 284.

Indiana Rev. Stat. 1894, § 2202, authorizing any agent of any society for the prevention of cruelty to animals to kill any animal found neglected or abandoned, and which is injured or diseased past recovery, or by age has become useless, is unconstitutional as depriving the owner of property without due process of law, so far as it permits

6. A relator in whom the title to an office is adjudged to be by a decision in quo warranto is not guilty of contempt in proceeding to take possession after the filing of a supersedeas bond, if he was ignorant of the fact of the allowance of a writ of error or the filing of the bond until after he had taken possession.

[No. 558.]

Submitted February 21, 1898. Decided March 21, 1898.

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment of that court affirming the judgment of the Superior Court of Iredell County, that the plaintiff is entitled to the office of railroad commissioner, and that the defendant had been lawfully suspended from that office, etc., in an action brought in the nature of a quo warranto to test the title to the office. On motion by defendant in error to dismiss the writ on the ground of want of jurisdiction, and on a rule against the relator Caldwell to show cause why he should not be punished for contempt in proceeding upon a judgment of the state court after a writ of error had been allowed and a supersedeas bond filed. *Motion to dismiss granted. Rule to show cause discharged.*

Statement by Mr. Justice **Peckham:**

Two motions were made in this case. The defendant in error made a motion to dismiss the writ on the ground of want of jurisdiction. The plaintiff in error obtained from this court a rule against the relator Caldwell to show cause why he should not be punished as for a contempt in a proceeding upon a judgment of the state court after a writ of error from this court had been allowed and a supersedeas bond duly filed. The two motions were heard together. The following were the facts presented upon the motion to dismiss:

By chapter 320 of the Laws of 1891, the general assembly of North Carolina passed an act creating a state railroad commission, the 1st

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such killing without notice to him. Loesch v. Koehler, 144 Ind. 278, 35 L. R. A. 682.

A person is not deprived of property without due process of law by a statute making anyone liable for all damages done to a highway on a hillside in driving a herd of animals over it, where the liability must be ascertained by judicial proceedings, and the statute clearly specifies the condition under which a presumption of neglect arises. Jones v. Brim, 165 U. S. 180 (41: 677), Affirming 11 Utah, 200, 29 L. R. A. 97.

The owner of a dead animal before it has become a nuisance has property rights in it of which he cannot be deprived without compensation, although the authorities may require its removal within a reasonable time before it actually becomes a nuisance. Schoen v. Atlanta, 97 Ga. 697, 33 L. R. A. 804.

The owner of hogs is not deprived of his property without due process of law by making it unlawful to permit them to run at large. Haigh v. Bell, 41 W. Va. 19, 31 L. R. A. 131.

The appropriation to public use of the real estate of a single owner for a public street, with the assessment back upon him, not only for the compensation awarded for the entire street, but of all the expenses of the proceeding, is a violation of U. S. Const. 14th Amendment, providing that no state shall deprive any person of property without due process of law. Baker v. Norwood, 74 Fed. Rep. 997.

Failure to provide for a notice to the person whose property may be affected by a local assessment, and to give opportunity to appear and contest the legality, justice, and correctness of the assessment, at some stage in the proceedings before it becomes final, renders the statute authorizing such assessments void for want of due process of law. Violett v. Alexandria, 92 Va. 561, 31 L. R. A. 382.

A statute validating assessments previously made for improving streets in a given city, which assessments were invalid because of certain omissions which might have been dispensed with if they had not been required by statute, does not violate the constitutional provision prohibiting the taking of property without due process of law. Hatzung v. Syracuse, 92 Hun, 203.

A city charter authorizing an assessment for sewers without any notice, either actual or constructive, to persons to be assessed, is unconstitutional as not providing for due process of law. Dietz v. Neenah, 91 Wis. 422.

A statute making the findings of viewers appointed by city councils with regard to damages and benefits arising upon the opening of streets or changing of grades binding and final unless appealed from is unconstitutional as making the city a judge in its own case. *Re* Fisher, 178 Pa. 325.

The adoption of an ad valorem method of assessing the lands in an irrigation district for the expense of the improvement is not a taking of the property without due process of law. Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112 (41: 369).

A statute making the issue of improvement bonds conclusive of the validity of an assessment, and permitting the issue of the bonds without actual notice to the owners of the property assessed, or on published notice only, within forty days after the assessment is finally determined, is unconstitutional as providing for deprivation of property without due process of law. Hayes v. Douglas County, 92 Wis. 429, 31 L. R. A. 213.

The constitutional prohibition against taking property without due process of law is not violated by N. Y. Penal Code, § 364a, making it a misdemeanor to have in possession with intent to sell or dispose of any article of merchandise marked with the word "sterling" or "sterling silver," or which shall be inclosed for sale or disposition in any package or other thing bearing thereon anything importing that the article is silver, sterling silver, or solid silver, unless nine hundred and twenty-five one thousandths of the component parts of the metal of which the article is manufactured is pure silver, as applied to articles in existence when the act was passed. People v. Webster, 17 Misc 410.

A village ordinance providing for the lighting of a railway within its limits by electric lights at designated points is the legitimate exercise of the police power, and is not a taking of the property of the railroad company without due process of law. St. Bernard v. Cleveland, C. C. & St. L. R. Co. 4 Ohio Dec. 371.

A railroad company is not deprived of property without due process of law by a statute making such companies liable for all fires caused and communicated from locomotives. St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1 (41: 611).

A statute reducing the tolls that may be charged by a turnpike company, so far as to prevent it from keeping its road in proper repair and earning any dividends whatever for stockholders, when the tolls previously charged are not unjust,—is unconstitutional as a deprivation of property without due process of law. Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578 (41: 560).

The phrases "due process of law" and "law of the

587] section of which is set out in *the margin.† At the same session the legislature passed another act making such commission a court of record.

Under the authority of the first-mentioned act, James W. Wilson, the plaintiff in error, was elected railroad commissioner by the general assembly of 1893, for the term ending April 1, 1899, and he duly qualified and entered upon the discharge of his duties as such railroad commissioner.

On the 24th of August, 1897, the governor sent a communication to the plaintiff in error, in which, after stating that it had been charged that he had been guilty of a violation of the act above mentioned, and giving the particu-

† "There shall be three commissioners elected by the general assembly to carry out the provisions of this act. . . . Said commissioner shall not jointly or severally, or in any way, be the holder of any stock or bond, or be the agent or attorney or employee of any such company, or have any interest in any way in such company, and shall so continue during the term of his office, and in case any commissioner shall, as distributee or legatee, or in any other way, have or become entitled to any stock or bonds or interest therein of any such company he shall at once dispose of the same; and in case any commissioner shall fail in this, or in case any one of them shall become disqualified to act, then it shall be the duty of the governor to suspend him from office and to report the fact of his suspension, together with the reason therefor, to the next general assembly, and the question of his removal from office shall be determined by a majority of the general assembly in joint session. In any case of suspension the governor shall fill the vacancy, and if the general assembly shall determine that the commissioner suspended shall be removed, then the appointee of the governor shall hold until his successor is elected and qualified as hereinbefore provided, but if the general assembly shall determine that the suspended commissioner shall not be removed from his office, then the effect shall be to reinstate him in said office. The person discharging the duties of said office shall be entitled to a salary for the time he is so engaged, but a commissioner who is suspended shall be allowed the salary during his suspension in case he should be reinstated by the next general assembly."

land" are synonymous, and refer to general public law operating upon all alike and not to such as singles out for regulation, without reason, particular persons or classes. Harding v. People, 160 Ill. 459, 32 L. R. A. 445.

Due process of law is not furnished by a judgment pronounced without opportunity to be heard, by a court of competent jurisdiction in accordance with the provisions of a statute, unless that statute accords with the provisions of the fundamental law. People v. Havnor, 149 N. Y. 195, 31 L. R. A. 689, Affirming 1 App. Div. 459.

A remedy by motion in a state court, which gives notice and affords an opportunity to be heard, may be sufficient to constitute due process of law. Iowa C. R. Co. v. Iowa, 160 U. S. 389 (40: 467).

Notice necessary for due process of law in determining the right to the succession of real estate, whether by ordinary administration proceedings or by proceedings in escheat, is afforded by actual notice by service of summons to all known claimants, and constructive notice by publication to all possible claimants who are unknown. Hamilton v. Brown, 161 U. S. 256 (40: 691).

Due process of law requires that an accused person shall plead or be ordered to plead, or in a proper case that a plea of not guilty be filed for him, before his trial can rightfully proceed. Crain v. United States, 162 U. S. 625 (40: 1097).

The finding of an indictment by a grand jury of less than thirteen does not violate the due process clause of the Constitution. Talton v. Mayes, 163 U. S. 370 (40: 196).

No denial of due process of law appears by the decision of a state court against the claim of a prisoner that the state Constitution and laws respecting reprieves and warrants for execution has not been complied with. Lambert v. Barrett, 159 U. S. 660 (40 : 296).

A state law conferring judicial powers on jury commissioners in selecting jurors does not for that reason conflict with the 14th Amendment to the Federal Constitution. Murray v. Louisiana, 163 U. S. 101 (41: 87).

A denial of due process of law by a state court is not shown by the fact that one of the jurors by whom the trial was had was an alien, where it does not appear when this fact came to the knowledge of the defendant, or when he took exception to the juror. Kohl v. Lehlback, 160 U. S. 293 (40: 432).

Due process of law signifies a right to be heard in one's defense. Hovey v. Elliott, 167 U. S. 409 (42: 215).

The denial of the right of appeal from judgments of justices of the peace where the amount claimed does not exceed $20 does not violate the Nebraska Bill of Rights, § 3, prohibiting the taking of private property without due process of law. Chicago, B. & Q. R. Co. v. Headrick, 49 Neb. 286.

Due process of law is not denied by Wash. act March 19, 1895, making it an offense to employ a female in a place where intoxicating liquor is sold. State v. Considine, 16 Wash. 358.

The right of a citizen of a state to send a notification by mail to an insurance company in another state, which is not authorized to do business in the state where he resides, in order that insurance previously provided for by a valid contract made and to be performed outside the state might attach to the property specified in a shipment mentioned in the notice, although the property was then within the state, cannot be prohibited by a state statute, since that right is included in the "liberty" of the citizen which is protected against deprivation without due process of law. Allgeyer v. Louisiana, 165 U. S. 578 (41: 832).

The dismissal of a writ of error taken by the accused from a conviction, because he has escaped and is a fugitive from justice, is not a denial of due process of law within the meaning of the Federal Constitution. Allen v. Georgia, 166 U. S. 138 (41: 949).

The provision of the United States Constitution against deprivation of liberty without due process of law does not govern the manner of arraigning and accusing a defendant under state laws. *Re* Krug, 79 Fed. Rep. 308.

The prohibition of the 14th Amendment of the Federal Constitution against taking property without due process of law refers to all instrumentalities of a state, and is therefore violated whenever any person, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 258 (41: 979, 993).

A decree *pro confesso* entered after striking defendant's answer from the files because of his contempt in refusing to obey an order of the court is void for want of due process of law. Hovey v. Elliott, 167 U. S. 409 (42: 215).

The state cannot take away or destroy the rights of a riparian owner without his consent and without compensation and without due process of law, for the sole purpose of benefiting some other riparian owner, or for any other mere private purpose. Priewe v. Wisconsin State Land & I. Co. 93 Wis. 534, 33 L. R. A. 645.

The provision of N. Y. Laws 1895, chap. 974, § 189, for a determination of the question of the forfeit-

lars regarding such violation, the governor directed him to show cause on a day named, at the office of the executive in Raleigh, why he should not be suspended from office, and a report thereof made to the next general assembly according to law, and he was directed on the return day of the notice to make answer and proofs in writing and to be present in person or by counsel, at his election.

On the return day the plaintiff in error appeared and denied in writing the various charges contained in the governor's communication, after which, in explanation of the charges, he made a written statement in regard to them. The plaintiff in error demanded of the governor that the evidence against him be produced, and that he have an opportunity to confront
588]*his accusers and cross-examine the witnesses. This demand was refused.

After receiving the answer and explanation of the plaintiff in error, and after hearing him upon the return day, the governor subsequently and on the 23d of September, 1897, sent him a written notice, in which he said to the plaintiff in error "that you have not only violated said act in the specification set out in said act, but that you have otherwise, within the meaning and intent and words of said act, become disqualified to act." The governor, therefore, assuming to proceed under the statute, further informed the plaintiff in error that he thereby suspended him "from the office of railroad commissioner and chairman of said commission, such suspension to continue until the question of your removal or restoration shall be determined by a majority of the general assembly in joint session. The fact of your suspension together with the reasons therefor, and the evidence, documents, and information connected therewith, will be reported to the next

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ure of a vessel and its furniture for violation of a provision against interfering with oyster beds, by a justice without the intervention of a jury, violates N. Y. Const. art. 1, § 6, by authorizing the devesture of the private property without due process of law. Colon v. Lisk, 13 App. Div. 195, Affirmed in 153 N. Y. 188.

A statute fixing a minimum, but not a maximum, fine for violation of a statute is not unconstitutional as depriving a citizen of property without due process of law. Martin v. Johnston, 11 Tex. Civ. App. 628.

A statute for the taxation of shares of stock is not wanting in due process of law because it does not contemplate any personal notice to the shareholder, when it defines the time when the assessment shall be made by an officer, and specifically directs him to hear any stockholder who may desire to be heard. Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461 (42: 236).

A statute making it an offense to deal in options does not violate Mo. Const. art. 2, § 30, providing that no person shall be deprived of life, liberty, or property without due process of law. State v. Gritzner, 134 Mo. 512.

One who has been convicted of selling imitation of butter after trial in due course of law cannot avail himself of Mo. Const. art. 2, § 30, in regard to the deprivation of property without due process of law. State v. Bockstruck, 136 Mo. 335.

Due process of law in condemnation proceedings does not require that the assessment of damages shall be made by a jury. Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685 (41: 1165).

Due process of law as to condemnation of property. Woodruff v. Catlin, 54 Conn. 277; Fleming v. Hull, 73 Iowa. 598; Black v. Stein, 23 Neb. 302; State, Andrews, v. Oshkosh, 84 Wis. 548; People, Copcutt, v. Yonkers Bd. of Health, 140 N. Y. 1, 23 L. R. A. 481; Yonkers Bd. of Health v. Copcutt, 140 N. Y. 12, 23, L. R. A. 485; McGavcock v. Omaha, 40 Neb. 64; Wulzen v. San Francisco City & County Supers. 101 Cal. 15; Merchant v. Pennsylvania R. Co. 153 U. S. 380 (38: 751); Barr v. New Brunswick, 67 Fed. Rep. 402; Hulling v. Kaw Valley R. & Improv. Co. 130 U. S. 559 (32: 1045); Ayer v. Chicago, 149 Ill. 262; Daniel v. Columbus, 8 Ohio C. C. 642; Snohomish County v. Hayward, 11 Wash. 429.

A reasonable exercise of the police power of the state requiring railroad trains to stop at all stations at county seats does not take the property of the railroad company without due process of law. Gladson v. Minnesota, 166 U. S. 427 (41: 1064).

A railroad is not deprived of property without due process of law by a statute prohibiting the heating of passenger cars on other than mixed trains by stoves or furnaces inside of or suspended from the cars, except in case of accident or other emergency. New York, N. H. & H. R. Co. v. New York, 165 U. S. 628 (41: 853).

A reduction of the rates of a turnpike company will not constitute a deprivation of its property without due process of law, where it does not appear that the dividends will be thereby reduced, or if so, to what extent. Winchester & L. Turnp. Road Co. v. Croxton, 98 Ky. 739, 33 L. R. A. 177.

Fixing rates to be charged by carrier as due process of law. Mercantile Trust Co. v. Texas & P. R. Co. 51 Fed. Rep. 529; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 24 L. R. A. 141, 4 Inters. Com. Rep. 682; Com v. Covington & C. Bridge Co. 14 Ky. L. Rep. 836; Chicago, M. & St.P. R. Co. v. Minnesota, 134 U. S. 418 (33: 970), 3 inters. Com. Rep. 209; Chicago, M. & St. P. R. Co. v. Becker, 32 Fed. Rep. 849.

As to grain elevators. People v. Budd, 117 N. Y. 1, 5 L. R. A. 559; *Re* Annon, 50 Hun, 413.

A valid exercise of the police power does not deprive any person of liberty without due process of law. State v. Holden, 14 Utah, 71, 37 L. R. A. 103.

One is not deprived of his liberty without due process of law by a statute making it an offense to have possession of prohibited articles, such as a record of lottery drawings, even if he did not know what the articles that he had were. Ford v. State, 85 Md. 465.

An information, instead of an indictment, is sufficient to constitute due process of law in a prosecution. Hodgson v. Vermont, 168 U. S. 262 (42: 461).

"Due process or law" within U. S. Const. 14th Amendment, § 1, declaring that no state shall deprive any person of life, liberty, or property without due process of law, is not denied by Utah Const. art. 1, § 10, providing that in courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. State v. Bates, 14 Utah, 293.

The jury referred to in the Federal Constitution is a jury of twelve persons. Thompson v. Utah, 170 U. S. 343 (*post*, —).

The appointment of another day for the execution of the death penalty, in accordance with a statute, when the day first appointed has passed during the pendency of an appeal, is not in denial of due process of law or in violation of the Federal Constitution. Craemer v. Washington, 168 U. S. 124 (42: 407).

Determination of insanity of a person after his conviction and sentence, under the Georgia Code, by a sheriff's jury with the concurrence of the ordinary, constitutes due process of law. Nobles v. Georgia, 168 U. S. 398 (42: 515), Affirming 98 Ga. 73, 38 L. R. A. 577.

general assembly. You will further take notice that under and by virtue of the powers conferred and duties imposed by law upon the chief executive I have appointed L. C. Caldwell, Esq., of the county of Iredell, to fill the vacancy created by your suspension. Inasmuch as you are understood to deny the power of the executive to suspend you from office, as provided by the statutes, I have requested Mr. Caldwell to make demand upon you for the possession of the office, and, upon your refusal, to bring action therefor to the end that the title to the office may be judicially determined.

"D. L. Russell, Governor."

The plaintiff in error in reply to the communication of the governor sent him the following letter:

Raleigh, N. C., September 24, 1897.

To D. L. Russell, Governor.

Sir: Yours of the 23d inst. is hereby acknowledged. In reply I will say that I shall disregard your order to suspend, but will continue to do business at the old stand until re-

589] moved *by a tribunal other than a self-constituted "star chamber."

Jas. W. Wilson,
Chairman Railroad Commission.

Mr. Caldwell duly qualified as a railroad commissioner, and thereupon demanded that the plaintiff in error should surrender the office papers, records, etc., to him, which the plaintiff in error refused to do. Mr. Caldwell then obtained leave from the attorney general to bring this action in the nature of a quo warranto, to test the title to the office. In the complaint the foregoing facts are set forth and a judgment asked determining the title to the office to be in relator and granting him judgment for the possession thereof.

The defendant below served an answer, in which it was admitted that the governor undertook or attempted to suspend the defendant from his office, and that he designated the plaintiff, the relator, for the vacancy which he had attempted to create, and that the relator had taken the oath prescribed by law for railroad commissioner. It was also admitted that the defendant refused to vacate his office or to surrender the same to the relator, and the defendant alleged that he was advised that his suspension was illegal, and that he was still entitled to discharge the duties of his office. He also set up that by an act of the general assembly of the state the railroad commission had been constituted a court of record inferior to the supreme court, to be known as the board of railroad commissioners, and with general jurisdiction as to all subjects embraced in the act creating the commission. Being a judge of a court of record, the defendant alleged that the governor had no constitutional power to suspend him.

The answer then set forth the proceedings already mentioned, resulting in the suspension of the defendant by the governor, and it also set forth the various demands made by defendant before the governor, to be confronted with witnesses and to have an opportunity to cross examine them, and the governor's refusal

590] of those demands, and as a result *the defendant alleged that the governor had without evidence and without trial found that the defendant had violated the law, and had become disqualified to act as a railroad commissioner, and that he had, without a more specific finding, assumed to suspend the defendant and deprive him of his office.

The defendant also alleged in his answer that the action of the governor was taken in violation of the 14th Amendment of the Constitution of the United States.

Upon these pleadings the action came on for trial, and the record states that "at the conclusion of the reading of the pleadings the defendant tendered the following issues, and demanded a trial by jury:

"1. Is the plaintiff entitled to the office of railroad commissioner?

"2. Does the defendant unlawfully intrude into, hold, and exercise the office of railroad commissioner and chairman of said commission?

"3. Has the defendant acquired any interest in any way in the Southern Railway Company in violation of law?

"4. Has the defendant become disqualified to act as a fair judge or commissioner, or has he become in any way disqualified to act?

"5. Did the defendant prior to September 1, 1897, sell and convey for a valuable consideration the Round Knob Hotel to R. M. Brown?

"6. Did the defendant demand of the governor that the evidence against him be produced and that he have an opportunity to confront his accusers and cross-examine the witnesses against him?

"7. Was said demand refused?

"8. Was any evidence produced?"

The court refused to submit these questions to the jury, and the defendant excepted.

The plaintiff thereupon moved for judgment upon the complaint and answer. The defendant objected that the motion was irregular and that the plaintiff should either demur or go to trial before the jury, and that the statute in question and the action of the governor, set out in the pleadings, deprived *defendant of [591 his office without due process of law and denied to him the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States, the protection of which he expressly claimed.

The court ruled that the plaintiff was entitled to judgment upon the pleadings, which judgment was thereupon rendered, and the defendant excepted and appealed to the supreme court of the state. After argument that court adjudged that the defendant had been lawfully suspended from the office of railroad commissioner; that the relator had been duly appointed to fill the vacancy thus created, and that the defendant should be ousted from and the relator inducted into that office. Judgment to that effect was accordingly entered. The defendant then sued out a writ of error from this court, which was allowed by the chief justice of the supreme court of the state.

Messrs. **R. O. Burton and Thomas N. Hill** for plaintiff in error.

Messrs. **James C. Mac Rae, William H. Day,** and **A. C. Avery** for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

A consideration of the facts convinces us that the motion to dismiss this writ of error for lack of jurisdiction ought to be granted.

Under the statute of 1891, creating the railroad commission and providing for the appointment, suspension, and removal of the officers of such commission, the act of the governor in suspending the plaintiff in error was not a finality. Before there could be any removal, the fact of suspension was to be reported to the next legislature by the governor, and unless that body removed the officer the effect was to reinstate him in office, and he then became entitled to the salary during the time of his suspension.

592] *In speaking of the statute and the purpose of this particular provision the supreme court of the state said: "The duty of suspension was imposed upon the governor from the highest motives of public policy to prevent the danger to the public interests which might arise from leaving such great powers and responsibilities in the hands of men legally disqualified. To leave them in full charge of their office until the next biennial session of the legislature, or pending litigation which might be continued for years, would destroy the very object of the law. As the governor was, therefore, by the very letter and spirit of the law, required to act, and act promptly, necessarily upon his own findings of fact, we are compelled to hold that such official action was, under the circumstances, due process of law. Even if it were proper, the governor would have no power to direct an issue like a chancellor."

The highest court of the state has held that this statute was not a violation of the Constitution of the state; that the hearing before the governor was sufficient; that the office was substantially an administrative one, although the commission was designated, by a statute subsequent to that which created it, a court of record; that the officer taking office under the statute was bound to take it on the terms provided for therein; that he was lawfully suspended from office; and that he was not entitled to a trial by jury upon the hearing of this case in the trial court. As a result the court held that the defendant had not been deprived of his property without due process of law, nor had he been denied the equal protection of the laws.

The controversy relates exclusively to the title to a state office, created by a statute of the state, and to the rights of one who was elected to the office so created. Those rights are to be measured by the statute and by the Constitution of the state, excepting in so far as they may be protected by any provision of the Federal Constitution.

Authorities are not required to support the general proposition that in the consideration of the Constitution or laws of a state this court follows the construction given to those instruments by the highest court of the state. The ex-

593]ceptions to *this rule do not embrace the case now before us. We are therefore concluded by the decision of the supreme court of North Carolina as to the proper construction of the statute itself, and that as construed it does not violate the Constitution of the state.

The only question for us to review is whether the state, through the action of its governor and judiciary, has deprived the plaintiff in error of his property without due process of law, or denied to him the equal protection of the laws.

We are of opinion the plaintiff in error was not deprived of any right guaranteed to him by the Federal Constitution, by reason of the proceedings before the governor under the statute above mentioned, and resulting in his suspension from office.

The proceedure was in aecordance with the Constitution and laws of the state. It was taken under a valid statute creating a state office in a constitutional manner, as the state court has held. What kind and how much of a hearing the officer should have before suspension by the governor was a matter for the state legislature to determine, having regard to the Constitution of the state. The procedure provided by a valid state law for the purpose of changing the incumbent of a state office will not in general involve any question for review by this court. A law of that kind does but provide for the carrying out and enforcement of a policy of a state with reference to its political and internal administration, and a decision of the state court in regard to its construction and validity will generally be conclusive here. The facts would have to be most rare and exceptional which would give rise in a case of this nature to a Federal question.

Upon this subject it was said in the case of *Allen* v. *Georgia*, 166 U. S. 138 [41: 949], as follows: "To justify any interference upon our part it is necessary to show that the course pursued has deprived, or will deprive, the plaintiff in error of his life, liberty, or property without due process of law. Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the supreme court of a state has acted in consonance with the constitutional *laws of a state[**594** and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen to justify our interference."

This statement is quoted with approval in *Hovey* v. *Elliott*, 167 U. S. 409, at 443 [42: 215, at 230].

No such fundamental rights were involved in the proceedings before the governor. In its internal administration the state (so far as concerns the Federal government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office. And in such matters the decision of the state court that the procedure by which an officer has been suspended or removed from office was regular and was under a constitutional and valid statute, must generally be conclusive in this court.

In *Kennard* v. *Louisiana* [*Morgan*], 92 U. S. 480 [23: 478], the proceeding under which the title to the office of justice of the supreme court of the state was tried, was held not to violate the 14th Amendment of the Constitution of the United States. The court said the officer had an opportunity to be heard before he was condemned. There was no intimation in that case that a hearing such as was had here would be insufficient or that the officer would be entitled to be "confronted with his accusers and to cross-examine the witnesses," and to have a jury trial. In *Foster* v. *Kansas* [*Johnson*], 112 U. S. 201 [28: 629], the *Kennard Case* was approved. Neither case gives any support to the claim that such a hearing as was given in this case would be insufficient under the 14th Amendment.

Nothing in that Amendment was intended to secure a jury trial in a case of this nature.

The demand made by the plaintiff in error for such a trial in the court below must have been for the purpose of submitting to the jury the question of the truth of the allegations set 595]*up in the answer regarding the proceedings before the governor, and to claim that if the jury found them to be true, he was not legally suspended. But the motion for judgment on the pleadings was equivalent to a demurrer to the answer for insufficiency, and was therefore an admission of all the facts well pleaded. The question then became one of law for the court to decide, and in granting the motion the court did decide that no defense was set forth in the answer In a case like this, such a decision of the state court is conclusive. The mere refusal of a jury trial, in and of itself, and separated from all other matters, raises no Federal question. *Walker* v. *Sauvinet*, 92 U. S. 90 [23: 678].

In the proceedings for trying the title to office in the case of *Kennard* v. *Louisiana* [*Morgan*], 92 U. S. *supra*, the statute provided for a hearing without a jury, and this court held it was not objectionable for that reason.

Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws

In *Hamblin* v. *Western Land Company*, 147 U. S 531 [37: 267], it was stated that "a real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgments of state courts. *Millingar* v. *Hartupee*, 73 U. S. 6 Wall. 258 [18: 829]; *New Orleans* v. *New Orleans Water Works Co.* 142 U. S 79, 87 [35: 943, 946]. In the latter case it was said that 'the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.' "

We think this case falls within the principle thus stated. Although an office has been held in North Carolina to be generally and in a certain restricted sense the property of the incumbent, yet in this case the supreme court held that the *incumbent, in taking the office, [596 holds it subject to the act creating it, which binds him by all its provisions, all of which were held to be valid. We should be very reluctant to decide that we had jurisdiction in such a case, and thus in an action of this nature to supervise and review the political administration of a state government by its own officials and through its own courts. The jurisdiction of this court would only exist in case there had been, by reason of the statute and the proceedings under it, such a plain and substantial departure from the fundamental principles upon which our government is based that it could with truth and propriety be said that if the judgment were suffered to remain, the party aggrieved would be deprived of his life, liberty, or property in violation of the provisions of the Federal Constitution.

We are of opinion that the facts herein present no such case, and that the jurisdiction of this court does not extend to the case as made in the record now before us.

For these reasons the motion of the defendant in error to dismiss this writ should be granted, and the writ is accordingly dismissed.

The following are the facts upon the motion to punish defendant in error as for a contempt:

The plaintiff in error, after the entry of the judgment of the supreme court affirming the judgment of ouster, sued out a writ of error from this court, which was duly allowed by the chief justice of the supreme court of that state on the 23d day of December, 1897, and on the same day a good and sufficient bond, conditioned as required by law in cases of supersedeas, was tendered, and the chief justice duly approved it and signed the citation. A few minutes after 7 o'clock in the afternoon of that day the writ of error with the petition therefor and the assignment of errors and the citation and bond were filed in the clerk's office of the state supreme court, and at the same time copies of the writ of error were lodged in the clerk's office, for the state of North Carolina and for the relator. The plaintiff in error alleged, on *information and belief, that the [597 relator, with full knowledge of the issuing of the writ and of the action of the chief justice, broke into the room occupied as offices by the railroad commission and took possession. The judgment of affirmance directed the issuing of a writ of possession. On the morning of the 24th of December, 1897, counsel for the relator made a motion in the state court to set aside the supersedeas, while at the same time counsel for the plaintiff in error made a motion that the execution of the writ of possession issued on the judgment of the state court be recalled on account of the supersedeas. Both motions were refused, and an opinion delivered by Mr. Justice Clark holding that the judgment of the court *ex proprio vigore* placed the relator in the possession of the office at the time the judgment was filed, and that such judgment took effect immediately upon being entered, and it was not superseded by the subsequent writ of error, regular or irregular. He also held that

the court had no power to set aside the writ of error or to pass upon the regularity thereof.

The relator made answer under oath. He alleged that after the judgment of the supreme court of North Carolina was rendered, and pursuant to its directions, a writ was issued out of that court at half past 5 o'clock of that day, and was immediately placed in the hands of the sheriff, and that the sheriff went to the offices of the railroad commission for the purpose of executing the writ, but that the plaintiff in error could not be found, and that he was absent from the county and state for the purpose, as alleged, of avoiding service of the writ; that the doors of the commission's rooms were locked, and the sheriff left the building for the purpose of getting keys or other means of entry, but did not return, and that the relator, after waiting a reasonable time for the return of the sheriff and being advised by counsel that he had good right in law so to do, procured the door of the room to be opened, and he then entered therein and assumed to exercise the duties of the office of railroad commissioner.

He denied under oath that any notice of the filing of a supersedeas by the plaintiff in error was served upon him, or that he had any knowledge of the filing of said bond until the 598] *day after the taking possession of the rooms of the commission as above stated.

Mr. Justice **Peckham** delivered the opinion of the court:

Plaintiff in error claims that by virtue of the allowance of the writ of error and the filing of the supersedeas bond, the relator was precluded from taking any step under the judgment of the state court, which ousted the plaintiff in error and adjudged the right to the office to be in the relator. It is argued that the filing of a proper bond operates as a supersedeas of the judgment in an action in the nature of a quo warranto, as well as in any other action. *United States, Crawford*, v. *Addison*, 63 U. S. 22 How. 174 [16: 304]. In that case Addison held the office of mayor of the city of Georgetown. Proceedings in the nature of quo warranto were commenced against him by the United States on the relation of Crawford. Upon the trial of the action judgment of ouster was entered against the defendant. A writ of error from this court was sued out by him and a sufficient bond was filed. The relator applied to this court for a peremptory writ of mandamus to be directed to the judges of the circuit court of the District of Columbia commanding them to execute the judgment of that court by which Addison had been ousted and the relator adjudged entitled to the office. This court denied the motion, and decided that after a writ of error had been sued out from this court and the proper bond filed further proceedings were stayed in the court below. It was not a case where immediately upon the entering of the judgment of ouster the court had directed the possession of the office to be taken by the relator, who had taken possession accordingly. The court was asked to actively intervene to put the relator in possession of the office, notwithstanding the allowance of a writ of error and the filing of a bond. The court refused to do so, holding that the supersedeas bond stayed further proceedings under the judgment.

*In *Foster* v. *Kansas* [*Johnson*], 112 U. [599 S. 201 [28:629], the attorney general of Kansas had instituted a proceeding to remove Foster, the plaintiff in error, from the office of county attorney for Saline county. The supreme court of Kansas rendered judgment on the 1st of April, 1884, removing Foster, and, under a statute of the state making it his duty so to do, the judge of the district court of Saline county, upon being presented with an authenticated copy of the record of the supreme court which removed Foster, duly appointed Moore to such office, and approved his bond on the 7th of April. A writ of error from this court had been allowed in Washington on the 5th of April, and the supersedeas bond approved and citation signed. Although notice of these facts was telegraphed on the same day from Washington to counsel in Kansas, who immediately exhibited the telegram to the judge of the district court, and notified him of what had been done in Washington, yet neither the writ of error nor the supersedeas bond arrived from Washington until the 8th of April, on which day they were duly lodged in the office of the clerk of the supreme court of the state. Moore, the appointee of the district judge, thereafter appeared as county attorney, and a rule was therefore granted requiring him to appear before this court and show cause why he should not be adjudged in contempt for violating the supersedeas. This court, after argument, held that he was not in contempt, and that the supersedeas was not in force when Moore was appointed to and accepted the office. The court said: "The judgment operated of itself to remove Foster and leave his office vacant. It needed no execution to carry it into effect. The statute gave the judge of the district court authority to fill the vacancy thus created. The judge was officially notified of the vacancy on the 7th, when the authenticated copy of the record of the supreme court was presented to him. The operation of that judgment was not stayed by the supersedeas until the 8th, that being the date of the lodging of the writ of error in the clerk's office. It follows that the office was in fact vacant when Moore accepted his appointment, gave his bond, and took the requisite oath. He was thus in office before the supersedeas became operative. *What effect the supersedeas had, when it [600 was afterwards obtained, on the previous appointment, we need not consider. This is not an appropriate form of proceeding to determine whether Foster or Moore is now legally in office." The rule was therefore discharged.

In this case it is also true that the judgment operated of itself to remove the plaintiff in error. The judgment also adjudged the title to the office to be in the relator. After the filing of the supersedeas bond it may be assumed that further action under the judgment was stayed. The question is whether the relator is shown to be guilty of a contempt in proceeding to take possession after he knew of the filing of the bond. He swears unequivocally that he was ignorant of the fact of the allowance of a writ or the filing of the bond at the time when he took possession of the room occupied by the commission, and that he was

not informed of that fact until some time the next day. We think this a sufficient answer to the case as it is now presented to us, and that any further proceeding is rendered unnecessary because of our conclusion to dismiss the writ of error for want of jurisdiction. We see no evidence of any intentional contempt on the part of relator, and our conclusion is that *the rule must be discharged.*

In No. 559 (*S. Otho Wilson, Plff. in Err.*, v. *State of North Carolina, etc.*), the same questions are involved and the same orders are made.

UNITED STATES, *ex rel.* ALFRED BERNARDIN, *Plff. in Err.*,
v.
BENJAMIN BUTTERWORTH, Commissioner of Patents.

(See S. C. Reporter's ed. 600-606.)

Mandamus against public officer—abates by his death.

1. On the death of the commissioner of patents pending a writ of error in a proceeding against him for a mandamus, the proceeding abates, and his successor cannot be substituted instead of the deceased, without statutory authority.

2. An action for a mandamus against an officer of the government is a personal action, and abates on his death or retirement from office; and the Maryland law of 1785, chap. 80, § 1, providing that no action shall abate by the death of a party, but shall be continued, and that the person interested on the part of the defendant may appear therein does not apply to such action for mandamus.

[No. 404.]

Submitted February 21, 1898. Decided March 21, 1898.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment of that court affirming the judgment of the Supreme Court of that District dismissing a petition for a mandamus to compel the Commissioner of Patents to issue a patent. On motion to substitute Hon. C. H. Duell, present Commissioner of Patents, as defendant in error in place of the Hon. Benjamin Butterworth, deceased. *Motion refused and judgment of court of appeals reversed*, and cause remanded to that court with directions to reverse the judgment of the Supreme Court of the District of Columbia and remand the cause to that court with directions to dismiss the petition for the writ of mandamus because of the death of the defendant Benjamin Butterworth.

See same case below, 10 App. D. C. 294.

The facts are stated in the opinion.

Mr. **Julian C. Dowell** for Bernardin, plaintiff in error, in favor of motion.

Mr. **John K. Richards,** Solicitor General, for defendant in error, in opposition to motion.

Mr. **J. M. Wilson** for the Crown Cork & Seal Company, the party in interest, in opposition to motion.

Mr. Justice **Shiras** delivered the opinion of the court:

On March 23, 1895, John S. Seymour, Commissioner of Patents, on appeal in an interference proceeding between the applications of Alfred S. Bernardin and William H. Northall decided that Barnardin was entitled to a patent for the invention involved in the interference. From this decision an appeal was taken by Northall to the court of appeals of the District of Columbia, and the decision of the Commissioner was by that court reversed.

Bernardin then instituted proceedings in the supreme court of the District of Columbia, seeking to compel the Commissioner to issue a patent in accordance with his previous decision, claiming that the act of Congress approved February 9, 1893, which, in form, confers jurisdiction upon the court of appeals of the District of Columbia to hear appeals from the action of the Commissioner of Patents, is unconstitutional and void, in that it attempts to confer jurisdiction upon that court to review or reverse the action of the Commissioner.

The supreme court of the District of Columbia dismissed the petition for mandamus, and on appeal the court of appeals of the District sustained the judgment of the supreme court. *Bernardin* v. *Seymour*, 10 App. D. C. 294.

Thereafter John S. Seymour resigned his office as Commissioner of Patents, and, on April 12, 1897, Benjamin Butterworth was appointed his successor. On April 17, 1897, Bernardin filed a new petition for mandamus in the supreme court of the District of Columbia, which was dismissed, and that decision was, on appeal to the court of appeals of the District, on May 11, 1897, affirmed.

*On May 25, 1897, a writ of error was [602 allowed from this court, and while the case was here pending, on January 16, 1898, Benjamin Butterworth died, and C. H. Duell was thereafter appointed to the office thus left vacant; and a motion has been made for leave to substitute Duell in the stead of Butterworth, notwithstanding that by the death of the latter the action had abated.

The question thus presented is not a novel one. In *The Secretary* v. *McGarrahan* [*Cox* v. *United States, McGarrahan*], 76 U. S. 9 Wall. 298 [19: 579], it was held that a judgment in mandamus ordering the performance of an official duty against an officer, as if yet in office, when in fact he had gone out after service of the writ, and before the judgment, is void, and cannot be executed against his successor. In *United States* v. *Boutwell*, 84 U. S. 17 Wall. 604 [21: 721], it was held that, in the absence of statutory provision to the contrary, a mandamus against an officer of the government abates on his death or retirement from office, and that his successor in office cannot be brought in by way of amendment of the proceeding, or on an order for the substitution of parties. The conclusion reached was put upon two independent grounds, and we quote the reasoning of the court, expressed in its opinion delivered by Mr. Justice Strong, as follows:

"The office of a writ of mandamus is to

NOTE.—*As to when mandamus will issue*, see note to M'Cluny v. Silliman, 4: 263.

As to mandamus to control inferior courts; discretion,—see note to *Re* Morgan, 29: 135.

compel the performance of a duty resting upon the person to whom the writ is sent. That duty may have originated in one way or another. It may, as is alleged in the present case, have arisen from the acceptance of an office which has imposed the duty upon its incumbent. But no matter out of what facts or relations the duty has grown, what the law regards, and what it seeks to enforce by a writ of mandamus, is the personal obligation of the individual to whom it addresses the writ. If he be an officer, and the duty be an official one, still the writ is aimed exclusively against him as a person, and he only can be punished for disobedience. The writ does not reach the office. It cannot be directed to it. It is, therefore, in substance, a personal action, and it rests upon the averred and assumed fact that the defendant has neglected or refused to perform a personal duty, to the performance of which by him the relator has a clear right. **603**]*Hence it is an imperative rule that previous to making application for writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant, and it must appear that he refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively inferred. Thus it is the personal default of the defendant that warrants impetration of the writ, and if a peremptory mandamus be awarded, the costs must fall upon the defendant. It necessarily follows from this, that on the death or retirement from office of the original defendant, the writ must abate in the absence of any statutory provision to the contrary. When the personal duty exists only so long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. And if a successor in office may be substituted, he may be mulcted in costs for the fault of his predecessor, without any delinquency of his own. Besides were a demand made upon him, he might discharge the duty and render the interposition of the court unnecessary. At all events, he is not in privity with his predecessor, much less is he his predecessor's personal representative. . . .

"And, even if the retirement of the defendant from office and his consequent inability to perform the act demanded to be done does not abate the writ, or necessitate its discontinuance, there is still an insuperable difficulty in the way of our directing the substitution asked for. We can exercise only appellate power. We have no original jurisdiction in the case. But any summons issued, or rule upon . . . [the successor in office] requiring him to become a party to the suit, would be the exercise of original jurisdiction over both a new party and a new cause, for the duty which he would be required to perform would be his own, not that of his predecessor."

In *Thompson* v. *United States*, 103 U. S. 480 [26: 521], the distinction is pointed out between proceedings where the obligation sought to be enforced devolves upon a corporation or continuing body, and those where the duty is personal with the officer. In the former case there is no abatement. The duty is perpetual *upon the corporation; in the latter, the [**604** delinquency charged is personal, and involves no charge against the government, against which a proceeding would not lie.

United States, Warden, v. *Chandler*, 122 U. S. 643 [30: 1244], was the case of a writ of error in review of a judgment of the supreme court of the District of Columbia refusing a mandamus against William E. Chandler, Secretary of the Navy, to require of him the performance of certain alleged official duties. When the case was called it appeared that Mr. Chandler was no longer secretary, and that the office was filled by his successor. Thereupon this court, upon the authority of *United States* v. *Boutwell*, held that the suit had abated, and dismissed the writ of error.

A similar view prevailed in *United States, Long*, v. *Lochren*, 164 U. S. 701 [41: 1181].

In *Warner Valley Stock Company* v. *Smith* 165 U. S. 28]41: 621], the subject was considered at some length. There a bill had been filed against Hoke Smith, as Secretary of the Interior, to compel him to cause patents to be issued to the plaintiff for certain tracts of land. The supreme court of the District sustained a demurrer to the bill and dismissed the suit. While an appeal in this court was pending Hoke Smith resigned his office, and it was held that the bill could not be amended by making his successor a defendant, because he was not in office before the bill was filed and had no part in the doings complained of, and accordingly the cause was remanded with directions to dismiss the bill. In discussing the case Mr. Justice Gray cited the cases just mentioned and several others to the same effect, and again pointed out the difference between the case of a public officer of the United States and that of a municipal board, which is a continuing corporation, although its individual members may be changed, to which in its corporate capacity a writ of mandamus may be directed; and in respect to which the language of Chief Justice Waite, in *Learenworth County Commissioners* v. *Sellew*, 99 U. S. 626 [25: 335], was quoted: "One of the objects in creating such corporations, capable of suing and being sued, and having perpetual succession, is that the very inconvenience which manifested itself in *Boutwell's Case* may be avoided."

*In the absence, therefore, of statutory [**605** authority, we cannot, after a cause of this character has abated, bring a new party into the case. Nor is the want of such authority supplied by the consent of a person not a party in the cause.

It is, however, contended that an act of the state of Maryland enacted in 1785, chap. 80, § 1, and which, it is claimed, became the law of the District of Columbia when the territory thereof was ceded to the United States, is applicable. The terms of said section are as follows:

"No action brought, or to be brought, in any court of this state shall abate by the death of either of the parties to such action, but upon the death of any defendant, in a case where the action by such death would have abated before this act, the action shall be continued, and the heir, devisee, executor, or administrator of the defendant, as the case may require, or other persons interested on the part of the defendant, may appear to such action."

It is suggested that the attention of this court was not called to this statute in the previous cases. However that may have been, we are unable to perceive that this statute, either in its terms or its spirit, is applicable to cases like the present one. Neither the heir, devisee, executor, or administrator of a deceased official would have any legal interest in such a controversy. Nor, in the case of a resignation, could the successor be said to be "a person interested on the part of the defendant."

In view of the inconvenience, of which the present case is a striking instance, occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that, in the case of suits against the heads of the departments abating by death or resignation, it should be lawful for the successor in office to be brought into the case by petition, or some other appropriate method.

The motion is refused and the judgment of the Court of Appeals is reversed, the costs in this court to be paid by the plaintiff in error, and **606**] *the cause remanded to that court with directions to reverse the judgment of the supreme court of the District of Columbia and remand the cause to that court with directions to dismiss the petition for the writ of mandamus because of the death of the defendant Butterworth.

Mr. Justice **Harlan**, Mr. Justice **Brewer**, and Mr. Justice **Peckham** dissent.

McCORMICK HARVESTING MACHINE COMPANY
v.
C. AULTMAN COMPANY *et al.*

McCORMICK HARVESTING MACHINE COMPANY
v.
AULTMAN-MILLER COMPANY.

(See S. C. Reporter's ed. 606-612.)

Validity of patent—attempted reissue—due process of law.

1. If the owner of a patent applies to the patent office for a reissue of it, and includes in his application the same claims as were in the old patent, and the primary examiner rejects some of such claims for want of patentable novelty, and allows others, both old and new, the owner of the patent, by taking no appeal and abandoning his application for reissue, does not hold the original patent, the return of which he procures from the patent office, invalidated as to those of its claims which were so disallowed in the proceeding for reissue.
2. Until the amended patent has been issued the original stands precisely as if a reissue had never been applied for.
3. To cancel a patent upon an application for reissue, when the first patent is considered invalid by the examiner, would be to deprive the applicant of his property without due process of law.

[Nos. 130, 131.]

Argued December 1, 2, 1897. Decided March 21, 1898.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit certifying a question upon which instruction is desired in a suit in equity brought by the McCormick Harvesting Machine Company against C. Aultman *et al.*, and also in a suit in equity brought by the same plaintiff against the Aultman-Miller Company, in each of which it was sought to restrain the defendant from the future infringement of two patents, one of which was issued to Marquis L. Gorham, February 9, 1875, and to recover damages for past infringements. *Question answered in the negative.*

See same case below, 58 Fed. Rep. 778.

Statement by Mr. Justice **Brown**:

This was a question certified to this court by the circuit court of appeals for the sixth circuit, involving the authority of a primary examiner of the Patent Office to reject as invalid claims of an original patent which were incorporated in an application for a reissue.

It appears that the McCormick Harvesting Machine Company filed a bill of equity in the United States circuit court for the northern district of Ohio against C. Aultman *et al.*, and also one against the Aultman-Miller Company, in each of *which it was sought to re- [**607** strain the defendant from the future infringement of two patents covering automatic twine binders for harvesting machines. As the interests of the several defendants were closely identified the two cases were heard together.

The question certified involves only patent No. 159,506, issued to Marquis L. Gorham February 9, 1875, and the other patent sued

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NOTE.—*For what patents are granted; when declared void*,—see note to Evans v. Eaton, 4: 433.

As to patentability of inventions, see notes to Thompson v. Boisselier, 29: 76; and Corning v. Burden, 14: 683.

As to abandonment of invention, see note to Pennock v. Dialogue, 7: 327.

As to distinction between inventions of mechanism, articles, or products and processes; when latter patented,—see note to Corning v. Burden, 14: 683.

As to including process and product in same patent; separate patents therefor,—see note to Evans v. Eaton, 4: 433.

As to what reissue may cover, see note to O'Reilly v. Morse, 14: 601.

As to assignment before issuing and reissuing patent; recording; when assignment transfers extended terms,—see note to Gayler v. Wilder, 13: 504.

As to when assignee may sue for infringement; when patentee must; when they must join,—see note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages,—see note to Hogg v. Emerson, 13: 824.

As to reissued patents for inventions, when valid; effect of reissue; laches,—see note to National Meter Co. v. Yonkers Water Comrs. 37: 644.

As to utility of invention, see note to National Automatic Device Co. v. Lloyd (C. C. N. D. Ill.) 5 L. R. A. 784.

As to prior use or sale, see note to Campbell v. New York (C. C. S. D. N. Y.) 1 L. R. A. 48.

As to protection of right, see note to American Bell Teleph. Co. v. Cushman Teleph. & Service Co. (C. C. N. D. Ill.) 1 L. R. A. 799.

upon will therefore not be considered. The record shows that there was filed in the Patent Office by the executrix of Gorham an application for a reissue of this patent, in which were included several claims of the original patent, as well as many new claims. Upon consideration, the assistant or primary examiner decided that claims 3, 10, 11, 25, and 26 of the original patent should be rejected for want of patentable novelty, and reference was made to prior patented devices. No appeal was taken from this decision, and subsequently, in compliance with a request, the original patent was returned to the plaintiff corporation, which had become the owner thereof. Thereafter these suits were brought against the defendants upon the original patent.

In the circuit court it was decided that, as the original claims 3, 10, 11, 25, and 26 had been determined by the examiner to be invalid, and no appeal had been taken from that decision, but the same had apparently been acquiesced in, the adverse action must be regarded as fatal to the claims in question, and to the same extent as if the rejection had been incident to the original application for the patent. 58 Fed. Rep. 778.

Upon appeal the circuit court of appeals [37 C. C. A. 358, note] decided that there was no infringement by the defendants as to claims 25 and 26, but that there was infringement of claims 3, 10, and 11 of the original patent, unless it should be determined that they were invalidated by their being rejected by the examiner upon an application for a reissue of the same; and, desiring instruction upon this point, it certified to this court the following question. "If the owner of a patent applies to the Patent Office for a reissue of it, and includes among the claims in the application the same claims as those which were included in the **608**] *old patent, and the primary examiner rejects some of such claims for want of patentable novelty, by reference to prior patents, and allows others (both old and new, does the owner of the patent, by taking no appeal and by abandoning his application for reissue, hold the original patent (the return of which he procures from the Patent Office) invalidated as to those of its claims which were disallowed for want of patentable novelty by the primary examiner in the proceeding for reissue?"

Mr. **Robert H. Parkinson** for appellant.

Messrs. **Thomas A. Banning, Edmund Wetmore,** and *Ephraim Banning* for appellees.

Mr. Justice **Brown** delivered the opinion of the court:

The validity of the claims in question depends upon the view taken of the action of the examiner in rejecting them when incorporated in an application for a reissue of the patent, upon the ground that the claims were wanting in patentable novelty, as evidenced by prior patents cited by him. No appeal was taken from this decision, and the matter lay in abeyance for nearly two years before the plaintiff corporation, which had in the meantime become the owner of the patent, abandoned the application for a reissue and requested and obtained from the Patent Office the return of the original patent.

It has been settled by repeated decisions of this court that when a patent has received the signature of the Secretary of the Interior, countersigned by the Commissioner of Patents, and has had affixed to it the seal of the Patent Office, it has passed beyond the control and jurisdiction of that office, and is not subject to be revoked or canceled by the President, or any other officer of the government. *United States, McBride,* v. *Schurz,* 102 U. S. 378 [26: 167]; *United States* v. *American Bell Telephone Co.* 128 U. S. 315, 363 [32: 450, 460]. It has *become the property of the patentee, [**609** and as such is entitled to the same legal protection as other property. *Seymour* v. *Osborne,* 78 U. S. 11 Wall. 516 [20: 33]; *Cammeyer* v. *Newton,* 94 U. S. 225 [24: 72]; *United States* v. *Palmer,* 128 U. S. 262, 271 [32: 442, 445], citing *James* v. *Campbell,* 104 U. S. 356 [26: 786].

The only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent. *Moore* v. *Robbins,* 96 U. S. 530, 533 [24: 848, 850]; *United States* v. *American Bell Telephone Co.* 128 U. S. 315, 364 [32: 450, 461]; *Michigan Land & Lumber Co.* v. *Rust,* 168 U. S. 589, 593 [*ante,* 591, 592]. And in this respect a patent for an invention stands in the same position and is subject to the same limitations as a patent for a grant of lands. The power to issue either one of these patents comes from Congress and is vested in the same department. In the case of a patent for lands it has been held that when one has obtained a patent from the government he cannot be called upon to answer in regard to that patent before the officers of the Land Department, and that the only way his title can be impeached is by suit. *United States* v. *Stone* [*Stone* v. *United States*], 69 U. S. 2 Wall. 525, 535 [17: 765, 767]; *Iron Silver Min. Co.* v. *Campbell,* 135 U. S. 286 [34: 155]; *Noble* v. *Union River Logging Railroad Co.* 147 U. S. 165 [37: 123]. But a suit may be maintained by the United States to set aside a patent for lands improperly issued by reason of mistake or fraud; but only in the case where the government has a direct interest, or is under obligation respecting the relief invoked. *United States* v. *Missouri, K. & T. R. R. Co.* 141 U. S. 358 [35: 766].

While a patent for a grant of lands is absolutely free from the future control of the officers of the Land Department after it has once issued, and jurisdiction over the matter cannot again be obtained, this is subject to a single qualification in the case of a patent for an invention where the patentee, his legal representatives or assigns, find the original patent inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his invention or discovery more than he had a right to claim as new (provided the error has arisen through inadvertence,*accident, or mistake, and with [**610** out fraudulent or deceptive intention). In such case a reissue will be granted by the Commissioner upon the surrender of the patent, but such surrender takes effect only upon the issue

of the amended patent. This provision is embodied in Rev. Stat. § 4916, which also declares that "the specifications and claim in every such case shall be subject to revision and restriction in the same manner as original applications, . . . but no new matter shall be introduced into the specification."

The plain purpose of this section is to give the patentee an opportunity to make valid and operative that which was before invalid and inoperative; invalid, because it claimed as new that which had been previously invented or used by the public; inoperative, because the specification was defective or insufficient. New matter cannot be introduced, nor can the scope of the invention be enlarged. All that the applicant can do is to so amend his patent as to enable him to receive some practical and beneficial result from his actual invention, of which he has been deprived by defects or omissions in the original patent. The object of a patentee applying for a reissue is not to reopen the question of the validity of the original patent, but to rectify any error which may have been found to have arisen from his inadvertence or mistake. But until the amended patent shall have been issued the original stands precisely as if a reissue had never been applied for (*Allen* v. *Culp*, 166 U. S. 501, 505 [41: 1093, 1095]), and must be returned to the owner upon demand. The fact that the rules of the Patent Office require that the original patent should be placed in its custody for the purpose of surrendering it upon the issue of an amended patent gives that department no right to the possession of it upon the rejection of the application for a reissue. If the patentee abandoned his application for a reissue, he is entitled to a return of his original patent precisely as it stood when such application was made and the Patent Office has no greater authority to mutilate it by rejecting any of its claims than it has to cancel the entire patent.

In *Peck* v. *Collins*, 103 U. S. 660 [26: 512], an application for reissue made under the laws in [611] force in 1866 was held to absolutely *extinguish the original patent. Subsequent to that time the law of 1870, of which Rev. Stat. § 4916, forms a part, was passed. Mr. Justice Bradley, in discussing the clause in that section which declares that the surrender "shall take effect upon the issue of the amended patent," said: "What may be the effect of this provision in cases where a reissue is refused, it is not necessary now to decide. Possibly it may be to enable the applicant to have a return of his original patent if a reissue is refused on some formal or other ground which does not affect the original claim. But if his title to the invention is disputed and adjudged against him, it would still seem that the effect of such a decision should be as fatal to his original patent as to his right to a reissue." This same question was considered but not decided in *Eby* v. *King*, 158 U. S. 366 [39: 1018], and in *Allen* v. *Culp*, 166 U. S. 501, 505 [41: 1093, 1095], it was held that if the original application for a reissue be rejected the original patent stands precisely as though a reissue had never been applied for; but the effect of the refusal of the reissue upon some ground equally affecting the original patent was not considered.

In neither of these cases was this court called upon to decide the question which has been certified, and the expression of opinion in *Peck* v. *Collins*, relied upon by the defendants, must be considered merely a *dictum*, and lacking the force of a judicial determination.

In the case under consideration the examiner acted upon the application as if it were a new proceeding, and dealt with it as the evidence before him seemed to warrant, but his action in rejecting some of the claims which had been repeated from the original patent did not affect that patent. It is true that it was within his power to reject any claims contained in the application for a reissue which he judged to be invalid, whether contained in the original patent or not. It is also true that the reasons given for the rejection of such claims might apply equally to the same claims contained in the original patent; but with respect to such claims he was *functus officio*. His opinion thereon was but his personal opinion, and however persuasive it might be, did not oust* the jurisdiction of any court [612] to which the owner might apply for an adjudication of his rights, and as the examiner had no authority to affect the claims of the original patent, no appeal was necessary from his decision.

Had the original patent been procured by fraud or deception it would have been the duty of the Commissioner of Patents to have had the matter referred to the Attorney General with the recommendation that a suit be instituted to cancel the patent; but to attempt to cancel a patent upon an application for reissue when the first patent is considered invalid by the examiner would be to deprive the applicant of his property without due process of law, and would be in fact an invasion of the judicial branch of the government by the executive.

Our conclusion upon the whole case is that, upon the issue of the original patent, the Patent Office had no power to revoke, cancel, or annul it. It had lost jurisdiction over it, and did not regain such jurisdiction by the application for a reissue. Upon application being made for such reissue the Patent Office was authorized to deal with all its claims, the originals as well as those inserted first in the application, and might declare them to be invalid, but such action would not affect the claims of the original patent, which remained in full force, if the application for a reissue were rejected or abandoned.

The validity of the claims, so far as their merits are concerned, has been sustained by the circuit court of appeals, and, as the original patent must stand precisely as though a reissue had never been applied for, *the question certified to this court must be answered in the negative.*

613] MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, *Plff. in Err.*,
v.
CHARLES HABER *et al.*

(See S. C. Reporter's ed. 613-644.)

Federal question—state statute, when not repugnant to act of Congress—act of March 29, 1884—Kansas statute—effect of act of 1884—damages for bringing diseased cattle into state—regulation of commerce—Federal Constitution—state regulations—rule of evidence—U. S. Rev. Stat. § 5258—review of state judgment.

1. The answer and claim made by defeudant in the state court, that an act of Congress furnished a complete defense to the action to enforce a state statute, raised a Federal question; and the overruling of that defense by that court gives this court jurisdiction to review the state judgment.
2. A state statute enacted in execution of a reserved power of the state is not inconsistent with an act of Congress passed in execution of a clear power under the Federal Constitution, unless the repugnance is so direct and positive that the two acts cannot be reconciled or stand together.
3. The power of the states to protect their domestic cattle from contagious diseases was left untouched and unimpaired by the act of Congress of March 29, 1884.
4. The Kansas statute of 1885, as amended in 1891, for the protection of domestic animals from contagious diseases, is not inconsistent with the said act of Congress of March 29, 1884, for the suppression and extinction of contagious diseases of cattle.
5. The regulations established by virtue of said act of Congress did not take away from anyone the right to recover damages for bringing diseased cattle into contact with his domestic cattle.
6. The said Kansas statute giving a right of action for such damages is not a regulation of interstate commerce, but only declares a rule of civil liability, and was passed in execution of the power of the state to protect the rights of property and to provide for the redress of wrongs within its limits.
7. Nor is said statute of Kansas a regulation of commerce among the states simply because it may incidentally affect such commerce.
8. The Federal Constitution does not by its own force give anyone the right to introduce into a state, against its will, and without liability for damages, cattle so infected with disease as to be dangerous to domestic cattle.
9. State regulations of the enjoyment of rights or the performance of duties, that do not directly interfere with the Federal Constitution or act of Congress, must be respected until Congress intervenes: even although the subject may be within its control.
10. The rule established by said Kansas statutes that proof that the cattle were brought from south of the 37th parallel of north latitude should be prima facie evidence that they were capable of imparting Texas fever, and that their owner, or person in charge had knowledge or notice thereof, does not violate any right secured by the Federal Constitution, or obstruct commerce, as the rule implies that damages shall not be recovered if from all the evidence it appears that such owner or person had no such knowledge or notice.
11. U. S. Rev. Stat. § 5258, which authorizes railroads to carry freight and property from one state to another, does not authorize them to carry into a state, in violation of state law, cattle known, or which by due diligence may be known, to be in such condition as to impart disease to the domestic cattle of such state.
12. This court cannot enter into the inquiry whether the finding of the jury in a state court is against the evidence; it can only consider, in this case, whether the state statute as interpreted by the jury is in violation of the Federal Constitution.

[No. 268.]

Argued January 27, 1898. Decided March 14, 1898.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment of that court which affirmed by one final judgment judgments in favor of the plaintiff Charles Haber, and of each of several cross petitioners, in an action brought by said Charles Haber against the Missouri, Kansas, & Texas Railway Company to recover damages sustained by said plaintiff, Charles Haber, by reason of the defendant having brought into that state certain cattle affected with the disease known as Texas, splenic, or Spanish fever and communicated by them to plaintiff's cattle whereby the latter sickened and died; in which action many persons having like causes of action intervened as parties defendant, and each by a cross petition asked and obtained judgment against the railway company. *Affirmed.*

See same case below, 56 Kan. 694.

The facts are stated in the opinion.

Messrs. **James Hagerman, T. N. Sedgwick,** and **Simon Sterne** for plaintiff in error.

Messrs. **E. W. Cunningham, J. Jay Buck, W. C. Perry,** *Eugene Hagan,* and *Madden Bros.* for defendants in error.

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution,* see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Jackson, Hart, v. Lamphire, 7: 679, and Commercial Bank v. Buckingham, 12: 169.

As to power of Congress to regulate commerce, see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.

As to adoption by Federal courts of remedies created by state statute; preservation of equity jurisdiction; enlargement of equitable remedies; limitation or enlargement of equity powers; extending legal remedies; limiting equitable jurisdiction,—see note to Leighton v. Young (C. C. A. 8th C.) 18 L. R. A. 266.

As to validity and construction of statutory regulations as to infected animals; statutes providing for their destruction; Texas cattle acts; necessity of statutes; construction of statutes; contributory negligence; conditional ownership,—see note to Grimes v. Eddy (Mo.) 26 L. R. A. 638.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought in one of the courts of Kansas against the Missouri, Kansas, & Texas Railway Company, a corporation of that state, and certain persons constituting the respective firms of F. Brogan & Sons and Hozier Bros. Its object was to recover the damages sustained by the plaintiff Charles Haber, one of the appellees, by reason of the defendants having brought and caused to be brought into that state certain cattle alleged to have been affected with the disease known as Texas, splenic, or Spanish fever, and communicated by them to the plaintiff's cattle whereby the latter sickened and died.

Many persons having like causes of action intervened as parties defendant, and each by cross petition asked judgment against the railway company.

It appeared in evidence that Hozier Bros. in the spring of 1892 owned and controlled a ranch of several thousand acres of land in Pecos county, Texas, upon which cattle known as Texas cattle were permitted to range. They entered into an agreement with F. Brogan & Sons, whereby the latter were to receive from the former a part of the above cattle at some point in Lyon county, Kansas, and take them to their ranch in Chase county in the same state to be there grazed during the summer of 1892. In execution of that agreement, Hozier Bros. caused to be shipped by railroad into Kansas from Pecos county, Texas, about 2,500 head of cattle which were delivered by defendant company in its stock yards at Hartford, Kansas, to F. Brogan & Sons, and by the latter were driven through Lyon and Chase counties to their range. These cattle, it was alleged, communicated Texas, splenic, or Spanish fever to domestic cattle that were owned by the plaintiff and by the cross petitioners.

The case was tried and submitted to the jury only as between the plaintiff, the cross petition-[616]ers, and the railway *company, the latter denying liability for any damages sustained by the former. The trial resulted in verdicts and judgments in favor of the plaintiff and of each of the cross petitioners. The judgments having been affirmed by one final judgment in the supreme court of Kansas, the case is here upon a writ of error sued out by the railway company, which contends that effect has been given to statutes of the state that are repugnant to the Constitution and laws of the United States. That contention involves the Federal question presented for determination.

In 1881 the legislature of Kansas passed an act for the protection of cattle in that state against contagious diseases. Laws of Kansas 1881, chap. 161. But those provisions need not be set out here, because they appear in subsequent enactments to which we will presently refer.

By a state enactment approved March 25, 1884, provision was made for a Live Stock Sanitary Commission, which was charged with the duty of protecting "the health of the domestic animals of the state from all contagious or infectious diseases of a malignant character," and was empowered to establish, maintain, and enforce such quarantine, sanitary, and other regulations as it deemed necessary. Laws of 1884, chap. 2. And by an act approved March 26, 1884, that commission was authorized to create and enforce quarantine against the disease known as Texas, splenic, or Spanish fever in the unorganized counties of the state. Laws of 1884, chap. 4, § 1. The commission was also authorized and directed by another act approved on the same day to co operate with the Commissioner of Agriculture of the United States or any officer of the general government in the suppression and extirpation of contagious diseases among domestic animals, and in the enforcement and execution of all acts of Congress passed to prevent the importation or exportation of diseased cattle and the spread of infectious or contagious disease among domestic animals. Laws of 1884, chap. 5, § 1.

In 1885 another statute was passed, which was amended in 1891. Laws of 1891, chap. 201. As amended, and as it appears in General Statutes of Kansas of 1897, vol. 2, chap. 139, p. 761, *that statute made it a misdemeanor for [617 any person, between the 1st day of February and the 1st day of December of any year, to drive or cause to be driven into or through any county in the state, or to turn upon or cause to be turned or kept upon any highway, range, common or pasture within the state, any cattle capable of communicating or liable to impart what is known as Texas, splenic, or Spanish fever. § 13. By another section it was made the duty of any sheriff, under sheriff, deputy sheriff, or constable within the state, upon complaint made to him that there were within the county where such officer resided cattle believed to be capable of communicating or liable to impart the disease known as Texas, splenic, or Spanish fever, to forthwith take charge of and restrain them under such temporary quarantine regulations as would prevent the communication of such disease, and make immediate report thereof to the Live Stock Sanitary Commission. § 14.

Other sections provided—

"Sec. 16. Any person or persons who shall drive, ship, or transport, or cause to be shipped, driven, or transported, into or through any county in this state, any cattle liable or capable of communicating Texas, splenic, or Spanish fever to any domestic cattle of this state, shall be liable to any person or persons injured thereby for all damages that they may sustain by reason of the communication of said disease, or Texas, splenic, or Spanish fever; to be recovered in a civil action in any court of competent jurisdiction, and the parties so injured shall have a first and prior lien to all other liens for such damages on the cattle communicating the disease of Texas, splenic, or Spanish fever.

"Sec. 17. In the trial of any person charged with the violation of any provisions of this act, and in the trial of any civil action brought to recover damages for the communication of Texas, splenic, or Spanish fever, proof that the cattle which such person or persons are charged with shipping, driving, or keeping, or which are claimed to have communicated the said disease, were brought into this state from south of the thirty-seventh parallel of north latitude, shall be taken as *prima facie [618 evidence that such cattle were, between the

1st day of February and the 1st day of December of the year in which the offense was committed, capable of communicating and liable to impart Texas, splenic, or Spanish fever, within the meaning of this act, and that the owner or owners or person or persons in charge of such cattle had full knowledge and notice thereof. If the owner or owners or person or persons in charge of said cattle shall show by such certificate or certificates as shall hereafter be designated by the Live Stock Sanitary Commission of the state, that the said cattle had been kept since the 1st day of December of the previous year west of the twenty-second meridian of longitude west from Washington, and north of the thirty-fourth parallel of north latitude, the provisions of this section shall not apply thereto.

"Sec. 18. Whenever two or more persons shall in violation of this act, at the same time or at different times during the same year, drive or cause to be driven upon the same highway, range, common, or pasture within this state any cattle capable of communicating or liable to impart Texas, splenic, or Spanish fever, they shall be jointly and severally liable for all damages that may arise from the communication of such disease at any time thereafter during the same year to any native, domestic, or acclimated cattle that shall have been upon the same highway, range, common, or pasture so previously traveled over by such first-mentioned cattle."

The general contention of the plaintiff in error is that the act of Congress of May 29, 1884 (23 Stat. at L. 31, chap. 60) known as the animal industry act, together with the act of March 3, 1891 (26 Stat. at L. 1044, 1049, chap. 544), appropriating money to carry out the provisions of that act, and § 5258 of the Revised Statutes relating to the transportation of passengers, freight, property, etc., from one state to another state by railroad, cover substantially the whole subject of the transportation from one state to another state of live stock liable to impart or capable of communicating infectious or contagious diseases, and therefore that the state of Kansas has no authority to deal in any form with that subject.

619] *Are the acts of Congress and the regulations established under their authority of such a character that the legislation of Kansas is without effect so far as it relates to injury done to domestic cattle by the bringing into that state of cattle liable to impart or capable of communicating Texas, splenic, or Spanish fever to domestic cattle?

The act of Congress of May 29, 1884 (23 Stat. at L. 31, chap. 60), provided for the establishment of a bureau of animal industry, and for the appointment of a chief thereof and two competent, practical stock raisers or experienced business men familiar with questions pertaining to commercial transactions in live stock, whose duty it should be, under the instructions of the Commissioner of Agriculture, to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and also to examine and report upon the best methods of treating, transporting, and caring for animals, and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia, and to provide against the spread of other dangerous, contagious, infectious, and communicable diseases. §§ 1, 2.

By other sections of the act it was provided:

"Sec. 3. That it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each state and territory, and invite said authorities to co operate in the execution and enforcement of this act. Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any state or territory in which pleuro-pneumonia or other contagious, infectious, or communicable disease is declared to exist, or such state or territory shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the governor of a state or other properly constituted authorities signify their readiness to co-operate for the extinction of any contagious, infectious, or communicable disease in conformity with the provisions *of this [**620** act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigations, and in such disinfection and quarantine measures, as may be necessary to prevent the spread of the disease from one state or territory into another.

"Sec. 4. That in order to promote the exportation of live stock from the United States the Commissioner of Agriculture shall make special investigation as to the existence of pleuro pneumonia, or any contagious, infectious, or communicable disease, along the dividing lines between the United States and foreign countries, and along the lines of transportation from all parts of the United States to ports from which live stock are exported, and make report of the results of such investigation to the Secretary of the Treasury, who shall, from time to time, establish such regulations concerning the exportation and transportation of live stock as the results of said investigations may require.

"Sec. 5. That to prevent the exportation from any port of the United States to any port in a foreign country of live stock affected with any contagious, infectious, or communicable disease, and especially pleuro pneumonia, the Secretary of the Treasury be, and he is hereby, authorized to take such steps and adopt such measures, not inconsistent with the provisions of this act, as he may deem necessary.

"Sec. 6. That no railroad company within the United States, or the owners or masters of any steam or sailing or other vessel or boat, shall receive for transportation or transport, from one state or territory to another, or from any state into the District of Columbia, or from the District into any state, any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro pneumonia; nor shall any person, company, or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, knowing them to be affected with any

contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot or transport in private con-
621] veyance from *one state or territory to another, or from any state into the District of Columbia, or from the District into any state, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro pneumonia: Provided, That the so-called splenetic or Texas fever shall not be considered a contagious, infectious, or communicable disease within the meaning of §§ 4 5, 6, and 7 of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto.

"Sec. 7. That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat, or other transportation company doing business in or through any infected locality, and by publication in such newspapers as he may select, of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district, who shall knowingly violate the provisions of § 6 of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment."

"Sec. 10. That the sum of one hundred and fifty thousand dollars, to be immediately available, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to carry into effect the provisions of this act."

1. The answer of the railway company as well as its requests for instructions, and the opinion of the supreme court of the state, show that the company contended throughout this litigation that legislation by Congress and the regulations prescribed by the Secretary of Agriculture in execution of the animal industry act, furnished a complete defense to all claims for damages asserted in this action. That
622] contention *was overruled by the trial court, as well as by the supreme court of the state. If the contention of the railway company had been sustained, the verdict and judgment must have been in its favor without reference to any other question in the case. In other words, the state court could not properly have disposed of the case without deciding the Federal question raised by the company. This court therefore has jurisdiction to inquire whether the supreme court of Kansas erred in holding that the legislation of Congress and the regulations of the Secretary of the Interior† gave to the railway company the right, privilege, and immunity specially set up and claimed by it. The motion to dismiss for want of jurisdiction in this court is consequently overruled. *Willson* v. *Blackbird Creek Marsh Co.* 27 U. S. 2 Pet. 245, 251 [7: 412, 414]; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574, 579 [28: 1084, 1087]; *Saycard* v. *Denny*, 158 U. S. 180, 184 [39: 941, 943]; *Chicago, Burlington, & Q. Rd. Co.* v. *Chicago*, 166 U. S. 226, 232 [41: 979, 983].

2. If §§ 16 and 17 of the Kansas act of 1885, as amended in 1891, are not inconsistent with the legislation of Congress, no question can be raised as to other provisions of the Kansas statutes. The 16th section, we have seen, provides that any person or persons, driving, shipping, or transporting, or causing to be driven, shipped, or transported, into or through any county in that state, cattle liable to impart or capable of communicating Texas, splenic, or Spanish fever to any domestic cattle of Kansas, shall be liable in a civil action to any person injured thereby for all damages sustained by reason of the communication of such fever to his cattle; while the 17th section makes the bringing into the state, from south of the 37th parallel of north latitude, of cattle alleged to have communicated Texas, splenic, or Spanish fever *to domestic cattle, prima facie [623 evidence that such cattle were, between February 1 and December 1 in any year, capable of communicating that disease, and that the owner or person in charge of such cattle had full knowledge and notice thereof.

May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together. *Sinnot* v. *Davenport*, 63 U. S. 22 How. 227, 243 [16: 243, 247].

We have seen that the 1st section of the animal industry act provided for an investigation as to the condition of the domestic animals of the United States, their protection and use, the causes of contagious, infectious, and communicable diseases among them, and the means for the prevention and cure of such diseases. The 2d section provided for an examination as to the best methods of treating, transporting, and caring for animals and the means to be adopted for the suppression and extirpation of contagious pleuro pneumonia, and to guard against the spreading of other dangerous, contagious, infectious, and communicable diseases. If any state was ready to co-operate with the Commissioner of Agriculture, then, by the 3d section, that officer was authorized to use the money appropriated by Congress in such investigations and in such disinfection and quarantine measures as were necessary "to prevent the spread of the disease from one state or territory into another." While the states were

†By the act approved February 9, 1889 (25 Stat. at L. 659, chap. 122), the Department of Agriculture was made an executive department. And by the act of March 2, 1889 (25 Stat. at L. 835, 840, chap. 373), the authority granted to the Commissioner of Agriculture by the act of May 29, 1884 (23 Stat. at L. 31, chap. 60), establishing the Bureau of Animal Industry, and by the provision of the appropriation act for the Agricultural Department, approved July 18, 1888 (25 Stat. at L. 328, chap. 677), relating to that bureau, was vested in the Secretary of Agriculture. The regulations above referred to were issued by Secretary Rusk, February 26, 1892.

invited to co-operate with the general government in the execution and enforcement of the act, whatever power they had to protect their domestic cattle against such diseases was left untouched and unimpaired by the act of Congress.

The act of Congress did not assume to give any corporation, company, or person the affirmative right to transport from one state to another state cattle that were liable to impart or capable of communicating contagious, in-
624] fectious, or *communicable diseases. On the contrary, it was made a misdemeanor to deliver for transportation, or to transport or drive from one state to another, cattle known to be affected with contagious, infectious, or communicable diseases. Whether a corporation transporting, or the person causing to be transported from one state to another cattle of the class specified in the Kansas statute, should be liable in a civil action for any damages sustained by the owners of domestic cattle by reason of the introduction into their state of such diseased cattle, is a subject about which the animal industry act did not make any provision. That act does not declare that the regulations established by the Department of Agriculture should have the effect to exempt from civil liability one who, but for such regulations, would have been liable either under the general principles of law or under some state enactment, for damages arising out of the introduction into that state of cattle so affected. And, as will be seen from the regulations prescribed by the Secretary of Agriculture, that officer did not assume to give protection to anyone against such liability.

By those regulations the Secretary gave notice to the "managers and agents of railroad and transportation companies of the United States, stockmen, and others" that "a contagious and infectious disease known as splenetic or southern fever exists among cattle" within certain parts of the United States, the outer line of which area or boundary was fully defined by that officer. The same regulations provided that from the 1st day of March, to the 1st day of December, 1892, no cattle should be transported from any part of the country included in that area or boundary to any part of the United States north or west of the described line except by rail for immediate slaughter, and when so transported certain directions were to be observed in handling and caring for them. The regulations made provision for moving cattle from specified parts of Tennessee in accordance with the rules established by the authority of that state. Rules were also prescribed for moving cattle from named counties in Texas to the states of Colorado, Wyoming, and Montana, "in accordance
625] *with the regulations made by said states for the admission of southern cattle thereto."

The cattle in question were originally received by the Texas & Pacific Railroad at Midland, Texas, outside of but near to the boundary of the "infected district" as defined by the Secretary of Agriculture. They were received by the defendant company at Dennison, Texas, as a connecting carrier, in the same cars in which they were loaded, and the entire route to the southern boundary line of Kansas was through that district. It may be that in the transportation of the cattle in question from Pecos county, Texas, through the infected district, all the regulations prescribed by the secretary were observed. But that fact does not show that Congress intended or assumed to exempt anyone complying with those regulations from liability to the owners of domestic cattle to which were communicated the contagious disease with which the cattle brought into the state were affected. The controlling object of the regulations was to prevent the spreading from one state to another of the cattle disease in question, not to deprive anyone of the right to recover damages for injury inflicted upon his domestic cattle by reason of their being brought into contact with diseased cattle.

It is said that the statute of Kansas giving a right of action for damages is, in itself, a regulation of commerce among the states, and, therefore, inconsistent with the power of Congress to regulate such commerce. But that statute is not, within the meaning of the Constitution, nor in any just sense, a regulation of commerce among the states. It cannot be supposed to have been so intended, even if its validity were to depend upon the intent with which it was enacted. It did nothing more than declare as a rule of civil liability in Kansas, that anyone driving, shipping, or transporting, or causing to be driven, shipped, or transported, into or through any county in that state, cattle liable to impart or capable of communicating Texas, splenic, or Spanish fever to domestic cattle, should be responsible in damages to any persons injured thereby. In fact, the state law is in aid of the objects which Congress had in view when it passed the animal industry act. It was *passed in execu
626] tion of a power with which the state did not part when entering the Union, namely, the power to protect the people in the enjoyment of their rights of property, and to provide for the redress of wrongs within its limits. We must not be understood as saying that this power may be so exerted as to defeat or burden the exercise of any power granted to Congress. On the contrary, a state statute, although enacted in pursuance of a power not surrendered to the general government, must, in the execution of its provisions, yield in case of conflict to a statute constitutionally enacted under authority conferred upon Congress; and this, as was said by Mr. Justice Nelson, speaking for the court in *Sinnot* v. *Davenport*, above cited, "without regard to the source of power whence the state legislature derived its enactment." This results, as was said by Chief Justice Marshall in *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, 210 [6: 23, 73], as well from the nature of the government as from the words of the Constitution. In that case the argument was pressed that if a law passed by a state in the exercise of its acknowledged sovereignty comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject and each other like "equal opposing powers." Touching that view, the Chief Justice said: "But the framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy, not only of itself, but of the laws made in pursuance of it. The nullity of any act in-

consistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."

Nor is the statute of Kansas to be deemed a **627**] regulation of *commerce among the states, simply because it may incidentally or indirectly affect such commerce. *Hennington* v. *Georgia*, 163 U. S. 299, 317 [41: 166, 174]; *New York, N. H. & H. Railroad Co.* v. *New York*, 165 U. S. 628, 631 [41: 853, 854]; *Chicago, Milwaukee, & St. Paul Railway Co.* v. *Solan*, 169 U. S. 133 [*ante*, 317]; *Richmond & Alleghany Railroad Co.* v. *R. A. Patterson Tobacco Co.* 169 U. S. 311 [*ante*, 385], and authorities cited in each case. Although the power of Congress to regulate commerce among the states, and the power of the states to regulate their purely domestic affairs, are distinct powers, which, in their application, may at times bear upon the same subject, no collision that would disturb the harmony of the national and state governments, or produce any conflict between the two governments in the exercise of their respective powers, need occur, unless the national government, acting within the limits of its constitutional authority, takes under its immediate control and exclusive supervision the entire subject to which the state legislation may refer. "The same bale of goods," Mr. Justice Johnson well said in his concurring opinion in *Gibbons* v. *Ogden*, "the same cask of provisions, or the same ship, that may be the subject of commercial regulation, may also be the vehicle of disease. And the health laws that require them to be scopped and ventilated are no more intended as regulations on commerce then the laws which permit their importation are intended to inoculate the community with disease. Their different purposes mark the distinction between the powers brought into action; and, while frankly exercised, they can produce no serious collision." 22 U. S. 9 Wheat. 235 [6: 79]. It is therefore a mistake to say that the Kansas statute, so far as it gives a right of action for injuries arising from disease communicated to domestic cattle by cattle of a particular kind brought into the state, comes into conflict with any regulation established under the authority of Congress to prevent the spread of contagious or infectious diseases from one state to another. That statute, we repeat, only embodies a rule of civil conduct prescribed by a state whose government is competent to regulate—in subordination always to **628**] the supreme law of the land and its *own fundamental law—the relative rights and obligations of all within its jurisdiction. Neither corporations nor individuals are entitled, by force alone of the Constitution of the United States and without liability for injuries resulting therefrom to others, to bring into one state from another state cattle liable to impart or capable of communicating disease to domestic cattle. The contrary cannot be affirmed under any sound interpretation of the Constitution. This court, while sustaining the power of Congress to regulate commerce among the states, has steadily adhered to the principle that the states possess, because they have never surrendered, the power to protect the public health, the public morals, and the public safety, by any legislation appropriate to that end which does not encroach upon rights guaranteed by the national Constitution, nor come in conflict with acts of Congress passed in pursuance of that instrument. Although the powers of a state must in their exercise give way to a power exerted by Congress under the Constitution, it has never been adjudged that that instrument by its own force gives anyone the right to introduce into a state, against its will, cattle so affected with disease that their presence in the state will be dangerous to domestic cattle.

This principle is illustrated in many adjudged cases. In *Hannibal & St. J. Railroad Co.* v. *Husen*, 95 U. S. 465, 471, 473 [24: 527, 530, 531],—a case much relied on by the plaintiff in error,—this court held to be unconstitutional a statute of Missouri declaring that no Texas, Mexican, or Indian cattle, not kept the entire previous winter in that state, should be driven or otherwise conveyed into or remain in any county in that state between the 1st day of March and the 1st day of November in each year. The statute contained a proviso to the effect that "when such cattle shall come across the line of this state, loaded upon a railroad car or steamboat, and shall pass through the state without being unloaded, such shall not be construed as prohibited by the act; but the railroad company or owners of a steamboat performing such transportation shall be responsible for all damages which may result from the disease called the Spanish or Texas fever, should the same occur along the line *of such **[629** transportation; and the existence of such disease along the line of such route shall be prima facie evidence that such disease has been communicated by such transportation." It also provided: "If any person or persons shall bring into this state any Texas, Mexican, or Indian cattle in violation of the 1st section of this act, he or they shall be liable, in all cases, for all damages sustained on account of disease communicated by said cattle." In that case the court cited with approval the language of the supreme court of Vermont in *Thorpe* v. *Rutland & Burlington Railroad Co.* 27 Vt. 149 [62 Am. Dec. 625], in which it was said that, by the general police power of a state, "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be, made, so far as natural persons are concerned." Under that power, this court said that while a state by legislation may not invade the domain of the national government, it may *exclude* from its limits convicts, paupers, idiots, and lunatics, persons likely to become a public charge, as well as persons affected by contagious or infectious diseases—adding that the

same principle "would justify exclusion of property dangerous to the property of citizens of the state, for example, *animals having contagious or infectious diseases.*" Such exertions of power by a state, it was said, were self defensive. In affirming the invalidity of state legislation professing to be an exercise of police powers for protection against evils from abroad, but which was beyond the necessity for its exercise, and interfered with the rights and powers of the Federal government, the court, speaking by Mr. Justice Strong, said: "Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the state any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and December 1, in any year, no matter whether they are free from disease or not, no matter whether **630**]*they may do an injury to the inhabitants of the state or not; and if you do bring them in, even for the purpose of carrying them through the state without unloading them, you shall be subject to extraordinary liabilities.' Such a statute, we do not doubt, it is beyond the power of a state to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure."

The decision in that case was placed distinctly on the ground that although the state could prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state, it could not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce, and the Missouri statute was held to be unconstitutional because it went beyond the necessities of the case, having been so drawn as to exclude all Texas, Mexican, or Indian cattle from the state (except cattle to be transported across and out of the state) whether free from disease or not, or whether they would or would not do injury to the inhabitants of the state.

No such criticism can be made of the statute of Kansas. It does not prohibit the bringing into the state of all Texas cattle. It does not in any true sense prohibit or burden any commerce among the states especially authorized by Congress; but, for the purpose of self-protection only and in the exercise of its inherent power to protect the property of its people, declared that any corporation or person bringing into the state or driving into or through any county of the state cattle liable to impart or capable of communicating Texas, splenic, or Spanish fever to domestic cattle, should be responsible in damages to anyone to whose cattle that disease was communicated by the cattle so brought into the state.

The general views we have expressed are sustained by *Kimmish* v. *Ball*, 129 U. S. 217, 220, 222 [32: 695, 696, 697, 2 Inters. Com. Rep. 407]. That case involved the validity of § 4059 of the Iowa Code, providing, in respect of Texas cattle that had not been wintered at least one winter north of the southern boundary of Missouri or Kansas, that "if any person **631**] now or hereafter has in his possession *in this state any such Texas cattle, he shall be liable for any damages that may accrue from allowing said cattle to run at large, and thereby spreading the disease among other cattle known as the Texas fever, and shall be punished as is prescribed in the preceding section." It was contended that that section was in conflict with the power of Congress to regulate commerce among the states, as well as with § 2 of article 4 of the Constitution of the United States relating to the privileges and immunities of citizens of the several states. The court stated that the statute of Iowa was based upon the notorious fact that cattle which were brought during the spring and summer months from Texas and Arkansas and from the Indian territory, were often affected with what is known as Texas fever, and that all danger of infection therefrom could be removed by cold weather, such as was usual in the country north of the southern boundary of Missouri and Kansas. Speaking by Mr. Justice Field, it said: "Section 4059, with which we are concerned, provides that any person who has in his possession in the state of Iowa any Texas cattle which have not been wintered north shall be liable for any damages that may accrue from allowing such cattle to run at large and thereby spread the disease. We are unable to appreciate the force of the objection that such legislation is in conflict with the paramount authority of Congress to regulate interstate commerce. We do not see that it has anything to do with that commerce; it is only levelled against allowing diseased Texas cattle held within the state to run at large." In reference to the other objection made to the act, the court said: "There is no denial of any rights and privileges to citizens of other states which are accorded to citizens of Iowa. No one can allow diseased cattle to run at large in Iowa without being held responsible for the damages caused by the spread of disease thereby; and the clause of the Constitution declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states does not give non-resident citizens of Iowa any greater privileges and immunities in that state than her own citizens there enjoy. So far as liability is concerned for the act mentioned, *citizens [**632** of other states and citizens of Iowa stand upon the same footing."

The case of *Sherlock* v. *Alling*, 93 U. S. 99, 103 [23: 819, 820], well illustrates the principle which, we think, must control the present case. That was an action for damages under a statute of Indiana, giving a right of action in favor of the personal representative of one whose death was caused by the wrongful act or omission of another, whenever the latter, if he had lived, could sue for an injury for the same act or omission. In that case the death, on account of which the suit was brought, occurred by reason of a collision between two steamboats navigating the Ohio river. It appears from the report of the case that one of the grounds of defense was that at the time of the alleged injuries the colliding boats were engaged in carrying on interstate commerce under the laws of the United States, and that the defendants, as their owners, were not liable for injuries occurring in navigation through the carelessness of their officers, except as pre-

scribed by Congress; and that the acts of Congress did not cover the liability asserted by the plaintiff under the statute of Indiana. The act of Congress referred to was that of August 30, 1852 (10 Stat. at. L. 65, chap. 106), providing for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam. After referring to some of the principal cases in which state enactments had been held void for interfering with the freedom of interstate commerce, the court said that the Indiana statute "imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the liability of all persons within the jurisdiction of the state for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the state, whether on land or on water. General legislation of this kind, prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with **633** equal propriety *be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged it it without constituting a regulation of it, within the meaning of the Constitution." Again, in the same case: "Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress."

In *Patterson* v. *Kentucky*, 97 U. S. 501, 505 [24: 1115, 1117], this court said that "the states may, by police regulations, protect their people against the introduction within their respective limits of infected merchandise," and by like regulations "exclude from their midst, not only convicts, paupers, idiots, lunatics, and persons likely to become a public charge, but animals having contagious diseases."

So it has been held that in the absence of legislation by Congress on the subject, a state may prescribe, as a rule of civil conduct, that engineers on railroad trains engaged in the transportation of passengers and freight, including interstate trains, shall undergo an examination by a state board as to their qualifications before becoming entitled to operate locomotive engines within such state, and that persons employed on railways shall be subjected to like examination with respect to their powers of vision. *Smith* v. *Alabama*, 124 U. S. 465, 482 [31: 508, 514, 1 Inters. Com. Rep. 804]; *Nashville, C. & St. L. Railway Co.* v. *Alabama*, 128 U. S. 96, 101 [32: 352, 354, 2 Inters. Com. Rep. 238]

In *New York, N. H. & H. Railroad Co.* v. *New York*, 165 U. S. 628, 633 [41:853, 855], it was contended that § 5258 of *the Revised Stat- **[634** utes, relating to transportation of persons and property from one state to another state, so far covered the whole subject of interstate transportation as to render inapplicable to interstate carriers a statute of New York regulating the heating of steam passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles. But this court said that the authority conferred by Congress "upon railroad companies engaged in commerce among the states, whatever may be the extent of such authority, does not interfere in any degree with the passage by the states of laws having for their object the personal security of passengers while traveling within their respective limits, from one state to another on cars propelled by steam."

In *Western U. Teleg. Co.* v. *James*, 162 U. S. 650, 660 [40: 1105, 1108], this court sustained as valid a statute of Georgia requiring every telegraph company, with a line of wires wholly or partly within that state, to receive despatches, and, on payment of the usual charges, to transmit or deliver them with due diligence, under a penalty of $100. It was contended in that case, as to telegraph messages from points outside to points inside the state, that the local statute was a regulation of interstate commerce, and therefore void. That contention was overruled, the court saying: "It would not unfavorably affect or embarrass it in the course of its employment, and hence until Congress speaks upon the subject, it would seem that such a statute must be valid. It is the duty of a telegraph company which receives a message for transmission, directed to an individual at one of its stations, to deliver that message to the person to whom it is addressed, with reasonable diligence and in good faith. That is a part of its contract, implied by taking the message and receiving payment therefor. The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in no wise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made without impartiality and in good faith *and with due **[635** diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not."

These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights, and the performance of the duties, of all persons within the jurisdiction of a state belongs primarily to such state under its reserved power to provide for the safety of all persons and property within its limits; and

that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the state upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress must be respected until Congress intervenes.

It is suggested that the statute is so drawn that the railway company would be liable, even if it acted in good faith, and had no reason to believe, after the exercise of the utmost diligence, that the cattle it received for transportation were liable to impart or were capable of communicating the fever named in the statute. If the statutes were thus interpreted, it might be—though upon that point we express no opinion—that it would be so oppressive in its necessary operation as to be deemed a burden upon the transportation of all cattle from Texas, whether diseased or not, and for that reason be liable to the same objection urged against the statute involved in *Hannibal & St. J. Railroad Co.* v. *Husen*. But we do not so construe the statute. Its 16th section must be interpreted in connection with the 17th section. The latter, as we have stated, declares that in the trial of any civil action, under the statute, proof that the cattle were brought into the state from south of the 37th parallel of north latitude—the southern boundary line of Kansas—should be prima facie evidence that they were, between the 1st day of February and **636**]*the 1st day of December, capable of communicating and liable to impart Texas, splenic, or Spanish fever, and that "the owner or owners, or person or persons, in charge of such cattle had full knowledge or notice thereof." As the state is competent to protect its domestic cattle against disease that may be communicated by cattle coming from beyond its limits, this rule of evidence cannot be regarded as inconsistent with any right secured by the national Constitution or as obstructing commerce among the states; for the rule finds its justification in the fact, heretofore recognized by this court, and substantially by the act of Congress, that Texas cattle, when brought northward during the spring and summer months, often carry the germs of fever, or are often, though not always, infected with fever that may be communicated by them to domestic cattle. That rule as prescribed implies that damages shall not be recovered if, from all the evidence, it appears that the defendant had no knowledge or notice that the cattle were of the kind forbidden by the statute to be brought into the state. This was the interpretation placed upon the statute by the plaintiff. His petition alleges that before the cattle in question were shipped, transported, and driven as stated, the defendants had knowledge, and were put upon inquiry, and had reason to know, that "said Texas cattle so kept, shipped, transported, and driven, were of a kind capable of communicating and liable to communicate and impart said disease to the domestic cattle of this state and to the aforesaid cattle of the plaintiff." And under this construction of the statute the case was tried. The trial court, among other things, instructed the jury: "The mere fact that the cattle of the plaintiff or those of any of the cross-petitioning defendants became sick and died from this disease imparted to them by cattle transported by the said defendant into Lyon or Chase counties is not sufficient to warrant a finding against said defendant railway company. You must find from the evidence, first, that Texas cattle were, in fact, brought into this state; of this there is no denial, and you can consider that fact as established; second, that the cattle of the plaintiff and each of the cross petitioning defendants who seek to recover herein against *said railway because of the loss of cattle, [**637** became infected and died because of the disease imparted to them by such Texas cattle, and that such disease was Texas, splenic, or Spanish fever; and, third that the officers, employees, or agents of the railway company defendant had knowledge that such Texas cattle transported by it to this state were liable to impart such disease to the native cattle of this state, or that they ought by the exercise of diligence and care to have known of the dangerous character of these cattle, and that they would or were liable to impart said disease to the native cattle of this state." We do not understand from the opinion of the supreme court of the state that it disagreed with this interpretation of the statute.

3. In support of the contention that national legislation leaves no room for state enactments relating to the bringing of deceased cattle into one state from another state, the railway company refers to the act of Congress, approved March 3, 1891 (26 Stat. at L. 1044, 1049, chap. 544), appropriating $500,000 for carrying out the provisions of the act for establishing the Bureau of Animal Industry, and which authorized the Secretary of Agriculture to use any part of that sum he might deem necessary or expedient, and in such manner as he might think best, to prevent the spread of pleuro-pneumonia and other diseases of animals, and for this purpose to employ as many persons as he might deem necessary, and to expend any part of that sum in the purchase and destruction of diseased or exposed animals and the quarantine of the same, whenever in his judgment it is essential to prevent the spread of pleuro-pneumonia or other diseases of animals from one state into another. This contention is disposed of by what has been already said.

4. In support of the same contention, the company refers to § 5258 of the Revised Statutes of the United States (brought forward from the act of June 15, 1866 (14 Stat. at L. 66, chap. 124), which authorizes every railroad company in the United States operated by steam, its successors and assigns, "to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, *and property on their way [**638** from any state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination." It is scarcely necessary to say that an act of Congress that does no more than give authority to railroad companies to carry "freight and property" over their respective roads from one state to another state will not authorize a railroad company to carry into a state cattle known, or which by

due diligence may be known, to be in such a condition as to impart or communicate disease to the domestic cattle of such state. A railroad company carrying diseased cattle into a state cannot claim the protection of § 5258, any more than it could when carrying into a state rags known, or which by proper diligence could have been known, to be infected with yellow fever. If the carrier takes diseased cattle into a state, it does so subject for any injury thereby done to domestic cattle to such liability as may arise under any law of the state that does not go beyond the necessities of the case and burden or prohibit interstate commerce. A statute prescribing as a rule of civil conduct that a person or corporation bringing into the state cattle that are known, or which by proper diligence could be known, to be capable of communicating disease to domestic cattle, cannot be regarded as beyond the necessities of the case, nor as interfering with any right intended to be given or recognized by § 5258 of the Revised Statutes.

Applying the principles settled in prior cases to the case before us, it is clear that a railroad company is not in any just sense hindered or obstructed by the statute of Kansas in the exercise of any privilege given or authority conferred by § 5258 of the Revised Statutes. This must be so, unless the company should be held to be entitled, of right, to carry into a state from another state, as freight or property, cattle liable to impart or capable of communicating disease, and of whose condition at the time it had knowledge, or could have had knowledge by the exercise of reasonable diligence. We cannot so hold. And we adjudge that if Congress could authorize the carrying of such cattle from one state into another state, **639**] *and by legislation protect the carrier against all suits for damages arising therefrom, it has not done so, nor has it enacted any statute that prevents a state from prescribing such a rule of civil conduct as that found in the statute of Kansas.

5. Much was said at the bar about the finding of the jury being against the evidence. We cannot enter upon such an inquiry. The facts must be taken as found by the jury, and this court can only consider whether the statute, as interpreted to the jury, was in violation of the Federal Constitution. *Chicago, Burlington, & Q. Rd. Co.* v. *Chicago*, 166 U. S. 226, 242-246 [41: 979, 987, 988].

Perceiving no error in the record in respect of any question of a Federal nature, *the judgment of the Supreme Court of Kansas is affirmed.*

Mr. Justice **Brewer** dissenting:

I am unable to concur in the opinion filed in this case. The statute provides that a carrier bringing into the state cattle which are capable of communicating Texas, splenic, or Spanish fever to domestic cattle shall be liable to any persons injured thereby for all damages they may sustain by reason of the communication of said fever. This liability is not limited to the injury which may be done by the cattle while in the possession of the carrier, but extends to that which may be done at any time thereafter in whosesoever possession they may be. And in this particular case it is found by the jury that the fever was communicated and the injury done after the cattle had passed out of the custody of the carrier and into the possession of other persons. The statute also provides that proof that the cattle were brought into Kansas from territory south of the Kansas state line shall be prima facie evidence that they were capable of communicating the fever, and that the carrier had knowledge of that fact.

I am not disposed to belittle this question, or the difficulties which attend the effort to prevent a communication of Texas fever and the injuries which result therefrom. On the contrary, *I fully appreciate the importance [**640** of securing to all stock owners in Kansas and elsewhere the fullest protection against this so fatal disease, and believe that stringent measures may properly be adopted to accomplish this result. I differ with my brethren only as to the authority by which such measures should be enacted, and as to the validity of the legislation before us. It is conceded in the opinion of the majority that Congress has full control over interstate commerce, and that it is the only authority by which that commerce can be regulated. On the other hand, it is equally clear, as pointed out, that the states may make many police restrictions and provisions which, while indirectly affecting interstate commerce, do not directly regulate it, and the question is whether this particular statute comes within the category of such police regulations.

It must be premised that southern cattle which are capable of communicating this disease are not necessarily themselves diseased, or their meat unfit for consumption. This is not a mere conjecture, but a well-established fact. In the report of the Bureau of Animal Industry for the years 1891 and 1892, which contains the results of investigations into the nature, cause, and prevention of cattle fever, it is said, on pages 266 and 267: "The presence of the parasite in southern cattle does not seem to materially affect their health, although it may maintain a more or less constant breaking up of the red corpuscles on a small scale, which would necessarily tax certain vital organs. . . . From a practical economic standpoint we must maintain that southern cattle may be healthy and yet be the cause of Texas fever:" and in the final summing up of the conclusions of the investigators, on page 290, it is further stated: "Cattle from the permanently infected territory, though otherwise healthy, carry the microparasite of Texas fever in their blood."

And in the regulations concerning cattle transporation, promulgated by the United States Department of Agriculture on February 26, 1892, as appears from the record in this case, as also in similar regulations issued by the same department on December 15, 1897, it is provided that within certain *specified [**641** dates no cattle are to be transported from below the Federal quarantine line except by rail or boat for immediate slaughter. These cattle are being constantly forwarded by the thousands to the packing houses of this country, and when butchered their meat is shipped all over the world and used with impunity. Statistics found in the cases of *Cotting* v. *Kansas City Stock-*

yards Company and *Hopkins* v. *United States*, now pending in this court, show that in the year 1896 (and that is but a sample of other years) of something over 1,700,000 head of cattle shipped to the Kansas City stockyards, more than 500,000 came from the territory proscribed by the Kansas statute, and that of these cattle 60 per cent or more were sold to the packing houses there situate for immediate slaughter.

It appears from the report above referred to that this fever is generally disseminated by means of a tick, technically called *boophilus bovis*, though the jury in this case in answer to specific questions, found that the fever was communicable otherwise than in that way. The presence of ticks upon the cattle does not necessarily indicate disease. They are purely external, like fleas on a dog, and do not prove that the body is in an unhealthy condition. It may be a curious fact, the cause of which is not yet fully explained, that these cattle range in the south without developing in themselves or communicating to others this Texas fever, while when brought into the temperate zone they seem to communicate it freely and in a most dangerous form. Whatever may be the explanation of this fact does not abridge its significance. Hence it is that these southern cattle, although they may have ticks upon them, and thus be liable to communicate the disease to northern cattle, may be entirely free from any disease, their meat a perfectly healthy article of food, and they themselves legitimate subjects of commerce. If they are, when brought into the north, pastured at a distance from native cattle, and the latter are not thereafter permitted to range in the field in which the former have been kept, the disease will not be communicated, the southern cattle may safely be fattened and prepared for market and use. It **642**] is only when the native *cattle are permitted to pasture in or near the grounds in which the southern cattle are or have recently been kept that injury results. The case presented, therefore, is not that of legislation to prevent importation of diseased meat—that which in itself is unhealthy and unfit for use—but something which, if improperly or carelessly handled, may communicate disease and do injury. The very phraseology of the statute indicates this. It does not name diseased cattle, but only those liable to communicate disease. If other northern states follow with like legislation commerce between the two sections of the country in this most important product of portions of the south will be practically interrupted.

The cases referred to in the opinion of the majority in which the police power of the state has been sustained were cases in which the restrictions or regulations only indirectly affected interstate commerce. As, for instance, requiring an engineer to take out a state license (*Smith* v. *Alabama*, 124 U. S. 465 [31: 508, 1 Inters. Com. Rep. 804]), or to be free from and submit to an examination for color blindness (*Nashville, C. & St. L. Railway Co.* v. *Alabama*, 128 U. S. 96 [32: 352, 2 Inters. Com. Rep. 238]); prescribing the mode of boating passenger cars (*New York, New Haven, & Hartford Railroad Co.* v. *New York*, 165 U. S. 628 [41: 853]; requiring the prompt delivery of telegraphic messages under conditions of a penalty (*Western Union Telegraph Co.* v. *James*, 162 U. S. 650 [40: 1105]). Nothing of that kind is prescribed by this statute. No inspection is provided for by the state; none required of the carrier; no duty imposed in respect to the handling and care of the cattle while in its possession. It simply prescribes the conditions upon which the carrier may bring cattle into the state, to wit, liability, not merely for injury which its own improper handling may cause, but for injury which may result at any time thereafter from any future improper handling by the consignee or subsequent party into whose custody the cattle may pass. It seems to me, beyond any peradventure, this is legislation directly regulating commerce between the states, and, as such, is within the sole dominion of Congress. It materially affects the conduct of the carrier outside of the limits of the state, and that is one of the tests of invalidity. *Hall* v. *De Cuir*, 95 U. S. 485-488 [24: 547, 548]; *Bowman* v. *Chicago & N. W. Railway Co.* 125 U. S. 465-486 [31: 700-707, 1 Inters. Com. Rep. 823]. *Suppose cattle are presented [**643** to a carrier in Texas for shipment to Kansas, can it properly refuse to receive and transmit it? Can it plead the Kansas statute in defense of its duty as a common carrier? If it says that the cattle have ticks upon them and therefore are liable to communicate Texas fever, or if not having ticks upon them may otherwise (as shown by the verdict of this jury) communicate the disease, the shipper may reply that he intends them for immediate slaughter, and that they are a legitimate article of commerce. But that will not relieve the carrier. The liability imposed by the Kansas statute does not depend upon the intent with which the cattle are shipped into the state; and having delivered them to the consignee, the carrier has no further control. Although shipped with the intention of immediate slaughter, the consignee may change his mind and pasture them within the state. Whatever may have been the intention of the shipment, the liability of the carrier is the same.

I cannot believe that the carrier is thus placed beneath the upper and the nether millstone, liable under the law of Texas to the owner of the cattle if he refuses to ship them (*Bowman* v. *Chicago & N. W. Railway Co. supra*), and liable to anyone in Kansas under the Kansas statute if injuries result from the improper handling by the consignee or others. The presumption of knowledge, which is provided for in § 17, is, in this aspect of the case, entirely immaterial, and does not affect the validity of the statute. Apply the principle of this legislation to other objects than cattle, and see in what it results. Gunpowder, dynamite, many of the drugs used in medicine, while legitimate articles of commerce, and of great value for certain purposes, may, if improperly or carelessly handled, be the means of doing immense injury. Can a state say to a carrier, You may bring gunpowder or any other article of danger into the state, but if you know its dangerous character you shall be responsible for all damages that it may cause in the hands of the consignee or any subsequent party through improper handling? It certainly places it in the power of the state to most materially in-

644] terfere with *interstate commerce if it can prescribe that as a condition of its being carried on. The number of articles and the amount of interstate commerce thus subjected to the will of the state can scarcely be overestimated.

It is undoubtedly true that legislation should be had in respect to matters of this kind, but in my judgment such legislation can only come from Congress, and that body, and that body alone, can prescribe the condition upon which commerce in these cattle can be carried on. Congress has legislated, but only partially, and the fact that its legislation does not go so far as in the judgment of the legislature of Kansas is required, is not, in my opinion, sufficient to warrant the state in enacting this statute. For these reasons thus briefly stated, I am compelled to dissent from the opinion of the court.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *et al.*, *Appts.*, *v.* HENRY W. BEHLMER.

(See S. C. Reporter's ed. 644–648.)

Motion to vacate supersedeas—appeal to this court—act of March 3, 1891—§ 2 of the same act.

1. This court will not grant a motion to declare that an appeal to it from the circuit court of appeals, when perfected and bond approved, does not operate as a supersedeas, or to vacate the supersedeas, in a case where the judgment of that court reversed the decree of the circuit court dismissing a suit to enforce an order of the Interstate Commerce Commission, and directed the enforcement of such order.

2. The words in § 11 of the act of 1891, "all provisions for bonds or other securities" which were in force at the time of the adoption of that act do not include, as applicable to appeals from the circuit court of appeals, the provision of § 16 of the Interstate Commerce Act that the appeal therein referred to shall not operate to stay or supersede.

[No. 585.]

Submitted March 14, 1898. Decided March 28, 1898.

APPEAL from a judgment of the United States Circuit Court of Appeals for the Fourth Circuit reversing the decree of the Circuit Court and directing that an order of the Interstate Commerce Commission be enforced. *On motion for an order to vacate the supersedeas. Motion denied.*

See same case below, 71 Fed. Rep. 835, 42 U. S. App. 581.

Mr. **Claudian B. Northrop** for appellee, in favor of motion.

Messrs **Edward Baxter** and **Joseph W. Barnwell** for appellants, in opposition to motion.

Mr. Chief Justice **Fuller** delivered **[645** the opinion of the court:

Henry W. Behlmer filed a petition before the Interstate Commerce Commission, which resulted in an order requiring the Louisville & Nashville Railroad Company and other companies to abstain from charging, demanding, collecting, or receiving any greater compensation in the aggregate for transportation on hay or other commodities carried by them, under circumstances and conditions similar to those appearing in the case, from Memphis, Tennessee, to Summerville, South Carolina, to that contemporaneously charged and received for the transportation of hay and other commodities from Memphis to Charleston, South Carolina. The companies having failed to comply with that order, Behlmer filed his petition in the circuit court of the United States for the district of South Carolina, setting out the action before the Commission, and the failure of the companies to comply with the order, and prayed for a writ of injunction or other proper process restraining the companies from continuing in their violation and disobedience to said order.

On final hearing the circuit court entered a decree dismissing the bill. 71 Fed. Rep. 835. Behlmer appealed to the circuit court of appeals for the fourth circuit and that court reversed the decree of the circuit court and directed that the order of the Interstate Commerce Commission be enforced. 42 U. S. App. 581.

An appeal was then allowed and perfected to this court, which operated as a supersedeas, and Behlmer now moves the court to declare the appeal not to have that effect; or to vacate the supersedeas resulting from the allowance of the appeal and the approval of the bond tendered.

The 16th section of the act to regulate commerce (24 Stat. at L. 379, chap. 104), as amended by the act of March 2, 1889 (25 Stat. at L. 855, chap. 382), under which resort to the circuit courts could be had for the enforcement of lawful orders or requirements of the Interstate Commerce Commission, provided that: "When the subject in dispute *shall be **[646** of the value of two thousand dollars or more, either party to such a proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon."

At the date of the passage of these acts the rapid growth of the country and the steady increase of its litigation had so congested the docket of this court that years frequently elapsed before appeals and writs of error could be heard. When, then, the Interstate Commerce Commission was created and provision made for the enforcement of its orders by the circuit courts, while appeals were allowed from the decrees of those courts to this court, it was the legislative will that such appeals should not suspend the operation of the decrees appealed from. It is quite true that if the circuit court reversed the order of the Commission and dismissed the petition, the question of superseding such a decree might not be material, but as the section provided that either party might appeal, the inhibition

NOTE.—*As to interstate commerce; regulation of; power of Congress, how far exclusive.*—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

on the effect of the appeal applied alike to either.

The primary object of the judiciary act of March 3, 1891, was to relieve this court of the overburden of cases which impeded the prompt administration of justice. *McLish* v. *Roff*, 141 U. S. 661 [35: 893]. Accordingly all cases in which the judgments and decrees of the circuit courts of appeals were made final by the act can only be brought to this court on certiorari, although in other cases, of which this is one, appeal or error will lie. The act also provided that when a case reaches this court through the circuit court of appeals, by appeal, writ of error, or certiorari, the cause shall be remanded to the proper district or circuit court for further proceedings in pursuance of the determination of this court, exactly as if the case came here directly from the district or circuit court.

Assuming that § 16 of the Interstate Commerce Act remained unrepealed, it was never-
647 theless so far affected* as that the appeal from the trial court had to be prosecuted to the circuit court of appeals instead of to this court. *Intersate Commerce Commission* v. *Atchison, T. & S. F. Railroad Company*, 149 U. S. 264 [37: 727].

But such appeal would not operate to supersede the decree of the trial court, nor would such decree be superseded if the case were brought to this court from the circuit court of appeals, even though the judgment of the latter court were superseded. In this case the petition was dismissed by the circuit court. The court of appeals reversed that decree, but it still remained in force because the judgment of the circuit court of appeals had been superseded. If the circuit court had decreed the enforcement of the order of the Commission, and the circuit court of appeals had affirmed that order, and then the case had been brought here, the result would have been the same.

This application of the plain words of the statute gives the same effect to the appeal to this court from the intermediate court as if the appeal had been taken directly to this court from the circuit court.

Section 11 of the act of March 3, 1891 (26 Stat. at L. 829, chap. 517), provided, among other things, as follows: "And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect to the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."

And it is argued that the words "all provisions for bonds or other securities," which were in force at the time of the adoption of the act of 1891, include as applicable to appeals from the circuit courts of appeals the provision
648 *of § 16 of the Interstate Commerce Act, that the appeal therein referred to shall not operate to stay or supersede. We cannot accede to that view, for the appeal treated of in § 16 is an appeal from the trial court, and does not refer to an appeal from the circuit courts of appeals. "Either party to such proceeding before said court may appeal," is the language, and as "said court" confessedly referred to the circuit court, the only question would be whether the scope of the provision had been enlarged by the act of 1891, in the matter under consideration, which we do not think it had.

When cases are brought here from the circuit courts of appeals, we are, of course, called on to review the judgments of those courts, in revision of the judgments of the courts below, but our mandate goes to the court of first instance, and is there carried into effect, though the court of appeals may have sent its own mandate down before the case was brought to this court by appeal, writ of error, or certiorari. *The Conqueror*, 156 U. S. 110 [41: 937].

The rule prescribed by the statute has necessarily not been changed by the omission to strictly observe it in the entry of judgment in some cases.

Motion denied.

UNITED STATES, *Appt.*, **[649**

v.

WONG KIM ARK.

(See S. C. Reporter's ed. 649-732.)

Chinese child born in the United States is a citizen thereof—United States Constitution—common law—unfounded theory—right to citizenship—opinion of court—14th Amendment—Chinese exclusion acts—right of Congress to restrict citizenship.

1. A child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China,—becomes at the time of his birth a citizen of the United States, by virtue of the 1st clause of the 14th Amendment of the Constitution.
2. The Constitution of the United States must be interpreted in the light of the common law.
3. By the common law every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other

NOTE.—*As to alienage, effect of, as to title to real estate*, see notes to Doe, Governeur, v. Robertson, 6: 488; and Griffith v. Godey, 28: 934.

As to citizenship of state, see note to Steusoff v. State, Lacour (Tex.) 12 L. R. A. 364.

As to privileges of citizens of states, see note to State v. Wiggin (N. H.) 1 L. R. A. 56.

As to political rights of, see note to Frieszieben v. Shallcross (Del.) 8 L. R. A. 337.

As to power of state legislature and courts in respect to naturalization in general; power of Federal government to confer power on state courts; what state courts may act,—see note to State, Rushworth, v. Hudson County C. P. Inferior Ct. Judges (N. J. L.) 30 L. R. A. 761.

As to right to equal protection of laws, see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 579.

diplomatic agent of a foreign state, or of an alien enemy in hostile occupation of the place where the child was born.

4. There is no ground for the theory that at the time of the adoption of the 14th Amendment to the Constitution there was any settled and definite rule of international law inconsistent with the ancient rule of citizenship by birth within the dominion.

5. It is the inherent right of every independent nation to determine for itself and according to its own Constitution and laws what classes of persons shall be entitled to its citizenship.

6. General expressions in an opinion of the court are to be taken in connection with the case in which those expressions are used.

7. The opening sentence of the 14th Amendment is affirmative of existing law, and declaratory of existing rights, and was intended to allay doubts and to settle controversies which had arisen, and not to impose any new restrictions upon citizenship.

8. The Chinese exclusion acts, passed after the adoption of the 14th Constitutional Amendment, cannot control its meaning or impair its effect, but must be construed and executed in subordination to its provisions.

9. The 14th Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.

[No. 132.]

Submitted May 4, 1896. Ordered for Oral Argument November 2, 1896. Argued March 5, 8, 1897. Decided March 28, 1898.

APPEAL from an order of the District Court of the United States for the Northern District of California discharging upon habeas corpus Wong Kim Ark, who was restrained of his liberty by the general manager of a steamship company acting under the direction of the collector of customs of the port of San Francisco, and denied permission to land in the United States upon the pretense that he was not a citizen thereof. The order of the district court discharging Wong Kim Ark was made upon the ground that he was a citizen of the United States. *Affirmed.*

See same case below, 71 Fed. Rep. 382.

Statement by Mr. Justice **Gray:**

This was a writ of habeas corpus issued October 2, 1895, by the district court of the United States for the northern district of California, to the collector of customs at the port of San Francisco, in behalf of Wong Kim Ark who alleged that he was a citizen of the United States, of more than twenty-one years of age, and was born at San Francisco in 1873 of parents of Chinese descent and subjects of the Emperor of China, but domiciled residents at San Francisco; and that, on his return to the United States on the steamship Coptic in August, 1895, from a temporary visit to China, he applied to said collector of customs for permission to land, and was by the collector refused such permission, and was restrained of his liberty by the collector, and by the general manager of the steamship company acting under his direction in violation of the Constitution and laws of the United States, not by virtue of any judicial order or proceeding, but solely upon the pretense that he was not a citizen of the United States.

At the hearing, the district attorney of the United States was permitted to intervene in behalf of the United States in opposition to the writ, and stated the grounds of his intervention in writing as follows:

"That, as he is informed and believes, the said person in *whose behalf said application [650 was made is not entitled to land in the United States, or to be or remain therein, as is alleged in said application, or otherwise.

"Because the said Wong Kim Ark, although born in the city and county of San Francisco, state of California, United States of America, is not, under the laws of the state of California and of the United States, a citizen thereof, the mother and father of the said Wong Kim Ark being Chinese persons and subjects of the Emperor of China, and the said Wong Kim Ark being also a Chinese person and a subject of the Emperor of China.

"Because the said Wong Kim Ark has been at all times, by reason of his race, language, color, and dress, a Chinese person, and now is, and for some time last past has been, a laborer by occupation.

"That the said Wong Kim Ark is not entitled to land in the United States, or to be or remain therein, because he does not belong to any of the privileged classes enumerated in any of the acts of Congress, known as the Chinese exclusion acts,† which would exempt him from the class or classes which are especially excluded from the United States by the provisions of the said acts.

"Wherefore the said United States attorney asks that a judgment and order of this honorable court be made and entered in accordance with the allegations herein contained, and that the said Wong Kim Ark be detained on board of said vessel until released as provided by law, or otherwise to be returned to the country from whence he came, and that such further order be made as to the court may seem proper and legal in the premises."

The case was submitted to the decision of the court upon the following facts agreed by the parties:

"That the said Wong Kim Ark was born in the year of 1873, at No. 751 Sacramento street, in the city and county of San Francisco, state of California, United States of America, and *that his mother and father were persons [651 of Chinese descent and subjects of the Emperor of China, and that said Wong Kim Ark was and is a laborer.

"That at the time of his said birth his mother and father were domiciled residents of the United States, and had established and enjoyed a permanent domicil and residence therein at said city and county of San Francisco, state aforesaid.

"That said mother and father of said Wong Kim Ark continued to reside and remain in the United States until the year 1890, when they departed for China.

†Acts of May 6, 1882 (22 Stat. at L. 58, chap. 126); July 5, 1884 (23 Stat. at L. 115, chap. 220); September 13, 1888 (25 Stat. at L. 476, chap. 1015); October 1, 1888 (25 Stat. at L. 504, chap. 1064); May 5, 1892 (27 Stat. at L. 25, chap. 60); August 18, 1894 (28 Stat. at L. 390, chap. 301).

"That during all the time of their said residence in the United States as domiciled residents therein the said mother and father of said Wong Kim Ark were engaged in the prosecution of business and were never engaged in any diplomatic or official capacity under the Emperor of China.

"That ever since the birth of said Wong Kim Ark, at the time and place hereinbefore stated and stipulated, he has had but one residence, to wit, a residence in said state of California, in the United States of America, and that he has never changed or lost said residence or gained or acquired another residence, and there resided, claiming to be a citizen of the United States.

"That in the year 1890 the said Wong Kim Ark departed for China upon a temporary visit and with the intention of returning to the United States, and did return thereto on July 26, 1890, on the steamship Gaelic, and was permitted to enter the United States by the collector of customs upon the sole ground that he was a native-born citizen of the United States.

"That after his said return the said Wong Kim Ark remained in the United States, claiming to be a citizen thereof, until the year 1894, when he again departed for China upon a temporary visit, and with the intention of returning to the United States, and did return thereto in the month of August, 1895, and applied to the collector of customs to be permitted to land; and that such application was denied upon the sole ground that said Wong Kim Ark was not a citizen of the United States.

652] *"That said Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom."

The court ordered Wong Kim Ark to be discharged, upon the ground that he was a citizen of the United States. 71 Fed. Rep. 382. The United States appealed to this court.

Messrs. **Holmes Conrad,** Solicitor General, and *George D. Collins* for appellant, on first submission of the case.

Mr. **Thomas D. Riordan** for appellee, on the first submission of the case.

Mr. **Holmes Conrad,** Solicitor General, for appellant, on final oral argument.

Messrs. **Maxwell Evarts** and **J. Hubley Ashton** for appellee, on final oral argument.

Mr. Justice **Gray** delivered the opinion of the court:

The facts in this case, as agreed by the parties, are as follows: Wong Kim Ark was born in 1873 in the city of San Francisco, in the state of California and United States of America, and was and is a laborer. His father and mother were persons of Chinese descent, and subjects of the Emperor of China; they were at the time of his birth domiciled residents of the United States, having previously established and still enjoying a permanent domicil and residence at San Francisco; they continued to reside and remain in the United States until 1890, when they departed for China; and during all the time of their residence in the United States they were engaged in business, and were never employed in any diplomatic or official capacity under the Emperor of China. Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California within the United States, and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him *therefrom. In 1890 (when he must have [653 been about seventeen years of age) he departed for China on a temporary visit and with the intention of returning to the United States, and did return thereto by sea in the same year, and was permitted by the collector of customs to enter the United States, upon the sole ground that he was a native-born citizen of the United States. After such return, he remained in the United States, claiming to be a citizen thereof, until 1894, when he (being about twenty-one years of age, but whether a little above or a little under that age does not appear) again departed for China on a temporary visit with the intention of returning to the United States; and he did return thereto by sea in August, 1895, and applied to the collector of customs for permission to land; and was denied such permission, upon the sole ground that he was not a citizen of the United States.

It is conceded that, if he is a citizen of the United States, the acts of Congress known as the Chinese exclusion acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him.

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the 14th Amendment of the Constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

1. In construing any act of legislation, whether a statute enacted by the legislature, or a Constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same lawmaking power, of which the act in question is an amendment; but also to the condition, and to the history, of *the law as previously existing, and in [654 the light of which the new act must be read and interpreted.

The Constitution of the United States, as originally adopted, uses the words, "citizens of the United States," and "natural born citizen of the United States." By the original Constitution, every representative in Congress is required to have been "seven years a citizen of the United States, and every Senator to have been "nine years a citizen of the United States;" and "no person except a natural-born citizen, or a citizen of the United States at the time of

the adoption of this Constitution, shall be eligible to the office of president." The 14th article of Amendment, besides declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," also declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And the 15th article of Amendment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."

The Constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor* v. *Happersett*, 88 U. S. 21 Wall. 162 [22: 627]; *Ex parte Wilson*, 114 U. S. 417, 422 [29: 89, 91]; *Boyd* v. *United States*, 116 U. S. 616, 624, 625 [29: 746, 749]; *Smith* v. *Alabama*, 124 U. S. 465 [31: 508, 1 Inters. Com. Rep. 804]. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent, Com. 336; Bradley, J., in *Moore* v. *United States*, 91 U. S. 270, 274 [23 346, 347].

655 *In *Minor* v. *Happersett*, Chief Justice Waite, when construing, in behalf of the court, the very provision of the 14th Amendment now in question, said: "The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that." And he proceeded to resort to the common law as an aid in the construction of this provision. 88 U. S. 21 Wall. 167 [22: 628].

In *Smith* v. *Alabama*, Mr. Justice Matthews, delivering the judgment of the court, said: "There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several states each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes." "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." 124 U. S. 478 [31: 512, 1 Inters. Com. Rep. 804].

II. The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called "ligealty," "obedience," "faith," or "power," of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual—as expressed in the maxim, *protectio trahit subjectionem subjectio protectionem*—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the Kingdom. Children born in England of such aliens were therefore natural-born subjects. But the children born within the realm of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the King's dominions, were not natural born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the King.

This fundamental principle, with these qualifications or *explanations of it, was clear- [**656** ly, though quaintly, stated in the leading case, known as *Calvin's Case*, or the *Case of the Postnati*, decided in 1608, after a hearing in the exchequer chamber before the lord chancellor and all the judges in England, and reported by Lord Coke and by Lord Ellesmere. *Calvin's Case*, 7 Coke, 1, 4*b*–6*a*, 18*a*, 18*b*; Ellesmere on *Postnati*, 62–64; S. C. 2 How. St. Tr. 559, 607, 613–617, 639, 640, 659, 679.

The English authorities ever since are to the like effect. Co. Litt. 8*a*, 128*b*; Lord Hale, in Hargrave's Law Tracts, 210, and in 1 Hale, P. C. 61, 62; 1 Bl. Com. 366, 369, 370, 374; 4 Bl. Com. 74, 92; Lord Kenyon, in *Doe, Durroure*, v. *Jones*, 4 T. R. 300, 308; Cockburn, Nationality, 7; Dicey, Confl. Laws, pp. 173–177, 741.

In *Udny* v. *Udny* (1869) L. R. 1 H. L. Sc. App. Cas. 441, the point decided was one of inheritance, depending upon the question whether the domicil of the father was in England or in Scotland, he being in either alternative a British subject. Lord Chancellor Hatherley said: "The question of naturalization and of allegiance is distinct from that of domicil." p. 452. Lord Westbury, in the passage relied on by the counsel for the United States, began by saying: "The law of England, and of almost all civilized countries, ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political status; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status." And then, while maintaining that the civil status is universally governed by the single principle of domicil, *domicilium*, the criterion established by international law for the purpose of determining civil status, and the basis on which "the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy, or *intestacy, must depend;" he yet distinct [**657** ly recognized that a man's political status, his country, *patria*, and his "nationality, that is, natural allegiance, . . . may depend on different laws in different countries." pp. 457, 460. He evidently used the word "citizen,"

not as equivalent to "subject," but rather to "inhabitant;" and had no thought of impeaching the established rule that all persons born under British dominion are natural born subjects.

Lord Chief Justice Cockburn, in the same year, reviewing the whole matter, said: "By the common law of England, every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled, or merely temporarily sojourning, in the country, was an English subject; save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England. No effect appears to have been given to descent as a source of nationality." Cockburn, Nationality, 7.

Mr. Dicey, in his careful and thoughtful Digest of the Law of England with Reference to the Conflict of Laws, published in 1896, states the following propositions, his principal rules being printed below in italics: "*'British subject' means any person who owes permanent allegiance to the Crown.* Permanent allegiance is used to distinguish the allegiance of a British subject from the allegiance of an alien who, because he is within the British dominions, owes temporary allegiance to the Crown. *'Natural-born British subject' means a British subject who has become a British subject at the moment of his birth. Subject to the exceptions hereinafter mentioned, any person who (whatever the nationality of his parents) is born within the British dominions, is a natural-born British subject.* This rule contains the leading principle of English law on the subject of British nationality." The exceptions afterwards mentioned by Mr. Dicey are only these two: "1. Any person who (his father being an alien enemy) is born in a part of the British dominions [658] which at the time of such *person's birth is in hostile occupation, is an alien." "2. Any person whose father (being an alien) is at the time of such person's birth an ambassador or other diplomatic agent accredited to the Crown by the sovereign of a foreign state is (though born within the British dominions) an alien." And he adds: "The exceptional and unimportant instances in which birth within the British dominions does not of itself confer British nationality are due to the fact that, though at common law nationality or allegiance in substance depended on the place of a person's birth, it in theory at least depended, not upon the locality of a man's birth, but upon his being born within the jurisdiction and allegiance of the King of England; and it might occasionally happen that a person was born within the dominions without being born within the allegiance, or, in other words, under the protection and control of the Crown." Dicey, Confl. Laws, pp. 173-177, 741.

It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the Crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, the jurisdiction, of the English sovereign; and therefore every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign state, or of an alien enemy in hostile occupation of the place where the child was born.

III. The same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established.

In the early case of *The Charming Betsy* [*Murray* v. *The Charming Betsy*] (1804), it appears to have been assumed by this court that all persons born in the United States were citizens of the United States; Chief Justice Marshall saying: "Whether a person born within the United States, or becoming a citizen according to the established laws of the country, can devest himself absolutely of *that [659 character otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide." 6 U. S. 2 Cranch, 64, 119 [2: 208, 226].

In *Inglis* v. *Sailors' Snug Harbor* (1830) 28 U. S. 3 Pet. 99 [7: 617], in which the plaintiff was born in the city of New York, about the time of the Declaration of Independence, the justices of this court (while differing in opinion upon other points) all agreed that the law of England as to citizenship by birth was the law of the English colonies in America. Mr. Justice Thompson, speaking for the majority of the court, said: "It is universally admitted, both in the English courts and in those of our own country, that all persons born within the colonies of North America, whilst subject to the Crown of Great Britain, were natural-born British subjects." 28 U. S. 3 Pet. 120 [7: 625]. Mr. Justice Johnson said: "He was entitled to inherit as a citizen born of the state of New York." 28 U. S. 3 Pet. 136 [7: 630]. Mr. Justice Story stated the reasons upon this point more at large, referring to *Calvin's Case*, Blackstone's Commentaries, and *Doe, Duroure*, v. *Jones*, above cited, and saying: "Allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is, and allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create citizenship; first, birth locally within the dominions of the sovereign; and, secondly, birth within the protection and obedience, or, in other words, within the ligeance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to, the sovereign, as such, *de facto*. There are some exceptions, which are founded upon peculiar reasons, and which, indeed, illustrate and confirm the general doctrine. Thus, a person who is born on the ocean is a subject of the prince to whom his parents then owe allegiance; for he is still deemed under the protection of his sovereign, and born in a place where he has dominion in common with all

other sovereigns. So the children of an ambas-
660] sador are held to be *subjects of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince." 28 U. S. 3 Pet. 155 [7: 637]. "The children of enemies, born in a place within the dominions of another sovereign, then occupied by them by conquest, are still aliens." 28 U. S. 3 Pet. 156 [7: 637]. "Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth." 28 U. S. 3 Pet. 164 [7: 640].

In *Shanks* v. *Dupont*, 28 U. S. 3 Pet. 242 [7: 667], decided (as appears by the records of this court) on the same day as the last case, it was held that a woman born in South Carolina before the Declaration of Independence, married to an English officer in Charleston during its occupation by the British forces in the Revolutionary War, and accompanying her husband on his return to England, and there remaining until her death, was a British subject, within the meaning of the treaty of peace of 1783, so that her title to land in South Carolina, by descent cast before that treaty, was protected thereby. It was of such a case, that Mr. Justice Story, delivering the opinion of the court, said: "The incapacities of *femes covert*, provided by the common law, apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations." 28 U. S. 3 Pet. 248 [7: 668]. This last sentence was relied on by the counsel for the United States, as showing that the question whether a person is a citizen of a particular country is to be determined, not by the law of that country, but by the principles of international law. But Mr. Justice Story certainly did not mean to suggest that, independently of treaty, there was any principle of international law which could defeat the operation of the established rule of citizenship by birth within the United States; for he referred (p. 245 [7: 667]) to the contemporaneous opinions in *Inglis* v. *Sailors' Snug Har-*
661]*bor*, *above cited, in which this rule had been distinctly recognized, and in which he had said (p. 162 [7: 639]) that "each government had a right to decide for itself who should be admitted or deemed citizens;" and in his Treatise on the Conflict of Laws, published in 1834, he said that, in respect to residence in different countries or sovereignties "there are certain principles which have been generally recognized by tribunals administering public law [adding, in later editions, "or the law of nations] as of unquestionable authority," and stated, as the first of those principles, "Persons who are born in a country are generally deemed to be citizens and subjects of that country." Story, Confl. Laws, § 48.

The English statute of 11 & 12 Wm. III. (1700) chap. 6, entitled "An Act to Enable His Majesty's Natural-Born Subjects to Inherit the Estate of Their Ancestors, Either Lineal or Collateral, Notwithstanding Their Father or Mother Were Aliens," enacted that "all and every person or persons, being the King's natural-born subject or subjects, within any of the King's realms or dominions," might and should thereafter lawfully inherit and make their titles by descent to any lands "from any of their ancestors, lineal or collateral, although the father and mother, or father or mother, or other ancestor, of such person or persons, by, from, through, or under whom" title should be made or derived, had been or should be "born out of the King's allegiance, and out of His Majesty's realms and dominions," as fully and effectually as if such parents or ancestors "had been naturalized or natural born subject or subjects within the King's dominions." 7 Statutes of the Realm, 590. It may be observed that, throughout that statute, persons born within the realm, although children of alien parents, were called "natural-born subjects." As that statute included persons born "within any of the King's realms or dominions," it of course extended to the colonies, and, not having been repealed in Maryland, was in force there. In *McCreery* v. *Somerville* (1824) 22 U. S. 9 Wheat. 354 [6: 109], which concerned the title to land in the state of Maryland, it was assumed that children born in that state of an alien who was still living, and who had not been naturalized, were "native-born citizens of the *United States;" and without such as [**662**
sumption the case would not have presented the question decided by the court, which, as stated by Mr. Justice Story in delivering the opinion, was, "whether the statute applies to the case of a living alien ancestor, so as to create a title by heirship, where none would exist by the common law, if the ancestor were a natural born subject." 22 U. S. 9 Wheat. 366 [6: 109].

Again, in *Levy* v. *M'Cartee* (1832) 31 U. S. 6 Pet. 102, 112, 113, 115 [8: 334, 338, 339], which concerned a descent cast since the American Revolution, in the state of New York, where the statute of 11 and 12 Wm. III. had been repealed, this court, speaking by Mr. Justice Story, held that the case must rest for its decision exclusively upon the principles of the common law; and treated it as unquestionable that by that law a child born in England of alien parents was a natural-born subject; quoting the statement of Lord Coke in Co. Litt. 8*a*, that "if an alien cometh into England and hath issue two sons, these two sons are *indigenæ*, subjects born, because they are born within the realm;" and saying that such a child "was a native-born subject, according to the principles of the common law stated by this court in *McCreery* v. *Somerville*, 22 U. S. 9 Wheat. 354 [6: 109]."

In *Dred Scott* v. *Sanford* (1857) 60 U. S. 19 How. 393 [15: 691], Mr. Justice Curtis said: "The 1st section of the 2d article of the Constitution uses the language, 'a natural-born citizen.' It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth. 60 U. S. 19 How. 576 [15:

772]. And to this extent no different opinion was expressed or intimated by any of the other judges.

In *United States* v. *Rhodes* (1866), Mr. Justice Swayne, sitting in the circuit court, said: "All persons born in the allegiance of the King are natural-born subjects, and all persons born in the allegiance of the United States are natural-born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country, as well as of England. . . . We find no warrant for [663] the opinion *that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor, and subject only to the same exceptions, since as before the Revolution." 1 Abb. (U. S.) 28, 40, 41.

The supreme judicial court of Massachusetts, speaking by Mr. Justice (afterwards Chief Justice) Sewall, early held that the determination of the question whether a man was a citizen or an alien was "to be governed altogether by the principles of the common law," and that it was established, with few exceptions, "that a man born within the jurisdiction of the common law is a citizen of the country wherein he is born. By this circumstance of his birth he is subjected to the duty of allegiance, which is claimed and enforced by the sovereign of his native lands, and becomes reciprocally entitled to the protection of that sovereign and to the other rights and advantages which are included in the term 'citizenship.'" *Gardner* v. *Ward* (1805) 2 Mass. 244, note. And again: "The doctrine of common law is, that every man born within its jurisdiction is a subject of the sovereign of the country where he is born; and allegiance is not personal to the sovereign in the extent that has been contended for; it is due to him in his political capacity of sovereign of the territory, where the person owing the allegiance was born." *Kilham* v. *Ward* (1806) 2 Mass. 236, 265. It may here be observed that in a recent English case Lord Coleridge expressed the opinion of the Queen's Bench Division that the statutes of 4 Geo. II. (1731) chap. 21, and 13 Geo. III. (1773) chap. 21 (hereinafter referred to), "clearly recognize that to the King in his politic, and not in his personal capacity, is the allegiance of his subjects due." *Isaacson* v. *Durant*, L. R. 17 Q. B. Div. 54, 65.

The supreme court of North Carolina, speaking by Mr. Justice Gaston, said: "Before our Revolution, all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, were native-born British subjects—those born out of his allegiance were aliens. . . . Upon the Revolution, no other change took place in the law of North Carolina, than was consequent upon the transition from a colony dependent on an Euro- [664] pean King to a free and *sovereign state; . . . British subjects in North Carolina became North Carolina freemen; . . . and all free persons born within the state are born citizens of the state. . . . The term 'citizen,' as understood in our law, is precisely analogous to the term 'subject' in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people—and he who before was a 'subject of the King' is now 'a citizen of the state.'" *State* v. *Manuel* (1838) 4 Dev. & B. L. 20, 24–26.

That all children, born within the dominion of the United States, of foreign parents holding no diplomatic office, became citizens at the time of their birth, does not appear to have been contested or doubted until more than fifty years after the adoption of the Constitution, when the matter was elaborately argued in the court of chancery of New York, and decided upon full consideration by Vice Chancellor Sandford in favor of their citizenship. *Lynch* v. *Clarke* (1844) 1 Sandf. Ch. 583.

The same doctrine was repeatedly affirmed in the executive departments, as, for instance, by Mr. Marcy, Secretary of State, in 1854 (2 Whart. Int. Dig. (2d ed.) p. 394); by Attorney General Black in 1859 (9 Ops. Atty. Gen. 373); and by Attorney General Bates in 1862 (10 Ops. Atty. Gen. 328, 382, 394, 396).

Chancellor Kent, in his Commentaries, speaking of the "general division of the inhabitants of every country, under the comprehensive title of aliens and natives," says: "Natives are all persons born within the jurisdiction and allegiance of the United States. This is the rule of the common law, without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are in theory born within the allegiance of the foreign power they represent. . . . To create allegiance by birth, the party must be born, not only within the territory, but within the ligeance of the government. If a portion of the country be taken and held by conquest in war, the conqueror acquires the right of the conquered as to its dominion and government, and children born in the armies of a state, while abroad and *occupying a foreign country, are [665] deemed to be born in the allegiance of the sovereign to whom the army belongs. It is equally the doctrine of the English common law, that during such hostile occupation of a territory, and the parents be adhering to the enemy as subjects *de facto*, their children, born under such a temporary dominion, are not born under the ligeance of the conquered." 2 Kent, Com. (6th ed.) 39, 42. And he elsewhere says: "And if, at common law, all human beings born within the ligeance of the King, and under the King's obedience, were natural-born subjects, and not aliens, I do not perceive why this doctrine does not apply to these United States, in all cases in which there is no express constitutional or statute declaration to the contrary. . . "Subject" and "citizen" are, in a degree, convertible terms as applied to natives; and though the term *citizen* seems to be appropriate to republican freemen, yet we are, equally with the inhabitants of all other countries, *subjects*, for we are equally bound by allegiance and subjection to the government and law of the land." 2 Kent, Com. 258, note.

Mr. Binney, in the second edition of a paper on the Alienigenæ of the United States, printed in pamphlet in Philadelphia, with a preface bearing his signature and the date of December 1, 1853, said: "The common-law principle of allegiance was the law of all the states at the time of the Revolution, and at the adoption of

the Constitution; and by that principle the citizens of the United States are, with the exceptions before mentioned [namely, foreign born children of citizens, under statutes to be presently referred to], such only as are either born or made so, born within the limits and under the jurisdiction of the United States, or naturalized by the authority of law, either in one of the states before the Constitution, or since that time, by virtue of an act of Congress of the United States." p. 20. "The right of citizenship never *descends* in the legal sense, either by the common law, or under the common naturalization acts. It is incident to birth in the country, or it is given personally by statute. The child of an alien, if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the **666**]same *principle." p. 22, note. This paper, without Mr. Binney's name, and with the note in a less complete form and not containing the passage last cited, was published (perhaps from the first edition) in the American Law Register for February, 1854. 2 Am. Law Reg. 193, 203, 204.

IV. It was contended by one of the learned counsel for the United States that the rule of the Roman law, by which the citizenship of the child followed that of the parent, was the true rule of international law, as now recognized in most civilized countries, and had superseded the rule of the common law, depending on birth within the realm, originally founded on feudal considerations.

But at the time of the adoption of the Constitution of the United States in 1789, and long before, it would seem to have been the rule in Europe generally, as it certainly was in France, that, as said by Pothier, "Citizens, true and native-born citizens, are those who are born within the extent of the dominion of France," and "mere birth within the realm gives the rights of a native born citizen, independently of the origin of the father or mother, and of their domicil;" and children born in a foreign country, of a French father who had not established his domicil there nor given up the intention of returning, were also deemed Frenchmen, as Laurent says, by "a favor, a sort of fiction," and Calvo, "by a sort of fiction of exterritoriality, considered as born in France, and therefore invested with French nationality." Pothier, Traité des Personnes, pt. 1, tit. 2, § 1, Nos. 43, 45; *Walsh-Serrant* v. *Walsh-Serrant* (1802) 3 Journal du Palais, 884; S. C., 8 Merlin, Jurisprudence, 5th ed. Domicil, § 13; *Preft du Nord* v. *Lebeau* (1862) Journal du Palais, 1863, 312, and note; 1 Laurent, Droit Civil, No. 321; 2 Calvo, Droit International, 5th ed. § 542; Cockburn, Nationality, 13, 14; Hall, International Law, 4th ed. § 68. The general principle of citizenship by birth within French territory prevailed until after the French Revolution, and was affirmed in successive constitutions, from the one adopted by the Constituent Assembly in 1791 to that of the French Republic in 1799. Constitutions et **667**]Chartes, ed. 1830, pp. 100, 136, 148, *186. The Code Napoleon of 1807 changed the law of France, and adopted, instead of the rule of country of birth, *jus soli*, the rule of descent of blood, *jus sanguinis*, as the leading principle; but an eminent commentator has observed that the framers of that Code "appear not to have wholly freed themselves from the ancient rule of France, or rather, indeed, ancient rule of Europe—*de la vieï le règle française, ou plutôt même de la vieille règle européenne*—according to which nationality had always been, in former times, determined by the place of birth." 1 Demolombe, Cours de Code Napoleon, 4th ed. No. 146.

The later modifications of the rule in Europe rest upon the constitutions, laws, or ordinances of the various countries, and have no important bearing upon the interpretation and effect of the Constitution of the United States. The English naturalization act of 33 Vict. (1870) chap. 14, and the commissioners' report of 1869 out of which it grew, both bear date since the adoption of the 14th Amendment of the Constitution; and, as observed by Mr. Dicey, that act has not affected the principle by which any person who, whatever the nationality of his parents, is born within the British dominions, acquires British nationality at birth, and is a natural-born British subject. Dicey, Confl. Laws, 741. At the time of the passage of that act, although the tendency on the continent of Europe was to make parentage, rather than birthplace the criterion of nationality, and citizenship was denied to the native born children of foreign parents in Germany, Switzerland, Sweden, and Norway, yet it appears still to have been conferred upon such children in Holland, Denmark, and Portugal, and, when claimed under certain specified conditions, in France, Belgium, Spain, Italy, Greece, and Russia. Cockburn, Nationality, 14–21.

There is therefore little ground for the theory that, at the time of the adoption of the 14th Amendment of the Constitution of the United States, there was any settled and definite rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion.

*Nor can it be doubted that it is the **[668** inherent right of every independent nation to determine for itself, and according to its own Constitution and laws, what classes of persons shall be entitled to its citizenship.

Both in England and in the United States, indeed, statutes have been passed, at various times, enacting that certain issue born abroad of English subjects, or of American citizens, respectively, should inherit, to some extent at least, the rights of their parents. But those statutes applied only to cases coming within their purport; and they have never been considered, in either country, as affecting the citizenship of persons born within its dominion.

The earliest statute was passed in the reign of Edward III. In the rolls of Parliament of 17 Edw. III. (1343), it is stated that "before these times there have been great doubt and difficulty among the lords of this realm, and the commons, as well men of the law as others, whether children who are born in parts beyond sea ought to bear inheritance after the death of their ancestors in England, because no certain law has been thereon ordained;" and by the King, lords, and commons, it was unanimously agreed that "there was no manner of doubt that the children of our Lord the King, whether they were born on this side the sea

or beyond the sea, should bear the inheritance of their ancestors;" "and in regard to other children, it was agreed in this Parliament, that they also should inherit wherever they might be born in the service of the King;" but, because the Parliament was about to depart, and the business demanded great advisement and good deliberation how it should be best and most surely done, the making of a statute was put off to the next Parliament. 2 Rot. Parl. 139. By reason, apparently, of the prevalence of the plague in England, no act upon the subject was passed until 25 Edw. III. (1350), when Parliament passed an act entitled "A Statute for Those Who Are Born in Parts beyond Sea," by which—after reciting that "some people be in doubt if the children born in the parts beyond the sea, out of the ligeance of England, should be able to demand any inheritance within the same ligeance, or not, whereof a petition [669] was put *in the Parliament" of 17 Edw. III., "and was not at the same time wholly assented"—it was (1) agreed and affirmed, "that the law of the Crown of England is, and always hath been such, that the children of the Kings of England, in whatsoever parts they be born, in England or elsewhere, be able and ought to bear the inheritance after the death of their ancestors;" (2) also agreed that certain persons named, "which were born beyond the sea, out of the ligeance of England, shall be henceforth able to have and enjoy their inheritance after the death of their ancestors, in all parts within the ligeance of England, as well as those that should be born within the same ligeance;" (3) and further agreed "that all children inheritors, which from henceforth shall be born without the ligeance of the King, whose fathers and mothers at the time of their birth be and shall be at the faith and ligeance of the King of England, shall have and enjoy the same benefits and advantages to have and bear the inheritance within the same ligeance, as the other inheritors aforesaid, in time to come; so always, that the mothers of such children do pass the sea by the license and wills of their husbands." 2 Rot. Parl. 231; 1 Statutes of the Realm, 310.

It has sometimes been suggested that this general provision of the statute of 25 Edw. III. was declaratory of the common law. See Bacon, *arguendo*, in *Calvin's Case*, 2 How. St. Tr. 585; Westlake and Pollock, *arguendo*, in *De Geer* v. *Stone*, L. R. 22 Ch. Div. 243 247; 2 Kent, Com. 50, 53; *Lynch* v. *Clarke*, 1 Sandf. Ch. 583. 659, 660; *Ludlam* v. *Ludlam*, 26 N. Y. 356 [84 Am. Dec. 193]. But all suggestions to that effect seem to have been derived, immediately or ultimately, from one or the other of these two sources: The one, the Year Book of 1 Richard III. (1483) fol. 4, pl. 7, reporting a saying of Hussey, Ch. J., "that he who is born beyond sea, and his father and mother are English, their issue inherit by the common law, but the statute makes clear, etc.," —which, at best, was but *obiter dictum*, for the chief justice appears to have finally rested his opinion on the statute. The other, a note added to the edition of 1688 of Dyer's Reports, 224*a*, stating that at Trinity Term, 7 Edw. III. Rot. 2 B. R., it was adjudged that children [670] of subjects born *beyond the sea in the service of the King were inheritable—which has been shown, by a search of the roll in the King's bench so referred to, to be a mistake inasmuch as the child there in question did not appear to have been born beyond sea, but only to be living abroad. Westlake, Private International Law, 3d ed. 324.

The statute of 25 Edw. III. recites the existence of doubts as to the right of foreign-born children to inherit in England; and, while it is declaratory of the rights of children of the King, and is retrospective as to the persons specifically named, yet as to all others it is, in terms, merely prospective, applying to those only "who shall be born henceforth." Mr. Binney, in his paper above cited, after a critical examination of the statute, and of the early English cases, concluded: "There is nothing in the statute which would justify the conclusion that it is declaratory of the common law in any but a single particular, namely, in regard to the children of the King, nor has it at any time been judicially held to be so." "The notion that there is any common-law principle to naturalize the children born in foreign countries of native-born American father *and* mother, father *or* mother, must be discarded. There is not, and never was, any such common-law principle." Binney, Alienigenæ, 14, 20; 2 Am. Law Reg. 199, 203. And the great weight of the English authorities, before and since he wrote, appears to support his conclusion. *Calvin's Case*, 7 Coke, 17*a*, 18*a*; Co. Litt. 8*a*, and Hargrave's note 36; 1 Bl. Com. 373; Barrington, Statutes, 5th ed. 268; Lord Kenyon, in *Doe, Duroure*, v. *Jones*, 4 T. R. 300 308; Lord Chancellor Cranworth in *Shedden* v. *Patrick*, 1 Macq. 535, 611; Cockburn, Nationality, 7, 9; *De Geer* v. *Stone*, L. R. 22 Ch. Div. 243, 252; Dicey, Confl. Laws, pp. 178, 741. "The acquisition," says Mr. Dicey (p. 741), "of nationality by descent is foreign to the principles of the common law, and is based wholly upon statutory enactments."

It has been pertinently observed that if the statute of Edward III. had only been declaratory of the common law, the subsequent legislation on the subject would have been wholly unnecessary. Cockburn, Nationality, 9. By the *statute of 29 Car. II. (1677) chap. 6, § 1, [671] entitled "An Act for the Naturalization of Children of His Majesty's Subjects Born in Foreign Countries During the Late Troubles," all persons who, at any time between June 14, 1641, and March 24, 1660, "were born out of His Majesty's dominions, and whose fathers or mothers were natural-born subjects of this realm," were declared to be natural-born subjects. By the statute of 7 Anne (1708) chap. 5, § 3, "the children of all natural-born subjects, born out of the ligeance of Her Majesty, her heirs and successors"—explained by the statute of 4 Geo. II. (1731) chap. 21, to mean all children born out of the ligeance of the Crown of England, "whose fathers were or shall be natural-born subjects of the Crown of England, or of Great Britain, at the time of the birth of such children respectively . . . shall be deemed, adjudged, and taken to be natural-born subjects of this Kingdom, to all intents, constructions, and purposes whatsoever." That statute was limited to foreign-born children of natural-born subjects; and was extended by

the statute of 13 Geo. III. (1773) chap. 21, to foreign-born grandchildren of natural born subjects, but not to the issue of such grandchildren; or, as put by Mr. Dicey, "British nationality does not pass by descent or inheritance beyond the second generation." See *De Geer* v. *Stone*, above cited. Dicey, Confl. Laws, p. 742.

Moreover, under those statutes, as is stated in the report in 1869 of the commissioners for inquiring into the laws of naturalization and allegiance, "no attempt has ever been made on the part of the British government (unless in eastern counties where special jurisdiction is conceded by treaty), to enforce claims upon, or to assert rights in respect of, persons born abroad, as against the country of their birth whilst they were residents therein, and when by its law they were invested with its nationality." In the appendix to their report are collected many such cases in which the British government declined to interpose, the reasons being most clearly brought out in a despatch of March 13, 1858, from Lord Malmesbury, the Foreign Secretary, to the British Ambassador at Paris, saying: "It is competent to any country to confer by general or special legislation the privileges of nationality upon those who [672] *are born out of its own territory; but it cannot confer such privileges upon such persons as against the country of their birth, when they voluntarily return to and reside therein. Those born in the territory of a nation are (as a general principle) liable when actually therein to the obligations incident to their status by birth. Great Britain considers and treats such persons as natural-born subjects, and cannot therefore deny the right of other nations to do the same. But Great Britain cannot permit the nationality of the children of foreign parents born within her territory to be questioned." Naturalization Commission Report, pp. iii., 67; United States Foreign Relations, 1873–74, pp. 1237, 1337. See also *Drummond's Case* (1834) 2 Knapp P. C. 295.

By the Constitution of the United States, Congress was empowered "to establish an uniform rule of naturalization." In the exercise of this power, Congress, by successive acts, beginning with the act entitled "An Act to Establish an Uniform Rule of Naturalization," passed at the second session of the first Congress under the Constitution, has made provision for the admission to citizenship of three principal classes of persons: First. Aliens, having resided for a certain time "within the limits and under the jurisdiction of the United States," and naturalized individually by proceedings in a court of record. Second. Children of persons so naturalized, "dwelling within the United States, and being under the age of twenty-one years at the time of such naturalization." Third. Foreign-born children of American citizens, coming within the definitions prescribed by Congress. Acts of March 26, 1790 (1 Stat. at L. 103, chap 3); January 29, 1795 (1 Stat. at L. 414, chap. 20); June 18, 1798 (1 Stat. at L. 566, chap 5); April 14, 1802 (2 Stat. at L. 153, chap. 28); March 26, 1804 (2 Stat. at L. 292, chap. 47); February 10, 1855 (10 Stat. at L. 604, chap. 71); Rev. Stat. §§ 2165, 2172, 1993.

In the act of 1790, the provision as to foreign-born children of American citizens was as follows: "The children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: Provided, that the right of citizenship shall not descend to persons whose fathers have never been resident *in the United States." 1 Stat. at L. 104, [673 chap. 3. In 1795 this was re-enacted, in the same words, except in substituting, for the words, "beyond sea, or out of the limits of the United States," the words "out of the limits and jurisdiction of the United States." 1 Stat. at L. 415, chap. 20.

In 1802 all former acts were repealed, and the provisions concerning children of citizens were re-enacted in this form: "The children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: Provided, that the right of citizensbip shall not descend to persons whose fathers have never resided within the United States." Act of April 14, 1802 (2 Stat. at L. 155, chap. 28, § 4).

The provision of that act, concerning "the children of persons duly naturalized under any of the laws of the United States," not being restricted to the children of persons already naturalized, might well be held to include children of persons thereafter to be naturalized. 2 Kent, Com. 51, 52; *West* v. *West*, 8 Paige, 433; *United States* v. *Kellar*, 11 Biss. 314; *Boyd* v. *Thayer* [*Boyd* v. *Nebraska*, *Thayer*], 143 U. S. 135, 177 [36: 103, 115].

But the provision concerning foreign-born children, being expressly limited to the children of persons who then were or had been citizens, clearly did not include foreign-born children of any person who became a citizen since its enactment. 2 Kent, Com. 52, 53; Binney, Alienigenæ, 20, 25; 2 Am. Law Reg. 203, 205. Mr. Binney's paper, as he states in his preface, was printed by him in the hope that Congress might supply this defect in our law.

In accordance with his suggestions, it was enacted by the *statute of February 10, [674 1855, chap. 71, that "persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: Provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States." 10 Stat. at L. 604; Rev. Stat. § 1993.

It thus clearly appears that, during the half century intervening between 1802 and 1855, there was no legislation whatever for the citi-

zenship of children born abroad, during that period, of American parents who had not become citizens of the United States before the act of 1802; and that the act of 1855, like every other act of Congress upon the subject, has, by express proviso, restricted the right of citizenship thereby conferred upon foreign-born children of American citizens to those children themselves, unless they became residents of the United States. Here is nothing to countenance the theory that a general rule of citizenship by blood or descent has displaced in this country the fundamental rule of citizenship by birth within its sovereignty.

So far as we are informed, there is no authority, legislative, executive, or judicial, in England or America, which maintains or intimates that the statutes (whether considered as declaratory, or as merely prospective), conferring citizenship on foreign born children of citizens, have superseded or restricted, in any respect, the established rule of citizenship by birth within the dominion. Even those authorities in this country which have gone the farthest towards holding such statutes to be but declaratory of the common law, have distinctly recognized and emphatically asserted the citizenship of native-born children of foreign parents. 2 Kent, Com. 39, 50 53, 258, note; *Lynch* v. *Clarke*, 1 Sandf. Ch. 583, 659; *Ludlam* v. *Ludlam*, 26 N. Y. 356, 371 [84 Am. Dec. 193].

Passing by questions once earnestly controverted, but finally put at rest by the 14th Amendment of the Constitution, it is beyond doubt that, before the enactment of the civil rights act of 1866, or the adoption of the consti-**675**]tutional *amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native born citizens of the United States.

V. In the fore front, both of the 14th Amendment of the Constitution, and of the civil rights act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms.

The civil rights act, passed at the first session of the Thirty-ninth Congress, began by enacting that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every state and territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." Act of April 9, 1866 (14 Stat. at L. 27, chap. 31, § 1).

The same Congress, shortly afterwards, evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent Congress, framed the 14th Amendment of the Constitution, and on June 16, 1866, by joint resolution proposed it to the legislatures of the several states; and on July 28, 1868, the Secretary of State issued a proclamation showing it to have been ratified by the legislatures of the requisite number of states. 14 Stat. at L. 358; 15 Stat. at L. 708.

The 1st section of the 14th Amendment of the *Constitution begins with the words, [**676** "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." As appears upon the face of the Amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Dred Scott* v. *Sandford* (1857) 60 U. S. 19 How. 393 [15: 691], and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. *The Slaughter-House Cases* (1873) 83 U. S. 16 Wall. 36, 73 [21: 394, 408]; *Strauder* v. *West Virginia* (1879) 100 U. S. 303, 306 [25: 664, 665]; *Ex parte Virginia* (1879) 100 U. S. 339, 345 [25: 676, 678]; *Neal* v. *Delaware* (1880) 103 U. S. 370, 386 [26: 567, 570]; *Elk* v. *Wilkins* (1884) 112 U. S. 94, 101 [28: 643, 646]. But the opening words, "All persons born," are general, not to say universal, restricted only by place and jurisdiction, and not by color or race—as was clearly recognized in all the opinions delivered in the *Slaughter-House Cases*, above cited.

In those cases, the point adjudged was that a statute of Louisiana, granting to a particular corporation the exclusive right for twenty-five years to have and maintain slaughterhouses within a certain district including the city of New Orleans, requiring all cattle intended for sale or slaughter in that district to be brought to the yards and slaughterhouses of the grantee, authorizing all butchers to slaughter their cattle there, and empowering the grantee to exact a reasonable fee for each animal slaughtered, was within the police powers of the state, and not in conflict with the 13th Amendment of the Constitution as creating an involuntary servitude, nor with the 14th Amendment as abridging the privileges or immunities of citizens of the United States, *or as [**677** depriving persons of their liberty or property without due process of law, or as denying to them the equal protection of the laws.

Mr. Justice Miller, delivering the opinion of the majority of the court, after observing that the 13th, 14th, and 15th articles of Amendment of the Constitution were all addressed to

the grievances of the negro race, and were designed to remedy them, continued as follows: "We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the 13th article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this Amendment may safely be trusted to make it void. And so if other rights are assailed by the states, which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent." 83 U. S. 16 Wall. 72 [21: 407]. And in treating of the 1st clause of the 14th Amendment, he said: "The distinction between citizenship of the United States and citizenship of a state is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a state, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union." 83 U. S. 16 Wall. 73, 74 [21: 408].

Mr. Justice Field, in a dissenting opinion, in which Chief Justice Chase and Justices Swayne and Bradley concurred, said of the same clause: "It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the Constitution or laws of any state or the condition of their ancestry." **678** 83 U. S. 16 Wall. 95, 111 [21: 415, *420]. Mr. Justice Bradley also said: "The question is now settled by the 14th Amendment itself, that citizenship of the United States is the primary citizenship in this country; and that state citizenship is secondary and derivitive, depending upon citizenship of the United States and the citizen's place of residence. The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons." 83 U. S. 16 Wall. 112 [21: 420]. And Mr. Justice Swayne added: "The language employed is unqualified in its scope. There is no exception in its terms, and there can be properly none in their application. By the language 'citizens of the United States' was meant all such citizens; and by 'any person' was meant all persons within the jurisdiction of the state. No distinction is intimated on account of race or color. This court has no authority to interpolate a limitation that is neither expressed nor implied. Our duty is to execute the law, not to make it. The protection provided was not intended to be confined to those of any particular race or class, but to embrace equally all races, classes, and conditions of men." 83 U. S. 16 Wall. 128, 129 [21: 425, 426].

Mr. Justice Miller, indeed, while discussing the causes which led to the adoption of the 14th Amendment, made this remark: "The phrase, 'subject to its jurisdiction,' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States." 83 U. S. 16 Wall. 73 [21: 408]. This was wholly aside from the question in judgment, and from the course of reasoning bearing upon that question. It was unsupported by any argument, or by any reference to authorities; and that it was not formulated with the same care and exactness, as if the case before the court had called for an exact definition of the phrase, is apparent from its classing foreign ministers and consuls together—whereas it was then well-settled law, as has since been recognized in a judgment of this court in which Mr. Justice Miller concurred, that consuls, as such, and unless expressly invested with a diplomatic character in addition to their ordinary powers, are not considered as intrusted with authority to represent their sovereign in his *intercourse with foreign [**679** states or to vindicate his prerogatives, or entitled by the law of nations to the privileges and immunities of ambassadors or public ministers, but are subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside. 1 Kent, Com. 44; Story, Confl. Laws, § 48; Wheaton, International Law, 8th ed. § 249; *The Anne* (1818) 16 U. S. 3 Wheat. 435, 445, 446 [4: 428, 430, 431]; *Gittings* v. *Crawford* (1838) Taney, 1, 10; *Re Baiz* (1890) 135 U. S. 403, 424 [34: 222, 229].

In weighing a remark uttered under such circumstances, it is well to bear in mind the often quoted words of Chief Justice Marshall: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens* v. *Virginia* (1821) 19 U. S. 6 Wheat. 264, 399 [5: 257, 290].

That neither Mr. Justice Miller, nor any of the justices who took part in the decision of *The Slaughter-House Cases* understood the court to be committed to the view that all children born in the United States of citizens or subjects of foreign states were excluded from the operation of the first sentence of the 14th Amendment, is manifest from a unanimous judgment of the court, delivered but two years later, while all those judges but Chief Justice Chase were still on the bench, in which Chief Justice Waite said: "Allegiance and protection are, in this connection [that is, in relation to citizenship] reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance. . . . At common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of *parents who [**680** were its citizens became themselves, upon their birth, citizens also. These were natives, or

natural born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient, for everything we have now to consider, that all children born of citizen parents within the jurisdiction are themselves citizens." *Minor* v. *Happersett* (1874) 88 U. S. 21 Wall. 162, 166–168 [22: 627, 628]. The decision in that case was that a woman born of citizen parents within the United States was a citizen of the United States, although not entitled to vote, the right to the elective franchise not being essential to citizenship.

The only adjudication that has been made by this court upon the meaning of the clause, "and subject to the jurisdiction thereof," in the leading provision of the 14th Amendment, is *Elk* v. *Wilkins*, 112 U. S. 94 [28: 643], in which it was decided that an Indian born a member of one of the Indian tribes within the United States, which still existed and was recognized as an Indian tribe by the United States, who had voluntarily separated himself from his tribe, and taken up his residence among the white citizens of a state, but who did not appear to have been naturalized, or taxed, or in any way recognized or treated as a citizen, either by the United States or by the state, was not a citizen of the United States, as a person born in the United States, "and subject to the jurisdiction thereof," within the meaning of the clause in question.

That decision was placed upon the grounds that the meaning of those words was, "not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance;" that by the Constitution, as originally established, "Indians not taxed" were excluded from the persons according to whose numbers representatives in Congress and direct taxes **681**] were apportioned among the *several states, and Congress was empowered to regulate commerce, not only "with foreign nations," and among the several states, but "with the Indian tribes;" that the Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states, but were alien nations, distinct political communities, the members of which owed immediate allegiance to their several tribes, and were not part of the people of the United States; that the alien and dependent condition of the members of one of those tribes could not be put off at their own will, without the action or assent of the United States; and that they were never deemed citizens, except when naturalized, collectively or individually, under explicit provisions of a treaty, or of an act of Congress; and, therefore, that "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes [an alien, though dependent, power,] although in a geographical sense born in the United States, are no more 'born in the United States, and subject to the jurisdiction thereof,' within the meaning of the 1st section of the 14th Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of embassadors or other public ministers of foreign nations." And it was observed that the language used, in defining citizenship, in the 1st section of the civil rights act of 1866, by the very Congress which framed the 14th Amendment, was "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed." 112 U. S. 99–103 [28: 645–647].

Mr. Justice Harlan and Mr. Justice Woods, dissenting, were of opinion that the Indian in question, having severed himself from his tribe and become a bona fide resident of a state, had thereby become subject to the jurisdiction of the United States, within the meaning of the 14th Amendment; and, in reference to the civil rights act of 1866, said: "Beyond question, by that act, national citizenship was conferred directly upon all persons in this country, of whatever race [excluding only 'Indians not taxed'], who were born within *the territorial [**682** limits of the United States, and were not subject to any foreign power." And that view was supported by reference to the debates in the Senate upon that act, and to the ineffectual veto thereof by President Johnson, in which he said. "By the first section of the bill all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. This provision comprehends the Chinese of the Pacific states, Indians subject to taxation, the people called gypsies, as well as the entire race designated as blacks, persons of color, negroes, mulattoes, and persons of African blood. Every individual of those races, born in the United States, is, by the bill, made a citizen of the United States." 112 U. S. 112–114 [28: 650].

The decision in *Elk* v. *Wilkins* concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African, or Mongolian descent, not in the diplomatic service of a foreign country.

The real object of the 14th Amendment of the Constitution, in qualifying the words, "all persons born in the United States," by the addition, "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state—both of which, as has already been shown by the law of England, and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country. *Calvin's Case*, 7 Coke, 1 18*b*; Cockburn, Nationality, 7; Dicey, Confl. Laws, 177; *Inglis* v. *Sailor's Snug Harbor*, 28 U. S. 3 Pet. 99, 155 [7: 617, 637]; 2 Kent, Com. 39, 42.

The principles upon which each of those ex-

ceptions rests were long ago distinctly stated by this court.

683] *In *United States* v. *Rice* (1819) 17 U. S. 4 Wheat. 246 [4: 562], goods imported into Castine, in the state of Maine, while it was in the exclusive possession of the British authorities during the last war with England, were held not to be subject to duties under the revenue laws of the United States, because, as was said by Mr. Justice Story in delivering judgment: "By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience." 17 U. S. 4 Wheat. 254 [4: 564].

In the great case of *The Exchange* [*The Exchange* v. *McFaddon*] (1812) 11 U. S. 7 Cranch, 116 [3: 287], the grounds upon which foreign ministers are, and other aliens are not, exempt from the jurisdiction of this country, were set forth by Chief Justice Marshall in a clear and powerful train of reasoning, of which it will be sufficient, for our present purpose, to give little more than the outlines. The opinion did not touch upon the anomalous case of the Indian tribes, the true relation of which to the United States was not directly brought before this court until some years afterwards in *Cherokee Nation* v. *Georgia* (1831) 30 U. S. 5 Pet. 1 [8: 25]; nor upon the case of a suspension of a sovereignty of the United States over part of their territory by reason of a hostile occupation, such as was also afterwards presented in *United States* v. *Rice*, above cited. But in all other respects it covered the whole question of what persons within the territory of the United States are subject to the jurisdiction thereof.

The Chief Justice first laid down the general principle: "The jurisdiction of the nation with-**684**]in its own territory is *necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory." 11 U. S. 7 Cranch, 136 [3: 298].

He then stated, and supported by argument and illustration, the propositions, that "this full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra territorial power," has "given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation"—the first of which is the exemption from arrest or detention of the person of a foreign sovereign entering its territory with its license, because "a foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation;" "a second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers;" "a third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions;" and, in conclusion, that "a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise that while necessarily within it, and demeaning herself in a friendly *manner, she should be ex- [**685** empt from the jurisdiction of the country." 11 U. S. 7 Cranch, 137-139, 147 [3: 294, 297].

As to the immunity of a foreign minister, he said: "Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extraterritorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extraterritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it. . . . The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power to the care of a person whom he has selected for that purpose cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him implies a consent that he shall possess those privileges which his principal intended he should retain —privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform." 11 U. S. 7 Cranch, 138, 139 [3: 294].

The reasons for not allowing to other aliens exemption "from the jurisdiction of the country in which they are found" were stated as

follows: "When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and **686**]local allegiance, and were *not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption." 11 U. S. 7 Cranch, 144 [3: 296].

In short, the judgment in the case of *The Exchange* declared, as incontrovertible principles, that the jurisdiction of every nation within its own territory is exclusive and absolute, and is susceptible of no limitation not imposed by the nation itself; that all exceptions to its full and absolute territorial jurisdiction must be traced up to its own consent, express or implied; that upon its consent to cede, or to waive the exercise of, a part of its territorial jurisdiction, rest the exemptions from that jurisdiction of foreign sovereigns or their armies entering its territory with its permission, and of their foreign ministers and public ships of war; and that the implied license under which private individuals of another nation enter the territory and mingle indiscriminately with its inhabitants, for purposes of business or pleasure, can never be construed to grant to them an exemption from the jurisdiction of the country in which they are found See also *Carlisle* v. *United States* (1872) 83 U. S. 16 Wall. 147, 155 [21: 426, 430]; *Radich* v. *Hutchins* (1877) 95 U. S. 210 [24: 409]; *Wildenhus's Case* [*Mali* v *Common Jail Keeper*] (1887) 120 U. S. 1 [30: 565]; *Chae Chan Ping* v. *United States* (1889) 130 U. S. 581, 603, 604 [32: 1068, 1075].

From the first organization of the national government under the Constitution, the naturalization acts of the United States, in providing for the admission of aliens to citizenship by judicial proceedings, uniformly required every applicant to have resided for a certain time "within the limits and under the jurisdiction of the United States;" and thus applied the words "under the jurisdiction of the United States" to aliens residing here before they had taken an oath to support the Constitution of the United States, or had renounced **687**] allegiance *to a foreign government. Acts of March 26, 1790 (1 Stat. at L. 103, chap. 3); January 29, 1795 (1 Stat. at L. 414, chap. 20, § 1); June 18, 1798 (1 Stat. at L. 566, 568, chap. 54, §§ 1, 6); April 14, 1802 (2 Stat. at L. 153, chap. 28, § 1); March 22, 1816 (3 Stat. at L. 258, chap. 32, § 1); May 24, 1828 (4 Stat. at L. 310, chap. 116, § 2); Rev. Stat. § 2165. And, from 1795, the provisions of those acts, which granted citizenship to foreign-born children of American parents, described such children as "born out of the limits and jurisdiction of the United States." Acts of January 29, 1795 (1 Stat. at L. 415, chap. 20, § 3); April 14, 1802 (2 Stat. at L. 155, chap. 28, § 4); February 10, 1855 (10 Stat. at L. 604, chap. 71); U. S. Rev. Stat. §§ 1993, 2172. Thus Congress, when dealing with the question of citizenship in that aspect, treated aliens residing in this country as "under the jurisdiction of the United States," and American parents residing abroad as "out of the jurisdiction of the United States."

The words "in the United States, and subject to the jurisdiction thereof," in the first sentence of the 14th Amendment of the Constitution, must be presumed to have been understood and intended by the Congress which proposed the Amendment, and by the legislatures which adopted it, in the same sense in which the like words had been used by Chief Justice Marshall in the well known case of *The Exchange;* and as the equivalent of the words "within the limits and under the jurisdiction of the United States," and the converse of the words, "out of the limits and jurisdiction of the United States," as habitually used in the naturalization acts. This presumption is confirmed by the use of the word "jurisdiction" in the last clause of the same section of the 14th Amendment, which forbids any state to "deny to any person within its jurisdiction the equal protection of the laws." It is impossible to construe the words "subject to the jurisdiction thereof," in the opening sentence, as less comprehensive than the words "within its jurisdiction," in the concluding sentence of the same section; or to hold that persons "within the jurisdiction" of one of the states of the Union are not "subject to the jurisdiction of the United States."

These considerations confirm the view, already expressed in this opinion, that the opening sentence of the 14th *Amendment is [**688** throughout affirmative and declaratory, intended to allay doubts and to settle controversies which had arisen, and not to impose any new restrictions upon citizenship.

By the civil rights act of 1866, "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed," were declared to be citizens of the United States. In the light of the law as previously established, and of the history of the times, it can hardly be doubted that the words of that act, "not subject to any foreign power," were not intended to exclude any children born in this country from the citizenship which would theretofore have been their birthright; or, for instance, for the first time in our history, to deny the right of citizenship to native-born children of foreign white parents not in the diplomatic service of their own country, nor in hostile occupation of part of our territory. But any possible doubt in this regard was removed when the negative words of the civil rights act, "not subject to any foreign power," gave way, in the 14th Amendment of the Constitution, to the affirmative words, "subject to the jurisdiction of the United States."

This sentence of the 14th Amendment is declaratory of existing rights, and affirmative

of existing law, as to each of the qualifications therein expressed—"born in the United States," "naturalized in the United States," and "subject to the jurisdiction thereof"—in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left the subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization.

The effect of the enactments conferring citizenship on foreign-born children of American parents has been defined, and the fundamental rule of citizenship by birth within the dominion of the United States, notwithstanding alienage of parents, has been affirmed, in well considered opinions of the executive departments of the government, since the adoption of the 14th Amendment of the Constitution.

689] *In 1869 Attorney General Hoar gave to Mr. Fish, the Secretary of State, an opinion that children born and domiciled abroad, whose fathers were native born citizens of the United States and had at some time resided therein, were, under the statute of February 10, 1855 (10 Stat. at L. 604, chap. 71), citizens of the United States, and "entitled to all the privileges of citizenship which it is in the power of the United States government to confer. Within the sovereignty and jurisdiction of this nation, they are undoubtedly entitled to all the privileges of citizens. . . . But," the Attorney General added, "while the United States may, by law, fix or declare the conditions constituting citizens of the country within its own territorial jurisdiction, and may confer the rights of American citizens everywhere upon persons who are not rightfully subject to the authority of any foreign country or government, it is clear that the United Sates cannot, by undertaking to confer the rights of citizenship upon the subjects of a foreign nation who have not come within our territory, interfere with the just rights of such nation to the government and control of its own subjects. If, therefore, by the laws of the country of their birth, children of American citizens, born in that country, are subjects of its government, I do not think that it is competent to the United States, by any legislation, to interfere with that relation, or, by undertaking to extend to them the rights of citizens of this country, to interfere with the allegiance which they may owe to the country of their birth while they continue within its territory, or to change the relation to other foreign nations which, by reason of their place of birth, may at any time exist. The rule of the common law I understand to be, that a person 'born in a strange country, under the obedience of a strange prince or country, is an alien' (Co. Litt. 128*b*), and that every person owes allegiance to the country of his birth." Citizenship-Passports, 13 Ops. Atty. Gen. 89–91.

In 1871 Mr. Fish, writing to Mr. Marsh, the American minister to Italy, said: "The 14th Amendment to the Constitution declares that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.' This is simply an affirmance *of the common law of[690 England and of this country, so far as it asserts the status of citizenship to be fixed by the place of nativity, irrespective of parentage. The qualification, 'and subject to the jurisdiction thereof,' was probably intended to exclude the children of foreign ministers, and other persons who may be within our territory with rights of extraterritoriality." 2 Whart. Int. Dig. p. 394.

In August, 1873, President Grant, in the exercise of the authority expressly conferred upon the President by art. 2, § 2, of the Constitution, to "require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices," required the opinions of the members of his cabinet upon several questions of allegiance, naturalization, and expatriation. Mr. Fish, in his opinion, which is entitled to much weight, as well from the circumstances under which it was rendered, as from its masterly treatment of the subject, said:

"Every independent state has as one of the incidents of its sovereignty the right of municipal legislation and jurisdiction over all persons within its territory, and may therefore change their nationality by naturalization, and this, without regard to the municipal laws of the country whose subjects are so naturalized, as long as they remain or exercise the rights conferred by naturalization, within the territory and jurisdiction of the state which grants it.

"It may also endow with the rights and privileges of its citizenship persons residing in other countries, so as to entitle them to all rights of property and of succession within its limits, and also with political privileges and civil rights to be enjoyed or exercised within the territory and jurisdiction of the state thus conferring its citizenship.

"But no sovereignty can extend its jurisdiction beyond its own territorial limits so as to relieve those born under and subject to another jurisdiction from their obligations or duties thereto; nor can the municipal law of one state interfere with the duties or obligations which its citizens incur, while voluntarily resident in such foreign state and without the jurisdiction of their own country.

*"It is evident from the proviso in the[691 act of 10th February, 1855, *viz.*, 'that the rights of citizenship shall not descend to persons whose fathers never resided in the United States,' that the law-making power not only had in view this limit to the efficiency of its own municipal enactments in foreign jurisdiction, but that it has conferred only a qualified citizenship upon the children of American fathers born without the jurisdiction of the United States, and has denied to them, what pertains to other American citizens, the right of transmitting citizenship to their children, unless they shall have made themselves residents of the United States, or, in the language of the 14th Amendment of the Constitution, have made themselves 'subject to the jurisdiction thereof.'

"The child born of alien parents in the United States is held to be a citizen thereof, and to be subject to duties with regard to this country which do not attach to the father.

"The same principle on which such children are held by us to be citizens of the United States, and to be subject to duties to this country, applies to the children of American fathers born without the jurisdiction of the United States, and entitles the country within whose jurisdiction they are born to claim them as citizens and to subject them to duties to it.

"Such children are born to a double character; the citizenship of the father is that of the child, so far as the laws of the country of which the father is a citizen are concerned, and within the jurisdiction of that country; but the child, from the circumstances of his birth, may acquire rights and owes another fealty besides that which attaches to the father." Opinions of the Executive Departments on Expatriation, Naturalization, and Allegiance (1873) 17, 18; U. S. Foreign Relations, 1873-74, pp. 1191, 1192.

In 1886, upon the application of a son born in France of an American citizen, and residing in France, for a passport, Mr. Bayard, the Secretary of State, as appears by letters from him to the Secretary of Legation in Paris, and from the latter to the applicant, quoted and adopted the conclusions of Attorney General Hoar in his opinion above cited. U. S. Foreign Relations, 1886, p. 303; 2 Calvo, Droit International, § 546.

692] *These opinions go to show that, since the adoption of the 14th Amendment, the executive branch of the government, the one charged with the duty of protecting American citizens abroad against unjust treatment by other nations, has taken the same view of the act of Congress of 1855, declaring children born abroad of American citizens to be themselves citizens, which, as mentioned in a former part of this opinion, the English foreign office has taken of similar acts of Parliament—holding that such statutes cannot, consistently with our own established rule of citizenship by birth in this country, operate extraterritorially so far as to relieve any person born and residing in a foreign country, and subject to its government, from his allegiance to that country.

In a very recent case, the supreme court of New Jersey held that a person, born in this country of Scotch parents who were domiciled but had not been naturalized here, was "subject to the jurisdiction of the United States," within the meaning of the 14th Amendment, and was "not subject to any foreign power," within the meaning of the civil rights act of 1866; and, in an opinion delivered by Justice Van Syckel, with the concurrence of Chief Justice Beasley, said: "The object of the 14th Amendment, as is well known, was to confer upon the colored race the right of citizenship. It, however, gave to the colored people no right superior to that granted to the white race. The ancestors of all the colored people then in the United States were of foreign birth and could not have been naturalized, or in any way have become entitled to the right of citizenship. The colored people were no more subject to the jurisdiction of the United States by reason of their birth here than were the white children born in this country of parents who were not citizens. The same rule must be applied to both races, and unless the general rule, that when the parents are domiciled here birth establishes the right to citizenship, is accepted, the 14th Amendment has failed to accomplish its purpose and the colored people are not citizens. The 14th Amendment, by the language, 'all persons born in the United States, and subject to the jurisdiction thereof,' was intended *to bring all races, without[**693** distinction of color, within the rule which prior to that time pertained to the white race." *Benny* v. *O'Brien* (1895) 58 N. J. L. 36, 39, 40.

The foregoing considerations and authorities irresistibly lead us to these conclusions: The 14th Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke, in *Calvin's Case*, 7 Coke, 6*a*, "strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject;" and his child, as said by Mr. Binney in his essay before quoted, "if born in the country, is as much a citizen as the natural born child of a citizen, and by operation of the same principle." It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides—seeing that, as said by Mr. Webster, when Secretary of State, in his report to the President on *Thrasher's Case*, in 1851, and since repeated by this court, "independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien, or a stranger *born, for so long a time as he continues [**694** within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason, or other crimes, as a native-born subject might be, unless his case is varied by some treaty stipulations." Ex. Doc. H. R. No. 10, 1st sess. 32d Congress, p. 4; 6 Webster's Works, 526; *Carlisle* v. *United States*, 83 U. S. 16 Wall. 147, 155 [21: 426, 430]; *Calvin's Case*, 7 Coke, 6*a*; Ellesmere on *Postnati*, 63; 1 Hale, P. C. 62; 4 Bl. Com. 74, 92.

To hold that the 14th Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to

deny citizenship to thousands of persons of English, Scotch, Irish, German, or other European parentage, who have always been considered and treated as citizens of the United States.

VI. Whatever considerations, in the absence of a controlling provision of the Constitution, might influence the legislative or the executive branch of the government to decline to admit persons of the Chinese race to the status of citizens of the United States, there are none that can constrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the 14th Amendment, which declares and ordains that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States so long as they are permitted by the United States to reside here; and are "subject to the jurisdiction thereof," in the same sense as all other aliens residing in the United States. *Yick Wo* v. *Hopkins* (1886) 118 U. S. 356 [30: 220]; *Lau Ow Bew* v. *United States* (1892) 144 U. S. 47, 61, 62 [36: 340, 345, 346]; *Fong Yue Ting* v. *United States* (1893) 149 U. S. 698, 724 [37: 905, 917]; *Lem Moon Sing* v. *United States* (1895) 158 U. S. 538, 547 [39: 1082, 1085]; *Wong Wing* v. *United States* (1896) 163 U. S. 228, 238 [41: 140, 144].

In *Yick Wo* v. *Hopkins* the decision was that [695] an ordinance *of the city of San Francisco, regulating a certain business, and which, as executed by the board of supervisors, made an arbitrary discrimination between natives of China, still subjects of the Emperor of China, but domiciled in the United States, and all other persons, was contrary to the 14th Amendment of the Constitution. Mr. Justice Matthews, in delivering the opinion of the court, said: "The right of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the Emperor of China." The 14th Amendment to the Constitution is not confined to the protection of citizens. It says, 'Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted, by § 1977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States, equally with those of the strangers and aliens who now invoke the jurisdiction of the court." 118 U. S. 368, 369 [30: 226].

The manner in which reference was made, in the passage above quoted, to § 1977 of the Revised Statutes, shows that the change of phrase in that section, re-enacting § 16 of the statute of May 31, 1870, chap. 114 (16 Stat. at L. 144), as compared with § 1 of the civil rights act of 1866—by substituting, for the words in that act, "of every race and color," the words, "within the jurisdiction of the United States"—was not *considered as making the sec- [696] tion, as it now stands, less applicable to persons of every race and color and nationality, than it was in its original form; and is hardly consistent with attributing any narrower meaning to the words "subject to the jurisdiction thereof" in the first sentence of the 14th Amendment of the Constitution, which may itself have been the cause of the change in the phraseology of that provision of the civil rights act.

The decision in *Yick Wo* v. *Hopkins*, indeed, did not directly pass upon the effect of these words in the 14th Amendment, but turned upon subsequent provisions of the same section. But, as already observed, it is impossible to attribute to the words, "subject to the jurisdiction thereof," that is to say, of the United States, at the beginning, a less comprehensive meaning than to the words "within its jurisdiction," that is, of the state, at the end of the same section; or to hold that persons, who are indisputably "within the jurisdiction" of the state, are not "subject to the jurisdiction" of the nation.

It necessarily follows that persons born in China, subjects of the Emperor of China, but domiciled in the United States, having been adjudged, in *Yick Wo* v. *Hopkins*, to be within the jurisdiction of the state, within the meaning of the concluding sentence, must be held to be subject to the jurisdiction of the United States, within the meaning of the first sentence of this section of the Constitution; and their children, "born in the United States," cannot be less "subject to the jurisdiction thereof."

Accordingly, in *Quock Ting* v. *United States* (1891) 140 U. S. 417 [35: 501], which, like the case at bar, was a writ of habeas corpus to test the lawfulness of the exclusion of a Chinese person who alleged that he was a citizen of the United States by birth, it was assumed on all hands that a person of the Chinese race, born in the United States, was a citizen of the United States. The decision turned upon the failure of the petitioner to prove that he was born in this country; and the question at issue was, as stated in the opinion of the majority of the court, delivered by Mr. Justice Field, "whether the evidence was sufficient to show that the petitioner was a citizen of the *United [697] States," or, as stated by Mr. Justice Brewer in his dissenting opinion, "whether the petitioner was born in this country or not." 140 U. S. 419, 423 [35: 502, 503].

In *State* v. *Ah Chew* (1881) 16 Nev. 50, 58 [40 Am. Rep. 488], the supreme court of Nevada said: "The Amendments did not confer the right of citizenship upon the Mongolian race, except such as are born within the United

States." In the courts of the United States in the ninth circuit, it has been uniformly held, in a series of opinions delivered by Mr. Justice Field, Judge Sawyer, Judge Deady, Judge Hanford, and Judge Morrow, that a child born in the United States of Chinese parents, subjects of the Emperor of China, is a native-born citizen of the United States. *Re Look Tin Sing* (1884) 10 Sawy. 353; *Ex Parte Chin King* (1888) 13 Sawy. 333; *Re Yung Sing Hee* (1888) 13 Sawy. 482; *Re Wy Ching* (1888) 13 Sawy. 530; *Gee Fook Sing* v. *United States* (1892) 7 U. S. App. 27; *Re Wong Kim Ark* (1896) 71 Fed. Rep. 382. And we are not aware of any judicial decision to the contrary.

During the debates in the Senate in January and February, 1866, upon the civil rights bill, Mr. Trumbull, the chairman of the committee which reported the bill, moved to amend the first sentence thereof so as to read, "All persons born in the United States, and not subject to any foreign power, are hereby declared to be citizens of the United States, without distinction of color." Mr. Cowan, of Pennsylvania, asked, "Whether it will not have the effect of naturalizing the children of Chinese and gypsies, born in this country?" Mr. Trumbull answered, "Undoubtedly;" and asked, "Is not the child born in this country of German parents a citizen?" Mr. Cowan replied, "The children of German parents are citizens; but Germans are not Chinese." Mr. Trumbull rejoined: "The law makes no such distinction and the child of an Asiatic is just as much a citizen as the child of a European." Mr. Reverdy Johnson suggested that the words "without distinction of color," should be omitted as unnecessary; and said: "The Amendment, as it stands, is that all persons born in the United States, and not subject to a foreign power, shall, by virtue of birth, be citizens. To that [698] I am willing to *consent; and that comprehends all persons, without any reference to race or color, who may be so born." And Mr. Trumbull agreed that striking out those words would make no difference in the meaning, but thought it better that they should be retained, to remove all possible doubt. Congressional Globe, 39th Cong. 1st sess. pt. 1, pp. 498, 573, 574.

The 14th Amendment of the Constitution, as originally framed by the House of Representatives, lacked the opening sentence. When it came before the Senate in May, 1866, Mr. Howard, of Michigan, moved to amend by prefixing the sentence in its present form (less the words "or naturalized"), and reading, "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Mr. Cowan objected, upon the ground that the Mongolian race ought to be excluded; and said: "Is the child of the Chinese immigrant in California a citizen? . . . I do not know how my honorable friend from California looks upon Chinese, but I do know how some of his fellow citizens regard them. I have no doubt that now they are useful, and I have no doubt that within proper restraints, allowing that state and the other Pacific states to manage them as they may see fit, they may be useful; but I would not tie their hands by the Constitution of the United States so as to prevent them hereafter from dealing with them as in their wisdom they see fit." Mr. Conness, of California, replied: "The proposition before us relates simply, in that respect, to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. We have declared that by law; now it is proposed to incorporate the same provision in the fundamental instrument of the nation. I am in favor of doing so. I voted for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States." "We are entirely ready to accept the provision proposed in this constitutional Amendment, that the children born here of Mongolian parents shall be declared by the Constitution of *the United [699] States to be entitled to civil rights and to equal protection before the law with others." Congressional Globe, 39th Congress, 1st sess. pt. 4, pp. 2890–2892. It does not appear to have been suggested, in either house of Congress, that children born in the United States of Chinese parents would not come within the terms and effect of the leading sentence of the 14th Amendment.

Doubtless, the intention of the Congress which framed and of the states which adopted this Amendment of the Constitution must be sought in the words of the Amendment; and the debates in Congress are not admissible as evidence to control the meaning of those words. But the statements above quoted are valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves; and are, at the least, interesting as showing that the application of the Amendment to the Chinese race was considered and not overlooked.

The acts of Congress, known as the Chinese exclusion acts, the earliest of which was passed some fourteen years after the adoption of the constitutional Amendment, cannot control its meaning, or impair its effect, but must be construed and executed in subordination to its provisions. And the right of the United States, as exercised by and under those acts, to exclude or to expel from the country persons of the Chinese race, born in China, and continuing to be subjects of the Emperor of China, though having acquired a commercial domicil in the United States, has been upheld by this court, for reasons applicable to all aliens alike, and inapplicable to citizens, of whatever race or color. *Chae Chan Ping* v. *United States*, 130 U. S. 581 [32: 1068]; *Nishimura Ekiu* v. *United States*, 142 U. S. 651 [35: 1146]; *Fong Yue Ting* v. *United States*, 149 U. S. 698 [37: 140]; *Lem Moon Sing* v. *United States*, 158 U. S. 538 [39: 1082]; *Wong Wing* v. *United States*, 163 U. S. 228 [41: 140].

In *Fon Yue Ting* v. *United States* the right of the United States to expel such Chinese persons was placed upon the grounds, that the right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, is an inherent and inalienable right of every sovereign and independent *nation, es- [700] sential to its safety, its independence, and its welfare; that the power to exclude or to expel aliens, being a power affecting international re-

lations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene; that the power to exclude and the power to expel aliens rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power; and, therefore, that the power of Congress to expel, like the power to exclude, aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend. 149 U. S. 711, 713, 714 [37: 912, 913].

In *Lem Moon Sing* v. *United States* the same principles were reaffirmed, and were applied to a Chinese person, born in China, and who had acquired a commercial domicil in the United States, and who, having voluntarily left the country on a temporary visit to China, and with the intention of returning to and continuing his residence in this country, claimed the right under a statute or treaty to re-enter it; and the distinction between the right of an alien to the protection of the Constitution and laws of the United States for his person and property while within the jurisdiction thereof, and his claim of a right to re-enter the United States after a visit to his native land, was expressed by the court as follows: "He is none the less an alien because of his having a commercial domicil in this country. While he lawfully remains here he is entitled to the benefit of the guaranties of life, liberty, and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country, and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a **701**] native or *naturalized citizen of the United States. But when he has voluntarily gone from the country, and is beyond its jurisdiction, being an alien, he cannot re-enter the United States in violation of the will of the government as expressed in enactments of the lawmaking power." 158 U. S. 547, 548 [39: 1085, 1086].

It is true that Chinese persons born in China cannot be naturalized, like other aliens, by proceedings under the naturalization laws. But this is for want of any statute or treaty authorizing or permitting such naturalization, as will appear by tracing the history of the statutes, treaties, and decisions upon that subject—always bearing in mind that statutes enacted by Congress, as well as treaties made by the President and Senate, must yield to the paramount and supreme law of the Constitution.

The power granted to Congress by the Constitution, "to establish a uniform rule of naturalization," was long ago adjudged by this court to be vested exclusively in Congress. *Chirac* v. *Chirac* (1817) 15 U. S. 2 Wheat. 259 [4: 234]. For many years after the establishment of the original Constitution, and until two years after the adoption of the 14th Amendment, Congress never authorized the naturalization of anyone but "free white persons." Acts of March 26, 1790 (1 Stat. at L. 103, chap. 3); January 29, 1795 (1 Stat. at L. 414, chap. 20); April 14, 1802 (2 Stat. at L. 153, chap. 28); March 26, 1804 (2 Stat. at L. 292, chap. 47); March 22, 1816 (3 Stat. at L. 258, chap. 32); May 26, 1824 (4 Stat. at L. 69, chap. 186); May 24, 1828 (4 Stat. at L. 310, chap. 116). By the treaty between the United States and China, made July 28, 1868, and promulgated February 5, 1870, it was provided that "nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States." 16 Stat. at L. 740. By the act of July 14, 1870, chap. 254, § 7, for the first time, the naturalization laws were "extended to aliens of African nativity and to persons of African descent." 16 Stat. at L. 256. This extension, as embodied in the Revised Statutes, took the form of providing that those laws should "apply to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent;" and it was amended by the act of *February 18, 1875, chap. 80, [**702** by inserting the words above printed in brackets. Rev. Stat. 2d ed. § 2169; 18 Stat. at L. 318. Those statutes were held, by the circuit court of the United States in California, not to embrace Chinese aliens. *Re Ah Yup* (1878) 5 Sawy. 155. And by the act of May 6, 1882, chap. 126, § 14, it was expressly enacted that "hereafter no state court or court of the United States shall admit Chinese to citizenship." 22 Stat. at L. 61.

In *Fong Yue Ting* v. *United States* (1893) above cited, this court said: "Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws." 149 U. S. 716 [37: 914].

The Convention between the United States and China of 1894, provided that "Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens." 28 Stat. at L. 1211. And it has since been decided, by the same judge who held this appellee to be a citizen of the United States by virtue of his birth therein, that a native of China of the Mongolian race could not be admitted to citizenship under the naturalization laws. *Re Gee Hop* (1895) 71 Fed. Rep. 274.

The 14th Amendment of the Constitution, in the declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside," contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at

once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by
703] treaty, as in the case *of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.

The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. "A naturalized citizen," said Chief Justice Marshall, "becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States precisely under the same circumstances under which a native might sue." *Osborn* v. *United States Bank*, 22 U. S. 9 Wheat. 738, 827 [6: 204, 225]. Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The 14th Amendment, while it leaves the power where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.

No one doubts that the Amendment, as soon as it was promulgated, applied to persons of African descent born in the United States, wherever the birthplace of their parents might have been; and yet, for two years afterwards, there was no statute authorizing persons of that race to be naturalized. If the omission or the refusal of Congress to permit certain classes
704] *of persons to be made citizens by naturalization could be allowed the effect of correspondingly restricting the classes of persons who should become citizens by birth, it would be in the power of Congress, at any time, by striking negroes out of the naturalization laws, and limiting those laws, as they were formerly limited, to white persons only, to defeat the main purpose of the constitutional amendment.

The fact, therefore, that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution, "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

VII. Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by Congress, "the right of expatriation is a natural and inherent right of all people," and "any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic." U. S. Rev. Stat. § 1999, re-enacting act of July 27, 1868 (15 Stat. at L. 223, 224, chap. 249, § 1). Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful. But it would be out of place to pursue that inquiry; inasmuch as it is expressly agreed that his residence has always been in the United States, and not elsewhere; that each of his temporary visits to China, the one for some months when he was about seventeen years old, and the other something like a year about the time of his coming of age, was made with the intention of returning, and was followed by his actual return, to the United States; and "that said Wong Kim Ark has not, either by himself or his parents acting *for him, ever renounced his al-[705 legiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom."

The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicil and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that *the question must be answered in the affirmative.* Order affirmed.

Mr. Justice **McKenna**, not having been a member of the court when this case was argued, took no part in the decision.

Mr. Chief Justice **Fuller**, with whom concurred Mr. Justice **Harlan**, dissenting:

I cannot concur in the opinion and judgment of the court in this case.

The proposition is that a child born in this country of parents who were not citizens of the United States, and under the laws of their own country and of the United States could not become such—as was the fact from the beginning of the government in respect of the class of aliens to which the parents in this instance belonged—is, from the moment of his birth, a citizen of the United States, by virtue

of the first clause of the 14th Amendment, any act of Congress to the contrary notwithstanding.

The argument is, that although the Constitution prior to that amendment nowhere attempted to define the words "citizens of the United States" and "natural-born citizen," as used therein, yet that it must be interpreted in the light of the English common law rule which made the place of birth the criterion of nationality; that that rule "was in force in all **706**] *the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established;" and "that before the enactment of the civil rights act of 1866 and the adoption of the constitutional amendment, all white persons, at least, born within the sovereignty of the United States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States."

Thus the 14th Amendment is held to be merely declaratory except that it brings all persons, irrespective of color, within the scope of the alleged rule, and puts that rule beyond the control of the legislative power.

If the conclusion of the majority opinion is correct, then the children of citizens of the United States, who have been born abroad since July 28, 1868, when the Amendment was declared ratified, were, and are, aliens, unless they have, or shall, on attaining majority, become citizens by naturalization *in* the United States; and no statutory provision to the contrary is of any force or effect. And children who are aliens by descent, but born on our soil, are exempted from the exercise of the power to exclude or to expel aliens, or any class of aliens, so often maintained by this court, an exemption apparently disregarded by the acts in respect of the exclusion of persons of Chinese descent.

The English common-law rule, which it is insisted was in force after the Declaration of Independence, was that "every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled or merely temporarily sojourning in the country, was an English subject; save only the children of foreign ambassadors (who were excepted because their fathers carried their own nationality with them) or a child born to a foreigner during the hostile occupation of any part of the territories of England." Cockburn, Nationality, 7.

The tie which bound the child to the Crown **707**] was indissoluble. *The nationality of his parents had no bearing on his nationality. Though born during a temporary stay of a few days, the child was irretrievably a British subject. Hall, Foreign Jurisdiction, etc., § 15.

The rule was the outcome of the connection in feudalism between the individual and the soil on which he lived, and the allegiance due was that of liegemen to their liege lord It was not local and temporary as was the obedience to the laws owed by aliens within the dominions of the Crown, but permanent and indissoluble, and not to be canceled by any change of time or place or circumstances.

And it is this rule, pure and simple, which it is asserted determined citizenship of the United States during the entire period prior to the passage of the act of April 9, 1866, and the ratification of the 14th Amendment, and governed the meaning of the words "citizens of the United States" and "natural-born citizen" used in the Constitution as originally framed and adopted I submit that no such rule obtained during the period referred to, and that those words bore no such construction; that the act of April 9, 1866, expressed the contrary rule; that the 14th Amendment prescribed the same rule as the act; and that if that Amendment bears the construction now put upon it, it imposed the English common-law rule on this country for the first time and made it "absolute and unbending," just as Great Britain was being relieved from its inconveniences.

Obviously where the Constitution deals with common-law rights and uses common-law phraseology, its language should be read in the light of the common law; but when the question arises as to what constitutes citizenship of the nation, involving as it does international relations, and political as contradistinguished from civil status, international principles must be considered, and, unless the municipal law of England appears to have been affirmatively accepted, it cannot be allowed to control in the matter of construction.

Nationality is essentially a political idea and belongs to the sphere of public law. Hence Mr. Justice Story, in *Shanks* v. *Dupont*, 28 U. S. 3 Pet. 248 [7: 668], said that the incapacities of **femes covert*, at common law, "do not [**708** reach their political rights, nor prevent their acquiring or losing a national character. Those political rights do not stand upon the mere doctrines of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations."

Twiss in his work on the Law of Nations, says that "natural allegiance, or the obligation of perpetual obedience to the government of a country wherein a man may happen to have been born, which he cannot forfeit, or cancel, or vary by any change of time, or place, or circumstance, is the creature of civil law, and finds no countenance in the law of nations, as it is in direct conflict with the incontestable rule of that law." Vol. 1, p. 231.

Before the Revolution, the views of the publicists had been thus put by Vattel: "The natives, or natural-born citizens, are those born in the country, of parents who are citizens. As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, those children naturally follow the condition of their fathers, and succeed to all their rights. The society is supposed to desire this, in consequence of what it owes to its own preservation; and it is presumed, as matter of course, that each citizen, on entering into society, reserves to his children the right of becoming members of it. The country of the fathers is therefore that of the children; and these become true citizens merely by their tacit consent. We shall soon see whether, on their coming to the years of discretion, they may

renounce their right, and what they owe to the society in which they were born. I say, that, in order to be of the country, it is necessary that a person be born of a father who is a citizen; for, if he is born there of a foreigner, it will be only the place of his birth, and not his country." Book 1, chap. 19, § 212. "The true bond which connects the child with the body politic is not the matter of an inanimate piece of land, but the moral relations of his parentage. . . . The place of birth produces no change in the rule that children follow the condition of their fathers, for it is not naturally the place of birth that gives rights, but extraction."

And to the same effect are the modern writ-
709]ers, as, for *instance, Bar, who says: "To what nation a person belongs is by the laws of all nations closely dependent on descent; it is almost an universal rule that the citizenship of the parents determines it—that of the father where children are lawful, and where they are bastards, that of their mother, without regard to the place of their birth; and that it must necessarily be recognized as the correct canon, since nationality is in its essence dependent on descent." International Law, § 31.

The framers of the Constitution were familiar with the distinction between the Roman law and the feudal law, between obligations based on territoriality and those based on the personal and invisible character of origin, and there is nothing to show that in the matter of nationality they intended to adhere to principles derived from regal government, which they had just assisted in overthrowing.

Manifestly, when the sovereignty of the Crown was thrown off and an independent government established, every rule of the common law and every statute of England obtaining in the colonies, in derogation of the principles on which the new government was founded, was abrogated.

The states, for all national purposes embraced in the Constitution, became one, united under the same sovereign authority, and governed by the same laws. but they retained their jurisdiction over all persons and things within their territorial limits, except where surrendered to the general government or restrained by the Constitution, and protection to life, liberty, and property rested primarily with them. So far as the *jus commune*, or *folk-right*, relating to the rights of persons, was concerned, the colonies regarded it as their birthright, and adopted such parts of it as they found applicable to their condition. *Van Ness* v. *Packard*, 27 U. S. 2 Pet. 137 [7: 374].

They became sovereign and independent states, and when the Republic was created each of the thirteen states had its own local usages, customs, and common law, while in respect of the national government there necessarily was no general, independent, and separate common law of the United States, nor has there ever been. *Wheaton* v. *Peters*, 33 U. S. 8 Pet. 591, 658 [8: 1055, 1079].

710] *As to the *jura coronæ*, including therein the obligation of allegiance, the extent to which these ever were applicable in this country depended on circumstances, and it would seem quite clear that the rule making locality of birth the criterion of citizenship because creating a permanent tie of allegiance, no more survived the American Revolution than the same rule survived the French Revolution.

Doubtless, before the latter event, in the progress of monarchial power, the rule which involved the principle of liege homage may have become the rule of Europe; but that idea never had any basis in the United States.

As Chief Justice Taney observed in *Fleming* v. *Page*, 50 U. S. 9 How. 618 [13: 282], though in a different connection: "It is true that most of the states have adopted the principles of English jurisprudence, so far as it concerns private and individual rights. And when such rights are in question, we habitually refer to the English decisions, not only with respect, but in many cases as authoritative. But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English Crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide."

And Mr. Lawrence, in his edition of Wheaton (Lawrence's Wheaton, p 920), makes this comment: "There is, it is believed, as great a difference between the territorial allegiance claimed by an hereditary sovereign on feudal principles, and the personal right of citizenship participated in by all the members of the political community, according to American institutions, as there is between the authority and sovereignty of the Queen of England, and the power of the American President; and the inapplicability of English precedents is as clear in the one case as in the other. The same view, with particular application to naturalization, was early taken by the *American [**711** commentator on Blackstone. Tucker's Blackstone, vol. 1, pt. 2, appx. p. 96."

Blackstone distinguished allegiance into two sorts, the one natural and perpetual; the other local and temporary. Natural allegiance, so called, was allegiance resulting from birth in subjection to the Crown, and indelibility was an essential, vital, and necessary characteristic.

The royal commission to inquire into the laws of naturalization and allegiance was created May 1, 1868; and, in their report, the commissioners, among other things, say: "The allegiance of a natural-born British subject is regarded by the common law as indelible. We are of opinion that this doctrine of the common law is neither reasonable nor convenient. It is at variance with those principles on which the rights and duties of a subject should be deemed to rest; it conflicts with that freedom of action which is now recognized as most conducive to the general good, as well as to individual happiness and prosperity; and it is especially inconsistent with the practice of a state which allows to its subjects absolute freedom of emigration."

However, the commission by a majority declined to recommend the abandonment of the rule altogether though "clearly of opinion that

it ought not to be, as it now is, absolute and unbending," but recommended certain modifications which were carried out in subsequent legislation.

But from the Declaration of Independence to this day the United States have rejected the doctrine of indissoluble allegiance and maintained the general right of expatriation, to be exercised in subordination to the public interests and subject to regulation.

As early as the act of January 29, 1795 (1 Stat. at L. 414, chap. 20) applicants for naturalization were required to take not simply an oath to support the Constitution of the United States, but of absolute renunciation and abjuration of all allegiance and fidelity to every foreign prince or state, and particularly to the prince or state of which they were before the citizens or subjects.

The statute 3 Jac. I. chap. 4, provided that [712] promising obedience *to any other prince, state, or potentate subjected the person so doing to be adjudged a traitor, and to suffer the penalty of high treason; and in respect of the act of 1795 Lord Grenville wrote to our minister, Rufus King: "No British subject can, by such a form of renunciation as that which is prescribed in the American law of naturalization, devest himself of his allegiance to his sovereign. Such a declaration or renunciation made by any of the King's subjects would, instead of operating as a protection to them, be considered an act highly criminal on their part." 2 Am. Stat. Papers, 149. And see *Fitch* v. *Webber*, 6 Hare, 51.

Nevertheless, Congress has persisted from 1795 in rejecting the English rule and in requiring the alien, who would become a citizen of the United States, in taking on himself the ties binding him to our government, to affirmatively sever the ties that bound him to any other.

The subject was examined at length in 1856, in an opinion given the Secretary of State by Attorney General Cushing ([Right of Expatriation] 8 Ops. Atty. Gen. 139) where the views of the writers on international law and those expressed in cases in the Federal and state courts are largely set forth, and the Attorney General says: "The doctrine of absolute and perpetual allegiance,—the root of the denial of the right of any emigration,—is inadmissible in the United States. It was a matter involved in, and settled for us by, the Revolution, which founded the American Union.

"Moreover, the right of expatriation, under fit circumstances of time and of manner, being expressly asserted in the legislation of several of the states, and conformed by decisions of their courts, must be considered as thus made a part of the fundamental public law of the United States."

Expatriation included not simply the leaving of one's native country, but the becoming naturalized in the country adopted as a future residence. The emigration which the United States encouraged was that of those who could become incorporate with its people; make its flag their own; and aid in the accomplishment of a common destiny; and it was obstruction to such emigration that made one of the charges against the Crown in the Declaration.

[713] *_Ainslie_ v. _Martin_, 9 Mass. 454, 460 (1813); _Murray_ v. _M'Carty_, 2 Munf. 393 (1811); _Alsberry_ v. _Hawkins_, 9 Dana, 177 [33 Am. Dec. 543] (1839), are among the cases cited. In _Ainslie_ v. _Martin_, the indelibility of allegiance according to the common law rule was maintained; while in _Murray_ v. _M'Carty_, and _Alsberry_ v. _Hawkins_, the right of expatriation was recognized as a practical and fundamental doctrine of America. There was no uniform rule so far as the states are severally concerned, and none such assumed in respect of the United States.

In 1859, Attorney General Black thus advised the President ([Rights of Expatriation], 9 Ops. Atty. Gen. 356): "The natural right of every free person, who owes no debts and is not guilty of any crime, to leave the country of his birth, in good faith and for an honest purpose, the privilege of throwing off his natural allegiance and substituting another allegiance in its place—the general right, in one word, of expatriation, is incontestable. I know that the common law of England denies it; that the judicial decisions of that country are opposed to it; and that some of our own courts, misled by British authority, have expressed, though not very decisively, the same opinion. But all this is very far from settling the question. The municipal code of England is not one of the sources from which we derive our knowledge of international law. We take it from natural reason and justice, from writers of known wisdom, and from the practice of civilized nations. All these are opposed to the doctrine of perpetual allegiance."

In the opinion of the Attorney General, the United States, in recognizing the right of expatriation, declined, from the beginning, to accept the view that rested the obligation of the citizen on feudal principles, and proceeded on the law of nations, which was in direct conflict therewith.

And the correctness of this conclusion was specifically affirmed not many years after, when the right, as the natural and inherent right of all people and fundamental in this country, was declared by Congress in the act of July 27, 1868 (15 Stat. at L. 223, chap. 249), carried forward into §§ 1999 and 2000 of the Revised Statutes, in 1874.

*It is beyond dispute that the most vi-[714] tal constituent of the English common-law rule has always been rejected in respect of citizenship of the United States.

Whether it was also the rule at common law that the children of British subjects born abroad were themselves British subjects—nationality being attributed to parentage instead of locality—has been variously determined. If this were so, of course the statute of Edw. III. was declaratory, as was the subsequent legislation. But if not, then such children were aliens, and the statute of 7 Anne and subsequent statutes must be regarded as in some sort acts of naturalization. On the other hand, it seems to me that the rule _partus sequitur patrem_ has always applied to children of our citizens born abroad and that the acts of Congress on this subject are clearly declaratory, passed out of abundant caution to obviate misunderstandings which might arise from the prevalence of the contrary rule elsewhere.

Section 1993 of the Revised Statutes pro-

vides that children so born "are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." Thus a limitation is prescribed on the passage of citizenship by descent beyond the second generation if then surrendered by permanent nonresidence, and this limitation was contained in all the acts from 1790 down. Section 2172 provides that such children shall "be considered as citizens thereof."

The language of the statute of 7 Anne is quite different in providing that "the children of all natural-born subjects born out of the ligeance of Her Majesty, her heirs and successors, shall be deemed, adjudged, and taken to be natural-born subjects of this kingdom, to all intents, constructions, and purposes whatsoever."

In my judgment, the children of our citizens born abroad were always natural born citizens from the standpoint of this government. If not, and if the correct view is that they were aliens but collectively naturalized under the acts of Congress which recognized them as natural born, then those born since the 14th
715] Amendment are not citizens at all, *unless they have become such by individual compliance with the general laws for the naturalization of aliens, because they are not naturalized "in the United States."

By the 5th clause of the 1st section of article 2 of the Constitution it is provided that: "No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of the Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States."

In the convention it was, says Mr. Bancroft, "objected that no number of years could properly prepare a foreigner for that place; but as men of other lands had spilled their blood in the cause of the United States, and had assisted at every stage of the formation of their institutions, on the 7th of September it was unanimously settled that foreign-born residents of fourteen years who should be citizens at the time of the formation of the Constitution are eligible to the office of President." 2 Bancroft, Hist. U. S. Const. 192.

Considering the circumstances surrounding the framing of the Constitution, I submit that it is unreasonable to conclude that "natural-born citizens" applied to everybody born within the geographical tract known as the United States, irrespective of circumstances: and that the children of foreigners, happening to be born to them while passing through the country, whether of royal parentage or not, or whether of the Mongolian, Malay, or other race, were eligible to the Presidency, while children of our citizens, born abroad, were not.

By the 2d clause of the 2d section of article 1 it is provided that: "No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen;" and by the 3d clause of § 3, that: "No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen."

*At that time the theory largely ob-[716
tained, as stated by Mr. Justice Story, in his Commentaries on the Constitution, "that every citizen of a state is *ipso facto* a citizen of the United States." § 1693.

Mr. Justice Curtis, in *Dred Scott* v. *Sandford*, 60 U. S. 19 How. 577 [15: 772], expressed the opinion that under the Constitution of the United States "every free person born on the soil of a state, who is a citizen of that state by force of its Constitution or laws, is also a citizen of the United States." And he said: "Among the powers unquestionably possessed by the several states was that of determining what persons should, and what persons should not be citizens. It was practicable to confer on the government of the Union this entire power. It embraced what may, well enough for the purpose now in view, be divided into three parts. *First:* The power to remove the disabilities of alienage, either by special acts in reference to each individual case, or by establishing a rule of naturalization to be administered and applied by the courts. *Second:* Determining what persons should enjoy the privileges of citizenship, in respect to the internal affairs of the several states. *Third:* What native-born persons should be citizens of the United States.

"The first-named power, that of establishing a uniform rule of naturalization, was granted; and here the grant, according to its terms, stopped. Construing a Constitution containing only limited and defined powers of government, the argument derived from this definite and restricted power to establish a rule of naturalization must be admitted to be exceedingly strong. I do not say it is necessarily decisive. It might be controlled by other parts of the Constitution. But when this particular subject of citizenship was under consideration, and, in the clause specially intended to define the extent of power concerning it, we find a particular part of this entire power separated from the residue, and conferred on the general government, there arises a strong presumption that this is all which is granted, and that the residue is left to the states and to the people. And this presumption is, in my opinion, converted into a certainty, by an examination of all such other clauses of the Constitution as touch this subject."

*But in that case Mr. Chief Justice Ta-[717
ney said: "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of the sovereignty. . . . In discussing this question we must not confound the rights of citizenship which a state may confer within its own limits, and the rights of citizenship as a member of the Union.

It does not by any means follow, because he has all the rights and privileges of a citizen of a state, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a state, and yet not be entitled to the rights and privileges of a citizen in any other state. For, previous to the adoption of the Constitution of the United States, every state had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the state, and gave him no rights or privileges in other states beyond those secured to him by the laws of nations and the comity of states. Nor have the several states surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each state may still confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other states. The rights which he would acquire would be restricted to the state which gave them. The Constitution has conferred on Congress the right to establish a uniform rule of naturalization and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no state, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of the state under the Federal gov-
718] ernment, *although, so far as the state alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the state attached to that character."

Plainly the distinction between citizenship of the United States and citizenship of a state thus pointed out, involved then, as now, the complete rights of the citizen internationally as contradistinguished from those of persons not citizens of the United States.

The English common-law rule recognized no exception in the instance of birth during the mere temporary or accidental sojourn of the parents. As allegiance sprang from the place of birth, regardless of parentage and supervened at the moment of birth, the inquiry whether the parents were permanently or only temporarily within the realm was wholly immaterial. And it is settled in England that the question of domicil is entirely distinct from that of allegiance. The one relates to the civil, and the other to the political, status. *Udny* v. *Udny*, L. R. 1 H. L. Sc. App. Cas. 457.

But a different view as to the effect of permanent abode on nationality has been expressed in this country.

In his work on Conflict of Laws, § 48, Mr. Justice Story treating the subject as one of public law, said: "Persons who are born in a country are generally deemed to be citizens and subjects of that country. A reasonable qualification of the rule would seem to be that it should not apply to the children of parents who were *in itinere* in the country, or who were abiding there for temporary purposes, as for health or curiosity or occasional business. It would be difficult, however, to assert, that in the present state of public law such a qualification is universally established."

Undoubtedly all persons born in a country are presumptively citizens thereof, but the presumption is not irrebuttable.

In his lectures on Constitutional Law, p. 279, Mr. Justice Miller remarked: "If a stranger or traveler passing through, or temporarily residing in, this country, who has not himself been naturalized, and who claims to owe no allegiance to our government, has a child born here which goes out of the country *with its[719 father, such child is not a citizen of the United States, because it was not subject to its jurisdiction."

And to the same effect are the rulings of Mr. Secretary Frelinghuysen in the matter of Hausding and Mr. Secretary Bayard in the matter of Greisser.

Hausding was born in the United States, went to Europe, and, desiring to return, applied to the minister of the United States for a passport, which was refused on the ground that the applicant was born of Saxon subjects temporarily in the United States. Mr. Secretary Frelinghuysen wrote to Mr. Kasson, our minister: "You ask, 'Can one born a foreign subject, but within the United States, make the option after his majority, and while still living abroad, to adopt the citizenship of his birthplace? It seems not, and that he must change his allegiance by emigration and legal process of naturalization.' Sections 1992 and 1993 of the Revised Statutes clearly show the extent of existing legislation; that the fact of birth, under circumstances implying alien subjection, establishes of itself no right of citizenship; and that the citizenship of a person so born is to be acquired in some legitimate manner through the operation of statute. No statute contemplates the acquisition of the declared character of an American citizen by a person not at a time within the jurisdiction of the tribunal of record which confers that character."

Greisser was born in the state of Ohio in 1867, his father being a German subject and domiciled in Germany, to which country the child returned. After quoting the act of 1866 and the 14th Amendment, Mr. Secretary Bayard said: "Richard Greisser was no doubt born in the United States, but he was on his birth 'subject to a foreign power,' and 'not subject to the jurisdiction of the United States.' He was not, therefore, under the statute and the Constitution, a citizen of the United States by birth; and it is not pretended that he has any other title to citizenship." 2 Whart. Int. Dig. 399.

The civil rights act became a law April 9, 1866 (14 Stat. at L. 27, chap. 31), and provided: "That all persons born in the United States and not subject to any foreign power, excluding Indians *not taxed, are hereby declared[720 to be citizens of the United States." And this was re enacted June 22, 1874, in the Revised Statutes, § 1992.

The words "not subject to any foreign power" do not in themselves refer to mere territorial jurisdiction, for the persons referred to

are persons born in the United States. All such persons are undoubtedly subject to the territorial jurisdiction of the United States, and yet the act concedes that nevertheless they may be subject to the political jurisdiction of a foreign government. In other words, by the terms of the act all persons born in the United States, and not owing allegiance to any foreign power, are citizens.

The allegiance of children so born is not the local allegiance arising from their parents merely being domiciled in the country, and it is single and not double allegiance. Indeed double allegiance in the sense of double nationality has no place in our law, and the existence of a man without a country is not recognized.

But it is argued that the words "and not subject to any foreign power" should be construed as excepting from the operation of the statute only the children of public ministers and of aliens born during hostile occupation.

Was there any necessity of excepting them? And if there were others described by the words, why should the language be construed to exclude them?

Whether the immunity of foreign ministers from local allegiance rests on the fiction of extraterritoriality or on the waiver of territorial jurisdiction by receiving them as representatives of other sovereignties, the result is the same.

They do not owe allegiance otherwise than to their own governments, and their children cannot be regarded as born within any other.

And this is true as to the children of aliens within territory in hostile occupation, who necessarily are not under the protection of, nor bound to render obedience to, the sovereign whose domains are invaded; but it is not pretended that the children of citizens of a government so situated would not become its citizens at their birth, as the permanent allegiance [721] *of their parents would not be severed by the mere fact of the enemy's possession.

If the act of 1866 had not contained the words "and not subject to any foreign power," the children neither of public ministers nor of aliens in territory in hostile occupation would have been included within its terms on any proper construction, for their birth would not have subjected them to ties of allegiance, whether local and temporary, or general and permanent.

There was no necessity as to them for the insertion of the words although they were embraced by them.

But there were others in respect of whom the exception was needed, namely, the children of aliens, whose parents owed local and temporary allegiance merely, remaining subject to a foreign power by virtue of the tie of permanent allegiance, which they had not severed by formal abjuration or equivalent conduct, and some of whom were not permitted to do so if they would.

And it was to prevent the acquisition of citizenship by the children of such aliens merely by birth within the geographical limits of the United States that the words were inserted.

Two months after the statute was enacted, on June 16, 1866, the 14th Amendment was proposed, and declared ratified July 28, 1868. The 1st clause of the 1st section reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." The act was passed and the Amendment proposed by the same Congress, and it is not open to reasonable doubt that the words "subject to the jurisdiction thereof" in the Amendment were used as synonymous with the words "and not subject to any foreign power" of the act.

The jurists and statesmen referred to in the majority opinion, notably Senators Trumbull and Reverdy Johnson, concurred in that view, Senator Trumbull saying: "What do we mean by 'subject to the jurisdiction of the United States?' Not owing allegiance to anybody else; that is what it means." And Senator Johnson: "Now, all that this Amendment provides *is that all persons born within the [722] United States and not subject to some foreign power—for that no doubt is the meaning of the committee who have brought the matter before us—shall be considered as citizens of the United States." Cong. Globe, 1st sess. 39th Cong. 2893 *et seq.*

This was distinctly so ruled in *Elk* v. *Wilkins*, *infra;* and no reason is perceived why the words were used if they apply only to that obedience which all persons, not possessing immunity therefrom, must pay the laws of the country in which they happen to be.

Dr. Wharton says that the words "subject to the jurisdiction" must be construed in the sense which international law attributes to them, but that the children of our citizens born abroad, and of foreigners born in the United States have the right on arriving at full age to elect one allegiance and repudiate the other. Whart. Confl. Laws, §§ 10–12.

The Constitution and statutes do not contemplate double allegiance, and how can such election be determined? By § 1993 of the Revised Statutes, the citizenship of the children of our citizens born abroad may be terminated in that generation by their persistent abandonment of their country; while by §§ 2167 and 2168, special provision is made for the naturalization of alien minor residents on attaining majority by dispensing with the previous declaration of intention and allowing three years of minority on the five years' residence required; and also for the naturalization of children of aliens whose parents have died after making declaration of intention. By § 2172 children of naturalized citizens are to be considered citizens.

While, then, the naturalization of the father carries with it that of his minor children, and his declaration of intention relieves them from the preliminary steps for naturalization, and minors are allowed to count part of the residence of their minority on the whole term required and are relieved from the declaration of intention, the statutes make no provision for formal declaration of election by children born in this country of alien parents on attaining majority.

The point, however, before us, is whether permanent *allegiance is imposed at [723] birth without regard to circumstances—permanent until thrown off and another allegiance acquired by formal acts—not local and determined by a mere change of domicil.

The 14th Amendment came before the court in the *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 73 [21: 394, 408], at December term, 1872 (the cases having been brought up by writ of error in May, 1870, 77 U. S. 10 Wall. 273 [19: 915]), and it was held that the first clause was intended to define citizenship of the United States and citizenship of a state, which definitions recognized the distinction between the one and the other; that the privileges and immunities of citizens of the states embrace generally those fundamental civil rights for the security of which organized society was instituted, and which remain, with certain exceptions mentioned in the Federal Constitution, under the care of the state governments; while the privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the national government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof; and that it is the latter which are placed under the protection of Congress by the second clause.

And Mr. Justice Miller, delivering the opinion of the court, in analyzing the first clause, observed that "the phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States."

That eminent judge did not have in mind the distinction between persons charged with diplomatic functions and those who were not, but was well aware that consuls are usually the citizens or subjects of the foreign states from which they come, and that, indeed, the appointment of natives of the places where the consular service is required, though permissible, has been pronounced objectionable in principle.

His view was that the children of "citizens or subjects of foreign states" owing permanent allegiance elsewhere and only local obedience here, are not otherwise subject to the jurisdiction of the United States than are their parents.

724] *Mr. Justice Field dissented from the judgment of the court, and subsequently in the case of *Look Tin Sing*, 10 Sawy. 353, in the circuit court for the district of California, held children born of Chinese parents in the United States to be citizens, and the cases subsequently decided in the ninth circuit followed that ruling. Hence the conclusion in this case which the able opinion of the district judge shows might well have been otherwise.

I do not insist that, although what was said was deemed essential to the argument and a necessary part of it, the point was definitely disposed of in the *Slaughter-House Cases*, particularly as Chief Justice Waite in *Minor* v. *Happersett*, 88 U. S. 21 Wall. 167 [22: 628], remarked that there were doubts, which for the purposes of the case then in hand, it was not necessary to solve. But that solution is furnished in *Elk* v. *Wilkins*, 112 U. S. 101 [28: 646], where the subject received great consideration, and it was said:

By the 13th Amendment of the Constitution slavery was prohibited. The main object of the opening sentence of the 14th Amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes (*Scott* v. *Sandford*, 60 U. S. 19 How. 393 [15: 691]; and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and *owing no allegiance to any alien power*, should be citizens of the United States and of the state in which they reside. *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 73 [21: 394, 408]; *Strauder* v. *West Virginia*, 100 U. S. 303, 306 [25: 664, 665].

"This section contemplates two sources of citizenship, and two sources only: birth and naturalization. The persons declared to be citizens are 'all persons born or naturalized in the United States and subject to the jurisdiction thereof.' The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but *completely subject to their political jurisdiction*, and *owing them direct* and *immediate allegiance*. And the words relate to the time of birth in the one case, as they do *to the time of [725 naturalization in the other. *Persons not thus subject to the jurisdiction of the United States at the time of birth* cannot become so afterwards, except by being naturalized, either individually, as by proceeding under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired."

To be "completely subject" to the political jurisdiction of the United States is to be in no respect or degree subject to the political jurisdiction of any other government.

Now I take it that the children of aliens whose parents have not only not renounced their allegiance to their native country, but are forbidden by its system of government, as well as by its positive laws, from doing so, and are not permitted to acquire another citizenship by the laws of the country into which they come, must necessarily remain themselves subject to the same sovereignty as their parents, and cannot, in the nature of things, be, any more than their parents, completely subject to the jurisdiction of such country.

Generally, speaking, I understand the subjects of the Emperor of China—that ancient Empire, with its history of thousands of years, and its unbroken continuity in belief, traditions, and government, in spite of revolutions and changes of dynasty—to be bound to him by every conception of duty and by every principle of their religion, of which filial piety is the first and greatest commandment; and formerly, perhaps still, their penal laws denounced the severest penalties on those who renounced their country and allegiance, and their abettors; and, in effect, held the relatives at home of Chinese in foreign lands as hostage for their loyalty.† And *whatever concession [726

†The fundamental laws of China have remained practically unchanged since the second century before Christ. The statutes have from time to time undergone modifications, but there does not seem to be any English or French translation of the Chinese Penal Code later than that by Staunton, published in 1810. That Code provided: "All persons renouncing their country and allegiance, or devising the means thereof, shall be beheaded; and in the punishment of this offense, no distinction shall be made between principals and accesso-

may have been made by treaty in the direction of admitting the rights of expatriation in some sense, they seem in the United States to have remained pilgrims and sojourners as all their fathers were. 149 U. S. 717 [37: 914]. At all events, they have never been allowed by our laws to acquire our nationality, and, exeept in sporadic instances, do not appear ever to have desired to do so.

The 14th Amendment was not designed to accord citizenship to persons so situated and to cut off the legislative power from dealing with the subject.

The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps toward becoming citizens of a country is as absolute and unqualified as the right to prohibit and prevent their entrance into the country. 149 U. S. 707 [37: 911].

But can the persons expelled be subjected to "cruel and unjust punishments" in the process of expulsion, as would be the case if children born to them in this country were separated from them on their departure, because citizens of the United States? Was it intended by this amendment to tear up parental relations by the roots?

The 15th Amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Was it intended thereby that children of aliens should, by virtue of being born in the United 727]*States, be entitled on attaining majority to vote irrespective of the treaties and laws of the United States in regard to such aliens?

In providing that persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens, the 14th Amendment undoubtedly had particular reference to securing citizenship to the members of the colored race, whose servile status had been obliterated by the 13th Amendment, and who had been born in the United States, but were not and never had been subject to any foreign power. They were not aliens (and even if they could be so regarded, this operated as a collective naturalization), and their political status could not be affected by any change of the laws for the naturalization of individuals.

Nobody can deny that the question of citizenship in a nation is of the most vital importance. It is a precious heritage, as well as an inestimable acquisition; and I cannot think that any safeguard surrounding it was intended to be thrown down by the Amendment.

In suggesting some of the privileges and immunities of national citizenship, in the *Slaughter-House Cases*, Mr. Justice Miller said: "Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States."

Mr. Hall says in his work on Foreign Jurisdiction, etc., §§ 2, 5, the principle is that "the legal relations by which a person is encompassed in his country of birth and residence cannot be wholly put aside when he goes abroad for a time; many of the acts which he may do outside his native state have inevitable consequences within it. He may for many purposes be temporarily under the control of another sovereign than his own, and he may be bound to yield to a foreign government a large measure of obedience; but his own state possesses a right to his allegiance; he is still an integral part of the national community. A state, therefore, can enact laws *enjoin-[728 ing or forbidding acts, and defining legal relations, which apply to its subjects abroad in common with those within its dominions. It can declare under what conditions it will regard as valid acts done in foreign countries, which profess to have legal effect; it can visit others with penalties; it can estimate circumstances and facts as it chooses." On the other hand, the "duty of protection is correlative to the rights of a sovereign over his subjects; the maintenance of a bond between a state and its subjects while they are abroad implies that the former must watch over and protect them within the due limit of the rights of other states. . . . It enables governments to exact reparation for oppression from which their subjects have suffered, or for injuries done to them otherwise than by process of law; and it gives the means of guarding them against the effect of unreasonable laws, of laws totally out of harmony with the nature or degree of civilization by which a foreign power affects to be characterized, and finally of an administration of the laws bad beyond a certain point. When in these directions a state grossly fails in its duties; when it is either incapable of ruling, or rules with patent injustice, the right of protection emerges in the form of diplomatic remonstrance, and in extreme cases of ulterior measures. It provides a material sanction for rights; it does not offer a theoretic foundation. It does not act within a foreign territory with the consent of the sovereign; it acts against him contentiously from without."

The privileges or immunities which, by the 2d clause of the Amendment, the states are forbidden to abridge, are the privileges or immunities pertaining to citizenship of the United States, but that clause also places an inhibition on the states from depriving any person of life, liberty, or property, and from denying "to any

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ries. The property of all such criminals shall be confiscated, and their wives and children distributed as slaves to the great officers of state. . . . The parents, grandparents, brothers and grandchildren of such criminals, whether habitually living with them under the same roof or not, shall be perpetually banished to the distance of 2,000 *lee*.

"All those who purposely conceal and connive at the perpetration of this crime shall be strangled. Those who inform against, and bring to justice, criminals of this description, shall be rewarded with the whole of their property.

"Those who are privy to the perpetration of this crime, and yet omit to give any notice or information thereof to the magistrate, shall be punished with 100 blows and banished perpetually to the distance of 3,000 *lee*.

"If the crime is contrived, but not executed, the principal shall be strangled, and all the accessories shall, each of them, be punished with 100 blows, and perpetual banishment to the distance of 3,000 *lee*. . . ." Staunton's Penal Code of China, 272, § 255.

person within its jurisdiction the equal protection of the laws," that is, of its own laws—the laws to which its own citizens are subjected.

The jurisdiction of the state is necessarily local, and the limitation relates to rights primarily secured by the states, and not by the United States. Jurisdiction as applied to the general government embraces international re-[729] lations; as *applied to the state, it refers simply to its power over persons and things within its particular limits.

These considerations lead to the conclusion that the rule in respect of citizenship of the United States prior to the 14th Amendment differed from the English common-law rule in vital particulars, and, among others, in that it did not recognize allegiance as indelible, and in that it did recognize an essential difference between birth during temporary, and birth during permanent, residence. If children born in the United States were deemed presumptively and generally citizens, this was not so when they were born of aliens whose residence was merely temporary, either in fact, or in point of law.

Did the 14th Amendment impose the original English common-law rule as a rigid rule on this country?

Did the Amendment operate to abridge the treaty-making power, or the power to establish an uniform rule of naturalization?

I insist that it cannot be maintained that this government is unable through the action of the President, concurred in by the Senate, to make a treaty with a foreign government providing that the subjects of that government, although allowed to enter the United States, shall not be made citizens thereof, and that their children shall not become such citizens by reason of being born therein.

A treaty couched in those precise terms would not be incompatible with the 14th Amendment, unless it be held that that Amendment has abridged the treaty-making power.

Nor would a naturalization law excepting persons of a certain race and their children be invalid, unless the Amendment has abridged the power of naturalization. This cannot apply to our colored fellow citizens, who never were aliens—were never beyond the jurisdiction of the United States.

"Born in the United States, and subject to the jurisdiction thereof," and "naturalized in the United States, and subject to the jurisdiction thereof," mean born or naturalized under such circumstances as to be completely subject to that jurisdiction, that is, as completely as citi-[730] zens of the United States, *who are of course not subject to any foreign power, and can of right claim the exercise of the power of the United States on their behalf wherever they may be. When, then, children are born in the United States to the subjects of a foreign power, with which it is agreed by treaty that they shall not be naturalized thereby, and as to whom our own law forbids them to be naturalized, such children are not born so subject to the jurisdiction as to become citizens, and entitled on that ground to the interposition of our government, if they happen to be found in the country of their parents' origin and allegiance, or any other.

Turning to the treaty between the United States and China, concluded July 28, 1868, the ratifications of which were exchanged November 23, 1869, and the proclamation made February 5, 1870, we find that, by its 6th article, it was provided: "Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect of travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. And, reciprocally, Chinese subjects residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization on the citizens of the United States in China, nor upon the subjects of China in the United States."

It is true that in the 5th article, the inherent right of man to change his home or allegiance was recognized, as well as "the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for the purposes of curiosity, of traffic, or as permanent residents."

All this, however, had reference to an entirely voluntary emigration for these purposes, and did not involve an admission of change of allegiance unless both countries assented, but the contrary according to the 6th article.

By the convention of March 17, 1894, it was agreed "that Chinese laborers or Chinese of any other class, either permanently *or tem-[731] porarily residing within the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens."

These treaties show that neither government desired such change nor assented thereto. Indeed, if the naturalization laws of the United States had provided for the naturalization of Chinese persons, China manifestly would not have been obliged to recognize that her subjects had changed their allegiance thereby. But our laws do not so provide, and, on the contrary, are in entire harmony with the treaties.

I think it follows that the children of Chinese born in this country do not, *ipso facto*, become citizens of the United States unless the 14th Amendment overrides both treaty and statute. Does it bear that construction; or, rather, is it not the proper construction that all persons born in the United States of parents permanently residing here and susceptible of becoming citizens, and not prevented therefrom by treaty or statute, are citizens, and not otherwise?

But the Chinese under their form of government, the treaties and statutes, cannot become citizens nor acquire a permanent home here, no matter what the length of their stay may be. Wharton, Confl. Laws, § 12.

In *Fong Yue Ting* v. *United States*, 149 U. S. 698, 717 [37: 905, 914], it was said in respect of the treaty of 1868: "After some years' experience under that treaty, the government of the United States was brought to the opinion that the presence within our territory of large numbers of Chinese laborers, of a distinct

race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests; and therefore requested and obtained from China a modification of the treaty."

It is not to be admitted that the children of persons so situated become citizens by the acci-
*732] dent of birth. On the contrary, *I am of opinion that the President and Senate by treaty and the Congress by naturalization, have the power, notwithstanding the 14th Amendment, to prescribe that all persons of a particular race, or their children, cannot become citizens, and that it results that the consent to allow such persons to come into and reside within our geographical limits does not carry with it the imposition of citizenship upon children born to them while in this country under such consent, in spite of treaty and statute.

In other words, the 14th Amendment does not exclude from citizenship by birth children born in the United States of parents permanently located therein, and who might themselves become citizens; nor, on the other hand, does it arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this government, are and must remain aliens.

Tested by this rule, Wong Kim Ark never became and is not a citizen of the United States, and the order of the district court should be reversed.

I am authorized to say that Mr. Justice Harlan concurs in this dissent.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1897.

Vol. 170.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1897,

AND REPORTED HEREIN,

VOL. 170,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 170 U. S.	Title.	Here in.
1–2	New York Indians v. United States	927
2–5	" " "	928
5–10	" " "	929
10–14	" " "	930
14–15	" " "	931
15–16	" " "	932
16–19	" " "	933
19–22	" " "	934
22–25	" " "	935
25–27	" " "	936
27–30	" " "	937
30–33	" " "	938
33–36	" " "	939
36	Leyson v. Davis	939
37–39	" "	940
39–41	" "	941
41	Budzisz v. Illinois Steel Co.	941
42–44	" " "	942
44–45	" " "	943
45–46	Parsons v. District of Columbia	943
46–49	" " "	944
49–50	" " "	945
50–53	" " "	946
53–56	" " "	947
56–57	" " "	948
57–59	Chicago, B. & Q. R. Co. v. Nebraska, Omaha	948
59–61	" " "	949
61–64	" " "	950
64–67	" " "	951
67–70	" " "	952
70–73	" " "	953
73–76	" " "	954
76–77	" " "	955
78	Missouri, Laclede Gaslight Co., v. Murphy	955
78–81	" " "	956
81–84	" " "	957
84–87	" " "	958
87–90	" " "	959
90–93	" " "	960
93–94	" " "	961
94–96	" " "	962
96–98	" " "	963
98–100	" " "	964
100	Barrow Steamship Co. v. Kane	964
100–103	" " "	965
103–106	Barrow Steamship Co. v. Kane	966
106–109	" " "	967
109–112	" " "	968
112–113	" " "	969
113–114	The John G. Stevens	969
114–115	" "	970
115–118	" "	971
118–121	" "	972
121–123	" "	973
123–126	" "	974
126–127	" "	975
127–128	Louisville Water Co. v. Kentucky	975
128–131	" " "	976
131–133	" " "	977
133	American Surety Co. v. Pauly (No. 1)	977
134–136	" " "	978
136–139	" " "	979
139–141	" " "	980
141–144	" " "	981
144–147	" " "	982
147–150	" " "	983
150–153	" " "	984
153–156	" " "	985
156–159	" " "	986
159–160	" " "	987
160	American Surety Co. v. Pauly (No. 2)	987
161	" " "	988
161–162	" " "	989
162–163	" " "	990
163–164	" " "	991
164–167	" " "	992
167–170	" " "	993
170–172	" " "	994
172–175	" " "	995
175–178	" " "	996
178–181	" " "	997
181–182	" " "	998
182	Kipley v. Illinois, Akin	998
182–184	" " "	999
184–185	" " "	1000
185–187	" " "	1001
187–189	" " "	1002
189	Hawker v. New York	1002
189–190	" "	1003
190–194	" " "	1004
194–195	" " "	1005

Off. Rep. 170 U. S.	Title.	Here in.
195–198	Hawker v. New York	1006
198–201	" "	1007
201–204	" "	1008
204–205	" "	1009
205–206	Kirwan v. Murphy	1009
206–209	" "	1010
209–210	" "	1011
210–211	Humes v. United States	1011
211–213	" "	1012
213–214	Williams v. Mississippi	1012
214–217	" "	1013
217–220	" "	1014
220–223	" "	1015
223–225	" "	1016
226–228	Galveston, H. & S. A. R. Co. v. Texas	1017
228–231	" " "	1018
231–234	" " "	1019
234–237	" " "	1020
237–240	" " "	1021
240–243	" " "	1022
243–245	Houston & T. C. R. Co. v. Texas	1023
245–248	" " "	1024
248–251	" " "	1025
251–254	" " "	1026
254–257	" " "	1027
257–259	" " "	1028
259–262	" " "	1029
262	Selvester v. United States	1029
262–265	" "	1030
265–268	" "	1031
268–271	" "	1032
271	" "	1033
272–273	Calderon v. Atlas Steamship Co.	1033
273–276	" " "	1034
276–279	" " "	1035
279–282	" " "	1036
282	" " "	1037
283	Magoun v. Illinois Trust & Sav. Bank	1037
283–284	" " "	1038
284–285	" " "	1039
285–288	" " "	1040
288–290	" " "	1041
290–293	" " "	1042
293–296	" " "	1043
296–299	" " "	1044
299–302	" " "	1045
302–303	" " "	1046
303	Drake v. Kochersperger	1046
303	Sawyer v. Kochersperger	1046
303	" "	1047
304–305	Williams v. Eggleston	1047
305–308	" "	1048
308–311	" "	1049
311–312	" "	1050
312–313	Shaw v. Kellogg	1050
313–316	" "	1051
317–319	" "	1052
319–322	" "	1053
322–324	" "	1054
324–327	" "	1055
327–330	" "	1056
330–333	" "	1057
333–335	" "	1058
335–338	" "	1059
338–341	" "	1060
341–343	" "	1061
343	Thompson v. Utah	1061
344	" "	1063
344–345	Thompson v. Utah	1064
345–348	" "	1065
348–351	" "	1066
351–353	" "	1067
353–355	" "	1068
355–356	Virginia & A. Coal Co. v. Central R. & B. Co.	1068
356–359	" " "	1069
359–362	" " "	1070
362–365	" " "	1071
365–368	" " "	1072
368–371	" " "	1073
371–372	" " "	1074
372–373	Smith v. United States	1074
373–376	" "	1075
376–379	" "	1076
379–382	" "	1077
382–383	" "	1078
383–384	Stuart v. Easton	1078
384–387	" "	1079
387–390	" "	1080
390–393	" "	1081
393–396	" "	1082
396–399	" "	1083
399–401	" "	1084
401–402	" "	1085
402–404	Jolly v. United States	1085
404–407	" "	1086
407–408	" "	1087
408–409	Havnor v. New York	1087
409–411	" "	1088
412	Rhodes v. Iowa	1088
412–413	" "	1090
413	" "	1091
413–416	" "	1092
416–419	" "	1093
419–422	" "	1094
422–425	" "	1095
425–427	" "	1096
427–430	" "	1097
430–433	" "	1098
433–436	" "	1099
436–438	" "	1100
438	Vance v. W. A. Vandercook Co. (No. 1)	1100
439–440	" " "	1101
440–443	" " "	1102
443–446	" " "	1103
446–449	" " "	1104
449–452	" " "	1105
452–455	" " "	1106
455–458	" " "	1107
458–461	" " "	1108
461–464	" " "	1109
464–466	" " "	1110
466–468	" " "	1111
468–469	Vance v. W. A. Vandercook Co. (No. 2)	1111
469–472	" " "	1112
472–475	" " "	1113
475–477	" " "	1114
477–480	" " "	1115
480–481	" " "	1116
481–483	Andersen v. United States	1116
483–486	" "	1117
486–499	" "	1118
499	" "	1119
499	" "	1120
499–500	" "	1121
500	" "	1122

Off. Rep. 170 U. S.	Title.	Here in.
500–503	Andersen v. United States	1123
503–506	" "	1124
506–509	" "	1125
509–511	" "	1126
511	Plaquemines Tropical Fruit Co. v. Henderson	1126
512–513	" "	1127
513–516	" "	1128
516–519	" "	1129
519–521	" "	1130
522	United States v. Winston	1130
522–524	" "	1131
524–527	" "	1132
527	United States v. Herron	1132
527	" "	1133
527–529	United States v. Garter	1133
529–530	" "	1134
530–531	Texas & P. R. Co. v. Reeder	1134
531–534	" " "	1135
534–537	" " "	1136
537	Westinghouse v. Boyden Power Brake Co.	
	Boyden Power Brake Co. v. Westinghouse	1136
537–538	" " "	1137
538–541	" " "	1138
541–544	" " "	1139
545–547	" " "	1140
547–550	" " "	1141
550–553	" " "	1142
553–556	" " "	1143
556–559	" " "	1144
559–562	" " "	1145
562–566	" " "	1146
566–568	" " "	1147
568–571	" " "	1148
571–574	" " "	1149
574–577	" " "	1150
577–580	" " "	1151
580–583	" " "	1152
583–584	" " "	1153
584–585	Fink v. United States	1153
585–587	" "	1154
588	Wagoner v. Evans	
	Evans v. Wagoner	1154
588–590	" " "	1155
590–593	" " "	1156
593	Provident Life & T. Co. v. Mercer County	1156
593–595	" " "	1157
595–597	" " "	1158
598–600	" " "	1159
600–603	" " "	1160
603–606	" " "	1161
606	" " "	1162
606–608	Ledbetter v. United States	1162
608–611	Ledbetter v. United States	1163
611–614	" "	1164
614	" "	1165
614–615	New York Indians v. United States	1165
615	Holloway v. Dunham	1165
615–618	" "	1166
618–620	" "	1167
621	United States v. Salambier	1167
621–624	" "	1168
624–626	" "	1169
626–628	" "	1170
628	United States v. Lies	1170
628–631	" "	1171
631–634	" "	1172
634–637	" "	1173
637	" "	1174
637–638	Hayes v. United States	1174
639–641	" "	1175
641–642	" "	1176
643–645	" "	1177
645–647	" "	1178
647–650	" "	1179
650–653	" "	1180
653–655	" "	1181
655	The Carib Prince	
	("Wuppermann v. The Carib Prince")	1181
655–657	" "	1182
658–659	" "	1185
659–662	" "	1186
662–665	" "	1187
665	Texas & P. R. Co. v. Archibald	1188
665–668	" " "	1189
668–670	" " "	1190
670–673	" " "	1191
673–674	" " "	1192
675	Kingman & Co. v. Western Mfg. Co.	1192
675–678	" " "	1193
678–681	" " "	1194
681–683	United States v. Coe	1195
683–684	" "	1196
684	" "	1197
684–687	" "	1198
687–690	" "	1199
690–693	" "	1200
693–696	" "	1201
696–698	" "	1202
698–701	" "	1203
701–702	" "	1204
	Stuart v. Hayden	
	Gruetter v. Stuart	1204
	" "	1205
708	Memorandum Cases	1207
707		1218

THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1897.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

1] NEW YORK INDIANS, *Appts.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 1-36.)

Grant to Indian tribes—resolution of Senate—condition subsequent—how construed—repudiation of agreement — documents from the Departments — intention to abandon — when claim abandoned.

1. The grant to Indian tribes by the treaty of Buffalo creek, whereby the tribes ceded to the United States certain lands, and the United States agreed to set apart certain other lands as a permanent home for the Indians, to be held in fee simple by patent from the President, invested a present legal title in the Indians.

2. A resolution by the Senate changing the terms of the Indian treaty cannot be considered a part of it, when it was not published with the treaty or brought to the attention of the Indian tribes or approved by the President.

3. A treaty provision that tribes of Indians who do not agree to remove to land set apart for them within five years, or such other time as the President may appoint, shall forfeit all their interest, constitutes a condition subsequent on which a forfeiture may be declared, but which gives no power to the United States to re-enter by simple executive action for breach of the condition.

4. A condition relied upon to work a forfeiture of title is construed with great strictness.

5. The repudiation by Indian tribes of an agreement to remove to a reservation, after accepting a treaty which made such removal a condition subsequent, must be as formal, as broad, and as unequivocal as the acceptance, in order to justify a forfeiture.

6. Documents emanating from the executive and legislative departments of the government may be judicially noticed on appeal, though they were not incorporated in the findings of the court below.

7. A claim by Indians against the United States for land cannot be deemed abandoned when there has been no intention on the part of the Indians to abandon it or any indication on the part of Congress that it considers it abandoned.

8. To create an abandonment of a claim there must not only be an omission to prosecute, but an intent to forego.

[No. 106.]

Argued December 7, 8, 1896. Ordered for reargument January 11, 1897. Reargued March 2, 3, 1898. Decided April 11, 1898.

APPEAL from a judgment of the Court of Claims dismissing a petition by the New York Indians who were parties to the treaty of Buffalo creek to enforce an alleged liability of the United States for the value of certain lands in Kansas set apart for such Indians and subsequently sold by the United States, and also for moneys agreed to be paid to the Indians upon their removal. *Reversed*, and case remanded, with instructions to enter a judgment for the net amount actually received by the United States for the Kansas lands, without interest, less certain deductions, and for other proceedings.

See same case below, 30 Ct. Cl. 413.

Statement by Mr. Justice **Brown:**

This was a petition by the Indians who were parties to the treaty of Buffalo creek, New York, on January 15, 1838 (7 Stat. at L. 550), to enforce an alleged liability of the United States for *the value of certain lands in Kansas, [2 set apart for these Indians, and subsequently sold by the United States, as well as for certain amounts of money agreed to be paid upon their removal.

These claims were referred, under the act of March 3, 1883 [22 Stat. at L. 485, chap. 116], known as the "Bowman Act," to the court of

NOTE.—*As to Indians and Indian tribes, their status and rights; jurisdiction and control over them,* —see note to Worcester v. Georgia, 8: 483.

As to construction and operation of treaties, see note to United States v. The Amistad, 10: 826.

As to alienage, effect of, as to title to lands, see notes to Griffith v. Godey, 28: 934; and Doe, Governeur, v. Robertson, 6: 488.

As to abandonment of right, what constitutes, see note to Utah Min. & Mfg. Co. v. Dickert & M. Sulphur Co. (Utah) 5 L. R. A. 259.

claims. That court reported its findings to the Senate, January 16, 1892, and thereupon, on January 28, 1893, Congress passed an act to authorize the court of claims to hear and determine these claims and to enter up judgment as if it had original jurisdiction of the case without regard to the statute of limitations. There was a further provision, that from any judgment rendered by that court, either party might appeal to the supreme court of the United States.

The petition, which was filed on February 10, 1893, set forth as the substance of the treaty that the claimants ceded and relinquished to the United States all their right, title, and interest in and to certain lands of the claimants at Green Bay, state of Wisconsin, and in consideration of such cession and relinquishment the United States, in and by said treaty, agreed and guaranteed as follows:

First. To set aside, as a permanent home for all of the claimants, a certain tract of country west of the Mississippi river, described by metes and bounds, and to include eighteen hundred and twenty-four thousand (1,824,000) acres of land, the same to be divided among the different tribes, nations, or bands of the claimants in severalty, according to the number of individuals in each tribe, as set forth in a certain schedule annexed to the said treaty, and designated as Schedule A, upon condition that such of the claimants as should not accept and agree to remove to the country set apart for them within five years, or such other time as the President might from time to time appoint, should forfeit to the United States all interest to the lands so set apart.

Secondly. The United States agreed to protect and defend the claimants in the peaceable possession and enjoyment of their new homes and to secure their right to establish their own government, subject to the legislation of Congress respecting trade and intercourse with the Indians.

3] *Thirdly The United States agreed that the lands secured to the claimants by the treaty should never be included in any state or territory of the Union.

Fourthly. The United States agreed to pay to the several tribes or nations of the claimants, hereinafter mentioned, on their removal west, the following sums respectively, namely: To the St. Regis tribe, five thousand dollars ($5,000); to the Seneca nation, the income annually of one hundred thousand ($100,000), (being part of the money due said nation for lands sold by them in New York, and which sum they authorized to be paid to the United States); to the Cayugas, twenty-five hundred dollars ($2,500) in cash, and the annual income of twenty-five hundred dollars ($2,500); to the Onondagas, two thousand dollars ($2,000) in cash, and the annual income of twenty-five hundred dollars ($2,500); to the Oneidas, six thousand dollars ($6,000) in cash, and to the Tuscaroras, three thousand dollars.

Fifthly. The United States agreed to appropriate the sum of four hundred thousand dollars ($400,000), to be applied from time to time by the President of the United States for the following purposes, namely: To aid the claimants in removing to their new homes and supporting themselves the first year after their removal; to encourage and assist them in being taught to cultivate their lands; to aid them in erecting mills and other necessary houses; to aid them in purchasing domestic animals and farming utensils, and in acquiring a knowledge of the mechanic arts.

By a supplemental article the St. Regis Indians were allowed to remove to the said country if they so desired, but were exempted from obligation so to do.

The treaty of Buffalo creek, having been duly assented to by all the parties thereto, was afterwards, on, to wit, the 4th day of April, A. D. 1840, duly proclaimed; and certain disputes thereunder having arisen, it was afterwards modified in some particulars not having reference to the matter of this claim, and as so modified was again proclaimed on, to wit, the 26th day of August, 1842.

The petition further alleged that at the time of the making *of the treaty of Buffalo creek [4 aforesaid, and for many years prior thereto, the claimants owned and occupied valuable tracts of land in the state of New York, and had improved and cultivated the same and resided thereon, and from the products thereof chiefly sustained themselves.

That the President of the United States never prescribed any time for the removal of the claimants, or any of them, to the lands, or any of them, set apart by the treaty of Buffalo creek, and no provision of any kind was ever made for the actual removal of more than about two hundred and sixty individuals of the claimant tribes, as contemplated by the said treaty; and of this number only thirty-two ever received patents or certificates of allotment of any of the lands mentioned in the first article of the said treaty, and the land allotted to those thirty-two was at the rate of 320 acres each, or 10,240 acres in all.

That after the conclusion of the said treaty of Buffalo creek the United States surveyed and made part of the public domain the lands of Green bay, ceded by the claimants, and sold or otherwise disposed of and conveyed the same and received the consideration therefor.

That the lands west of the Mississippi river, secured to the claimants of the said treaty of Buffalo creek, were set apart by the United States and designated upon the land maps thereof as the New York Indian reservation, and so remained until in or about the year A. D. 1860, at which time the United States surveyed and made part of the public domain the lands aforesaid, and the same were sold or otherwise disposed of by the United States, which received the entire consideration therefor; and the said lands thereafter were, and now are, included within the territorial limits of the state of Kansas. The said lands at the time the same were so appropriated by the United States were of great value, to wit, of the value of one dollar and twenty-five cents ($1.25) per acre and upwards.

That the action of the United States in appropriating the said lands as aforesaid was in pursuance of the proclamation of the President of dates December 3 and 17, 1860, and grew out *of an order of the Secretary of the Interior of [5 the 21st day of March, A. D. 1859; and between the said last-mentioned date and proclamation of

the said lands aforesaid the claimants employed counsel to protect and prosecute their claims in the premises, and asserted that the United States had seized upon the said lands contrary to the obligations of the said treaty, and would not permit the said claimants to occupy the same or make any disposition thereof, and the claimants have steadily since asserted said claim in the premises.

That the sum of $400,000, agreed by the treaty of Buffalo creek to be appropriated by the United States for the purposes aforesaid, only the sum of $20,477 50, was ever so appropriated, except as hereinafter stated, and of this sum only $9,464.08 was actually expended.

The petition further alleged that the Tonawanda band had been paid $256,000 for their interest in the land; that settlement had also been had with the Senecas, and that a special act had been passed authorizing the court of claims to find the facts and enter up judgment, without interest, and that the statute of limitations should not be pleaded as a bar to any recovery.

The petition concluded with a demand for a judgment for the value of the lands and for the amounts that were to be paid in cash.

The court of claims found the facts stated in [6] the margin,† together *with others which are not deemed material to the consideration of the case, and also found as a conclusion of law from these facts that the petition should be dismissed, whereupon the claimants appealed to this court.

Messrs. **Joseph H. Choate, Henry E. Davis,** *George Barker, James B. Jenkins, Jonas H. McGowan,* and *Guion Miller* for appellants, on first argument.

Messrs. **Charles C. Binney** and *Holmes Conrad,* Solicitor General, for appellee, on first argument.

Messrs. **Joseph H. Choate,** *George Barker, James B. Jenkins, Jonas H. McGowan, Henry E. Davis,* and *Guion Miller* for appellants, on reargument.

Messrs. **Charles C. Binney** and *L. A. Pradt,* Assistant Attorney General, for appellee, on reargument.

*Mr. Justice **Brown** delivered the opinion of the court: [8

*The facts in this case are somewhat complicated, but the real question involved is whether the cessions of the Kansas lands to these Indians ever took complete effect, or whether the failure, or rather the refusal, of the Indians to remove to the *lands set apart [9 [10

†Findings of Fact.

1. In 1780 the Six Nations of "New York Indians" consisted of the following nations or tribes: Senecas Cayugas, Onondagas, Oneidas, Tuscaroras, and Mohawks. The Mohawks soon after withdrew to Canada, relinquishing to New York all claim to lands in that state.

The court decides that the Indians described in the jurisdictional act sending this case to this court as, "the New York Indians, being those Indians who were parties to the treaty of Buffalo creek, New York, on the 15th of January, 1838," were the following: Senecas, Onondagas, Onondagas residing on the Seneca reservation, Onondagas at Onondaga, Cayugas, Cayugas residing on the Seneca reservation, Cayuga Indians residing in the state of New York, Tuscaroras, Tuscaroras residing in the state of New York, Oneidas residing in New York, at Green Bay (Wisconsin), and in the Seneca reservation, Oneidas, St. Regis, St. Regis in New York, the American party of the St. Regis residing in the state of New York, Stockbridges, Munsees, Brothertowns.

2. Some of the New York Indians between 1810 and 1816 petitioned the President of the United States for leave to purchase reservations of their western l threm with the privilege of removing to and occupying the same without changing their existing relations and treaties with the government or their right to the annuities promised in those treaties. (February 12, 1816, the Secretary of War, by authority of the President, gave his permission.) In 1820 and 1821 defendant aided some ten Indians, representing plaintiffs, in exploring certain parts of Wisconsin with a view of making arrangements with the Indians residing there for a portion of their country to be inhabited by such of the Six Nations as might choose to emigrate thither. Among the petitioners for leave to purchase reservations were the Onondagas, Senecas, Cayugas, and Oneida nations of New York Indians.

August 18, 1821, the Menominees and Winnebago nations, in consideration of $2,000, chiefly in goods, ceded, released, and quitclaimed all their right, title, and claim in certain lands near Green bay, Wisconsin, amounting to about 500,000 acres, to the Six Nations and the St. Regis, Stockbridge, and Munsee tribes, reserving the right of fishing and the right to occupy "a necessary proportion of the lands for the purposes of hunting, provided that in such use and occupation no waste or depredation should be committed on lands under improvement."

The President's approval of the arrangement found in the treaty of August 18, 1821, was signified February 19, 1822, as follows:

"The within arrangement, entered into between the Six Nations, the St. Regis, Stockbridge, and Munsee nations, of the one part, and the Menominees and Winnebagoes of the other, is approved with the express understanding that the lands thereby conveyed to the Six Nations, the St. Regis, Stockbridge, and Munsee nations are to be held by them in the same manner as they were previously held by the Menominees and Winnebagoes.

"February 19, 1822. James Monroe."

The $2,000 above mentioned was thus paid: In goods, $900 from the Stockbridges, $400 from the Oncidas, $200 from the Tuscaroras, in cash, $500. The Senecas subsequently denied that they had any title to any lands in Wisconsin. It does not appear that the Cayugas or Onondagas claimed any interest in the lands prior to 1860.

3. Permission to secure an extension of the cession in the preceding finding recited was given by the Secretary of War, and thereafter on September 23, 1822, the Menominees, in consideration of $3,000 in goods, made a similar cession of another tract containing at least 5,000,000 acres, rather undefined (adjoining the above), to the Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee nations, the releases promising, however, that the releasors should "have the free permission and privilege of occupying and residing upon the lands" in common with the former.

The President's approval was given March 13, 1823, as follows:

"The foregoing instrument is approved, so far as it conveys to the Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee tribes or nations of Indians that portion of the country therein described which lies between Sturgeon bay, Green bay, Fox river; that part of the former purchase made by said tribes or nations of Indians of the Menominee and Winnebago Indians on the 8th of August, 1821, which lies south of Fox river and a line drawn from the southwestern extremity of said purchase to the head of Sturgeon bay, and no farther, that quantity being deemed sufficient for the use of the first before-mentioned tribes and nations of Indians. It is to be understood, however, that the lands, to the cession of which to the tribes or nations aforesaid the government has assented, are to be held by them in the same manner as they were held by the Menominees previous to concluding and signing the aforegoing instrument, and that the title which they have acquired is not to interfere in any manner whatever with the lands previously acquired or occupied by the government of the United States or its citizens."

October 27, 1823, the Secretary of War officially notified the releasees that the President distinctly wished them to understand that by this partial sanction he did not mean to interfere with, nor

for them within five years, worked *ipso facto*, under the third article of the treaty, a forfeiture of their interest.

1. So far as concerns the legal aspects of the 11]case, it is *unnecessary to inquire whether the government received from the Indians an adequate consideration for its reservation to them of the lands in Kansas. The findings upon this point are in substance that some of the New 12] York Indians, between 1810 *and 1816, with the permission of the President and with some actual aid from the government in making explorations, bought of the Menominee and Winnebago nations all their right, title, and claim to about 500,000 acres of land in Wiscon- 13] sin *in consideration of $2,000, chiefly in goods. This purchase was made for the benefit of the Six Nations and the St. Regis, Stockbridge, and Munsee tribes.

Under a similar permission given by the Secretary of War, *and on September 23, 1822,[14 the Menominees, in consideration of $3,000 in goods, made a similar cession of another tract, containing about 5,000,000 acres, to the Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee nations. Both of these cessions were approved by the President. Thereafter, some of the New York Indians removed to and took possession of the lands in Wisconsin.

It seems, however, that the Menominees were dissatisfied with and repudiated the arrangement, and thereupon entered into two treaties with the United States, by the first of which (August 11, 1827, 7 Stat. at L. 303), they agreed to refer the matter to the President, and by the second of which (February 8, 1831, 7 Stat. at L. 342), protesting that they were under no obligations to recognize any

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in any manner invalidate, their title to all the lands which they had thereby acquired, including those not confirmed by the government, but, on the contrary, he considered their title to every part of the country conveyed to them by the releasors as equally valid as against them; and that what they had done was with the full assent of the government.

Of the consideration above mentioned, $1,000 were paid by the Stockbridges and Munsees, while $1,000 were to be paid by the Oneidas, Tuscaroras, and St. Regis in one year from September 23, 1822, and $1,000 in two years from that date. Of the two latter amounts $1,000 appears to have been paid by the United States out of the funds of the St. Regis about 1825, while $950 were paid by the Brothertown tribe September 18, 1824. In consideration of which the releasees, by an agreement with the Brothertowns, under date of January 8, 1825, ceded to them a small separate tract by metes and bounds, and, after reserving to themselves, for each tribe of the releasees, a similar tract from out the country purchased from the releasors, granted to the Brothertowns an equal, undivided part of all the remaining portion of said purchase. It does not appear whether the Oneidas and Tuscaroras paid any part of the above consideration.

4. The grants set forth in findings 2 and 3 include the lands subsequently ceded by the Menominees to the United States by the treaties of August 11, 1827, and February 8, 1831.

5. Thereafter some New York Indians, belonging to the Onelda, St. Regis, Stockbridge, Munsee, and Brothertown tribes, removed to and took possession of the lands in Wisconsin.

Later, and after 1832, another small portion of the New York Indians removed to the Wisconsin or Green bay lands.

March 14, 1840, the Senecas denied ownership of Wisconsin lands, stating that they determined to have no other home than that of their fathers where they then resided, and, in May and September following, in petitions to the President, the Senate, and the House of Representatives, their council denied that they were parties to the treaty.

6. It does not appear that application was made by the tribes or bands, or any of them, to the government, for removal to the Kansas lands provided for in the Buffalo creek treaty, except as hereafter appears in these findings.

It does not appear that any substantial number of Indians wished to go to Kansas other than those who made up the Hogeboom party (*infra*).

7. In the year 1838, at the time of the negotiation of the treaty of Buffalo creek, the Senecas, the Onondagas, the Oneidas, the Cayugas, the Tuscaroras, and the St. Regis each possessed a reservation of land in the state of New York on which members of the tribes resided, and the right of occupancy of which was secured to them by treaty stipulations. The Cayuga Indians had no separate reservation of their own in the state of New York, but made their home with and resided upon the reservation and lands possessed by the Seneca nation; this they did with the consent of the Senecas, and a portion of the Onondagas did the same.

(The eighth finding is immaterial.)

9. For many years prior to the treaty of Buffalo creek (of 1838) these nations or tribes of Indians had improved and cultivated their lands, on which they resided and from the products of which they chiefly sustained themselves.

The treaty of Buffalo creek, as printed in the seventh volume of the Statutes at Large, contains a misprint on the third line of page 556. The word "Oneidas" is in the origiual treaty "Onondagas," the whole line reading, "Onondagas residing on the Seneca reservation."

10. Extract from Executive Journal of June 11, 1838.

The Senate resumed as in committee of the whole the consideration of the treaty with the New York Indians, and the articles supplemental thereto.

On motion of Mr. Wright, and by unanimous consent, the question was taken on agreeing to the amendments reported from the committee on Indian affairs, and determined in the affirmative, yeas 33.

. . . . . .

No further amendments having been made, the treaty was reported to the Senate, and the amendments were unanimously concurred in.

Mr. White then submitted the following resolution of ratification, embracing the amendments as reported from the committee and adopted by the Senate:

Resolved (two thirds of the senators present concurring), That the Senate advise and consent to the ratification of the treaty made and concluded at Buffalo creek, in the state of New York, the 15th day of January, in the year of our Lord 1838, by Ransom H. Gillet, a commissioner on the part of the United States, and the chiefs, headmen, and warriors of the several tribes of the New York Indians, assembled in council, with the following amendments.

(Here follows a series of amendments striking out original articles 3, 4, 5, 6, 9, and 19, striking out particular words and clauses from other articles, inserting new article 15, and concluding as follows):

Resolved, further (two thirds of the senators present concurring), That the Senate advise and consent to the ratification of the supplemental article to the treaty concluded at Buffalo creek, in the state of New York, January 15, 1838, which was made at the council house of St. Regis on the 13th day of February, 1838: Provided, The chiefs and headmen of St. Regis Indians, residing in New York, will in general council accept of and adopt the aforesaid treaty, as modified by the preceding resolution of ratification.

Provided always, and be it further resolved (two thirds of the Senate present concurring), That the treaty shall have no force or effect whatever, as it relates to any of said tribes, nations, or bands of New York Indians, nor shall it be understood that the Senate have assented to any of the contracts connected with it until the same, with the amendments herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each of said tribes or bands, separately assembled in council, and they have given their free and voluntary assent thereto; and if one or more of said tribes or bands, when consulted as aforesaid, shall freely assent to said treaty as amended, and to their contract connected therewith, it shall be

claim of the New York Indians to any portion of their country. They agreed to set apart as a home for the several tribes of the New York Indians about 500,000 acres of land, for which the United States agreed to pay them $20,000, to be applied to their use. By these treaties a large quantity of other lands was also ceded by the Menominees directly to the United States, three townships of which were set aside for the Stockbridges, Munsees, and Brothertowns.

It sufficiently appears from this statement that the Indians were possessed of some sort of title or interest in a large quantity of lands in Wisconsin, which the government was desirous of acquiring, and for which it was willing to make a large cession in the then unnamed, almost unknown, and wholly unsettled territory, which was subsequently admitted to the Union as the state of Kansas. The consideration was evidently treated as a valuable one, and whether adequate or not would have been sufficient to support a deed between private *parties. Probably, however, the [15 main inducement to the cession was the agreement of the Indians to remove beyond the Mississippi, and whether the agreement of the government to set apart for them a permanent home in this territory was supported by any other consideration which would be deemed a valuable one between private parties, is wholly immaterial so far as the treaty obligations of the government are concerned.

2. The first and one of the most important questions in the case turns upon the nature of the title acquired by the Indians under the treaty. Was it a grant *in præsenti*, or merely an agreement to set apart for the Indians at some future time the lands in question, pro-

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binding and obligatory upon those so assenting, although other or others of said bands or tribes may not give their assent, and thereby cease to be parties thereto: Provided, further, That if any portion or part of said Indians do not emigrate the President shall retain a proper portion of said sum of four hundred thousand dollars, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant three hundred and twenty acres only.

The Senate proceeded by unanimous consent to the consideration of said resolution.

On the question to agree thereto,

It was determined in the affirmative { Yeas.... 32 / Nays ... 2

. . . . . .

Ordered, that the secretary lay this resolution before the President of the United States.

. . . . . .

Proclamation of the Treaty of Buffalo Creek.

Martin Van Buren, President of the United States of America, to all and singular to whom these presents shall come, Greeting:

Whereas a treaty was made and concluded at Buffalo, in the state of New York, on the fifteenth day of January, one thousand eight hundred and thirty-eight, by Ransom H. Gillet, a commissioner on the part of the United States, and the chiefs, headmen, and warriors of the several tribes of the New York Indians, assembled in council;

And whereas the Senate did, by a resolution of the eleventh of June, one thousand eight hundred and thirty-eight, advise and consent to the ratification of said treaty with certain amendments, which treaty so amended is word for word as follows, to wit. . . .

And whereas the Senate did, on the 25th of March, one thousand eight hundred and forty, resolve "that in the opinion of the Senate the treaty between the United States and the Six Nations of New York Indians, together with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to and approved of by said tribes, the Seneca tribe included, and that in the opinion of the Senate the President is authorized to proclaim the treaty as in full force and operation:"

Now, therefore, be it known that I, Martin Van Buren, President of the United States of America, do, in pursuance of the resolutions of the Senate of the eleventh of June, one thousand eight hundred and thirty-eight, and twenty-fifth day of March, one thousand eight hundred and forty, accept, ratify, and confirm said treaty, and every article and clause thereof.

In testimony whereof I have caused the seal of the United States to be hereunto affixed, having signed the same with my hand.

Done at this city of Washington this fourth day of April, one thousand eight hundred and forty, and of the Independence of the United States the sixty-third.

M. Van Buren.

By the President:
[Seal.] John Forsyth,
Secretary of State.

11. The President of the United States never prescribed any time for the removal of the claimants or any of them to the lands or any of them set apart by the treaty of Buffalo creek further than is shown in these findings.

Many of the Indians have protested against any removal. The Onondagas have officially declared that they would not remove, and treaties subsequent to that of 1838 appear in the statutes in relation to this subject-matter. The Tuscaroras still occupy their reservation in New York.

After the amended treaty had been assented to, the Senecas, the Cayugas, and the Onondagas residing with them, and the Tuscaroras continued to protest against the treaty, the Senecas asserting that their declaration of assent was invalid, and that they would never emigrate but on compulsion and requesting (as did also some Onondaga chiefs) that no appropriation be made to carry the treaty into effect. These protests were continued even after the treaty was ratified and until the treaty of May 20, 1842, was made. More than five years from the ratification of the treaty of Buffalo creek the Tuscarora chiefs declared that the tribe would not part with its reservation nor remove from it, whatever a few individuals might do. The Indian protests against the treaty were based upon the following allegations: (*a*) That the treaty had been brought about by corrupt means operating upon the Indians of influence in their tribes, and put in motion by an agent of the preemption owners; (*b*) that a considerable majority of the Indians wished to remain in New York.

After the treaty of May 20, 1842, was ratified, the lands and improvements on the Buffalo creek reservation in New York were appraised, and the Indians thereon gradually withdrew to the Cattaraugus and Alleghany reservations in New York.

12. Prior to November 24, 1845, some of the New York Indians had applied to the Indian office for the proper steps to be taken for their emigration. It was not deemed expedient to enter into any arrangements for this purpose until the department believed that a sufficient number to justify the expenditure incident to the appointment of an agent was prepared to remove.

No provision was made for the actual removal of more than about 260 individuals of the claimant tribes as contemplated by the treaty of Buffalo creek and as shown below. Of this number only 32 ever received patents or certificates of allotment of the lands mentioned in the first article of the treaty and the amount allotted to those 32 was at the rate of 320 acres each, or 10,240 acres in all.

In 1845 Abram Hogeboom represented to the government of the United States that a number of the New York Indians, parties to the treaty of 1838, desired to remove to the Kansas lands and upon such representation, and in conformity with such desire, said Hogeboom was appointed special agent of the government to remove the said Indians to Kansas.

The sum of $9,464.08 of an amount appropriated by Congress was expended in the removal of a party of New York Indians under Hogeboom's direction in 1846.

From Hogeboom's muster-roll, in the Indian office, it appears that 271 were mustered for emigration. The roll shows that of this number 73 did not leave New York with the party; 191 only arrived in Kansas, June 15, 1846; 17 other Indians

vided that they would remove thither within the five years fixed by the third article of the treaty?

By the first article "the several tribes of New York Indians . . . *hereby cede and relinquish* to the United States all their right, title, and interest to the lands secured to them at Green bay;" and by the second article "in consideration of the above cession and relinquishment, . . . the United States *agree to set apart*" a tract of country, containing 1,824,000 acres of land, described by metes and bounds, "as a permanent home for all the New York Indians, . . . to have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section" of the act of May 28, 1830, "with full power and authority in the said Indians to divide said lands among the different tribes, nations, or bands in severalty, with the right to sell and convey to and from each other." By the third article "such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years . . . shall forfeit all interest in the lands so set apart to the United States."

The proper construction to be placed upon similar clauses was the subject of consideration by this court in several cases before the rail road land grant cases, and the conclusion reached that, if from all the language of the statute or treaty, *it was apparent that [16 Congress intended to convey an immediate interest, it will be construed as a grant *in præsenti*.

In the case of *Rutherford* v. *Greene's Heirs*, 15 U. S. 2 Wheat. 196 [4: 218] the state of North Carolina passed an act in 1782 "for the relief of the officers and soldiers in the continental line," and in the 5th section enacted that 25,000 acres of land "*shall be allotted for, and given to*, Major General Nathaniel Greene, his heirs or assigns, within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners," and a further section (7th) provided that the commissioners should "grant certificates to such persons as shall appear to them to have a right to the same." It was contended on the part of the appellant that these words gave nothing; that they were in the future, and not in the present tense, and indicated an intention to give in future, but created no present obligation on the state nor present interest in General Greene. But it was held that, as the act was to be performed in future, the words directing it were necessarily in the future tense, and that, although the land was undefined, the survey afterwards made in pursuance of the act gave

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arrived subsequently; 82 died and 94 returned to New York.

It does not appear that any of the thirty-two Indians to whom allotments were made settled permanently in Kansas.

13. A council of the Senecas, the Cayugas and Onondagas living with them, and the Tuscaroras was called by the Indian commissioner, to be held at Cattaraugus, June 2, 1846, to learn the final wishes of the Indians as to emigration. The commissioner who was sent on the part of the United States reported that the meeting was well attended, but that the chiefs were unanimous in the opinion that scarcely any Indians who wished to emigrate remained. The commissioner also reported that he held an enrolment for two full days, but that only seven persons requested to be enrolled for emigration, and these vouched for five more as wishing to go.

14. The United States, after the conclusion of the treaty of Buffalo creek, surveyed and made part of the public domain the lands of Green bay ceded by the claimants, and sold or otherwise disposed of and conveyed the same and received the consideration therefor except as in these findings shown to the contrary. The reservation to "the first Christian and Orchard parties of Oneida Indians," which was set aside for them by defendants at Green bay, Wisconsin, contained 65,540 acres, all of which has been allotted in severalty and reserved for school purposes except 84.08 acres.

The Stockbridge Indians acquired a reservation in Wisconsin of 11,803 acres, some of which has been allotted in severalty. 9 Stat. at L. 955; 11 Stat. at L. 663, 679; 16 Stat. at L. 404. The United States never acquired any lands in the state of New York from the Indians of that state. The lands ceded in that state by the Indians thereof were ceded for consideration to the state or to the Ogden Land Company, so called. There may have been some small cessions to individuals, but there were none to the United States.

15. Upon the ratification of the Oneida treaty of February 3, 1838, the present Oneida reservation in Wisconsin was surveyed, containing about 65,000 acres. After the ratification of the treaty of Buffalo creek the United States surveyed, made part of the public domain, and sold or otherwise disposed of, the tract at Green bay, the Indian title to which had been ceded by that treaty, except the said Oneida reservation. This was treated as if it had been the reservation excepted from the cession in article 1 of that treaty, which latter reservation was never surveyed, and the bounds of which as given in the said article are not the same as those of the former reservation, although the two reservations cover for the most part the same ground and are of about the same area.

The lands west of the Mississippi secured to the claimants by the treaty of Buffalo creek have been since that treaty surveyed and made a part of the public domain and sold or otherwise disposed of by the United States, which received the consideration therefor; and the said lands were thereafter and now are included within the territorial limits of the state of Kansas. The price realized by the United States for such of said lands as were sold was at the rate of $1.34 per acre, while the cost of surveying, etc., the same was at the rate of about 12 cents per acre, making the net price realized by the United States about $1.22 per acre.

16. By treaty with the Tonawanda band of the Senecas, numbering 650 individuals, the United States, November 5, 1857, in consideration of certain releases of claims under the treaties of 1838 and 1842, agreed to pay and invest, and did pay and invest, for said band the sum of $256,000.

The sum of $256,000 was equivalent to $1 per acre for the lands in Kansas to which the Tonawandas would have been entitled had they all emigrated under the treaty of Buffalo creek, and also to a part of the sum of $400,000 proportioned to their numbers as compared with the whole number of New York Indians, according to the schedule in the treaty. A portion of the fund, all of which was paid and invested as agreed, was applied to the purchase in fee of 7,549.73 acres of the Tonawanda reservation in New York for the tribe's benefit, and the Tonawandas still reside thereon.

17. After March 21, 1859, an order of the Secretary of the Interior was made which directed that the tract of land in Kansas territory known as the New York Indian reserve be surveyed, with a view of allotting a half section each to such of the New York Indians as had removed there under treaty provisions, after which the residue was to become public domain. Thirty-two New York Indians were found to be resident on the land, and allotments were made to them. After this and before the proclamation of the President of said lands as part of the public domain (December 3 and 17, 1860), some of the New York Indians employed counsel to protect and prosecute their claims in the premises, asserting, in the powers of attorney, that the United States had seized upon the said lands, contrary to the obligations of said treaty, and would not permit the said Indians to occupy the same or make any disposition thereof. The said Indians have since asserted their said claims.

(The remaining findings are deemed to be immaterial.)

precision to the title and attached it to the land surveyed.

In reply to the argument that to make this an operative gift the words "are hereby given" should have been used, Mr. Chief Justice Marshall observed: "Were it even true that these words would make the gift more explicit, which is not admitted, it surely cannot be necessary now to say that the validity of a legislative act depends, in no degree, on its containing the technical terms usual in a conveyance. Nothing can be more apparent than the intention of the legislature to order their commissioners to make the allotment, and to give the land, when allotted, to General Greene."

This case was followed in *United States* v. *Brooks*, 51 U. S. 10 How. 442 [13: 489], in which a treaty with the Caddo Indians provided that certain persons "*shall have their right* to the said four leagues of land reserved for them, and their heirs and assigns, forever. The said lands to be taken out of the lands ceded to the United States by the said Caddo nation of Indians, as expressed in the treaty to which these articles [17] are supplementary. *And the said four leagues of land *shall be laid off*," etc. It was held that these words gave to the reservees a fee simple to all rights which the Caddos had in those lands, as fully as any patent from the government could make one.

Fremont v. *United States*, 58 U. S. 17 How. 542 [15: 241], was a case of a Mexican grant of a tract of land known as "Las Mariposas," within certain undefined boundaries. The grant was of 10 square leagues, subject to certain conditions, and was to be made definite by a future survey. The grant purported to convey a present and immediate interest, in consideration of previous public services, and it was decided to be *in præsenti* upon the authority of *Rutherford* v. *Greene's Heirs*, 15 U. S. 2 Wheat. 196 [4: 218],—that the conditions were conditions subsequent, but that noncompliance with them did not amount to a forfeiture of the grant. Two members of the court dissented, being of opinion that the case was controlled by those of *United States* v. *Boisdoré*, 52 U. S 11 How. 63. 96 [13: 605, 619]; *Glenn* v. *United States*, 54 U. S. 13 How. 250, 259 [14: 133, 136], and *Vilemont* v. *United States*, 54 U. S. 13 How. 261 [14: 138].

In the cases arising under the railroad land grants, of which *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall 44 [22: 551], is a leading one, the language of the granting clause was in the present tense, "*there be, and hereby is, granted*," etc.; and it has always been held that these were grants *in præsenti*, although the lands could not be identified until the map of the definite location of the road was filed, when the title, which was previously imperfect, acquired precision and became attached to the land. The doctrine of this case has been affirmed so many times that the question is no longer open to argument here. *Lessieur* v. *Price*, 53 U. S. 12 How. 59 [13: 893]; *Leavenworth, L. & G. R. R. Co.* v. *United States*, 92 U. S. 733 [23: 634]; *Missouri, Kansas, & Texas R. R. Co.* v. *Kansas Pacific R. R. Co.* 97 U. S. 491 [24: 1095]; *Denver & R. G. Railway Company* v. *Alling*, 99 U. S. 463, 475 [25: 438, 444]; *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1 [35: 77]; *Deseret Salt Company* v. *Tarpey*, 142 U. S. 241 [35: 999].

The same doctrine has also been applied to grants of swamp and overflowed lands by the acts of September 28, 1850, and June 10, 1852. *Hannibal & St. J. Railroad Company* v. *Smith*, 76 U. S. 9 Wall. 95 [19: 599]; *Wright* v. *Roseberry*, 121 U. S. 488 [30: 1039].

*One or two cases, which apparently [18 hold a contrary doctrine, are readily reconcilable. That of *Heydenfelt* v. *Daney Gold & Silver Mining Co.* 93 U. S. 634 [23: 995], arose under the school land grant contained in the act of March 21, 1864, enabling the people of Nevada to form a state government. 13 Stat. at L. 30, chap. 36. The 7th section of the act provided "that sections numbered 16 and 36 in every township . . . *shall be, and are hereby, granted*, to said state." These words were held, under the peculiar language of the act, not to constitute a grant *in præsenti*, but an inchoate and incomplete grant until the premises were surveyed by the United States, and the survey properly approved. "We do no seek," said the court, "to depart from this sound rule [in *Schulenberg* v. *Harriman*]; but in this instance, words of qualification restrict the operation of those of present grant. . . . A grant, operating at once, and attaching prior to the surveys by the United States, would deprive Congress of the power of disposing of any part of the lands in Nevada, until they were segregated from those granted. . . . Until the *status* of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them."

In *Hall* v. *Russell*, 101 U. S. 503 [25: 829], the language of the grant was "that *there shall be, and hereby is*, granted to every white settler or occupant of the public lands," and it was held that, as the land was not identified and the grantee was not named, there could not be a present grant. "There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee, and not a present one, the grant will take effect in the future, and not presently. In all the cases in which we have given these words the effect of an immediate and present transfer, it will be found that the law has designated a grantee qualified to take, according to the terms of the law, and actually in existence at the time."

In the case of *Rice* v. *Minnesota & N. W. Railroad Co.* 66 U. S. 1 Black, 358 [17: 147], the granting clause of the act was in the present tense, but there was a further clause expressly declaring that no title should vest nor *any patent issue till certain portions of the [19 road had been completed.

From this summary of cases it is evident that the language of the granting clause is not conclusive, but the intent of Congress must be gathered from the whole scope of the instrument, and the facts to which it was intended to apply. Applying the principle of the cases above cited to the one under consideration, we are of the opinion that the grant in question was intended to invest a present legal title in the Indians for the following reasons:

First. There is no doubt that the cession by

the Indians of their interest in the Wisconsin lands, in the first article of the treaty, was an absolute, unconditional, and immediate grant, and it is improbable that the Indians would have consented, or that the United States would desire, that they should accept from the government a mere promise to set apart for them in the future the tract in Kansas. If we are to adopt such a construction it would follow that the title of the Indians, not only to the tract in Kansas, but to the lands in Wisconsin, was made dependent upon their removal to their new home. While it might be reasonably contended that their failure to remove should result in a cancelation of the treaty and a restoration to them of their rights in the Wisconsin lands, that construction is precluded by the language of the first article, which contains a present and irrevocable grant of the Wisconsin lands and puts it beyond their power to revoke the bargain. The object of the treaty was evidently to effect an exchange of lands in pursuanee of the act of May 28, 1830 (4 Stat. at L. 411, chap. 148) the 3d section of which provides "that in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made that the United States will forever secure and guarantee to them, and their heirs and successors, the country so exchanged with them; and, *if they prefer it*, that the United States will cause a patent or grant to be made and executed to them for the same; Provided always, That such lands shall revert to the United States, if the Indians become extinct or abandon the same."

20] *Second. The lands covered by the treaty were identified, described by metes and bounds, and an appropriation was made to aid in the immediate removal of the Indians to their new home. There was no uncertainty as to the lands granted, or as to the identity of the grantees, which, in the case of *Heydenfelt* v. *Daney Gold & S. Min. Co.* 93 U. S. 634 [23: 995], was held to turn it into a grant *in futuro*.

Third. While the granting clause is in the future tense, an agreement to set apart, the *habendum* clause is in the present tense: "To have and to hold the same in fee simple to the said tribes or nations of Indians, by patent from the President of the United States, issued in conformity with the provisions of the third section of the act entitled 'An Act to Provide for an Exchange of Lands with the Indians Residing in any of the States or Territories, and for their Removal West of the Mississippi,' approved on the 28th day of May, 1830, with full power and authority in the said Indians to divide said land among the different tribes, nations, or bands in severalty, with the right to sell and convey to and from each other." The object of the *habendum* clause is said to be "to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use." Sheppard's Touchstone, 75. It may explain, enlarge, or qualify, but cannot contradict or defeat, the estate granted by the premises, and where the grant is uncertain or indefinite concerning the estate intended to be vested in the grantee, the *habendum* performs the office of defining, qualifying, or controling it. Jones, Real Prop. § 563; Devlin, Deeds, § 215.

In this case if the *habendum* clause were alone considered, there could be no doubt whatever that the Indians would take a present title to a fee simple. There is certainly no conflict between the granting and *habendum* clauses. Admitting that the former, if standing alone, would engender a doubt as to when the grant should take effect, the *habendum* clause removes that doubt, and imports a present surrender of a defined tract. The addition of the words "by a patent from the President of the United States" is immaterial, since it refers to *and is intended to be construed[21 in connection with the 3d section of the act of May 28, 1830, in which the issue of a patent is merely spoken of as an optional or preferential method of acquiring full title to the land.

Fourth. By article 10 a special provision was made for the Senecas by which the easterly part of the tract was set apart for them, and a deed made by them of their New York lands to Ogden and Fellows was recognized and approved of by the government, and the consideration invested for their use. And by article 14 another special tract of the lands granted was set off for the Tuscaroras, who conveyed to the United States 5,000 acres of land in New York to be held in trust for them, and another deed to Ogden and Fellows of lands in New York was assented to and sanctioned by the government.

These proceedings, by which these tribes devested themselves of their title to lands in New York, indicate an intention on the part, both of the government and the Indians, that they should take immediate possession of the tracts set apart for them in Kansas.

3. There is, however, another consideration which must not be overlooked in this connection, and which raises the only difficult point in the interpretation of the treaty. It is found by the court below (finding 10) that, when the treaty was laid before the Senate for ratification, June 11, 1838, the third, fourth, fifth, sixth, ninth, and nineteenth of the original articles were stricken out, several others were amended by eliminating particular clauses, a new article was added as article 15, and the ratification made subject to the following condition:

"Provided always, and be it further resolved (two thirds of the Senate present concurring), That the treaty shall have no force or effect whatever, as it relates to any of said tribes, nations, or bands of New York Indians, nor shall it be understood that the Senate have assented to any of the contracts connected with it until the same, with the amendments herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each of said tribes or bands, separately assembled in council, and they have given *their[22 free and voluntary assent thereto; and if one or more of said tribes or bands, when consulted as aforesaid, shall freely assent to said treaty as amended, and to their contract connected therewith, it shall be binding and obligatory upon those so assenting, although other or others of said bands or tribes may not give their assent and thereby cease to be parties thereto: Provided, further, That if any portion

or part of said Indians do not emigrate the President shall retain a proper proportion of said sum of four hundred thousand dollars, and shall also deduct from the quantity of land allowed west of the Mississippi such number of acres as will leave to each emigrant three hundred and twenty acres only."

Now, if the above proviso (that if any portion or part of said Indians do not emigrate, the President shall . . . deduct from the quantity of land allowed west of the Mississippi such numbers of acres as will leave to each emigrant 320 acres only) be considered a part of the treaty and, to be respected as such, it would be difficult to avoid the conclusion that the grant of Kansas lands was not intended to take immediate effect, since the power to *deduct* (differing in that respect from the power to *forfeit* contained in the third article) would show an intention that the grant as a whole should not take immediate effect, and would imply that it was extended only to 320 acres to each emigrant. If the allotment is to be treated as one of 320 acres for each emigrant and not of the entire tract as specified in article two, the residue, of course, belongs to the government.

But did this resolution ever become operative? It is not found in the original nor in the published copy of the treaty, nor in the proclamation of the President, which recites that the Senate did, by a resolution of the 11th of June, 1838, "advise and consent to the ratification of said treaty with certain amendments; *which treaty, as so amended, is word for word as follows*, to wit:" (Here follows a copy of the treaty as published in 7 Stat. at L. 550.) But no allusion is here made to the final resolution or its proviso. This is the more remarkable, as every other amendment made by the Senate appears in the treaty as published, while no refer-[23]ence whatever *is made to this—the reason probably being that the resolution was mainly directory in its character, requiring that the treaty be fully and fairly explained by the commissioner to each of the tribes separately assembled in council, and that they should give their free and voluntary assent thereto. The proviso may also have been well considered as merely directory to the President, but in any event it is difficult to see how it can be regarded as part of the treaty or as limiting at all the terms of the grant.

The power to make treaties is vested by the Constitution in the President and Senate, and, while this proviso was adopted by the Senate, there is no evidence that it ever received the sanction or approval of the President. It cannot be considered as a legislative act, since the power to legislate is vested in the President, Senate, and House of Representatives. There is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it. The proviso never appears to have been called to the attention of the tribes, who would naturally assume that the treaty, embodied in the Presidential proclamation, contained all the terms of the arrangement. It is true that the proclamation recites that the Senate did, on March 25, 1840, resolve that the treaty, "together with the amendments proposed by the Senate of the 11th of June, 1838, have been satisfactorily acceded to and approved of by said tribes," but, as the proclamation purported to set forth the treaty "word for word" as so amended, of course the amendments referred to were those embodied in the treaty as published in the proclamation.

The case of *Doe* [*Clark*] v. *Braden*, 57 U. S. 16 How. 635 [14: 1090], relied upon by the government in this connection, is not in point. In this case, in the ratification by the King of Spain of the treaty by which Florida was ceded to the United States it was admitted that certain grants of land in Florida were annulled and *declared to be void, and it was held that [24] a written declaration, annexed to a treaty at the time of its ratification, was as obligatory as if the provision had been inserted in the body of the treaty itself. The question in the case was whether the King had power to annul the grant, which was considered a political, and not a judicial question; but, as the annulling clause was inserted in the ratification and published in both countries as part of the treaty, there was no question whatever of concealment.

4. Assuming that the Indians took an immediate title to the lands reserved for them in Kansas, we are next to inquire whether such title has been legally forfeited. By the third article of the treaty it was further agreed "that such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may, from time to time, appoint, shall forfeit all interest in the lands so set apart, to the United States."

Acting in pursuance of the treaty and of the assumed right of forfeiture, the government surveyed, and made part of the public domain, the lands at Green bay, ceded by the claimants and sold or otherwise disposed of, and conveyed the same and received the consideration therefor, except a reservation of about 65,000 acres to the Oneidas. The lands west of the Mississippi (the Kansas lands) were, after the treaty of Buffalo creek, surveyed and made a part of the public domain, and sold or otherwise disposed of by the United States, which received the consideration therefor, and these lands were thereafter and now are included within the territorial limits of the state of Kansas.

In the view we have taken of the granting clauses of this treaty, the provisions of the third article created a condition subsequent, upon a breach of which the government might declare a forfeiture, but had no power by simple executive action to re-enter, take possession of the lands, and sell them. A distinction is drawn by the authorities between the case of a private grantor, who may re-enter in the case of the breach of a condition subsequent, and the government, which can only *repossess it-[25] self of lands by legislative or judicial action. The distinction was first clearly drawn by this court in the case of *United States* v. *Repentigny*, 72 U. S. 5 Wall. 211, 267 [18: 627, 646], in which the court said: "We agree that before a

forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly, under the authority of the government, without these preliminary proceedings." Practically the same language was used with reference to a grant of lands in aid of a railroad in *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 44, 63 [22: 551, 555]; in *Farnsworth* v. *Minnesota & P. R. R. Co.* 92 U. S. 49 [23: 530], and in *Van Wyck* v. *Knevals*, 106 U. S. 360 [27: 201]. In *St. Louis, I. M. & S. Rwy. Co.* v. *McGee*, 115 U. S. 469 [29: 446], it was said: "That legislation to be sufficient [for that purpose] must manifest an intention by Congress to reassert title and resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and a judgment therein establishing the right, it should be direct, positive, and free from all doubt or ambiguity." See also *New Orleans Pacific Railway Co.* v. *United States*, 124 U. S. 124 [31: 383]. As there is no pretense that any such action as is contemplated by these cases was ever taken, it necessarily follows that, if an estate in fee simple vested in the Indians, the proceedings subsequently taken would not revest the title in the government.

5. But even if it were conceded that the rights of the Indians were subject to forfeiture by executive action, it is by no means certain that the contingency ever happened which authorized such forfeiture; or, if a forfeiture did result, it was not waived by the subsequent action of Congress. A condition, when relied upon to work a forfeiture, is construed with great strictness. The grantor must stand on his legal rights, and any ambiguity in his deed 26]or defect in the evidence *offered to show a breach will be taken most strongly against him, and in favor of the grantee. A condition will not be extended beyond its express terms by construction. The grantor must bring himself within these terms to entitle him to a forfeiture. Jones, Real Prop. §§ 678, 679.

It will be observed that the forfeiture is conditioned, not upon the actual removal of the Indians to the Kansas reservation, but upon their accepting and agreeing to removal within five years, or such other time as the President might from time to time appoint. The tribes for whom the Kansas lands were intended as a future home were the Senecas, Onondagas, Cayugas, Tuscaroras, Oneidas, St. Regis, Stockbridges, Munsees, and Brothertowns, residing in the state of New York.

Of these the Senecas and certain of the Cayugas and Onondagas residing among them expressly agreed in article 10 "to remove from the state of New York to their new homes within five years, and to continue to reside there."

By article 13 the Oneidas also agreed to remove as soon as they could make satisfactory arrangements for the purchase of their lands at Oneida.

By article 14 the Tuscaroras also agreed to accept the country set apart for them, and to remove there within five years, and to continue to reside there.

In a supplemental treaty made with the St. Regis Indians on February 13, 1838, it was agreed that any of them who wished to do so should be at liberty to remove to Kansas at any time thereafter within the time specified in the treaty, but the government should not compel them to remove.

It thus appears that, as to three of these tribes, there has been a technical performance so far as a forcible removal was concerned.

It further appears from the eleventh, twelfth, and thirteenth findings that the President never fixed any time for their removal, as was contemplated in the third article; that many of the Indians protested against any removal; that the Onondagas officially declared they would not remove; that—

"After the amended treaty had been assented to, the Senecas, the Cayugas and the Onondagas residing with *them, and the Tuscaroras[27 continued to protest against the treaty, the Senecas asserting that their declaration of assent was invalid, and that they would never emigrate but on compulsion, and requesting (as did also some Onondaga chiefs) that no appropriation be made to carry the treaty into effect. These protests were continued even after the treaty was ratified and until the treaty of May 20, 1842, was made. More than five years from the ratification of the treaty of Buffalo creek the Tuscarora chiefs declared that the tribe would not part with its reservation nor remove from it, whatever a few individuals might do."

It further appeared that—

"No provision was made for the actual removal of more than about 260 individuals of the claimant tribes. Of this number only 32 ever received patents or certificates of allotment of the lands mentioned in the first article of the treaty, and the amount allotted to those 32 was at the rate of 320 acres each, or 10,240 acres in all.

"In 1845 Abram Hogeboom represented to the government of the United States that a number of the New York Indians, parties to the treaty of 1838, desired to remove to the Kansas lands, and upon such representation, and in conformity with such desire, said Hogeboom was appointed special agent of the government to remove the said Indians to Kansas.

"The sum of $9,464.08 of an amount appropriated by Congress was expended in the removal of a party of New York Indians under Hogeboom's direction in 1846.

"From Hogeboom's muster-roll, in the Indian Office, it appears that 271 were mustered for emigration. The roll shows that of this number 73 did not leave New York with the party; 191 only arrived in Kansas, June 15, 1846; 17 other Indians arrived subsequently; 82 died and 94 returned to New York.

"It does not appear that any of the 32 Indians to whom allotments were made settled permanently in Kansas."

It is further found that—

"A council of the Senecas, the Cayugas and Onondagas living with them, and the Tusca-

28] roras was called by the *Indian commissioner, to be held at Cattaragus, June 2, 1846, to learn the final wishes of the Indians as to emigration. The commissioner who was sent on the part of the United States reported that the meeting was well attended, but that the chiefs were unanimous in the opinion that scarcely any Indians who wished to emigrate remained."

In these findings lie the main strength of the defense.

It thus appears that a part had accepted and agreed to remove; that a few had actually removed; that others had stipulated that they should not be compelled to remove, and still others protested against the treaty and refused to remove. If the acceptance and signing of the treaty is not to be considered in itself as an acceptance and agreement to remove, as to which we express no opinion, there was a technical compliance with the conditions of article 3 by a part of the Indians, and a flat refusal upon the part of others. But, after all, a mere agreement to accept and remove, though probably sufficient to prevent a legal forfeiture, was of no practical value, and would have availed the government nothing, except as it might have justified a forcible removal had the government elected to take that course. No provison was made as to the manner in which the removal was to be effected, but from the dependent character of the Indians, and from the appropriation of $400,000, made for that purpose, it is evident that it was contemplated that the removal should be made by the government itself. It was so held by this court in *Fellows* v. *Blacksmith*, 60 U. S. 19 How. 366 [15: 684], and we see no reason to question the propriety of that ruling. Whether the government could have removed them forcibly was not decided in that case, and is not in this.

The difficult point in the case, in its equitable aspect, is whether the protests of the Indians and their final refusal to remove in 1846 do not estop them from claiming the benefit of the reservation made for them. This is the main defense in the case. Upon the other hand, no time was fixed by the President for their removal; no formal notice was ever given them to remove; but at various times, and particularly at the council held at Cattaraugus, June 2, 1846, called by the 29] commissioners *to learn the final wishes of the Indians as to the emigration, the chiefs of the four tribes present were unanimous in the opinion that scarcely any Indians who wished to emigrate remained. This action constitutes practically the only claim of forfeiture. There is no finding that the other five tribes did refuse. The practical application which counsel seek to make of this partial refusal is to justify the government, not only in appropriating the Kansas lands, but, inferentially, in failing to make any other compensation to the Indians for the seizure and sale of the Wisconsin lands. In view of this, it seems to us that, to justify a forfeiture, it should appear that the repudiation was as formal, as broad, and as unequivocal as the acceptance; that the President should have fixed a time for the removal, and should at last have made a formal tender of performance. If it be said that, considering the number of the tribes and the character of the individuals he was dealing with, this was impracticable, it may also be said that the government had undertaken to negotiate a treaty with them severally and collectively, and if it sought to enforce a forfeiture of rights originating in such treaty, it should have given formal notice to that effect, that the Indians might understand that they were risking the loss of all compensation for their Wisconsin lands by refusing to emigrate.

But, however this may be, we think the fact that the government never insisted upon this as an estoppel, and never treated the Indians as having lost their rights in the Kansas lands, is a sufficient answer to the claim of abandonment. After their refusal at the council in 1846, nothing appears to have been done until 1854, when Kansas had begun to feel the impress of a sudden and large immigration from the east, and an act known as the Kansas-Nebraska act was passed, creating the territory of Kansas, in which Congress defined the limits of the new territory (10 Stat. at L. 284, chap. 59) and, after giving the boundary lines, which included the New York Indian lands,

"Provided further, That nothing in this act contained shall be construed to impair the rights of person or property *now per- [30 taining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory *which by treaty with any Indian tribe*, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Kansas, until said tribe shall signify their assent to the President of the United States to be included within the said territory of Kansas."

The 37th section of the same act (p. 200) provides:

"That all treaties, laws, and other engagements made by the government of the United States with the Indian tribes inhabiting the territories embraced within this act shall be faithfully and rigidly observed, notwithstanding anything contained in this act."

Even if the first clause of this proviso be limited to the Indians then "in said territory," of whom only thirty-two were New York Indians, the second clause is subject to no such limitation, and applies to treaties "with any Indian tribe." The reference here is evidently to the treaty of Buffalo creek, and is a distinct recognition of the subsisting validity of such treaty, and a promise on the part of Congress that it shall be faithfully and rigidly observed, "notwithstanding anything contained in this act," and, we may add, notwithstanding the refusal of the Indians to emigrate and the now claimed forfeiture of their rights.

Some steps were taken to effect a settlement with the Indians, and on November 5, 1857, a treaty was entered into with the Tonawandas in which, after reciting the treaty of 1838, the surrender of 500,000 acres of lands in Wisconsin, the agreement to set apart the lands in Kansas, the Tonawandas relinquished their interest in the Kansas lands, the United

States agreeing to pay them therefor the sum of $256,000. 11 Stat. at L. 735. But the Tonawandas were but one of the nine tribes which participated in the treaty, and there seems to have been no reason why their claim 31]should have been recognized *in preference to others who stood upon the same footing. Upon the theory of the government, there was no reason why this treaty should have been entered into at all. It was clearly a recognition of the fact that the Tonawandas had rights which, in the nineteen years which had elapsed since the treaty was made, they had not forfeited.

But this is not all: In the 11th section of the sundry civil appropriation act of March 3, 1859 (11 Stat. at L. 425, chap 82), a provision was made for the issue of patents to Indians who were entitled to separate selection of lands in Kansas, with a proviso that "nothing herein contained shall be construed to apply to the New York Indians, or to affect their rights under the treaty made by them in 1838 at Buffalo creek." If this was not a recognition of the fact that the Indians still had rights, it certainly shows that their alleged rights had been made the subject of consideration, and were not repudiated or denied.

But it seems that the matter did not rest here, for in the same month in which the last above act was passed, namely, March 21, 1859, the Secretary of the Interior directed the New York Indian reservation in Kansas to be surveyed, with a view of allotting a half section each to such of the New York Indians as had removed there under the treaty, after which the residue was to become public domain, and in December, 1860, the President proclaimed the reservation to be a part of the public domain.

Notwithstanding this, however, in the act of January 29, 1861 (12 Stat. at L. 126, chap. 20), admitting Kansas to the Union as a state, it was provided that nothing should be so construed as to impair the rights of person or property pertaining to the Indians in said territory so long as such rights should remain unextinguished by treaty. It may be said that the provisos in this act applied only to the Indians in said territory, but even if it be so limited, the provision in the act of March 3, 1859, clearly applies only to the New York Indians, whose rights under the treaty were recognized. Up to the time these acts were passed certainly there had been no denial of the right of the Indians to these lands, and no action on the part 32] *of the government indicating an intent to insist upon the forfeiture of such right. Every legislative expression tended toward an acknowledgment of the fact that their claim was unimpaired.

Our attention has also been called to certain documents emanating from the executive and legislative departments of the government, some of which tend to strengthen the idea that these departments never intended to treat the action of the Indians as a forfeiture of their grant, and acquiesced in the justice of the claims the Indians now make, and have already made under the treaty of Buffalo creek. It is insisted by the Attorney General that, as these documents are not referred to in the findings of fact by the court below, this court cannot consider them; but as they are documents of which we may take judicial notice, we think the fact that they are not incorporated in the findings of the court will not preclude us from examining them, with a view of inquiring whether they have the bearing claimed. *Jones v. United States*, 137 U. S. 202, 214 [34: 691, 696].

While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records, or public documents, which were not called to its attention, or other similar matters of judicial cognizance.

As indicating the views of the executive in regard to the justice of the Indians' claims a treaty was concluded September 2, 1863, with the New York Indians who had moved to Kansas under the treaty of 1838, for the purpose of extinguishing their title to lands in that state. This treaty was based on the treaty of November 5, 1857, with the Tonawandas, and was sent to the Senate for ratification, but action was suspended upon it "until a treaty could be concluded with all the New York Indians to arrange all matters between them and the United States which required adjustment." Ex. Doc. Y, p. 2, 40th Cong. 3d sess.

In pursuance of this policy, the President, in May, 1864, directed a commissioner to proceed to the state of New York for the purpose of negotiating a treaty with the New York Indians. *These Indians had been previously [33 notified on April 26, 1864, by the Secretary of the Interior, that he deemed it proper to advise them, through their agent, 'that it is the desire of the government to extinguish their title to a tract of land in Kansas, ceded to them by the treaty of January 15, 1838;" and that a treaty had already been made for that purpose with the fragments of bands of these Indians residing in Kansas. Ex. Doc. No. 1, 38th Cong. 2d sess. p. 188.

The treaty with the Indians living in New York was not concluded, but in his annual report to Congress the Secretary of the Interior on December 6, 1864, spoke of the efforts to extinguish the title of these Indians to the Kansas lands, and considered their claims as "being undeniable and just." *Ibid.*

This opinion was reiterated by the commissioner of Indian affairs on December 5, 1866, in his annual report. (p. 61.)

In November, 1868, the President again attempted to negotiate a treaty or treaties with the Senecas and other New York Indians with reference to "their claims arising under the treaties of 1838 and 1842." Ex. Doc. Y p. 10, 40th Cong. 3d sess. And thereafter a treaty was concluded December 4, 1868, according to the commissioner appointed to negotiate it, by which the United States agreed to pay the sum of $350 to each Indian, including half breeds, of the Six Nations in New York and Wisconsin. *Ibid.* p 1.

The commissioner appointed to negotiate this treaty reported to the Indians in council that "the reason why the New York Indians had not been removed to their Kansas reservation was because squatters had obtained possession of their lands, and the United States was unable to drive them off, and keep them off." *Ibid.* p. 10.

This treaty, however, was not ratified by Congress, owing presumably to the passage of a general law which denied the right of any Indian tribe or nation to be recognized as an independent nation for treaty-making purposes. 16 Stat. at L. 566.

In a communication dated January 29, 1884, 34]addressed to *the Secretary of the Interior for transmission to the Senate, the commissioner of Indian affairs reviewed the claims of the New York Indians under the treaty of 1838, and adhered to the opinions of his predecessors, in that there was a failure on the part of the government to provide homes for those who went to Kansas, and that no consideration had been given the New York Indians for the cession of the 500,000 acres of Wisconsin lands. He referred to the settlement with the Tonawandas, and stated that he saw "no reason why the other tribes should not receive the same relief."

While none of these documents are of great importance in themselves, they serve to indicate very clearly that in the mind of the executive and departmental officers the rights of the Indians, under the treaty of Buffalo creek, were continuously recognized as just claims against the government.

We are at loss to understand upon what theory this can be considered an abandoned claim. If the evidence pointed in that direction the argument would come with better grace if the government had not itself received the full consideration stipulated by the treaty (so far as such consideration was a valuable one) for the Kansas lands, and had neglected to render any account of the same. Of course, if the legal title passed to these Indians, something else than a failure to assert such title is necessary to devest it. But, however this may be, the court finds (finding 17) that after the order of the Secretary of the Interior of 1859, and before the proclamation of the President of said lands as a part of the public domain in December, 1860, "some of the New York Indians employed counsel to protect and prosecute their claims in the premises, asserting, in the powers of attorney, that the United States had seized upon the said lands contrary to the obligations of said treaty, and would not permit the said Indians to occupy the same or make any disposition thereof. The said Indians have since asserted their said claims." How long, or how frequently, or in what manner, the Indians continued to assert their claims, does not appear; but it seems that on June 21, 1884, their claims, together with the vouchers, papers, proofs, and documents appertaining 35] thereto, were referred to the *court of claims for an investigation and finding of facts. To create an abandonment there must not only be an omission to prosecute, but an intent to forego, of which there is no evidence in this case. Indeed, it is not altogether clear that the government did not waive this point in the act of 1893, conferring jurisdiction upon the court of claims to enter judgment, when it declared that the statute of limitations should not be pleaded as a bar to recovery.

The appropriation of these lands by the government is probably explicable by the fact that an enormous emigration to Kansas was at that time in progress for the avowed purpose of preventing the establishment of slavery in the territory; that the pressure of population for land was very great; that the territory was almost in the throes of civil war; that the negotiation of a new treaty with nine different tribes would be attended with considerable delay; that but few of the Indians had actually removed and resided in Kansas, and that the Secretary of the Interior assumed, what undoubtedly the facts had some tendency to show, that the grant had lapsed by the failure of the Indians to emigrate, and therefore considered himself fully justified in taking possession of the lands, and settling with the Indians in a future treaty. The claim of the Tonawandas was actually settled. Congress, in the act of 1861 admitting Kansas, provided for the subsequent extinguishment of Indian titles; but a great civil war then intervened, and for several years absorbed the attention of Congress, and the matter does not seem to have been resuscitated until after the lapse of about twenty years, when Congress referred the case to the court of claims, with an express waiver of the statute of limitations. We do not perceive in all this an intention on the part of the Indians to abandon their claims, or any indication on the part of Congress that it considered it abandoned.

6. But little need be said considering the cash payments to be made under the ninth, twelfth, thirteenth, and fourteenth articles of this treaty. Most, if not all, of these payments were to be made upon the actual removal of these Indians to the west, and as this contingency never happened, the*amounts[36 never became due. The same ruling applies to the appropriation of $400,000 in the fifteenth article, which was made to aid in removing the Indians to their new homes, supporting them the first year after their removal, and for other incidental purposes contingent upon their removal.

The judgment of the Court of Claims is therefore reversed, and the case remanded with instructions to enter a new judgment for the net amount actually received by the government for the Kansas lands, without interest, less the amount of lands upon the basis of which settlement was made with the Tonawandas, and other just deductions, and for such other proceedings as may be necessary, and in conformity with this opinion.

The CHIEF JUSTICE, Mr. Justice **Harlan**, and Mr. Justice **Brewer** dissented.

JOHN H. LEYSON, as Administrator with the Will Annexed of Andrew J. Davis, Deceased, *Plff. in Err.*,

v.

ANDREW J. DAVIS, JR., and the First National Bank of Butte.

(See S. C. Reporter's ed. 36-41.)

Federal question.

A controversy merely as to which of the parties has the superior equity to shares of stock of a

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitu-*

national bank, and in which the national banking act is only collaterally involved, does not raise a Federal question which gives jurisdiction to this court to review a state judgment.

[No. 517.]

Submitted March 14, 1898. Decided April 11, 1898.

IN ERROR to the Supreme Court of the State of Montana to review a decree of that court affirming the decree of the District Court of the State of Montana for the County of Silver Bow in favor of the defendant, Andrew J. Davis, in an action brought by John H. Leyson, administrator, etc., against said Davis *et al.* to recover shares of capital stock of the First National Bank of Butte. *On motion to dismiss or affirm. Dismissed.*

See same case below, 17 Mont. 220 [31 L. R. A. 429].

37 *Statement by Mr. Chief Justice **Fuller**:

This was an action commenced by the special administrator of the estate of Andrew J. Davis, deceased, and continued in the name of his successor, Leyson, administrator with the will annexed, against Andrew J. Davis, Jr., and the First National Bank of Butte, in the district court of the state of Montana for the county of Silver Bow, to recover nine hundred and fifty shares of the capital stock of the defendant bank, alleged by the administrator to belong to the estate of the deceased, and claimed by the defendant Davis, Jr., under a *donatio causa mortis*. The prayer of the complaint was that the claim of defendant Davis, Jr., to the stock be declared void; that he be compelled to deliver up the certificates; and that the bank be required to transfer the same on its books and issue new certificates to plaintiff as administrator.

The answer of Davis, Jr., in addition to his defense, set up affirmative matter, and prayed that he be adjudged the owner of the stock; that plaintiff as administrator and the estate be decreed to have no right or interest therein; and that the bank be required to make the proper transfers upon its books to him. The bank answered that it was ready and willing to transfer the shares of stock to the party determined by the court entitled to the same.

The trial court found as facts, in substance, that in the latter part of December, 1889, Andrew J. Davis was, and had been for some months, seriously and dangerously ill, suffering from an ailment of which he died in the month of March following; that being so ill, and in view and expectation of death, but being of sound and disposing mind, he gave to defendant Andrew J. Davis, as a gift, the shares of stock and certificates thereof described in the complaint, and at the same time delivered the certificates to said Andrew J., who then and there received and accepted the same, and who has ever since said gift and delivery retained and held the shares of stock and certificates in his possession, and claimed them as his own; that the deceased had great affection for and confidence in defendant Andrew J., and at the time of the gift of the stock and certificates, and for several years prior thereto, it was and had been the intention of the deceased to give the stock and *certificates to said[**38** Andrew J.; that there was no written assignment of the stock or certificates, or power of attorney executed by deceased in connection with the gift, nor any written authority empowering Andrew J., or any other person for him, to transfer the stock and certificates on the books of the bank during the lifetime of the donor, and that there was no transfer made on the books of the bank to Andrew J.; that no other gift than the gift of the stock was made, or attempted to be made, by the deceased to Andrew J.; that the gift of the stock was an absolute gift, and was a valid gift *mortis causa;* and that defendant Andrew J. had ever since held possession and exercised control and dominion over the stock, with the knowledge of the donor to the time of his death, arising and resulting only from the fact of the gift and the donee's possession. It was therefore concluded that the defendant Andrew J. Davis was the owner of the stock and certificates described in the complaint, and entitled to have the shares transferred to him on the books of the bank, and to have new certificates issued to him therefor; that the donor was devested of his possession, dominion, and control of said shares of stock by the gift; that the plaintiff, as administrator, had not, nor had the estate of the deceased, any right, title, or claim in or to the shares of stock or certificates, and that defendant Andrew J. was entitled to a decree in accordance with the prayer of his answer.

The decree was accordingly so entered. On appeal the supreme court of Montana reviewed the facts and the law at length, and elaborately discussed the authorities both in England and in this country, sustained the claim of defendant Davis to the stock and affirmed the decree. 17 Mont. 220 [31 L. R. A. 429].

A writ of error from this court was thereafter allowed and motions made to dismiss or affirm.

Messrs. **A. T. Britton, W. W. Dixon, A. B. Browne, James W. Forbis,** and **B. Platt Carpenter,** for defendant in error, in support of motion to dismiss or affirm.

Messrs. **Robert G. Ingersoll, Walter S. Logan, Charles M. Demond, Edwin W. Toole,** and *Henry A. Root* for plaintiff in error, in opposition to motion.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

*The supreme court of Montana held [**39** that as between donor and donee a valid gift of the stock was made by the delivery thereof, without a transfer of the shares on the books of the bank or indorsement on the back of the certificates themselves, which carried the equitable title and entitled the donee to call for the legal title as against the representative of the donor's estate. This conclusion was

tion, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Jackson, Hart, v. Lamphire, 7: 679; and Commercial Bank v. Buckingham, 12: 169.

arrived at solely on principles of general law, and in itself involved the disposition of no Federal question.

It is true that by § 5139 of the Revised Statutes shares of the capital stock of national banks are declared to be personal property, "transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association;" and it is conceded by defendant in error that by one of the by-laws of defendant bank it was prescribed that its stock should be "assignable and transferable only on the books of this bank, subject to the restrictions and provisions of the banking laws, and transfer book shall be provided, in which all assignments and transfers of stock shall be made. No transfer of stock shall be made without the consent of the board of directors by any stockholder who shall be liable, either as principal debtor or otherwise;" and that the certificates in question contained the provision: "Transferable only by him or his attorney on the books of this bank on the surrender of this certificate."

But these matters raised no Federal question. The rights of third parties, or of creditors, or of the bank, were not in issue or determined here, but simply the equities as between the particular parties. The representative of the donor was manifestly bound by the donor's valid acts, and could assert no right superior to his. His right to make the gift was the right to dispose of his own property, and whether as between him and his donee the equitable title passed was a question of general or local law. The administrator's claim that he was entitled to receive the stock as rep-
40] resenting the estate or for the *benefit of the next of kin rested on that law as administered by the courts of the state.

So far as the act of Congress is concerned, we understand the doctrine to be, as stated in *Johnston* v. *Laflin*, 103 U. S. 800, 804 [26: 532, 535], that "the transferability of shares in the national banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies."

In *Black* v. *Zacharie*, 44 U. S. 3 How. 483, 513 [11: 690, 704], it was said: "It is true that the charters of the Carrollton Bank and of the Gaslight & Banking Company provide that no transfer of the stock of these corporations shall be valid or effectual until such transfers shall be entered or registered in a book or books to be kept for that purpose by the corporation. But this is manifestly a regulation designed for the security of the bank itself, and of third persons taking transfers of the stock without notice of any prior equitable transfer. It relates to the transfer of the legal title, and not of any equitable interest in the stock subordinate to that title. In the case of the *Union Bank of Georgetown* v. *Laird*, 15 U. S. 2 Wheat. 390 [4: 269], this court took notice of the distinction between the legal and equitable title in cases of bank stock, where the charter of the bank had provided for the mode of transfer. The general construction which has been put upon the charter of other banks containing similar provisions as to the transfer of their stock is, that the provisions are designed solely for the safety and security of the bank itself, and of purchasers without notice; and that as between vendor and vendee a transfer, not in conformity to such provisions, is good to pass the equitable title and devest the vendor of all interest in the stock. Such are the decisions in the cases of *Bank of Utica* v. *Smalley*, 2 Cow. 777, 778 [14 Am. Dec. 526]; *Gilbert* v. *Manchester Iron Mfg. Co.* 11 Wend. 628; *Commercial Bank of Buffalo* v. *Kortright*, 22 Wend. 362; *Quiner* v. *Marblehead Social Insurance Co.* 10 Mass. 476, and *Sargent* v. *Franklin Ins. Co.* 8 Pick. 90 [19 Am. Dec. 306]."

We cannot perceive that any title, right, privilege, or immunity was specially set up or claimed by the administrator under a law of the United States and denied by the highest tribunal *of the state, which is the ground of [41 jurisdiction relied on. The controversy was merely as to which of the claimants had the superior equity to these shares of stock, and the national banking act was only collaterally involved. *Conde* v. *York*, 168 U. S. 642 [*ante*, 266]; *Union National Bank* v. *Louisville, N. A. & C. Ry. Co.* 163 U. S. 325 [41: 177]; *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111].

Writ of error dismissed.

Mr. Justice **Harlan** is of opinion that this court has jurisdiction and that the judgment should be affirmed.

JOHN BUDZISZ and August Budzisz, *Plffs. in Err.*,

v.

ILLINOIS STEEL COMPANY.

(See S. C. Reporter's ed. 41-45.)

Federal question—validity or construction of treaty.

1. Mere allegations that the construction or validity of a treaty is involved or drawn in question, not based on the facts of the case, do not create a case which this court is authorized to review on writ of error to the circuit court.
2. The validity or construction of a treaty is not drawn in question by a party having a rightful interest in such question, when he does not claim any right under such treaty or under any of the parties to it, or connect himself with the treaty or with any of the parties to it.

[No. 560.]

Submitted February 21, 1898. Decided April 11, 1898.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin to review a judgment in favor of plain-

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Jackson, Hart, v. Lamphire, 7: 679; and Commercial Bank v. Buckingham, 12: 169.

tiff, the Illinois Steel Company, against John Budzisz, *et al.* for the recovery of the possession of certain lands in Milwaukee. *On motion to dismiss. Dismissed.*

See same case below, 82 Fed. Rep. 160.

Statement by Mr. Justice **Shiras**:

This was an action for ejectment brought in the circuit court of the United States for the eastern district of Wisconsin, in February, 1896, by the Illinois Steel Company, a corporation of the state of Illinois, against John Budzisz and August Budzisz, citizens of the state of Wisconsin, to recover certain lots or parcels of land in the fifth ward of the city of Milwaukee. The case was so proceeded in that, on November 20, 1897, a final judgment was entered in favor of the plaintiff for possession of the premises, and for costs. A writ of error was then sued out from this court.

Messrs. **William E. Carter** and **Elbert H. Gary** for defendant in error, in favor of motion to dismiss.

Mr. **Rublee A. Cole** for plaintiffs in error, in opposition to motion.

Mr. Justice **Shiras** delivered the opinion of the court:

This cause is now before us on a motion to dismiss the writ of error, on the ground that there is not involved any question that brings the case within any of those provisions of the act of March 3, 1891, establishing circuit courts of appeals, which give this court jurisdiction to review the judgment of the circuit court. Neither the petition, containing, as it did, only the allegations usual in an action of ejectment, nor the answer, first filed, raised any question which, however disposed of in the circuit court, would have enabled either party to have brought the case directly to this court.

Subsequently, however, the defendants filed an amended answer, in which they averred that the title to the land in dispute was still in the United States; that the Indian title to said land had not been extinguished at the time of the inception of plaintiff's title; that any patent or purported patent granted by the United States while the Indian title was still existing was null and void. After, on motion of the plaintiff, certain portions of these answers had been stricken out, the defendants filed a second amended answer, the main allegations of which were as follows:

That the Indian title to the lands in dispute had not been extinguished when Increase Claflin and Daniel Darnell made their entry; that the Indian title was conveyed to the United States under and by virtue of several treaties with the Menominee Indians, to wit: The treaty of February 8, 1831; of February 17, 1831; of October 27, 1832; of October 18, 1848; that by reason of the aforesaid treaties the lands were not subject to entry under the laws of the United States, and that therefore the entry of Claflin and Darnell was null and void; that said lands were first offered for sale by the proclamation of the President on May 6, 1835; that [43] the patent of the United *States dated September 1, 1838, to Alexander J Irwin, assignee of Increase Claflin and Daniel Darnell, was and is null and void; that the patent of the United States dated April 16, 1838, to Albert G. Ellis, assignee of Daniel Darnell, was and is null and void, and in no way extinguished the title of the government of the United States to the lands in dispute.

On July 30, 1897, the court, on motion of the plaintiff, struck out those portions of the amended answers which have just been enumerated; and on August 3, 1897, the defendants filed exceptions to the orders of the court striking out those portions of the answers, which exceptions were allowed and signed by the judge.

With the record in that condition the case came on for trial, and resulted in a verdict and judgment in favor of the plaintiff.

The record shows no exceptions taken or allowed during the course of the trial, either to the admission or rejection of evidence, or to the charge of the judge. The only bill of exceptions to be found in the record is the one allowed and signed by the judge relating to the striking out of portions of the answers.

The course most favorable to the plaintiffs in error will be to treat the orders of the court striking out portions of the answers as if they were rejections of offers made at the trial, to prove the allegations contained in the portions stricken out.

The reasons given by the court for striking out those portions of the answers were that a patent of the United States is the highest evidence of title, where the grant originates out of the public domain; that the defendants were mistaken in the inference that the ownership of these lands was at any time, in view of the law, vested in the Indians, or derived through the treaties referred to; that there is no recognition by any of the authorities of a fee vested in the Indians; that as to the land in Wisconsin, the treaty with Great Britain and the cessions of Massachusetts and Virginia are the legal sources of title in the general government; that the treaties with the Indians are regarded only for rights of occupancy and for reservations from sale; that therefore the doctrine is established that the patent issued by the government is "an *invaluable muniment of title and a source [44] of peace and quiet to its possessor;" that even if it be allowed, for the purposes of the motion, that there was no right of entry at the time of original entry alleged, the answer concedes that these lands were offered for sale by the President's proclamation of May 6, 1835, upon survey of 1834, and that the patents were issued, respectively, April 16 and September 1, 1838; that it is not asserted that their validity has ever been since questioned, either by the United States, or by any person in its right, under equities pre-existing or otherwise; that these lands became patentable after the survey and proclamation, and were clearly within the jurisdiction of the land department when the patents were issued in 1838; that all questions as to entry and right to patent were then determinable by that tribunal, and the patents were not void, even if they were voidable at the instance of proper parties; that the special matters alleged in the answers and included in the motion to strike out state no grounds which are available to these defendants by way of defense; that under the act of Congress of March 3, 1891 (26 Stat. at L. 1093, chap. 559),

any action by the United States is now barred, and that even if the defendants were possessed of paramount equities, or were in any manner entitled to avail themselves of rights existing in the United States, they are equally barred by that limitation. *Illinois Steel Co.* v. *Budzisz*, 82 Fed. Rep. 160.

The correctness of these views is not before us on this motion to dismiss for want of jurisdiction, and we only state them to show that no question is really presented which brings this case within our supervisory power. It is not claimed that the construction or application of the Constitution was involved, and we think it is quite clear that, in fact, neither the construction nor the validity of any treaty of the United States or made under its authority is in any way involved, or arises, or is drawn in question in this case. Mere allegations to that effect, not based upon the facts of the case, do not create a case which we are authorized to review. The alleged invalidity of the entries and of the patents do not arise out of any alleged misconstruction or breach of any treaty 45] *but out of the alleged misconduct of the officers of the Land Office in permitting the entries and in issuing the patents; and if any error was committed by the circuit court in dealing with that question, which we do not intimate, the proper course for the defendants was to have gone to the circuit court of appeals.

Moreover, the defendants did not connect themselves in any way with the Indian treaties, or with any of the parties to them; nor did they claim any rights under said treaties, or under any of the parties to them. In no true sense, therefore, can it be said that this is a case in which the validity or construction of any treaty made under the authority of the United States is drawn in question by a party having a rightful interest in such question.

The motion of the defendant in error must be allowed, and the writ of error is accordingly dismissed.

HOSMER B. PARSONS, *Plff. in Err.*,
v.
DISTRICT OF COLUMBIA and Commissioners.

(See S. C. Reporter's ed. 45-57.)

Federal question—water-main tax—power of Congress—assessments.

1. The validity of statutes of the United States and of authority exercised under the United States is drawn in question in the determination of the constitutionality of certain acts of Congress, and of proceedings under them for special assessment, without sufficient notice or opportunity to be heard.
2. Notice to a property owner is not necessary to sustain a water-main tax under an act of Congress providing that all assessments for laying water mains in the District of Columbia shall be at a specified rate per front foot on abutting lots, and giving commissioners power to lay water mains whenever they deem necessary for the public safety, comfort, or health.
3. Congress can create a general system to store water and furnish it to the inhabitants of the District of Columbia, and prescribe the amount and method of collection of the assessment; and plaintiff in error cannot be heard to complain that he was not notified of the creation of the system or consulted as to its cost.
4. An assessment for water mains, exceeding the actual cost of laying them, is not for that reason excessive, when it is made, not merely to put down the pipes, but to raise a fund to keep the water system in efficient repair.

[No. 177.]
Submitted December 20, 1897. Decided April 11, 1898.

IN ERROR to the Court of Appeals of the District of Columbia, to review a judgment of that court affirming the judgment of the Supreme Court of that District dismissing suit brought by Hosmer B. Parsons, plaintiff, against the District of Columbia *et al.*, to annul a certain special assessment for laying a water main as illegal. There was also motion to dismiss. *Affirmed.*

See same case below, 8 App. D. C. 391.

Statement by Mr. Justice **Shiras:**

On October 5, 1895, Hosmer B. Parsons, the plaintiff in error, filed in the supreme court of the District of Columbia *his petition [46 against the District of Columbia and John W. Ross, Charles F. Powell, and George Truesdell, commissioners of the District, complaining, as illegal, of a certain charge or special assessment against land belonging to the petitioner, as a water-main tax, or assessment for laying a water main in the street on which said land abuts. The petition avers that the charge or assessment in question was made in accordance with the act of the legislative assembly of the District of Columbia approved June 23, 1873, and the acts of Congress approved respectively June 10, 1879, June 17, 1890, and August 11, 1894. The petition alleged the following grounds of objection to the assessment:

1. That the petitioner was not one of the property holders who requested that the work and improvements for which said parcel of land was assessed should be done and made, and that said charge was made against property whose owner had not requested the doing of said work or the making of said improvements.

2. That the petitioner was not consulted as to advisability of making said improvements, and was given no opportunity to be heard upon the questions of cost or utility or benefit of the work, or of the apportionment of the tax, and

NOTE.—*As to public improvements distinguished from taxes*, see note to Adams County v. Quincy (Ill.) 6 L. R. A. 155.

As to necessity of special benefit to sustain assessments for local improvements; legislative discretion as to rule of apportionment,—see note to *Re* Bonds of Madera Irrig. Dist. (Cal.) 14 L. R. A. 755.

As to constitutionality of frontage rule of assessment; rule repudiated; rural or suburban property,—see note to Raleigh v. Peace (N. C.) 17 L. R. A. 330.

For cost of sewerage, see note to Proprietors of Mt. Auburn Cemetery v. Cambridge (Mass.) 4 L. R. A. 836.

was not notified of the amount charged until after the work was concluded, and after the assessment had been made and had gone into effect as a lien upon said land, which was not a reasonable time.

3. Said assessment was not made and was not authenticated by any officer or person authorized to make or authenticate the same.

4. The assessment was made without any estimate of the cost of the work to be done, and without regard to the cost of the work or the value of the improvement, and not upon the basis of benefits to the property assessed, and said assessment is in excess of the cost of the work.

5. The assessment was made without authority of law, and the respondents had no jurisdiction or right to make the same.

47] *6. The description of the parcel of land assessed is insufficient.

7. The said tax was not assessed within thirty days after the said water main had been laid and erected.

8. All of the said land assessed does not abut upon the street in which said water main was laid.

The petition proceeded to allege that the said charge remained unpaid, and that the commissioners were threatening to sell and convey said land in order to pay and satisfy said illegal charge, whereby the petitioner's title to his land was clouded, and that he was thereby injured and has no appeal.

The petitioner prayed that a writ of certiorari should issue, commanding the respondents to certify to the court a copy of each and every record and part of record relating in any manner to the laying of said water main and said assessment, and that, upon the coming in of the return of the respondent, the said charge complained of should be quashed and annulled, etc.

The writ of certiorari was issued and a return made thereto, the principal facts appearing therein are that the petitioner's land was assessed with the sum of $872.50, being at the rate of $1.25 for each linear foot abutting on the street; that the land abutting on the opposite side of the street was charged with an equal sum, making a total assessment of $2.50 per foot; and that the cost of the main was $1.50 per foot.

On January 6, 1896, after a hearing upon the petition and return, the petition was dismissed. An appeal was thereupon taken to the court of appeals of the District of Columbia, where, after argument, the judgment of the supreme court of the District was, on April 16, 1896, affirmed; and on May 5, 1896, the cause was by a writ of error brought to this court.

The principal enactments of Congress pertaining to the water system of the District of Columbia are found in the Revised Statutes relating to the District in chapter 8, §§ 195-221.

Thereby the legislative assembly, then in ex-
48] istence, was *authorized to supply the inhabitants of Washington and Georgetown with Potomac water from the aqueduct, mains, or pipes laid in the streets and avenues by the United States, and to make all laws and regulations for the proper distribution of the same; to establish a scale of annual rates for the supply and use of the water, and generally to enact such laws as might be necessary to supply the inhabitants of Washington and Georgetown with pure and wholesome water, and to carry into full effect the provisions of said chapter 8 of the Revised Statutes. It is further provided that a water tax may be levied and collected on all real property within the limits of the city of Washington, which binds or touches on any avenue, street, or alley in which a main water pipe may be laid by the United States or by the District; that the water tax may be levied on lots in proportion to their frontage or their area, as may be determined by law, and may be collected in not less than three nor more than five annual assessments; and that the water tax so authorized to be levied and collected shall constitute a fund to be used exclusively to defray the cost of distribution of the water, including all necessary fixtures and machines connected with such distribution.

In pursuance of the authority thus delegated, the legislative assembly, by act approved June 23, 1873, provided as follows:

"That hereafter, in order to defray the expenses of laying water mains and the erection of fire plugs, there be, and is hereby, levied a special tax of one and a quarter cents per square foot on every lot or part of lot which binds inor touches on any avenue, street, or alley in which a main water pipe may hereafter be laid and fire plug erected, which tax shall be assessed by the water registrar within thirty days after such water mains and fire plugs shall have been laid and erected; of which assessments the water registrar shall immediately notify the owner or agent of the property chargeable therewith, setting forth in said notice the number of the square in which is situated the property on which said tax is assessed, and the avenue, street, or alley on which it fronts; and the said tax shall be due and payable in four *equal instalments, the first of [49 which shall be payable within thirty days from the date of the notice," etc.

By the act of March 3, 1863 (Rev. Stat. D. C. § 204), it was provided that, "on petition of the owners of the majority of real estate on any square or line of squares in the city of Washington, water pipes may be laid and fire plugs and hydrants erected wherever the same may be requisite and necessary for public convenience, security from fire, or for health." But this provision was replaced by the act of June 17, 1890 (26 Stat. at L. 159, chap. 428), which enacted that "the Commissioners of the District of Columbia shall have the power to lay water mains and water pipes and erect fire plugs and hydrants wherever the same may be, in their judgment, necessary for the public safety, comfort, or health."

By the act of August 11, 1894 (28 Stat. at L. 275, chap. 253), it was provided "that hereafter assessments levied for laying water mains in the District of Columbia shall be at the rate of one dollar and twenty-five cents per linear front foot against all lots or land abutting upon the street, road, or alley in which a water main shall be laid."

Mr. **Arthur A. Birney,** for plaintiff in error:

In any case where proceedings are to be had for the taking of property, or to impose a bur-

den upon it, the statute itself must provide for notice to the property owner; otherwise it is unconstitutional.

Ulman v. *Baltimore*, 72 Md. 587, 11 L. R. A. 224, 165 U. S. 719 (41: 1184); *Garvin* v. *Daussman*, 114 Ind. 429; *Gatch* v. *Des Moines*, 63 Iowa, 718; *Allman* v. *District of Columbia*, 3 App. D. C. 8; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701 (28: 569); *Spencer* v. *Merchant*, 125 U. S. 345 (31: 763); *Palmer* v. *McMahon*, 133 U. S. 660 (33: 772); *Paulsen* v. *Portland*, 149 U. S. 30 (37: 637); *Stuart* v. *Palmer*, 74 N. Y. 189, 30 Am. Rep. 289.

A law which authorizes assessments to be laid without regard to benefits would take property for the public without compensation, or take property from one person for the benefit of another, and in either aspect it would be unconstitutional.

Stuart v. *Palmer*, 74 N. Y. 189, 30 Am. Rep. 289; *Illinois C. R. Co.* v. *Decatur*, 147 U. S. 198 (37: 135); *Dyar* v. *Farmington*, 70 Me. 527; *State, Cunningham*, v. *Ramsey County Dist. Ct.* 29 Minn. 62; *Johnson* v. *Milwaukee*, 40 Wis. 315; *Wetwell* v. *Cincinnati*, 45 Ohio St. 424; *Schumacker* v. *Toberman*, 56 Cal. 510.

By special benefits is not meant the usual advantages to the public derived from an improvement, but benefits which exceed the general benefits to the public, and which are present and accrue immediately from the construction of the work.

Mittel v. *Chicago*, 9 Ill. App. 534; *State, New Jersey R. & Transp. Co.*, v. *Elizabeth*, 37 N. J. L. 330.

And the assessment must not only be on the basis of benefits to the land assessed, but strictly in proportion to such benefits.

White v. *Saginaw*, 67 Mich. 40.

The assessment was a taking of private property for public use without just compensation.

Schenley v. *Com., Allegheny*, 36 Pa 29; *White* v. *Saginaw*, 67 Mich. 41.

Messrs. **Sidney T. Thomas** and **Andrew B. Duvall,** for defendants in error:

The act of the late legislative assembly of the District of Columbia, approved June 23, 1873, under which the assessment in question was levied, is not unconstitutional because it does not provide for preliminary notice to property owners of intention to lay water mains.

25 Am. & Eng. Enc. Law, 546, note 1 and cases; *Mobile* v. *Kimball*, 102 U. S. 691–704 (27: 238–242); *Louisiana* v. *Pillsbury*, 105 U. S. 278 (26: 1090); *Spencer* v. *Merchant*, 125 U. S. 345–353 (31: 763–767).

The assessment complained of was not a taking of private property without just compensation.

Baltimore v. *Johns Hopkins Hospital*, 56 Md. 1; *Alberger* v. *Baltimore*, 64 Md. 1; *Spencer* v. *Merchant*, 125 U. S. 355 (31: 767); *Taylor* v. *McFadden*, 84 Iowa, 262; *Allentown* v. *Henry*, 78 Pa. 404; *Allen* v. *Drew*, 44 Vt. 174.

The object of water-main taxes in the District of Columbia is to create a fund to defray the cost of distributing Potomac water.

Congress may authorize Washington city to assess the expense of repairing the streets with a new and different pavement upon adjacent proprietors of lots.

Willard v. *Presbury*, 14 Wall. 676 (20: 719).

Whether the particular proprietor has been benefited by public improvements cannot be reviewed by certiorari except for errors of law.

People, Davidson, v. *Gilon*, 126 N. Y. 147.

The commissioners of the District of Columbia had jurisdiction to lay the water main in question.

Spencer v. *Merchant*, 125 U. S. 345 (31: 763).

The original water-main tax of a cent and a quarter a square foot for laying water mains was a deliberate legislative judgment of the immediate cost of laying mains and the contingent expense of maintaining and keeping the same in repair.

Mr. Justice **Shiras** delivered the opinion of the court:

The defendants in error have moved to dismiss the writ of error, because the sum or value of the matter in dispute is less than $5,000, and because the judgment of the court below does not involve the validity of a statute of the United States or of an authority exercised under the United States.

It is true that the amount or value of the matter in dispute is not sufficient to enable this court to exercise its revisory power *over [50 the judgment of the court of appeals, but we think it plainly appears that the validity of statutes of the United States and of an authority exercised under the United States was drawn into question in the court below, and is presented, by the assignment of error, for the consideration of this court.

It is stated in the opinion of the court of appeals that the questions raised in that court were three: 1st, whether the act of the legislative assembly of the District of Columbia, approved June 23, 1873, in reference to the construction of water mains, and providing the mode of assessment therefor, and also the act of Congress of August 11, 1894 [28 Stat. at L. 275, chap. 253], "to regulate water-main assessments in the District of Columbia," are constitutional and valid enactments; 2d, whether in the assessment there was a sufficient description of the appellant's property; 3d, whether there was sufficient notice of the assessment given to the appellant. 8 App. D. C. 391. Those questions are clearly within the terms of the statute authorizing this court to review the final judgments or decrees of the court of appeals.

The proposition chiefly urged on our consideration is that, in all cases where proceedings are to be had for taking of property, or to impose a burden upon it, the statute itself must provide for notice to the property owner: otherwise it is unconstitutional; and that the statutes under which the present proceeding was had did not provide for notice to the owner of land to be assessed, nor give him an opportunity to be heard.

Before we reach a particular examination of the reasoning advanced and of the authorities cited on behalf of the plaintiff in error, certain principles, so well settled by the authorities, Federal and state, and by views expressed by esteemed authors, as to form safe materials from which to reason, may well be briefly adverted to.

In every modern civilized community or state there are some matters of which every

citizen and property owner must be indisputably visited with notice. In the eye of the law, he knows that his personal service is due to maintain public order and to protect his country from hostile invasion. He is bound to know that, in view of the protection he and his 51]*property receive, it is his duty to contribute his due share to the establishment and maintenance of stable government. No person, in any country governed by laws, least of all in a country where the laws are passed and administered by legally constituted authorities, can be heard to say that he was ignorant of the fact that such was his duty, and that, if he neglected or failed to make such due contribution, lawful compulsory methods might be resorted to.

So, too, when he elects to become a member of a municipal community, and seeks to enjoy the social benefits thereby afforded, he is supposed to have notice of the necessary obligations he thus incurs. Streets must be graded, paved, and lighted. A police force to enforce peace and order must be provided. Particularly, in the line of our present investigation, there is the obvious necessity for a system to supply the inhabitants with a constant and unfailing supply of water, as essential for health, comfort, and safety next in importance to air. He cannot be heard to contend that he is entitled to gratuitously receive such advantages, nor that the laws and ordinances under which they are created and regulated are invalid, unless his individual and personal views have been formally obtained and considered.

On the other hand it is equally well settled that the exercise of the power to assess and collect the public burdens should not be purely arbitrary and unregulated.

In each case, therefore, where the party, whose property is subjected to the charge of a public burden, challenges the validity of the law under which it was imposed, it becomes the duty of the courts to closely consider the special nature of the tax and legislation complained of.

It is trite to say that general principles announced by courts, which are perfectly sound expressions of the law under the facts of a particular case, may be wholly inapplicable in another and different case; and there is scarcely any department of the law in which it is easier to collect one body of decisions and contrast them with another in apparent conflict, than that which deals with the taxing and police powers.

There is a wide difference between a tax or as 52]sessment *prescribed by a legislative body, having full authority over the subject, and one imposed by a municipal corporation, acting under a limited and delegated authority. And the difference is still wider between a legislative act making an assessment, and the action of mere functionaries, whose authority is derived from municipal ordinances.

The legislation in question in the present case is that of the Congress of the United States, and must be considered in the light of the conclusion, so often announced by this court, that the United States possess complete jurisdiction, both of a political and municipal nature, over the District of Columbia. *Mattingly* v. *District of Columbia*, 97 U. S. 687 [24: 1098]; *Gibbons* v. *District of Columbia*, 116 U. S. 404 [29: 680]; *Shoemaker* v. *United States*, 147 U. S. 282 [37: 170]; *Bauman* v. *Ross*, 167 U. S. 568 [42: 280].

By this legislation a comprehensive system, regulating the supply of water and the erection and maintenance of reservoirs and of water mains, was established, and of this legislation every property owner in the District must be presumed to have notice. And accordingly when by the act of August 11, 1894, Congress enacted that thereafter assessments levied for laying water mains in the District of Columbia should be at the rate of one dollar and twenty-five cents per linear front foot against all lots or land abutting upon the street, road, or alley in which a water main shall be laid, such act must be deemed conclusive alike of the question of the necessity of the work, and of the benefits as against abutting property. To open such questions for review by the courts, on the petition of any or every property holder, would create endless confusion. Where the legislature has submitted these questions for inquiry to a commission, or to official persons to be appointed under municipal ordinances or regulations, the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing, or to notice or an opportunity to be heard.

This distinction was clearly brought out in the noted case of *Stuart* v. *Palmer*, 74 N. Y. 183 [30 Am. Rep. 289]. There an act of the state of New York empowered a commission composed of three persons to open and pave an avenue, and for that purpose "to take *such[53 land as was requisite, estimate the value thereof, and assess the amount on the lands benefited by the opening of the avenue in proportion to the benefits," but which provided for no notice to the property owner; and the court of appeals held that notice of the proceeding was essential, and that, accordingly, the proceedings were invalid. Subsequently the legislature passed a validating act, directing a sum equal to so much of the first assessment as had not been paid, with interest, and a proportionate part of the expenses of that assessment, should be assessed upon and apportioned among the lots upon which the former assessment had not been paid. The court of appeals sustained the act. [*Spencer* v. *Merchant*], 100 N. Y. 585. In delivering the opinion of that court, Judge Finch said:

"The act of 1881 determines absolutely and conclusively the amount of tax to be raised, and the property to be assessed and upon which it is to be apportioned. Each of these things was within the power of the legislature whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. . . . The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so, and may settle both questions for itself; and when it does so its action is necessarily conclusive and beyond review. Here an improvement has been ordered and made; the expense of which might justly have been imposed upon adjacent property benefited by the change. By the act of 1881, the legislature imposes the unpaid portion of the cost and ex-

pense with the interest thereon upon that portion of the property benefited which has thus far borne none of the burden. In so doing it necessarily determines two things, *viz.*, the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of neces-
54]sity a question of fact, and *when the legislature determines it in a case within its general power, its decision must of course be final. . . . The precise wrong of which complaint is made appears to be that the landowners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the legislature and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission that is a hearing never granted in the process of taxation. The legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confided to its jurisdiction. It may err, but the courts cannot review its discretion. In this case, it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its direction; and, second, when it designated the lots and property which, in its judgment, by reason of special benefits should bear the burden; and, having the power, we cannot criticise the reasons or manner of its action."

The case was brought to this court, and, under the style of *Spencer* v. *Merchant*, is reported in 125 U. S. 345 [31: 763]. The reasoning of the court of appeals was quoted and approved, and its judgment, sustaining the constitutionality of the act in question, was affirmed.

In *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701 [28: 569], the distinction between a tax or assessment imposed by a direct exercise of the legislative power, calling for no inquiry into the weight of evidence, nor for anything in the nature of judicial examination, and a tax or assessment imposed upon property according to its value to be ascertained by assessors upon evidence, was pointed out, and it was held that in the former case no notice to the owner is required, but that in the latter case the officers, in estimating the value, act judicially, and notice and an opportunity to be heard are necessary. In giving the opinion of the court it was said by Mr. Justice Field: "Of
55]the different kinds of taxes which the *state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him,—such as poll taxes, license taxes, . . . and, generally, specific taxes on things or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded."

Similar views have prevailed in most of the state courts, but, instead of citing the cases, we shall content ourselves with referring to the conclusions reached by two text-writers of high authority.

In Cooley on Taxation, p. 447, the following conclusions, from many cases, are stated:

"1. The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.

"2 The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.

"3. The whole cost in other cases is levied on lands in the immediate vicinity of the work.

"In a constitutional point of view either of these methods is admissible, and one may be sometimes just, and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule."

In Dillon's Municipal Corporations, vol. 2, § 752, 4th ed., the conclusions reached are thus expressed:

*"The courts are very generally agreed [
56
that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it . . . Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency."

It is well settled, by repeated decisions of this court, that the power of Congress to exercise exclusive jurisdiction in all cases whatever within the District includes the power of taxation. *Loughborough* v. *Blake*, 18 U. S. 5 Wheat. 317 [5: 98]; *Willard* v. *Presbury*, 81 U. S. 14 Wall. 676 [20: 719]; *Shoemaker* v. *United States*, 147 U. S. 282 [37: 170]; *Bauman* v. *Ross*, 167 U. S. 548 [42: 270]; *Wilson* v. *Lambert*, 168 U. S. 611 [*ante*, 599].

Our conclusion is that it was competent for Congress to create a general system to store water and furnish it to the inhabitants of the District, and to prescribe the amount of the assessment and the method of its collection; and that the plaintiff in error cannot be heard to complain that he was not notified of the cre-

ation of such a system or consulted as to the probable cost thereof. He is presumed to have notice of these general laws regulating such matters.

The power conferred upon the Commissioners was not to make assessments upon abutting properties, nor to give notice to the property owners of such assessments, but to determine the question of the propriety and necessity of laying water mains and water pipes, and of erecting fire plugs and hydrants, and their bona fide exercise of such a power cannot be reviewed by the courts.

Another complaint urged is that the assessment exceeded the actual cost of the work, and this is supposed to be shown by the fact that the expense of putting down this particular main was less than the amount raised by the as-
57] sessment. *But this objection overlooks the fact that the laying of this main was part of the water system, and that the assessment prescribed was not merely to put down the pipes, but to raise a fund to keep the system in efficient repair. The moneys raised beyond the expense of laying the pipe are not paid into the general treasury of the District, but are set aside to maintain and repair the system; and there is no such disproportion between the amount assessed and the actual cost as to show any abuse of legislative power.

A similar objection was disposed of by the supreme judicial court of Massachusetts in the case of *Inhabitants of Leominster* v. *Conant*, 139 Mass. 384. In that case the validity of an assessment for a sewer was denied because the amount of the assessment exceeded the cost of the sewer; but the court held that the legislation in question had created a sewer system, and that it was lawful to make assessments by a uniform rate which had been determined upon for the sewerage territory.

In *Hyde Park* v. *Spencer*, 118 Ill. 446, and other cases, the supreme court of Illinois held that a statutory assessment to defray the cost, maintenance, and keeping in repair of a drainage system, was valid.

The other contentions made on behalf of the plaintiff in error are covered by the observations already made.

The judgment of the Court of Appeals is accordingly affirmed.

CHICAGO, BURLINGTON, & QUINCY RAILROAD COMPANY, *Plff. in Err.*, *v.* STATE OF NEBRASKA, *ex rel.* CITY OF OMAHA.

(See S. C. Reporter's ed. 57-77.)

Federal question—power of this court—contracts affecting public welfare—contract between a city and a railroad to construct a viaduct—police power—due process of law.

1. A Federal question is raised by an unsuccessful contention in a state court that the obligations of a contract have been impaired by state statute and ordinances.
2. This court, when reviewing a state judgment upholding a state enactment alleged to be in violation of the contract clause of the Constitution, will determine for itself the existence or nonexistence of the alleged contract, and whether its obligation has been impaired by the state enactment.
3. Contracts which affect the safety and welfare of the public are within the supervising power and control of the legislature when exercised to protect the public safety, health, or morals.
4. A contract between a city and a railroad company to participate in the construction of a viaduct in view of their mutual duty to the public is not violated by a statute and ordinance compelling the railroad company to repair it.
5. The maintenance of a safe viaduct over railroad tracks at an important street crossing in a populous city cannot be taken out of the police power of the legislature by contract between the city and railroad company.
6. An apportionment by ordinance, of the repairs to a railroad viaduct between railroad companies, without notice to them, is not without due process of law, when they have opportunity to, and do in fact, put in issue the validity of the ordinance and the reasonableness of the apportionment.

[No. 178.]

Argued January 10, 11, 1898. Decided April 11, 1898.

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment of that court affirming the judgment of the District Court of the Fourth Judicial District of Nebraska in favor of the plaintiff, the state of Nebraska, on the relation of the City of Omaha, against the Chicago, Burlington, & Quincy Railroad Company for a peremptory mandamus requiring the defendant company to make repairs upon a viaduct in the city of Omaha. There was also motion to dismiss. *Judgment affirmed.*

See same case below, 47 Neb. 549.

Statement by Mr. Justice **Shiras:**

The state of Nebraska on the relation of the city of Omaha filed its petition in the district court of the fourth judicial district of Nebraska on January 19, 1895, asking judgment for the issuing of a writ of mandamus requiring the Chicago, Burlington, & Quincy Railroad Company to repair, in accordance with the directions of a city ordinance enacted under certain statutes of the state legislature, the south one third of the viaduct at Eleventh street in the city of Omaha, a structure forming a part of that street and spanning a number of railroad tracks, one of which was owned and used by the said company, the others being owned by the Union Pacific Railway Company and used by it and two other companies. The defendant filed its answer on March 6, 1895, alleging therein, amongst other things, that the legislature of Nebraska had no *power to [59 impose upon the defendant the duty of maintaining or repairing the viaduct, for the reason that to do so would be in violation of the ob-

NOTE.—*That impairing remedy impairs obligation of contract*, see note to Louisiana, Ranger, v. New Orleans, 26: 132.

As to constitutionality of law altering charter, as impairing contract, see note to Dartmouth College v. Woodward, 4: 629.

ligations of the contract, hereinafter described, under which the viaduct was constructed, and contrary to the provisions of the Constitution of the United States. At the trial of the case evidence was adduced by both parties, but there was substantially no dispute respecting the facts, the controversy having relation only to the validity, interpretation, and effect of legislative enactments and to the validity of city ordinances. On May 1, 1895, the court entered judgment in favor of the city, and directed that a peremptory writ of mandamus issue to the defendant company, commanding and requiring it to make the repairs in question, the same to be commenced immediately and carried forward without unnecessary delay. The defendant, having been denied a new trial, took the case on writ of error to the supreme court of the state, and, upon the affirmance by that court of the judgment of the said district court, sued out a writ of error bringing the case here, alleging in its assignment of errors that the statutes of Nebraska, which were held by the supreme court of that state to be valid, and to require the company to make the said repairs, were repugnant to the Constitution of the United States because they impaired the obligation of contracts, abridged the company's privileges and immunities, deprived it of its property without due process of law, and denied to it the equal protection of the laws, and that the judgment enforcing those statutes was therefore erroneous.

The facts presented are substantially as follows:

The defendant company is a corporation of the state of Illinois, has complied with the laws of the state of Nebraska so as to be authorized to do business as a railroad company in that state, and maintains a general office therein, and is the grantee of and successor to the Burlington & Missouri River Railroad Company in Nebraska, a corporation of the state of Nebraska, which company was the lessee of the Omaha & Southwestern Railroad Company, a corporation organized in the year 1869 under chapter 25, Revised Statutes of Nebraska [60] of 1866. *That chapter contains, among other provisions, the following:

"Sec. 83. If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley, or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities owning or having charge thereof, and the railroad company, to agree upon the manner, and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary, in the judgment of the directors of such railroad company, to use or occupy such road, street, alley, or other public way or ground, such company may appropriate so much of the same as may be necessary for the purposes of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the eighty-first section of this chapter. . . . Sec. 86. Any railroad company may construct and carry their railroad across, over, or under any road, railroad, canal, stream, or watercourse, when it may be necessary in the construction of the same; and in such cases said corporation shall so construct their railroad crossings as not necessarily to impede the travel, transportation, or navigation upon the road, railroad, canal, stream, or watercourse so crossed. . . . Sec 103. Every railroad corporation shall maintain and keep in good repair all bridges with their abutments which such corporation shall construct, for the purpose of enabling their road to pass over or under any turnpike, road, canal, watercourse, or other way."

On May 14, 1884, an ordinance of the city of Omaha was approved, granting to the Omaha & Southwestern Railroad Company the right of way through portions of certain streets and alleys, including Eleventh street, in that city. The ordinance was in part as follows:

"Said Omaha & Southwestern Railroad Company shall have the right to construct, maintain, and operate a line of railroad along, upon, through, and across said portions of said streets and alleys as a part of its line; Provided, that said *railroad track and tracks [61] are constructed so as to conform to the grade of said street as near as may be, and so as to interfere as little as possible with the travel along and upon said streets; and, provided, that nothing herein contained shall be construed as interfering with the right of any property owner to recover from said company any damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall authorize any interference with the tracks of the Union Pacific Railway Company now laid and operated by said Union Pacific Railway Company in any portions of the streets and alleys herein named and enumerated."

On March 4, 1885, an act of the legislature of Nebraska was approved, entitled "An Act to Provide for Viaducts, Bridges, and Tunnels in Certain Cases, in Cities of the First Class;" whereby it was provided that the mayor and city council of any city of the first class should have power, whenever they deemed any such improvement necessary for the safety and convenience of the public, to engage and aid in the construction of any viaduct or bridge over or tunnel under any railroad track or tracks, switch or switches, in such cities, when such track or switches crossed or occupied any street, alley, or highway thereof, in the manner and extent provided for in the act; and should have the power to pass any or all ordinances, not in conflict with the act, that might be necessary or proper for the construction, maintenance and protection of the said works.

By virtue of this act the city of Omaha, which was then a city of the first class, and the Union Pacific Railway Company and the Omaha & Southwestern Railroad Company,

As to what laws are void as impairing obligations of contracts, see note to Fletcher v. Peck, 3: 162.

As to what is due process of law, see note to Pearson v. Yewdall, 24: 436.

As to effect of decision of state courts in Federal courts; rule of property; questions of general or commercial law; effect of state decisions in other states; Federal questions,—see note to Forepaugh v. Delaware, L. & W. R. Co. (Pa.) 5 L. R. A. 506.

the lessor of the defendant company, executed an agreement in writing February 1, 1886, providing, amongst other things, for the construction of a viaduct on Eleventh street across the tracks of those companies The agreement was in part as follows:

"That the said parties of the second part, [the Union Pacific Railway Company and the Omaha & Southwestern Railroad Company], in 62] pursuance of the provisions of an act *of the legislature of the state of Nebraska, entitled 'An Act to Provide for Viaducts, Bridges, and Tunnels in Certain Cases, in Cities of the First Class,' do hereby assume and agree to pay as may be required by the mayor and city council of said city three fifths of the entire cost of constructing a viaduct along Eleventh street and three fifths of the damages to abutting property on account of the construction of such viaduct not otherwise provided for by waivers or private contributions, such entire costs and damages not to exceed the sum of ninety thousand dollars ($90,000), the amount so assumed and agreed to be paid being three fifths of the entire cost and damages, to be proportioned between said parties of the second part, as follows: Three fourths thereof to be paid by said Union Pacific Railway Company and one fourth thereof to be paid by said Omaha & Southwestern Railroad Company. . . . The plans and specifications for said viaducts, before contracts for the construction thereof are entered into, shall be submitted and approved by said parties of the second part, and should plans and specifications be adopted by said party of the first part, and approved by said party of the second part, which shall increase the said cost and damages beyond the amounts herein limited, then the said parties of the second part are to pay their respective proportions of said increased cost and damages, in the same manner and according to the same division as hereinbefore agreed."

Under the provisions of this agreement the viaduct was built, and in 1887 it was opened to the use of the public. On March 30 of that year, a short time before the viaduct was completed, an act of the legislature was approved, entitled "An Act to Incorporate Metropolitan Cities, Defining, Regulating, and Prescribing Their Duties, Powers, and Government" The act, which took effect from its passage, declared that all cities in the state of Nebraska then having a population of 60,000 inhabitants or more according to the state census of 1885, and all cities in the state which should thereafter have a population of 60,000 inhabitants or more, should be considered and known as cities of the metropolitan class, and should be governed by the provisions of the act. Chap. 10, Laws 63]of *Nebraska 1887. At that time the city of Omaha, according to the state census of 1885, had a population in excess of the said number, and under the act was incorporated a city of the metropolitan class. Section 48 of this act, as amended by an act approved in 1893 (chap. 3, Laws of Nebraska 1893), is as follows:

"Sec. 48. The mayor and council shall have power to require any railroad company or companies, owning or operating any railroad track or tracks upon or across any public street or streets of the city, to erect, construct, reconstruct, complete, and keep in repair any viaduct or viaducts, upon or along such street or streets, and over or under such track or tracks, including the approaches to such viaduct or viaducts, as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. Whenever any such viaduct shall be deemed and declared by ordinance necessary for the safety and protection of the public, the mayor and council shall provide for appraising, assessing, and determining the damages, if any, which may be caused to any property by reason of the construction of such viaduct and its approaches.

"The proceedings for such purpose shall be the same as provided herein for the purpose of determining damages to property owners by reason of the change of grade of a street, and such damages shall be paid by the city, and may be assessed by the city council against property benefited.

"The width, height, and strength of any such viaduct, and approaches thereto, the material therefor, and the manner of the construction thereof, shall be as required by the board of public works, as may be approved by the mayor and council.

"When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof, and the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council.

"It shall be the duty of any railroad company or companies, upon being required as herein provided, to erect, construct, reconstruct, *or repair any viaduct, to proceed [64 within the time and in the manner required by the mayor and council, to erect, construct, reconstruct, or repair the same, and it shall be a misdemeanor for any railroad company or companies, to fail, neglect, or refuse to perform such duty, and upon conviction any such company or companies shall be fined one hundred dollars ($100), and each day any such company or companies shall fail, neglect, or refuse to perform such duty shall be deemed and held to be a separate and distinct offense, and in addition to the penalty herein provided any such company or companies shall be compelled by mandamus or other appropriate proceeding to erect, construct, reconstruct, or repair any viaduct as may be required by ordinance as herein provided. The mayor and council shall also have power whenever any railroad company or companies shall fail, neglect, or refuse to erect, construct, reconstruct, or repair any viaduct or viaducts, after having been required so to do as herein provided, to proceed with the erection, construction, reconstruction, or repair of such viaduct or viaducts by contract or in such other manner as may be provided by ordinance, and assess the cost of the erection, construction, reconstruction, or repair of such viaduct or viaducts against the property of the railroad company or companies required to erect, construct, reconstruct, or repair the same, and such cost shall be a valid and subsisting lien against such property, and shall also be a legal indebtedness of said company or companies in favor of such city, and may be enforced and collected by suit in the proper court."

In May, 1890, the Union Pacific Railway

Company, which now owns twenty one tracks crossing Eleventh street beneath the said viaduct, entered into agreements with the Chicago, Rock Island, & Pacific Railway Company and the Chicago, Milwaukee, & St. Paul Railway Company, by the terms of which agreements it granted to those companies the right to possess and use, in common with itself, its main and passing tracks between certain points, which tracks are among the said twenty-one tracks, for the period of 999 years. Subsequently, in that year, the said companies **65**] entered *into possession of the interests granted them, and have since continued to use the said tracks in common with their grantor.

By a concurrent resolution of the city council of Omaha, adopted July 21, 1892, it was provided that the city engineer and the committee on viaducts and railways should examine the roadbed of the said viaduct and report whether or not it was necessary to repave it. Acting under this resolution the committee made an examination, and on the 23d of the following month reported in writing that both the roadway and sidewalk of the viaduct were in a dangerous condition. By authority of the city, the viaduct was closed to general public travel sometime in 1892, but continued to be used by a street-railway company, whose tracks were laid across it, until the autumn of 1894, since which time the city has not permitted it to be used for any travel.

By an ordinance approved December 12, 1893, the city declared the necessity of repairing the viaduct, and empowered and directed the board of public works to prepare plans and specifications for the repairs. Such plans and specifications were thereafter prepared, and were submitted to the council December 15, 1893, by the board of public works and the city engineer, and on January 30, 1894, the council passed an ordinance, No. 3752, approved February 3, 1894, which is as follows:

"An Ordinance Approving the Plans and Specifications Submitted by the Board of Public Works for the Repairing of the Eleventh Street Viaduct over the Railroad Tracks and Ordering the Repairing of Said Viaduct to Be Done.

"Whereas, it has been and hereby is deemed and declared necessary for the safety and protection of the public that the Eleventh street viaduct be repaired as herein required; and

"Whereas, it is right, proper, and reasonable that the railroad companies owning or operating railway tracks across said Eleventh street should make said repairs to said viaduct; therefore

"*Be it ordained by the City Council of the City of Omaha:* Section 1, That the plans and specifications submitted by the board of public works of the city of Omaha, December 15, 1893, **66**]*for the repairs of the Eleventh street viaduct over the railroad tracks, upon and across Eleventh street, from a point near Jackson street to a point near Mason street, in the city of Omaha, as prepared by the city engineer of said city, be and the same are hereby approved and adopted.

"Sec. 2. That the Union Pacific Railway Company be and is hereby ordered, directed, and required to repair that portion of said Eleventh street viaduct from the north end of said viaduct south for a distance of two thirds of the entire length of said viaduct; and the Chicago, Burlington, & Quincy Railroad Company, grantee and successor to the Missouri River Railroad Company, in Nebraska, and the Omaha & Southwestern Railroad Company, be and is hereby ordered, directed, and required to repair that portion of said Eleventh street viaduct commencing at the south end thereof, and extending northward a distance of one third of the entire length of said viaduct; the said repairs to be made in accordance with said plans and specifications, and to be done under the supervision of the city engineer; the said repairs to be commenced without unnecessary delay and fully completed, as herein required, within ninety days from the passage and approval of this ordinance.

"Sec. 3. That the city clerk be and is hereby directed to furnish to said Union Pacific Railway Company and to said Chicago, Burlington, & Quincy Railroad Company, owning or operating railroad tracks upon and across said Eleventh street under said Eleventh street viaduct, a duly certified copy of this ordinance, without unnecessary delay, and that the city engineer is hereby directed to furnish to each of said railroad companies a copy of said plans and specifications, and to superintend the work of making said repairs.

"Sec. 4. That this ordinance shall take effect and be in force from and after its passage."

Certified copies of this ordinance and of the said plans and specifications were furnished to the defendant company, but it refused to make the said repairs, or to take any action with reference to making the same. Wherefore the present proceeding was instituted as aforesaid.

Messrs. **Charles J. Greene** and *Ralph W. Breckenridge* for plaintiff in error.

Mr. **W. J. Connell** for defendant in error.

Mr Justice **Shiras** delivered the opinion of the court:

The motion to dismiss the writ of error, on the ground that the rights and immunities of the plaintiff in error under the Constitution of the United States were not set up or claimed in the state courts at the proper time and in the proper way, cannot be allowed.

This subject has been so frequently and so recently discussed by this court that it is unnecessary for us to further consider it at large. It is sufficient to say that this record discloses that the plaintiff in error, in its answer to the writ of mandamus issued out of the district court of Douglas county, state of Nebraska, claimed that by reason of certain provisions of its charter, of general laws of the state, and of ordinances of the city of Omaha, all of which were specifically set forth, a contract was created between the plaintiff in error and said city in respect to the viaduct in question, the obligations whereof would be violated by the proposed enforcement of the subsequent act 1887, contrary to the provisions of the Constitution of the United States; that the district court held that the laws and ordinances so pleaded did not create a contract between the state and city on the one side and the plaintiff in error on the other;

that the plaintiff in error in its petition in error to the supreme court of the state, specifically assigned as error the holding of the trial court, that the said laws, charter, and ordinances did not constitute a contract within the meaning and protection of the Constitution of the United States, guaranteeing the inviolability of contracts; and that the supreme court of the state, in its opinion disposing of the case, states that "the most important subject of inquiry is presented by respondent's contention that the ordinance under which the
68] city proceeded in ordering *the repairs in question contemplates the taking of its property without due process of law within the meaning of the state and Federal Constitutions, and also impairs the obligation of the contract under which its track was laid and under which said viaduct was constructed."

We think it is plain, from this recital, that a Federal question was specifically presented in both the trial and supreme court of the state.

As the record further discloses that the state supreme court overruled the railroad company's contention that it held an existing contract whose obligation would be violated by the enforcement of the provisions of a subsequent law of the state, it becomes the duty of this court to inquire whether there was error in that judgment of the supreme court of the state.

We have often had occasion to say that this court, when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, possesses paramount authority to determine for itself the existence or the nonexistence of the contract set up, and whether its obligation has been impaired by the state enactment. *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 1 Black, 436 [17: 173]; *Mississippi & M. Railroad Co.* v. *Rock*, 71 U. S. 4 Wall. 177 [18: 381]; *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18 [31: 607]; *Mobile & Ohio Railroad Co.* v. *Tennessee*, 153 U. S. 492 [38: 796].

We shall proceed, therefore, to examine whether the statutes and ordinances to which the plaintiff in error points us constituted a contract within the protection of the Constitution of the United States, and whether such contract, if found to exist, has been impaired by the subsequent statute and the proceedings thereunder.

The contract, which the plaintiff in error sets up as constitutionally protected from subsequent legislation, is alleged to be found in the act of March 4, 1885, and the agreement in compliance with the provisions of that act between the city of Omaha, the Union Pacific Railway Company, and the Omaha & Southwestern Railroad Company on the 1st day of February, 1886.

69] *By the provisions of the act the mayor and city council in any city of the first class were authorized, whenever they deemed it necessary for the safety and convenience of the public, to engage and aid in the construction of any viaduct, or bridge over, or tunnel under any railroad track or tracks, switch or switches, in such cities, when such tracks or switches cross or occupy any street, alley, or highway thereof; to adopt and secure plans and specifications therefor, together with the estimated cost of the work, and thereupon, if the railroad company or companies, across whose tracks or switches the work is proposed to be built, will assume three fifths of all damages to abutting property on account of the construction of said viaduct, bridge, or tunnel, and secure to the city the payment of the necessary funds to meet it as the work progresses, in such manner and with such security as the mayor and city council shall require; and when the payment of the further sum of one fifth of the money required for said improvement is arranged for in manner satisfactory to said mayor and council, either by private donations or by execution of such good and sufficient bonds as will protect said city from the payment of said one fifth, then the said mayor and council may proceed to contract with the necessary party or parties for the construction of such viaduct, bridge, or tunnel, under the supervision of the board of public works of such city, and to provide for the payment of one fifth of the cost thereof by the city, by special tax on all taxable property in such city, and one fifth by special tax on property benefited. It was further provided that the city, with the assent of the railroad company or companies aiding in the construction of any such viaduct, bridge, or tunnel, may permit any street railway company to build its street-railway track and operate its railway upon or through the same, upon such terms and conditions and for such compensation as shall be agreed upon between the city and the street-railway company; and that the compensation for such use shall be set apart and used towards the maintenance of such viaduct, bridge, or tunnel; and it was further provided that the mayor and council of any such city should have the power to pass any and all ordinances, *not in conflict [70
with the act, that might be necessary or proper for the construction, maintenance, and protection of the works provided for.

The agreement made in pursuance of the said act, between the city of Omaha, as party of the first part, and the Union Pacific Railway Company and the Omaha & Southwestern Railroad Company, as parties of the second part, provided that the parties of the second part assumed and agreed to pay, as should be required by the mayor and city council, three fifths of the entire cost of constructing such viaduct along Eleventh street in said city over the railroad tracks of the said second parties, and three fifths of the damages to abutting property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of $90,000; and that the amount so assumed and agreed to be paid, being three fifths of the entire cost and damages, was to be apportioned between the railroad companies, so that three fourths thereof should be paid by the Union Pacific Railway Company and one fourth by the Omaha & Southwestern Railroad Company.

Under this agreement the viaduct was built and finally opened to the use of the public early in the year 1887.

By an act approved March 30, 1887 (Laws of Nebraska 1887, p. 105), entitled "An Act Incorporating Metropolitan Cities, and Defining,

Regulating, and Prescribing Their Duties, Powers, and Government," it was, among other things, provided as follows: "The mayor and council shall have power to require any railroad company or companies, owning or operating any railroad track or tracks upon or across any public street or streets of the city, to erect, construct, reconstruct, complete, and keep in repair any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including the approaches to such viaduct or viaducts, as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. . . . When two or more railroad companies own or operate separate lines of track to be 71]crossed by any such viaduct, *the proportion thereof, and of the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council. After the completion of any such viaduct, any revenue derived therefrom by the crossing thereon of street-railway lines or otherwise shall constitute a special fund, and shall be applied in making repairs to such viaduct. All ordinary repairs to any such viaduct or to the approaches thereto shall be paid out of such fund, or shall be borne by the city."

In 1893 another act was passed (Laws of Nebraska 1893, p. 70) amending the act of 1887, and making it the duty of any railroad company or companies to erect, construct, or repair any viaduct in the manner required by the mayor and council, providing a penalty for neglect or refusal to perform such duty, and prescribing a proceeding by mandamus to compel the companies to erect or repair any viaduct as may be required by ordinance, and empowering the city, in case of failure or refusal by the railroad companies, itself to do the necessary work, the cost thereof to be a charge and lien upon the property of the railroad companies, and also to be a legal indebtedness of the companies, collectible by suit in the proper court. On January 30, 1894, the city council passed an ordinance requiring the Union Pacific Railway Company to repair that portion of the said Eleventh street viaduct for a distance of two thirds of the entire length of the viaduct, and the Chicago, Burlington, & Quincy Railroad Company, as grantee and successor of the Omaha & Southwestern Railroad Company, to repair the other one-third portion of said viaduct, said repairs to be made in accordance with plans furnished by the city and under the supervision of the city engineer, and to be completed within ninety days. And upon the refusal of the companies to comply with said ordinance separate proceedings in mandamus were brought against them.

No doubt the agreement of 1886 constituted a contract, in such a sense that the respective parties thereto continued to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remained unchanged. While the agreement lasted its pro-72] visions defined the rights and duties *of the city and the railroad companies. But was it a contract whose continuance and operation could not be affected or controlled by subsequent legislation?

Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health, and morals, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature.

We do not, indeed, understand that these principles are questioned on behalf of the plaintiff in error. What is claimed is that the subject-matter of the contract in question does not fall within the range of the police power of the state. It is argued that "while it may be true that a viaduct over railroad tracks located across a public street may be essential to the public safety, it does not follow that a legislative enactment impairing the obligation of an existing contract is necessary to secure its construction and maintenance, and that any attempt upon behalf of the state to establish a viaduct through such legislation, however necessary the viaduct itself may be to the public safety, would be an invasion of the Federal jurisdiction unless adopted under the compulsion of state necessity; that while it is not questioned that the *maintenance of the viaduct[73 is essential to the safety of the community, yet if existing contract obligations devolve this burden upon the city, the legislature of the state cannot, under the plea of public necessity, pass a law imposing it upon the plaintiff in error, without bringing the act within the prohibitions of the Federal Constitution."

Before considering this proposition it is proper to observe that it proceeds upon the assumption that, by the agreement between the parties in the present case, the duty of repairing and maintaining the viaduct was put upon the city. But an examination of the terms of the contract fails to show that this assumption is well founded. Certainly there is therein no express provision or stipulation that, after the viaduct had been constructed, its future repair and maintenance should be at the cost of the city. It is, however, contended that, as the viaduct when constructed became a part of Eleventh street, and as the law implies a duty on the city to keep its streets in a safe condition, such a duty entered into this contract as a part thereof, and therefore the city by the execution of the contract became bound to keep the viaduct in repair. On the other side, however, it was equally made the duty of the rail-

road company by the statute of Nebraska under which this agreement was made "to maintain and keep in good repair all bridges, with their abutments, which such corporation shall construct for the purpose of enabling their road to pass over or under any turnpike, road, canal, watercourse, or other way."

While, therefore, it is the equal duty of the city and of the railroad company to guard the safety of the public by the erection and maintenance of a proper crossing or viaduct, it does not follow that, in the absence of an express agreement to that effect, such a duty is, by implication of law, devolved upon one party to the relief of the other. Indeed, the contract in question shows that, in consideration of their mutual duty to the public, the parties participated in the expense of the construction of the viaduct; and it would seem to be a reasonable implication that there should be a common obligation to keep it in repair.

However this may be, we think that, in view [74] of the *paramount duty of the legislature to secure the safety of the community at an important crossing within a populous city, it was and is within its power to supervise, control, and change such agreements as may be, from time to time, entered into between the city and the railroad company, in respect to such crossing, saving any rights previously vested. Any other view involves the proposition that it is competent for the city and the railroad company, by entering into an agreement between themselves, to withdraw the subject from the reach of the police power, and to substitute their views of the public necessities for those of the legislature.

This subject has been so often considered by this court that it seems needless to here enlarge upon it. It is sufficient to cite a few of the cases. *Boston Beer Co* v. *Massachusetts*, 97 U. S. 25 [24: 989]; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659 [24: 1036]; *New Orleans Gaslight Co.* v. *Louisiana Light Co.* 115 U S. 650 [29: 516]; *Mugler* v. *Kansas*, 123 U. S. 623 [31: 205].

In *New York & New England R. R. Co.* v. *Bristol*, 151 U. S. 556 [38: 269], the subject was elaborately considered, and it was there held that an act of the state of Connecticut relating to railway crossings, being directed to the extinction of grade crossings as a menace to public safety, was a proper exercise of the police power of the state; that there is no unjust discrimination and no denial of the equal protection of the laws, in regulations regarding railroads, which are applicable to all railroads alike; and that the imposition upon a railroad corporation of the entire expense of a change of grade at a highway crossing is no violation of the Constitution of the United States, if the statute imposing it provides for an ascertainment of the result in a mode suited to the nature of the case. It is true that in that case there was a provision in the charter of the railroad company, reserving a right to the legislature to alter and amend the same; but this court based its reasoning and conclusion entirely upon the police power of the state. The following language of the supreme court of Connecticut was quoted with approval: "The act, in scope and purpose, concerns protection of life. Neither in intent nor fact does it increase or diminish the assets either of the city or of the *railroad corporations. It is the ex- [75] ercise of the governmental power and duty to secure a safe highway. The legislature having determined that the intersection of two railways with a highway in the city of Hartford at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone or in part by both; and may enforce obedience to its judgment."

Wabash Railroad Company v. *Defiance*, 167 U. S. 88 [42: 87], was a case much like the present one. It was there held, affirming the supreme court of Ohio, that the legislative power of a city may control the question of grades and crossings of its streets, and a power to that effect, when duly exercised by ordinances, will override any license or consent previously given, by which the control of a certain street had been surrendered; that such matters cannot, from their public nature, be made the subject of a final and irrevocable contract.

Another ground of complaint is that the act in question delegates to the municipality authority, in cases where two or more railway companies own or operate tracks across public streets, to impose the cost and expense of constructing and maintaining viaducts over the same upon either or any of such companies, and that the city ordinance, in execution of such authority, imposes upon two of the four companies named in the record the entire expense of the repairs in question, and this is said to deny the plaintiff in error the equal protection of the law.

It is true that, by virtue of agreements between the Union Pacific Railway Company and the Chicago, Milwaukee, & St. Paul Railroad Company and the Chicago, Rock Island, & Pacific Railroad Company, the latter two companies were using certain tracks belonging to the former which were under said viaduct. But it is not easy to see why the *plaintiff [76] in error can complain that the city omitted to bring those companies in as parties. The nature and extent of their rights under the agreements with the Union Pacific Railway Company do not appear, and, for aught that is disclosed in this record, it may have been a feature of those agreements that the Union Pacific should protect them from any charge or exaction of the kind in question.

Again, it is said that the apportionment made by the ordinance of the extent of the repairs, one third to the plaintiff in error and two thirds to the Union Pacific Railway Company, was arbitrary, without notice, and contrary to plain principles of justice and equality.

But if, as we have seen, it would have been competent for the legislature to have put the burden of these repairs upon one of the parties, or to have apportioned them among the parties, as it saw fit, so it may make a due apportionment through the instrumentality of the

city council. The latter was not directed to proceed judicially, but to exercise a legally delegated discretion.

In *State* v. *Missouri Pacific Ry. Co.* 33 Kan. 176, the power of the city of Atchison to compel the respondents to construct viaducts was sustained under legislation similar to that herein involved, and referring to the subject of notice, the court, per Judge Valentine, said: "We do not think that it is necessary that the city should have given the railroad companies notice before passing the ordinance requiring them to construct the viaduct. Notice afterward, with an opportunity on the part of the railroad company to contest the validity of the ordinance and the right of the city to compel them to construct the viaduct, is sufficient."

New York Health Department v. *Trinity Church*, 145 N. Y. 32 [27 L. R. A. 710], was the case of an action to recover a penalty under a statute requiring all tenement houses to be supplied with water on each floor occupied or intended to be occupied by one or more families, whenever so directed by the board of health. The statute made no provision for notice to property holders, and none in fact was given, while it was admitted that it would cost the respondent a considerable sum of money to comply with the order of the board. 77] *In the opinion of the court, per Peckham, J., it was said: "The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in a particular case. . . . The fact that the legislature has chosen to delegate a certain portion of its power to the board of health . . . would not alter the principle, nor would it be necessary to provide that the board shall give notice and afford a hearing to the owner before it made such order. . . . Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

So, in the present case, while no notice may have been given to the railroad companies of the pendency of the ordinance, and while they may not have been invited to participate in the proposed legislation, yet they had an opportunity to, and did in fact, put in issue, by the answer, both the validity of the ordinance and the reasonableness of the amount apportioned to them respectively for the repair of the viaduct in question.

The validity of the statute and of the ordinance having been passed upon and upheld by the courts of the state, it is not the function of this court, apart from the provisions of the Federal Constitution supposed to be involved, to declare state enactments void, because they seem doubtful in policy and may inflict hardships in particular instances.

The judgment of the Supreme Court of Nebraska is accordingly affirmed.

The CHIEF JUSTICE took no part in the hearing and decision of the case.

STATE OF MISSOURI, *ex rel.* LACLEDE GASLIGHT COMPANY, *Plff. in Err.*, v. MICHAEL J. MURPHY, Street Commissioner of the City of St. Louis, and the City of St. Louis. [78

(See S. C. Reporter's ed. 78–100.)

Mandamus—official duty—Federal question—placing electric wires under streets.

1. Mandamus lies to compel a party to do that which it is his duty to do, but can confer no new authority, and the party to be coerced must have the power to perform the act.
2. A court cannot command a city officer to do that which it is not his official duty to perform.
3. A judgment of a state court that the street commissioner of a city has no power under its charter and ordinances to issue a permit to a company to lay electric wires under the streets to light the city does not involve a Federal question, where there is no contract right that leave to do so shall be given by that officer.
4. The right of a company to place electric wires under the streets of a city is subject to such reasonable regulations as the city deems best to make for the public safety and convenience.
5. The exemption of a corporation from requirements inconsistent with its charter as to placing electric wires under streets will not relieve it from submitting itself to such police regulations as the city may lawfully impose.

[No. 47.]

Argued January 17, 20, 1896. Ordered for reargument December 21, 1896. Reargued March 1, 2, 1898. Decided April 11, 1898.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment of that court affirming the judgment of the trial court denying a mandamus on the petition of the Laclede Gaslight Company against Michael J. Murphy, street commissioner of St. Louis, to require him to grant a permit to lay down in the streets of that city certain wire for the purpose of lighting the street by electricity. *Affirmed.*

See same case below, 130 Mo. 10 [31 L. R. A. 798].

Statement by Mr. Chief Justice **Fuller:**

The Laclede Gaslight Company filed its pe-

NOTE.—*As to when mandamus will issue*, see note to McCluny v. Silliman, 4: 263.

As to mandamus to control inferior courts; discretion,—see note to *Ex parte* Morgan, 29: 135.

As to power of city to allow subway under street for wires, see note to State, St. Louis Underground Service Co., v. Murphy (Mo.) 34 L. R. A. 369.

As to right to lay wires in streets, see note to State, Laclede Gaslight Co., v. Murphy (Mo.) 31 L. R. A. 798.

As to duty to keep streets substantially safe, see note to Western U. Teleg. Co. v. State, Nelson (Md.) 31 L. R. A. 572.

tition for mandamus in the name of the state of
79]Missouri, on its relation, *against Michael J. Murphy, street commissioner of the city of St. Louis, on November 26, 1894, in the supreme court of that state.

This petition stated that the relator was incorporated by an act of the general assembly of Missouri, approved March 2, 1857, which was amended by an act approved March 3, 1857, and by an act approved March 26, 1868, and set forth the three acts *in extenso*.

The 5th section of the act of March 2, 1857, read as follows:

Sec. 5. The said company, its successors and assigns, shall, within all that portion of the present corporate limits of the city of St. Louis, in St. Louis county, not embraced within the corporate limits of said city, as established by the act entitled 'An Act to Incorporate the City of St. Louis,' approved February 8, 1839, have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gaslights, gas fixtures, and of any substance or material that may be now or hereafter used as a substitute therefor; and, to that end, may establish and lay down, in said portion of said corporate limits, all pipes, fixtures, or other thing properly required, in order to do the same (the same to be done with as much despatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company."

The words "sole and exclusive" in the 5th section were stricken out by the act of March 3, 1857. Laws Mo. 1856–57, pp. 598, 599.

Section 1 of the act of March 26, 1868 (amending the act of March 2, 1857), was as follows:

"Sec. 1. The said Laclede Gaslight Company shall and may, within the corporate limits of the city of St. Louis, as the same are now or may hereafter be established, exercise, have, hold, and enjoy forever all the rights, privileges, and franchises granted to it by the fifth section of the act to which this act is amendatory, and may, at any time, lease, sell, or dispose of any portion of said rights, privileges, and
80]*franchises to individuals, associations, or corporations intending or desiring to exercise the same within any portion of the limits aforesaid." Laws Mo. 1868, p. 187.

The petition then averred that the act of March 2, 1857, as amended by the subsequent acts, constituted relator's charter, by which relator was granted the privilege and right of lighting the city of St. Louis as in the acts set forth; "and to that end may establish and lay down in any portion of said corporate limits all pipes, fixtures, or other thing properly required in order to do the same, with this limitation only, that in laying down pipes, fixtures, or other thing properly required therefor relator shall do the same with as much despatch and as little inconvenience to the public as possible."

It was further stated that by a certain agreement executed February 28, 1873, relator had "abandoned and surrendered any and all exclusive rights and all claims or pretenses of claims of sole or exclusive privilege or right of lighting any part of the city of St. Louis with gas, or making or vending gas, gaslights, or gas fixtures, and also all exclusive right whatsoever under its said charter."

The petition went on to say that in pursuance of its charter relator had been for a long time engaged in the lighting business, both by gas and electricity; that under a contract with the city it was lighting a part of the public streets and alleys by electricity, and would be obliged to do so for some years to come; that it was furnishing light by means of gas or electricity to a large part of the inhabitants of the city; that in order to fulfil its obligations to the city and the public the company had erected and was maintaining "extensive and costly plants for the manufacture and distribution of gas, as well as for generating and distributing electric currents;" that for distributing gas it had constructed a system of pipes laid under ground, without objection; that for the distribution of electricity it had "hitherto used overhead wire strung upon poles along the streets and alleys of said city," which poles and electric wires had been and are maintained and used by relator without objection by said city or the authorities thereof for the distribution of electricity, as well to furnish *light [81
to private consumers as for the fulfilment by relator of its said contract with said city of St. Louis for the lighting by electricity of certain public streets and alleys thereof; that to effect such distribution it is necessary to transmit through and by means of said wires electric currents of great power which, if and when accidentally diverted, are dangerous to human life and property; that in order to avoid the inconvenience and danger to the public necessarily incident to that method of distributing electric currents, and in order to provide more effective and proper service, relator has made arrangements to lay its wires underground along and under the streets of said city according to approved and practicable plans, and is now ready to do so with as much despatch and as little inconvenience to the public as possible.

It was then stated that Murphy was street commissioner, to whom was committed, under the city charter, "the supervision and control of the streets and alleys of said city and the enforcement of city ordinances relating thereto." And relator averred that, having completed its preparation to carry out the work above indicated, and having given notice to the street commissioner of its intention to do so, the company proceeded, on the 30th day of October, 1894, to begin the work of excavating at a point on the east side of Broadway street in St. Louis, near the corner of Mound street, that point being adjacent to its generating plants, which work was proper and necessary for placing wires underground, when the street commissioner caused the work to be stopped, and notified relator "that he would not allow any part of any street of said city to be excavated for any purpose whatever without a permit previously obtained from him for that purpose as provided by ordinance; and relator states that by § 568, art. 1, chap. 15, of the Revised Ordinance 1887 of said city of St. Louis, it is provided that 'no person shall make or cause to be made any excavation on any public street, highway, or alley, without written permission

of the street commissioner so to do, excepting public work under the authority of the water or sewer commissioner, who at the time of ordering any such excavating shall notify the street commissioner of the same.' "

82] *That upon being so notified the company applied to the street commissioner for a permit to make the necessary excavation on Broadway, so that it might place its wires under the street for the purposes indicated. That the officer refused to give the permit asked, whereby, it was alleged, the company, in the exercise of its vested rights, was prevented from laying down in the streets of the city the pipes and fixtures required in the conduct of its business.

That it was the duty of the street commissioner to grant the permit; and, being without other remedy, relator prayed a mandamus against that officer, commanding him to issue a permit to the company to make an excavation along the east side of Broadway street, as near the curb as practicable, and extending from the southeast corner of Mound street to the southeast corner of Olive street and Broadway, in so far as was necessary for the laying of the company's electric wires under ground, "the same to be done with as much despatch and as little inconvenience to the public as possible."

An alternative writ of mandamus having been issued, the street commissioner filed his return thereto, alleging therein that the act of March 26, 1868, was in conflict with paragraph 2 of § 1 of article 8 of the Constitution of Missouri of 1865, because the company did not, within one year from the time the act of March 2, 1857, took effect, organize or commence the transaction of its business; and not until 1873; and that said act was in conflict with § 25, art. 4, of the Constitution of Missouri, because it did not set forth the act or part of act amended at length, as if it were an original act or provision.

That relator had never by any act been granted the franchise to make and vend electricity for any purpose whatever; and that lighting by electricity was wholly unknown March 2, 1857, and March 26, 1868.

"That the relator has heretofore placed its pipes and fixtures beneath the surface of the street on the east side of Broadway, from Mound street to Olive street, and at divers and sundry other places beneath the surface of the streets of the city of St. Louis, for the purpose

83] of transmitting and *vending and supplying gas to consumers in the city of St. Louis; that in order to convey electricity it is necessary to carry the same by means of wires strung on poles above the surface of the streets or by means of wires strung in nonconductive tubes or condults beneath the surface of the streets, and that relator has never acquired from the state of Missouri or the city of St. Louis any right to place such wires above or beneath the streets of said city.

"That it is provided by § 2721 of art. 5 of chap. 42, Rev. Stat. 1889, that no company shall place its wires and other fixtures under ground in any city unless it shall first obtain consent from said city, through the municipal authorities thereof.

"And that it is provided by art. 2, chap. 15, Rev. Ordinance of the city of St. Louis, 1887, as the same has been amended by Ordinance No. 16,894, that no wires, tubes, or cables, conveying electricity for the production of light, heat, or power shall hereafter be placed along or across any of the streets, alleys, or public places in the city of St. Louis by any person, corporation, or association not having, previous to the passage of this ordinance, accepted and complied with Ordinance No. 12,723, now amended, or shall be duly authorized by the municipal assembly, and then only upon condition that such person, corporation, or association so authorized by ordinance, before placing its wires, tubes, and cables under ground, shall file in the office of the board of public improvements an application therefor, stating in detail the streets, alleys, or public places which said wires, tubes, or cables are to occupy, and the manner in which said wires, tubes, or cables are to be secured or supported and insulated, together with a plat showing the route of such wires, tubes, and cables, and that thereupon, if the same is approved, the board of public improvements shall grant a permit therefor, subject to such restrictions, regulations, and qualifications as may be prescribed by said board, and all such work shall be done under the supervision of and to the satisfaction of the supervisor of city lighting; and that whenever an alley is available for placing such wires, tubes, or cables the same shall be placed in or under alleys, and not along *or under streets; that relator has never ac-[84 cepted the provisions of said article and chapter, nor of said Ordinance No. 16,894, nor has it ever been authorized by the municipal assembly of St. Louis to place its wires, tubes, and cables under the streets or alleys of St. Louis.

"Respondent further shows unto the court that said ordinance provisions are legal and binding and valid provisions, and such as the city of St. Louis had the right to adopt and enact under ¶ 2 of § 26 of art. 3 of the charter of St. Louis, which gives said city the power to regulate the use of all streets, avenues, alleys, and so forth in said city, and such ordinance provisions are legal enactments, notwithstanding any rights which relator now has or may heretofore have had, by virtue of any act of the general assembly of the state of Missouri.

"Respondent further shows unto the court that relator has never made application to the board of public improvements for a permit to place its wires, tubes, and cables under ground in said city, nor has it complied in any manner with any of the ordinance provisions aforesaid, and that respondent has not the power to grant any such permit as is asked for by relator in this case."

The relator moved to strike out certain portions of the return, and demurred to certain other portions thereof, assigning, among other grounds, that its "charter was and is a contract between the state of Missouri and said corporation, not subject to alteration, suspension, or repeal except with the consent of said corporation, and that any constitutional provision, law, or municipal ordinance adopted or enacted after said date, by or by authority of said state or by any municipality thereof, inconsistent with any right, privilege, or franchise granted by said charter to relator or the effect of which would be to deny to relator any

such right, privilege, or franchise, or to annex to the full exercise thereof by relator any condition or requirement not prescribed by said charter, would be in contravention of section fifteen of article 2 of the Constitution of Missouri, 1875, forbidding the general assembly to pass any law impairing the obligation of con-
85] tracts, and *also of section 10 of article 1 of the Constitution of the United States, forbidding any state to pass any such law."

That "the provisions of said ordinance of said city of St. Louis in said portion of said return mentioned, if held valid or binding upon relator, would necessarily impair the obligation of the contract between relator and said state of Missouri, contained in said charter, by annexing to the exercise by relator of the rights and privileges by said charter granted to it certain conditions and requirements not prescribed by said charter, and which it does not appear nor is by respondent averred that the relator has ever consented to or accepted."

On the issues thus presented the supreme court heard the cause and denied the peremptory writ.

Subsequently on the application of relator the judgment was set aside; the demurrer to the return and motion to strike out parts thereof were overruled; and leave was given to plead over.

Relator thereupon filed a traverse to the return, setting forth at length the grounds on which relator denied that the averments in the return in respect of the organization of the company and of the time when it commenced the transaction of business, and of the invalidity of the act of March 26, 1868, constituted defenses to the proceeding.

The traverse further stated that if electricity was not a substance or material as averred by respondent, which relator denied, that constituted no defense. That relator was incorporated to carry on the business of lighting the city of St. Louis, and the right and privilege of doing so was granted, as before set forth and reiterated. The traverse explained the process of lighting by gas, and also by electricity, which relator asserted was included in the grant; admitted that the company had theretofore exercised its corporate franchise of lighting the city with gas through pipes laid beneath the surface of the street on the east side of Broadway from Mound street to Olive street, and in other places; that to furnish light by means of electricity it was necessary to use wires "either on poles above the surface of the
86] street, as relator is *now doing under a contract with said city of St. Louis, or in tubes or conduits beneath said surface," and that "its purpose in making the excavation on Broadway mentioned in the petition was to construct and place under ground a conduit for wires, such conduit and wires being properly required for the production of electric light as a substitute for gaslight;" and set forth that the conduit and wires so intended to be laid down were of the most approved description, offering no obstruction, and avoiding the danger to life and property attending the use of overhead electric wires.

The traverse denied that relator had not acquired the right to place such wires above or beneath the streets; and denied that § 2721 of article 5, chapter 42, Revised Statutes of Missouri, 1889, applied to relator, but averred that if it did, its provisions would be invalid as impairing the obligation of the contract contained in its charter.

The traverse admitted that by article 2, chapter 15, Revised Ordinance of St. Louis of 1887, as amended by Ordinance No. 16,894, the municipal authorities undertook to prescribe certain conditions for placing wires, tubes, or cables conveying electricity along, across, or under the streets and alleys of the city; and averred that said ordinance and the amendatory Ordinance No. 16,894 are the same ordinances revised and re-enacted in article 2 of chapter 15 of the Revised Ordinance of 1892, by an Ordinance No. 17,188, approved April 7, 1893, and that §§ 603–614 are the only provisions prescribing regulations or conditions in respect of placing along, across, or under any of the streets, alleys, and public places of wires, tubes, or cables conveying electricity for the production of light, heat, or power, and are the provisions insisted on by respondent. These sections were set out in the traverse and are printed in the margin.† *The traverse [87 then proceeded:

†Sec. 603. That no wires, tubes, or cables conveying electricity for the production of light, heat, or power shall hereafter be placed along or across any of the streets, alleys, or public places in the city of St. Louis, by any person, corporation, or association not having, previous to the passage of this ordinance, accepted and complied with ordinance number twelve thousand seven hundred and twenty-three, now amended, or shall be duly authorized by the municipal assembly, and then only as hereinafter provided.

Sec. 604. All such wires, tubes, or cables, along or across any of the streets, alleys, or public places of the city of St. Louis, shall be placed at such distances above or below the surface of the ground, and secured in such manner as shall be prescribed by the board of public improvements.

Sec. 605. That any person or persons, corporation or association, duly authorized by ordinance to do business in the city of St. Louis, and desiring to place along or across any of the streets, alleys, or public places of the city of St. Louis, such wires, tubes, or cables, shall file in the office of the board of public improvements an application therefor, stating in detail the streets, alleys, or public places which said wires, tubes, or cables are to occupy, and the manner in which said wires, tubes, or cables are to be secured or supported and insulated, together with a plat showing the route of such wires, tubes, or cables.

Sec. 606. The board of public improvements is hereby authorized, upon the filing of the application and plat required by the preceding section, to grant a permit for such occupancy of the streets, alleys, and public places herein named, with such restrictions, regulations, and qualifications as may be prescribed by said board, and under the supervision and to the satisfaction of the supervisor of city lighting.

Sec. 607. That in case any person or persons, corporation or association, duly authorized by ordinance, desiring to place along or across any of the streets, alleys, or public places of the city of St. Louis, such wires, tubes, or cables, shall, with the application and plat heretofore provided for, file in the office of the board of public improvements the written consent of any telegraph or telephone company, or any other electric light or power company, doing business in the city of St. Louis, to the placing of such wires, tubes, or cables upon the poles of said telegraph, telephone, electric light, or power company, situated in the streets, alleys, or public places named in such application, the board of public improvements is hereby authorized to grant a permit for such occupancy of the poles of such telegraph, telephone, electric light, or power company, with such restrictions, regulations, and qualifications as may be prescribed by said board, and under the supervision and to the satisfaction of the supervisor of city lighting.

"Relator denies that the requirements of said city ordinances set forth were or are legal and binding and valid provisions so far as the rights 88] of this relator under its *charter were or are concerned, and denies that as against this relator said city of St. Louis had or has the lawful right or power to adopt or enforce the same, whether under the provisions of paragraph 2 of section 26 of article 3 of the charter 89] of said *city, as by respondent alleged, or under any other provision of the charter of said city.

"Relator further shows to the court that by reason of the exemption contained as aforesaid in section 8 of said act of March 2, 1857, relator's charter as granted in and by said act of 1857 and as subsequently amended by the act of March 26, 1868, hereinbefore mentioned, was and is a contract by the state of Missouri with relator, which was not nor is subject to alteration, suspension, or repeal by the state of Mis-90]souri *or by any municipality thereof; that said city of St. Louis had not nor has lawful power by ordinance or otherwise to impair the obligation of said contract, nor to abridge or interfere with the full exercise by relator or any corporate franchise thereby granted to it; that the enforcement against said relator of said provisions of said ordinances of said city of St. Louis would be a denial to relator of its corporate rights and franchises aforesaid, and would impair the obligation of the said contract of the said state of Missouri contained in relators's charter as amended, and would be in contravention of section 15 of article 2 of the Constitution of Missouri, 1875, forbidding the general assembly to pass any law impairing the obligation of contracts, and also section 10 of article 1 of the Constitution of the United States, forbidding any state to pass any such law, each of which constitutional provision is hereby referred to and relied on by relator for the protection of its corporate rights and franchises aforesaid in his behalf.

"Relator further shows to the court that the only condition annexed by its charter, as amended, to the exercise by relator of its right to establish and lay down in said city all pipes, fixtures, or other thing properly required in order to carry on relator's said lighting business, is that the same shall be done with as much despatch and as little inconvenience to the public as possible, and avers not only that in making its arrangements and preparations to lay its wires under ground along and under the streets of said city as in its peti-

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Sec. 608. That whenever an alley is available for the placing of poles for the support of such wires, tubes, or cables, the board of public improvements will advertise for five days previous to a day set for hearing objections or arguments in favor of placing the said poles in the alley. If, after due consideration, the board of public improvements are of the opinion that the placing of poles for the purposes aforesaid is practicable, such poles shall be placed along said alley instead of along the street named in application. Where the poles are set in any alley they shall be located as near the side lines of the alley as practicable, and in such a manner as not to incommode the public or the adjoining proprietors or residents.

Sec. 609. The poles used as herein provided shall be of sound timber, not less than five inches in diameter, at the upper end, straight, shapely, and of uniform size, neatly planed or shaved, and thoroughly painted with two coats of lead and oil paint, of such color as may be directed by the board of public improvements, and be supplied with iron steps, commencing twelve feet from the surface of the ground and reaching to the arms supporting the wires, tubes, or cables; said wires, tubes, or cables shall be run at a height not less than twenty-five feet above the grade of the street. Whenever the poles are erected on a street they shall be placed, in all cases, when practicable, on the outer edge of the sidewalk, just inside the curbstone and on the line dividing the lots one from the other, and in no case be so placed as to obstruct the drainage of the streets, or interfere with or damage in any way the curbstones, trees, or other public or private property on the line of the street or alley or public place where such pole shall be erected.

Sec. 610. Any person or persons, corporation or association, having made excavations in the streets, alleys, or public places of the city of St. Louis for the purposes aforesaid, shall replace the streets, alleys, or public places in such manner and in accordance with such regulations as may from time to time be prescribed by ordinance or by the board of public improvements, to the satisfaction of the street commissioners.

Sec. 611. The right is hereby reserved to the board of public improvements at any time to direct any alterations in the location of said poles, and also in the height at which the wires, tubes, or cables shall run; but before any alteration is made, at least five days' notice in writing shall be given to the person or persons, or the president or the officer in charge of the company affected by the proposed alteration, and reasonable opportunity shall be afforded the representative of such company, or any citizen interested, to be heard in regard thereto. But when any such alteration shall be ordered, the said company shall within five days thereafter commence such alterations and complete the same as soon as practicable thereafter; and upon failure so to do, it shall be deemed guilty of a misdemeanor, and punished as hereafter provided.

Sec. 612. No person or persons, corporation or association, shall be entitled to any of the privileges conferred by this article, except upon the following conditions: That said person or persons, corporation or association, before availing himself or itself of any of the rights or privileges granted by this article shall file with the city register his or its acceptance of all the terms of this article, and agree therein that he or it will file with the comptroller of the city, on the first days of January and July of each year, a statement of his or its gross receipts from his or its business arising from supplying electricity for light or power for the six months next preceding such statement, which shall be sworn to by such person or persons, or the president or secretary of such corporation or association; and further agree that he or it will, at the time of filing said statement with the comptroller, pay into the city treasury two and one half per cent on the amount of such gross receipts up to the year eighteen hundred ninety, and five per cent on the amount of gross receipts thereafter. And said person or persons, or corporation or association, shall, at the time of filing said acceptance, also file with the city register his or its penal bond in the sum of twenty thousand dollars with two or more good and sufficient securities, to be approved by the mayor and council, conditioned that he or it will comply with all the conditions of this article, or any ordinance which may be hereafter passed, regulating the placing of wires, tubes, or cables in the streets and alleys for the purposes named therein; that he or it will comply with all the regulations made by the board of public improvements having reference to the subject embraced in this article or any ordinance herein named; that he or it will make the statements and payments required by the provisions of this section, and will save the city of St. Louis harmless and indemnified from all loss, cost, or damage by reason of the exercise of any of the privileges granted by this article or any ordinance which may be hereafter passed relating to the subject-matter of this article.

Sec. 613. Any person or persons, corporation or association which, or any president, manager, superintendent, or officer in charge of any corporation or association, who shall violate or fail to comply with any of the provisions of this article, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not less than fifty dollars, nor more than five hundred dollars.

Sec. 614. The city reserves the right to alter, amend, or repeal this article at any time.

tion in this behalf alleged, and in applying to respondent as street commissioner of said city for a p rmit to make the necessary excavation therefor, relator has fulfilled every condition to which it was or is lawfully subject in that behalf, but also that respondent in refusing to relator such permit did not allege as a ground for such refusal, nor did in fact refuse such permit for the reason that by laying its wires under ground in the manner by it proposed relator would cause any inconvenience to the public, but expressly and unconditionally refused to permit relator to make any excavation in any street of said city.

91] *"Relator shows to the court that, as against this relator, the said ordinances and provisions above mentioned are not valid, legal, or binding enactments, nor constitute any defense to this proceeding:

"Because, as relator avers, said provisions are not, so far as relator's rights are concerned, lawful or reasonable regulations of the use of the streets of said city, but were intended to and do prohibit relator from exercising its said charter rights and powers except upon compliance by relator with conditions which the city of St. Louis has not nor has the municipal assembly thereof any lawful right or power to impose on relator in that behalf, including as one of said conditions that relator shall first be duly authorized thereto by the municipal assembly, thereby impairing the obligation of the contract contained in relator's charter as amended.

"Because the enforcement against relator by said city or any officer thereof of the conditions prescribed by said ordinances would not be a lawful or reasonable exercise of the power of said city under its charter to regulate the use of its streets or of the police power of said city, but is an attempt by said city under control of its charter powers to compel relator to enter into the obligations and to pay to said city, from time to time, the tax of five per cent upon the gross annual receipts from relator's business prescribed by section 590, article 2, chapter 15, of the Revised Ordinance 1887, re-enacted as section 612, article 2, chapter 15, of the Revised Ordinance 1892, above mentioned; forasmuch as it is provided by said section 690, article 2, chapter 15, of the Revised Ordinance 1887, re-enacted as section 612, article 2, chapter 15, of the Revised Ordinance 1892, that no person or persons, corporation or association, shall be entitled to any of the privileges conferred by said article 2, chapter 15, except upon fulfilling the several conditions in said section 612 prescribed as hereinbefore set forth.

"Because among the conditions prescribed by said section 590, re-enacted as section 612, relator would be compelled, before availing itself of any of the rights or privileges mentioned in said article 2, chapter 15, Revised 92] Ordinance 1887, *re enacted as article 2, chapter 15, Revised Ordinance 1892, to file with the city register its penal bond in the sum of twenty thousand dollars, conditioned that relator will comply with all the conditions of said article 2, or with any ordinance which might thereafter be passed, and will comply with all regulations which may be made by the board of public improvements having reference to the subject-matter embraced in said article 2 or any ordinance therein named; all which requirements and conditions are a denial of relator's rights under its charter and impair the obligation of the contract contained therein as aforesaid.

"Because said article 2, chapter 15, Revised Ordinance 1887, re-enacted as article 2, chapter 15, Revised Ordinance 1892, purports to authorize the board of public improvements of said city, in granting a permit for the use or occupation of the streets, alleys, and public places of said city for the purposes therein mentioned, to prescribe such restrictions, regulations, and qualifications as said board may think fit in respect of the use of said streets, alleys, and public places, and requires every person or corporation obtaining such permit, as a condition of availing itself of the privileges mentioned in said article 2, to agree to comply with all such regulations made by said board, whereas the power to regulate the use of the streets of said city, granted—clause 2, section 26, of article 3, of its charter—is granted only to the mayor and assembly of said city, to be exercised by ordinance not inconsistent with the Constitution or any law of this state or with said charter, and does not authorize the said mayor and municipal assembly, or either of them, by ordinance or otherwise, to delegate to the board of public improvements of said city the power to make regulations for the use of said streets. Wherefore relator says that said requirements and said conditions are unlawful and void.

"And relator says that the several conditions and requirements prescribed in said article 2, chapter 15, Revised Ordinance 1887, as amended and re-enacted in article 2, chapter 15, Revised Ordinance 1892, are not independent of each other, but are so framed as to subject relator, its officers and *agents, to the [93 penalties prescribed in section 591 of Revised Ordinance 1887, re-enacted as section 613 of Revised Ordinance 1892, unless, before placing along, across, or under any street of the city of St. Louis any wires, such as hereinbefore mentioned, it, said relator, shall not only have obtained authority so to do from the municipal assembly of the city of St. Louis, but shall also have filed in the office of the board of public improvements of said city an application therefor, such as prescribed in section 583, Revised Ordinance 1887, re-enacted as section 605, Revised Ordinance 1892, and shall have obtained a permit therefor from said board with such restrictions, regulations, and qualifications as by it prescribed, and shall also have filed with the city register its acceptance of all the terms of said article 2, chapter 15, and shall therein agree as required by section 590, Revised Ordinance 1887, re-enacted as section 612, Revised Ordinance 1892, to file with the comptroller of said city sworn semi-annual statements of its gross receipts from its business, and to pay to the city treasurer a tax of five per cent upon the amount of such gross receipts, and shall also have filed with the city register its bond in the sum of twenty thousand dollars, conditioned as prescribed in said section 590, Revised Ordinance 1887, re-enacted as section 612, Revised Ordinance 1892; all of which requirements and conditions are

a denial of relator's rights under its charter and impair the obligation of the contract contained therein as aforesaid."

To this traverse respondent filed a general demurrer, assigning also special grounds.

Subsequently the city of St. Louis was made a party; entered its appearance; and adopted as its own the return of the street commissioner and his demurrer to the traverse.

The demurrer was then sustained by the supreme court, "for the reasons given in the opinion heretofore rendered in this cause, to which reference is hereby made as a part of this judgment," and judgment was again entered denying the peremptory writ.

A writ of error from this court was allowed by the chief justice of Missouri. The opinion of the state court forms part of the record and is reported in 130 Mo. 10 [31 L. R. A. 798].

94] *The court in that opinion stated that on the pleadings the following issues of law were fairly framed:

"*First.* Is the act of March 26, 1868, unconstitutional as being in conflict with section 2, article 8, of the Constitution of Missouri of 1865?

"*Second.* Is said act void as being in conflict with section 25 of article 4 of said Constitution?

"*Third.* Did the charter of relator expire by limitation at the end of thirty years from the date of the act of March 2, 1857?

"*Fourth.* Do the powers granted relator include the right to manufacture, sell, or distribute electricity for lighting purposes?

"*Fifth.* Has relator the right, under its charter, to place its wires under ground without the assent of the municipal authorities and without compliance with the requirements of the valid ordinances of the city?"

But the court declined to express an opinion on "any question involving the right of relator to exercise the rights, or enjoy the franchises which appear to have been granted under the acts of the general assembly mentioned in the statement;" or "to inquire whether the right to use electricity for making light was included under the terms 'substance or material' as used in the charter," and confined itself "to the question whether relator has a vested right to place its electric wires under the surface of the streets without the assent of the municipal authorities thereof and without compliance with valid ordinances of the city."

And this question, for reasons given, the supreme court determined in the negative, and held that "respondent, under his official duties as street commissioner, properly refused to grant the permit demanded, unless relator first complied with the requirements of the valid ordinances then in force."

Messrs. **Henry Hitchcock** and **Isaac H. Lionberger** for plaintiff in error on first argument.

Mr. **W. C. Marshall** for defendants in error on first argument.

Mr. **Henry Hitchcock** for plaintiff in error on reargument.

Mr. **W. C. Marshall** for defendants in error on reargument.

Mr. **Isaac H. Lionberger**, for plaintiff in error:

This court has jurisdiction to review the record and decision below. The plaintiff in error asserts certain charter privileges. The validity and effect of the charter, and the validity of a subsequent law which impairs the obligation of the charter, are directly drawn in question. The decision of the court below was in favor of the validity of the ordinance.

U. S. Const. art. 1, § 10; Rev. Stat. § 709; *Mobile & O. R. Co.* v. *Tennessee*, 153 U. S. 486 (38: 793).

The acts creating the plaintiff corporation are valid enactments. They do not violate § 1 of article 8 of the Constitution of Missouri, 1865.

St. Louis v. *St. Louis Gaslight Co.* 70 Mo. 118; *St. Louis Gaslight Co.* v. *St. Louis*, 86 Mo. 499; *State, St. Louis*, v. *Laclede Gaslight Co.* 102 Mo. 483; *St. Louis & I. R. Co.* v. *Shambaugh*, 106 Mo. 568.

Neither do they violate § 25 of article 4 of said Constitution.

Boonville v. *Trigg*, 46 Mo. 289; *State, Maguire*, v. *Draper*, 47 Mo. 33; *State, Atty. Gen.*, v. *Miller*, 100 Mo. 446; *State* v. *Bennett*, 102 Mo. 356, 10 L. R. A. 717.

Said acts are now in full force, and entitle the plaintiff to "have, hold, exercise, and enjoy" the rights thereby conferred.

State, St. Louis, v. *Laclede Gaslight Co.* 102 Mo. 483.

Among the privileges conferred is the right to light the city of St. Louis, and to make and vend gas, gaslights, and gas fixtures, and any substance or material that may now or hereafter be used as a substitute therefor; and to that end to establish and lay down in any portion of the corporate limits of St. Louis any pipe, fixture, or thing necessary or proper to do the same.

Act March 2, 1857, § 5, as amended by § 1 of the act of March 26 1868.

The ordinance of 1887, as amended by ordinance 16,894 is void because:

First. It delegates to the board of public improvements the regulation of the use of the streets of St. Louis by electric companies, whereas the charter of the city provides that the "mayor and municipal assembly shall by ordinance regulate the use of the streets."

Ruggles v. *Collier*, 43 Mo. 353; *St. Louis, Murphy*, v. *Clemens*, 43 Mo. 395; *St. Louis, Creamer*, v. *Clemens*, 52 Mo. 133; *St. Louis, Murphy*, v. *Buckner*, 44 Mo. 19; *Haegele* v. *Mallinckrodt*, 46 Mo. 577; *Saline County* v. *Wilson*, 61 Mo. 237; *Matthews* v. *Alexandria*, 68 Mo. 115, 30 Am. Rep. 776; *Thomson* v. *Boonville*, 61 Mo. 282; *St. Louis* v. *Russell*, 116 Mo. 248, 20 L. R. A. 721; *St. Louis* v. *Howard*, 119 Mo. 41; *St. Joseph* v. *Wilshire*, 47 Mo. App. 125; *King Hill Brick Mfg. Co.* v. *Hamilton*, 51 Mo. App. 120; *O'Neil* v. *American F. Ins. Co.* 166 Pa. 72, 26 L. R. A. 715; *Anderson* v. *Manchester F. Assur. Co.* 59 Minn. 182, 28 L. R. A. 609.

Second. It exacts from the plaintiff a tax of 5 per cent upon its gross receipts, and to that extent impairs the obligation of its contract with the state.

State, St. Louis, v. *Laclede Gaslight Co.* 102 Mo. 483; *Rushville* v. *Rushville Natural Gas Co.* 132 Ind. 575, 15 L. R. A. 321.

Third. It wholly prohibits the exercise by plaintiff of the powers and privileges conferred

by its charter, and thereby impairs the obligation of said contract.

U. S. Const. art. 1, § 10.

Section 35 of article 4 of the charter of St. Louis charges upon the street commissioner of said city the duty of repairing, etc., the streets, and the ordinances of the city provide that no person shall make an excavation in the streets without a permit from said commissioner.

2 Mo. Rev. Stat. 1889, p. 2109; Rev. Ord. St. Louis 1892, § 1335.

The street commissioner refuses a permit, and mandamus is the proper remedy.

State, St. Louis, v. *Laclede Gaslight Co.* 102 Mo. 472; *State, Sharp*, v. *Weeks*, 93 Mo 499; *State, Cannon*, v. *May*, 106 Mo. 488.

Mr. **W. C. Marshall,** for defendants in error:

The act of March 26, 1868, is unconstitutional, null, and void, and is in conflict with ¶ 2 of § 1 of art. 8 of the Constitution of Missouri of 1865.

Unless the act of 1868 extended the life of relator "forever" the franchises, rights, and privileges of the Laclede Gaslight Company expired in 1887.

The cases of *Boonville* v. *Trigg*, 46 Mo. 288, and *French* v. *Woodward*, 58 Mo. 66, did not discuss nor decide the question here involved.

The said act of March 26, 1868, is null and void and in conflict with § 25 of art. 4 of the Constitution of 1865.

People, Drake, v. *Mahaney*, 13 Mich. 497; *Boonville* v. *Trigg*, 46 Mo. 288; *French* v. *Woodward*, 58 Mo. 66; *St. Louis & S. F. R. Co.* v. *Evans Brick Co.* 85 Mo. 307; *State, Harris*, v. *Laughlin*, 75 Mo. 150.

The charter of the relator, by the terms of § 9 of the act of 1857, expired on the 2d of March, 1887, and hence relator is not entitled to any of the privileges, rights, and franchises claimed by it.

1 Bl. Com. 469; 2 Kent, Com. 221; *Dartmouth College* v. *Woodward*, 4 Wheat. 636, 4 L. ed. 659; *Providence Bank* v *Billings*, 4 Pet. 562 (7: 956); *Fairchild* v. *Masonic Hall Asso.* 71 Mo. 526; *State* v. *Morrow*, 26 Mo 141.

Article 2, chap. 15, Rev. Ord. 1887, as amended by ordinance No. 16,894, provides that no wires, tubes, cables, etc., conveying electricity for the production of light, heat, or power, shall hereafter be placed along or across any of the streets, alleys, or public places in the city of St Louis, by any person, corporation, or association not having, previous to the passage of this ordinance, accepted and complied with ordinance No. 12,723 now amended, unless the same shall be duly authorized by the municipal assembly, and then only upon condition that the plans showing the places to be occupied, the manner of insulation, etc., be approved by the board of public improvements, and under a permit issued by it; that the relator has not brought itself within the provisions of this ordinance by either applying for or obtaining such ordinance and permit, and that ¶ 2 of § 26 of article 3 of the charter of the city of St. Louis, confers the power upon it to enact this ordinance.

New York New York Electric Lines Co., v. *Squire*, 145 U. S. 175 (36: 666), 14 Daly, 154, 107 N. Y. 593; *Charlotte, C. & A. R. Co.* v. *Gibbs*, 142 U. S. 386 (35: 1051).

By § 2721 of article 5 of chapter 42, Rev. Stat. 1889, no company shall place its wires or other fixtures underground in any city unless it shall first obtain consent from said city, through the municipal authorities thereof.

St. Louis v. *Western U. Teleg. Co.* 148 U. S. 92 (37: 380), 149 U. S. 465 (37: 810).

The general assembly of Missouri, by the act of March 2, 1857, did not, and did not intend to, confer upon relator the right to manufacture and vend electricity for lighting purposes.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

*Mandamus lies to compel a party to do [95 that which it is his duty to do, but can confer no new authority, and the party to be coerced must have the power to perform the act. *Brownsville Taxing Dist.* v. *Loague*, 129 U. S. 493, 501 [32: 780, 783].

On the facts disclosed by the record, was it the duty of the street commissioners to issue a permit to the company to make excavations on Broadway so that it might place electric wires under the surface of the street?

The supreme court of the state held that it was not the duty of the street commissioner to do so. Did that court in so holding give effect to ordinances impairing the obligations of the contract created by the company's charter?

Assuming the charter to be in force, as contended, the company was authorized to light the city, and to lay down pipes for that purpose, "with as much despatch and as little inconvenience to the public as possible." It originally furnished light by means of gas through underground pipes, and when electricity came into use it furnished electric light through overhead wires. It now sought to put these electric wires under the surface; and it insisted that it had a vested right to do this without being controlled by the municipal authorities.

Subsequently to the passage of the acts of 1857 and 1868, a city charter had been adopted, whereby the state vested the city with the power to regulate the use of the streets, and pass ordinances deemed expedient "in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures."

The board of public improvements of the city of St. Louis, consisting of a president, the street commissioner, the sewer commissioner, the water commissioner, the harbor and wharf commissioner, and the park commissioner, has existed for many years under the charter and ordinances of that city. Each of these commissioners is the head of the department indicated by the title of the office, and has special charge thereof, but subject to the general control of the board, and the board is charged with the duty, among other things, of furnishing *data* and information to the municipal assembly of the city in respect of matters with which it is called upon *to deal; pre- [96 paring and recommending ordinances for the improvement and lighting of the streets; and establishing regulations for excavations and the laying of gas pipes in the streets, etc., etc. Rev. Ord. 1892, p. 976; Rev. Ord. 1887, p. 893; Rev. Ord. 1881, p. 716.

The street commissioner had primary jurisdiction over streets and highways, and § 568, article 1, of chap. 15 of the Revised Ordinance of 1887, which article treated of excavations in streets and public places, for various purposes, provided that "no person shall make or cause to be made any excavation on any public street, highway, or alley, without written permission of the street commissioner so to do, except public work done under the authority of the water or sewer commissioner, who at the time of ordering any such excavating shall notify the street commissioner of the same."

By §§ 581, 582, 583 *et seq.*, article 2 of the same chapter, wires, tubes, or cables carrying electricity for the production of light or power were to be placed above or below the surface of the ground of streets, alleys, or public places, and secured in such manner as prescribed by the board of public improvements, and that board, on the filing of an application stating the streets, alleys, and public places desired to be occupied and the manner in which the wires, tubes, or cables were to be secured, were authorized to grant a permit for such occupancy, with such restrictions, regulations, and qualifications as the board might designate, etc., etc. These were sections of Ordinance No. 12,723. (See Revised Ordinance 1887, p. 652.)

Section 590, article 1, chap. 15, of the Revised Ordinance of 1892, was the same as § 568 of Revised Ordinance of 1887, and §§ 603, 604, *et seq.*, of article 2 of that chapter, quoted *ante*, corresponded substantially with sections 581, etc., of the Ordinance of 1887. Revised Ordinance 1892, p. 660.

Section 2721, chap. 42, of the Revised Statute of Missouri of 1889 (vol. 1, p. 693), provided: "Companies organized under the provisions of this article for the purpose of constructing and maintaining telephone or magnetic telegraph lines, are authorized to set their poles, piers, abutments, wires, and other fixtures along, across, or under any of the public roads, 97] *streets, and waters of this state, in such manner as not to incommode the public in the use of such roads, streets, and waters: *Provided*, Any telegraph or telephone company desiring to place their wires and other fixtures under ground, in any city, they shall first obtain consent from said city through the municipal authorities thereof."

The company asserted by its pleadings that it had never accepted the provisions of Ordinance 12,723, and the subsequent ordinances, and had never obtained the consent of the municipal assembly to occupy the streets with electric wires laid under their surface.

Nor had the company ever applied to the board of public improvements for a permit to occupy Broadway with electric wires laid under the surface of that street.

But the company asserted that the only limitation on its power to so occupy the streets was that the work should be done "with as much despatch and as little inconvenience to the public as possible."

And, admitting that it sought to excavate with the view to occupy the street with electric wires laid under the surface, the company demanded the writ of mandamus to compel the street commissioner to issue a permit allowing it to excavate for that purpose.

The supreme court held that the grant of the state to the company, "though construed to include the right to use electricity for illuminating purposes in respect to such right was taken subject to reasonable regulations as to its use, and the power to regulate has been delegated to the city of St. Louis. Under its general police power the city has the right to require compliance with reasonable regulations as a condition to using its streets by electric wires."

In view of the want of knowledge in the art of producing light by electricity when the franchise was granted, the court thought that "it would be most unwarrantable to imply, not only that relator had the right under the general words used in the act of incorporation to use electricity for lighting purposes, but that it also had the right to adopt its own methods for exercising that power, regardless of the paramount rights *of the public to[98 the use of the streets. The power delegated to the city to regulate the use of its streets existed before the art of lighting by electricity was known, or at least before relator adopted it, and the art should be exercised, if at all, under the powers thus in force when it was brought into use."

Considering the danger to life and property from electric wires when charged, it seemed to the court too plain for argument that the city should have the right to direct the manner in which their use should be exercised, and especially when more than one method was open, and the rights and safety of the public were more or less affected by either.

Again, many companies used electric wires for various purposes, and to accommodate them all and prevent monopolies in the use of the streets it appeared absolutely necessary that the municipal authorities should have the right to direct the manner in which wires should be placed under ground.

The court was of opinion that it would be time enough for the company to complain when its rights were distinctly infringed, and held that the street commissioner "properly refused to grant the permit demanded, unless relator first complied with the requirements of the valid ordinances then in force."

Obviously the supreme court declined to enter on a discussion as to what were and what were not valid ordinances as respected the company, because the record showed that the company denied that it was subject to any control by the municipal authorities, and claimed that all that was required of it by its charter was to do the work with as much despatch and as little inconvenience as possible.

It had made no application to the municipal assembly, directly or through the board of public improvements, for authority to proceed.

It had not filed any application with the board of public improvements giving details of the streets it wished to occupy, and the manner in which the wires, etc., were to be secured, supported, and insulated, and a plat of the route; nor asked that board for a permit for the occupancy it desired.

Whatever objections the company may have
99] been entitled *to raise to particular provisions of the ordinances, in denial of their applicability or validity, it took no action whatever, so far as this record shows, calculated to bring such matters to a distinct issue.

The street commissioner had no power under the charter and ordinances to issue the permit requested in the absence of the assent of the board of public improvements, which had general control; and the court could not command him to do that which it was not his official duty to perform.

Judgment to that effect in itself involved no Federal question, for confessedly there was no contract right that leave to excavate should be given by a particular officer; but we concur with the conclusion of the supreme court that the company was subject to reasonable regulations in the exercise of the police powers of the city, and so far as that involved any Federal question, such question was correctly decided. *New York* [*New York Electric Lines Co*] v. *Squire*, 145 U. S. 175 [36: 666]; *St. Louis* v *Western U. Telegraph Company*, 148 U. S. 92 [37: 380], 149 U. S. 465 [37: 810].

We are unable to accede to the contention that the company was entitled by contract with the state to lay electric wires under ground without reference to the directions or regulations of the city on that subject; or that the street commissioner was obliged to permit it to excavate the streets for that purpose without the assent of the board of public improvements or of the municipal assembly, or effort to obtain either, on the mere averment of the company that it fears it might thereby subject itself to requirements from which it insists it was exempted by the terms of its charter.

If the company, as it asserted, possessed the right to place electric wires beneath the surface of the streets, that right was subject to such reasonable regulations as the city deemed best to make for the public safety and convenience, and the duty rested on the company to comply with them.

If requirements were exacted or duties imposed by the ordinances, which, if enforced, would have impaired the obligations of the company's contract, this did not relieve the company from offering to do those things which it was lawfully bound to do.

100] *The exemption of the company from requirements inconsistent with its charter could not operate to relieve it from submitting itself to such police regulations as the city might lawfully impose. And until it has complied, or offered to comply, with regulations to which it was bound to conform, it was not in a position to assert that its charter rights were invaded because of other regulations, which, though applicable to other companies, it contended would be invalid if applied to it.

The supreme court of Missouri did not feel called on to define in advance what might, or might not, be lawful requirements; and there is certainly nothing in this record compelling us to do so.

It must be remembered that the case does not come before us from the circuit court. This is a writ of error to revise the judgment of the highest tribunal of a state, and this we cannot do unless Federal questions have been erroneously disposed of.

Judgment affirmed.

BARROW STEAMSHIP COMPANY, *Plf. in Err.*, *v.* MICHAEL KANE.

(See S. C. Reporter's ed. 100-113.)

Corporation, when a citizen—liability to be sued —in what courts—personal tort committed abroad—jurisdiction of Federal courts.

1. For the purposes of suing and being sued in a Federal court, a state corporation is to be considered as a citizen of the state, and the persons composing the corporation are presumed to be citizens of the same state.
2. The liability of a foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on its business there.
3. An alien or a foreign corporation may be sued in the United States circuit court by a citizen of a state, in any district in which valid service can be made on the defendant.
4. An action may be maintained in a Federal court in one state by a citizen and resident of another state against a foreign corporation doing business in the former state for a personal tort committed abroad, which would have been actionable if committed in the state, or elsewhere in this country.
5. That the legislature of the state has not authorized like suits to be brought in its own courts by citizens and residents of other states cannot deprive such citizens of their right to invoke the jurisdiction of the national courts under the Constitution and laws of the United States.

[No. 353.]

Argued October 22, 1897. Decided April 11, 1898.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit certifying a question to be answered in an action brought by Michael Kane against the Barrow Steamship Company for damages for personal injuries by being assaulted and maltreated by servants of the defendant, in which action the plaintiff recovered a verdict. *Question answered in the affirmative.*

NOTE.—*As to discriminating against citizens of other states*, see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 583.

As to residence or citizenship of corporations for purpose of Federal jurisdiction in state other than that where created; adoption or new incorporation; residence; an "inhabitant" where; where "found" under act of 1875,—see note to Stephens v. St. Louis & S. F. R. Co. (C. C. W. D. Ark.) 14 L. R. A. 184.

As to citizenship of consolidated corporation, see note to Stephens v. St. Louis & S. F. R. Co. (C. C. W. D. Ark.) 14 L. R. A. 184.

As to privileges of citizens of states, see note to State v. Wiggin (N. H.) 1 L. R. A. 56.

As to political rights of, see note to Frieszleben v. Shallcross (Del.) 8 L. R. A. 337.

Statement by Mr. Justice Gray:

This was an action brought November 1, 1894, in the circuit court of the United States for the southern district of New York by Michael Kane against the Barrow Steamship Company (Limited).

101] *The complaint alleged that the plaintiff was a citizen of New Jersey, and resided at Newark, in that state; and that "the defendant is a corporation organized and incorporated under the laws of the Kingdom of Great Britain, and is the owner of a certain steamship known as the Devonia, and is and was at the time hereinafter mentioned a common carrier of passengers, and engaged in the business of transportation of freight and passengers upon said steamship Devonia and other steamers, among other places, fron Londonderry, Ireland, to the city of New York, and has offices and property in the said city of New York, and its general agents therein, managing the affairs of the said company within said city, and is a resident and inhabitant of the city of New York and the southern district of New York, within the meaning of the statute in such case made and provided;" that "the said defendant operates its business, or part thereof, in and under the name and as part of the Anchor Line, and its said business is in whole or in part done under that name, and its steamers, including the said Devonia, belong to what is known as the Anchor Line steamships; that the general managers of said business in the city of New York are the firm of Henderson Brothers, who are the general agents of said defendant, and the officers of said defendant company and said agents are at No. 7 Bowling Green and pier 54 North river, in said city; that on or about September 13, 1893, the plaintiff purchased and paid for a ticket as a passenger for transportation hy defendant from Londonderry, in Ireland. Kingdom of Great Britain, to the city of New York, on the steamship Devonia, belonging to said defendant; and the said defendant received the said plaintiff as a passenger, and undertook and promised to transport the said plaintiff from said Londonderry to New York with due care, and to do all those things necessary and required for the safe transportation of the said plaintiff to and from said points; and it became and was its duty, and it became bound, to protect and save harmless the said plaintiff from any injury or harm from its agents or servants employed in its business;" and that "for the purpose of transporting passengers over part of the voyage, *viz.*, from 102]Londonderry to *the steamship Devonia, lying in the harbor, the said defendant used a certain tender; that said plaintiff, being a passenger on said tender, in pursuance of the obligation and promise aforesaid, the same being part of the transportation to New York, was violently, on or about September 14, 1893, assaulted and maltreated, without just cause or excuse and wrongfully and unlawfully, by servants or agents of said defendant on said tender," as particularly stated in the complaint; and thereby suffered damages to the extent of $20,000.

To this complaint the defendant filed the following appearance and demurrer: "The defendant above named, appearing specially by Henry T. Wing and Harrington Putnam as its attorneys, specially, only for the purposes hereof, as stated in its special appearance noted herein, demurs to the complaint herein for the special purpose, and no other, until the questions herein raised have been decided, of objecting to the jurisdiction of this court, demurring and excepting to the complaint, because it appears upon the face thereof that the court has not jurisdiction of the person of the defendant, nor of the subject-matter of the action, for the reason that neither the defendant nor the plaintiff is an inhabitant or resident of the southern district of New York, and the action therefore cannot be maintained therein, and that the defendant is a foreign corporation, and the cause of action did not arise within the state of New York. Wherefore defendant prays judgment whether this court has jurisdiction, and asks that the complaint be dismissed, with costs; but should the court overrule this demurrer and exception, the defendant then asks time and leave to answer to the merits, though excepting to the action of the court in overruling said demurrer."

The court overruled the demurrer, with liberty to answer the complaint. The defendant thereupon answered, and the case went to trial.

When the plaintiff's counsel had opened the case to the jury, the defendant's counsel moved to dismiss the suit, upon the ground "that it appeared upon the face of the complaint that the court had not jurisdiction thereof; that it had no *jurisdiction of the person of the [103 defendant; and that it had no jurisdiction of the subject matter of the action;" and presented as grounds of the motion the same reasons that had been urged at the hearing on the demurrer. The court denied the motion, and the defendant duly excepted to the denial.

At the close of the testimony, the defendant again moved the court to dismiss the proceedings on the ground of want of jurisdiction, both of the subject matter and of the person of the defendant. The motion was denied and an exception reserved.

The trial resulted in a verdict for the plaintiff for $7,500, upon which judgment was rendered.

The defendant took the case by writ of error to the circuit court of appeals, which requested the instruction of this court upon a question of law, and embodied in its certificate the provisions of the New York Code of Civil Procedure which are copied in the margin,† the

† Sec. 432. (Amended 1877, chap. 416.) How personal service of summons made upon a foreign corporation.—Personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the state, as follows:

1. To the president, treasurer, or secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose by a writing, under the seal of the corporation, and the signature of its president, vice president, or other acting head, accompanied with the written consent of the person designated, and filed in the office of the secretary of state. The designation must specify a place, within the state, as the office or residence of the person designated; and, if it is within a city, the street, and street number, if any, or other suitable designation of the particular locality. It remains in force until the filing in the same office of a written revocation thereof, or of the consent, executed in like manner; but the person designated may, from time to time, change the

foregoing pleadings and proceedings in the case, and this statement of facts:

104] *"The cause of action is for damages alleged to have been sustained in consequence of an assault upon the plaintiff, a passenger by the defendant's steamship, while the plaintiff was in transit under a contract of transportation, by a person for whose acts it is alleged the defendant was responsible. The alleged assault took place in the port of Londonderry, Ireland. The plaintiff is a citizen and resident of the state of New Jersey. The defendant is a corporation organized and incorporated under the laws of the United Kingdom of Great Britain and Ireland. It is a common carrier operating a line of steamships from ports in that Kingdom to the port of New York. It does business in the state of New York through the firm of Henderson Brothers, its regularly appointed agents, and has property therein. There is no proof of any written designation by the defendant of anyone within the state of New York upon whom service of process may be made. Service of the summons was made on a member of the firm of Henderson Brothers as agents for the defendant."

The question of law certified was: "Had **105**]the circuit court *jurisdiction to try the action and render judgment therein against the defendant?"

Mr. **Esek Cowen** for plaintiff in error.

Mr. **F. K. Pendleton** for defendant in error.

Mr. Justice **Gray** delivered the opinion of the court:

This action was brought in the circuit court of the United States for the southern district of New York against the Barrow Steamship Company, by a passenger on one of its steamships on a voyage from Londonderry in Ireland to the city of New York, for an assault upon him by its agents in the port of Londonderry. The certificate of the circuit court of appeals shows that the plaintiff is a citizen and resident of the state of New Jersey; that the defendant is a corporation, organized and incorporated under the laws of the United Kingdom of Great Britain and Ireland, and a common carrier running a line of steamships from ports in that Kingdom to the port of New York, and does business in the state of New York, through a mercantile firm, its regularly appointed agents, and upon whom the summons in this action was served.

It was contended, in behalf of the steamship company, that, being a foreign corporation, no suit could be maintained against it *in personam* in this country without its consent, express or implied; that by doing business in the state of New York it consented to be sued only as authorized by the statutes of the state; that the jurisdiction of the courts of the United States held within the state depended on the authority given by those statutes; that the statutes of New York conferred no authority upon any court to issue process against a foreign corporation in an action by a nonresident, and for a cause not arising within the state; and therefore that the circuit court acquired no jurisdiction of this action brought against a British corporation by a citizen and resident of New Jersey.

*The constant tendency of judicial de-[**106** cisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them.

By the Constitution of the United States, the judicial power, so far as depending upon citizenship of parties, was declared to extend to controversies "between citizens of different states," and to those between "citizens" of a state and foreign "citizens or subjects." And Congress, by the judiciary act of 1789, in defining the original jurisdiction of the circuit courts of the United States, described each party to such a controversy, either as "a citizen" of a state, or as "an alien." Act of September 24, 1789 (1 Stat. at L. 78, chap. 20, § 11); Rev. Stat. § 629. Yet the words "citizens" and "aliens," in these provisions of the Constitution and of the judiciary act, have always been held by this court to include corporations.

The jurisdiction of the circuit courts over suits between a citizen of one state and a corporation of another state was at first maintained upon the theory that the persons composing the corporation were suing or being sued in its name, and upon the presumption of fact that all those persons were citizens of the state by which the corporation had been created; but that this presumption might be rebutted, by plea and proof, and the jurisdiction thereby defeated. *Bank of United States* v. *Deveaux*, 9 U. S. 5 Cranch, 61, 87, 88 [3: 38, 44, 45]; *Hope Ins. Co.* v. *Boardman*, 9 U. S. 5 Cranch, 57 [3: 36]; *Commercial & R. R. Bank* v. *Slocomb*, 39 U. S. 14 Pet. 60 [10: 354].

But the earlier cases were afterwards overruled; and it has become the settled law of this court that, for the purposes of suing and being sued in the courts of the United States, a corporation created by and doing business in a state is, although an artificial person, to be considered as a citizen of the state, as much as a

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place specified as his office or residence to some other place within the state, by a writing, executed by him, and filed in like manner. The secretary of state may require the execution of any instrument, specified in this section, to be authenticated as he deems proper, and he may refuse to file it without such an authentication. An exemplified copy of a designation so filed, accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this section, can be found with due diligence, and the corporation has property within the state, or the cause of action arose therein, to the cashier, a director, or a managing agent of the corporation, within the state.

Sec. 1780. When foreign corporation may be sued. —An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a nonresident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract, made within the state, or relating to property situated within the state, at the time of the making thereof.

2. Where it is brought to recover real property situated within the state, or a chattel, which is replevied within the state.

3. Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state.

natural person; and there is a conclusive presumption of law that the persons composing the corporation are citizens of the same state with the corporation. *Louisville, C. & C. Railway Co.* v. *Letson*, 43 U. S. 2 How. 497, 558 [11: 353, 377]; *Marshall* v. *Baltimore & Ohio Railroad Co.* 57 U. S. 16 How. 314, 329 [14: 953, 959]; *Muller* v. *Dows*, 94 U. S. 444 [24: 207]; *National Steamship Co.* v. *Tugman*, 106 U. S. 118 [27: 87]; *St. Louis & San Francisco Railway Co.* v. *James*, 161 U. S. 545, 555–559 [40: 802, 806, 807].

107 *In *Bank of Augusta* v. *Earle*, 38 U. S. 13 Pet. 519 [10: 274], decided before the case of *United States* v. *Deveaux*, above cited, had been overruled, and while that case was still recognized as authority for the principle that in a question of jurisdiction the court might look to the character of the persons composing a corporation, Chief Justice Taney, in delivering judgment, said that the principle had 'never been supposed to extend to contracts made by a corporation, especially in another sovereignty;" but that "whenever a corporation makes a contract, it is the contract of the legal entity—of the artificial being created by the charter—and not the contract of the individual members." 38 U. S. 13 Pet. 586, 587 [10: 306, 307].

In *Bank of Augusta* v. *Earle* it was adjudged that a corporation created by one state, and acting within the scope of its charter, might do business and make contracts in another state when permitted to do so by the laws thereof, and might sue upon such contracts in the courts of that state. As was said in the opinion: "It is sufficient that its existence as an artificial person, in the state of its creation, is acknowledged and recognized by the law of the nation where the dealing takes place; and that it is permitted, by the laws of that place, to exercise there the powers with which it is endowed." 38 U. S. 13 Pet. 589 [10: 308]. And it was declared to be well settled that by the law of comity among nations, prevailing among the several states of the Union, "a corporation created by one sovereignty is permitted to make contracts in another, and to sue in its courts," except as to contracts repugnant to its own policy. 38 U. S. 13 Pet. 592 [10: 309].

The manifest injustice which would ensue, if a foreign corporation, permitted by a state to do business therein, and to bring suits in its courts, could not be sued in those courts, and thus, while allowed the benefits, be exempt from the burdens, of the laws of the state, has induced many states to provide by statute that a foreign corporation making contracts within the state shall appoint an agent residing therein, upon whom process may be served in actions **108** upon such contracts. This *court has often held that wherever such a statute exists service upon an agent so appointed is sufficient to support jurisdiction of an action against the foreign corporation, either in the courts of the state, or, when consistent with the acts of Congress, in the courts of the United States held within the state; but it has never held the existence of such a statute to be essential to the jurisdiction of the circuit courts of the United States. *Lafayette Ins. Co.* v. *French*, 59 U. S. 18 How. 404 [15: 451]; *Ex parte Schollenberger*, 96 U. S. 369 [24: 853]; *New England Mut. L. Ins. Co.* v. *Woodworth*, 111 U. S. 138, 146 [28: 379, 382]; *Shaw* v. *Quincy Mining Co.* [*Ex parte Shaw*], 145 U. S. 444, 452 [36: 768, 772].

In *Lafayette Ins. Co.* v. *French*, the court said: "We limit our decision to the case of a corporation acting in a state foreign to its creation, under a law of that state which recognized its existence, for the purposes of making contracts there and being sued on them, through notice to its contracting agents." But it was cautiously added: "The case of natural persons, or of other foreign corporations, is attended with other considerations, which might or might not distinguish it; upon this we give no opinion." 59 U. S. 18 How. 408, 409 [15: 458].

The liability of a foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on its business there.

Accordingly, in *Baltimore & O. Railroad Co.* v. *Harris*, 79 U. S. 12 Wall. 65 [20: 354], the Baltimore & Ohio Railroad Company, a corporation chartered by the state of Maryland, and authorized by the statutes of the state of Virginia to extend its railroad into that state, and also by the act of Congress of March 2, 1831, (4 Stat. at L. 476, chap. 85), to extend, construct, and use a lateral branch of its railroad into and within the District of Columbia, and to exercise the same powers, rights, and privileges, and be subject to the same restrictions in regard thereto, as provided in its charter, was held, by reason of the act of Congress, and of service upon its president in the District of Columbia, to be liable to an action in the District by a passenger for an injury happening in the state of Virginia; although the railroad company was a corporation of the state of Maryland only, and *neither the act of Congress authoriz- [**109** ing it to construct and use a branch railroad in the District of Columbia, nor any other act of Congress, had made any provision for bringing suits against foreign corporations, the action having been brought before the passage of the act of February 22, 1867 (14 Stat. at L. 404, chap. 64, § 11); Rev. Stat. D. C. § 790. Mr. Justice Swayne, in delivering judgment, said: "If the theory maintained by the counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another state. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility. It is not to be supposed that Congress intended that the important powers and privileges granted should be followed by such results. But turning our attention from this view of the subject and looking at the statute alone, and reading it by its own light, we entertain no doubt that it made the company liable to suit, where this suit was brought in all respects as if it had been an independent corporation of the same locality." 79 U. S. 12 Wall. 83, 84 [20: 359].

In that case, it is to be observed, the cause

of action arose, neither in the state of Maryland, where the defendant was incorporated, nor in the District of Columbia, where the action was brought, but in the state of Virginia. The decision, in principle and in effect, recognizes that a corporation of one state, lawfully doing business in another state, and summoned in an action in the latter state by service upon its principal officer therein, is subject to the jurisdiction of the court in which the action is brought.

In England, the right of a foreign corporation doing business in England to sue in the English courts was long ago recognized; and its liability to be subjected to suit in those courts, by service made upon one of its principal officers residing and representing it within the realm, has been fully established by recent
110]decisions. **Newby* v. *Von Oppen*, L. R. 7 Q. B. 293; *Haggin* v. *Comptoir d' Escompte de Paris*, L. R. 23 Q. B. Div. 519.

In the courts of several states of the Union, the like view has prevailed. *Libbey* v. *Hodgdon*, 9 N. H. 394; *March* v. *Eastern Railroad Co.* 40 N. H. 548, 579 [77 Am. Dec. 732]; *Day* v. *Essex County Bank*, 13 Vt. 97; *Moulin* v. *Trenton Mut. L. & F. Ins. Co.* 25 N. J. L. 57; *Bushel* v. *Commonwealth Ins. Co.* 15 Serg. & R. 173; *North Missouri Railroad Co.* v. *Akers*, 4 Kan. 453, 469 [16 Am. Dec. 183]; *Council Bluffs Canning Co* v. *Omaha Tinware Mfg. Co.* 49 Neb 537. The courts of New York and Massachusetts, indeed, have declined to take jurisdiction of suits against foreign corporations, except so far as it has been expressly conferred by statutes of the state. *M'Queen* v. *Middletown Manuf. Co.* 16 Johns. 5; *Robinson* v. *Oceanic Steam Navigation Co.* 112 N. Y. 315 [2 L. R. A. 636]; *Desper* v. *Continental Water Met-r Co.* 137 Mass. 252. But the jurisdiction of the circuit courts of the United States is not created by, and does not depend upon, the statutes of the several states.

In the circuit courts of the United States, there have been conflicting opinions, but the most satisfactory ones are those of Judge Drummond and Judge Lowell in favor of the liability of foreign corporations to be sued. *Wilson Packing Co.* v. *Hunter*, 8 Biss. 429; *Hayden* v. *Androscoggin Mills*, 1 Fed. Rep. 93.

In *Lafayette Ins. Co.* v. *French*, above cited, this court, speaking by Mr. Justice Curtis, after saying that a corporation created by one state could transact business in another state only with the consent, express or implied, of the latter state, and that this consent might be accompanied by such conditions as the latter state might think fit to impose, defined the limits of its power in this respect by adding, "and these conditions must be deemed valid and effectual by other states, and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense." 59 U. S. 18 How. 407 [15: 453].

111] *The object of the provisions of the Constitution and statutes of the United States, in conferring upon the circuit courts of the United States jurisdiction of controversies between citizens of different states of the Union, or between citizens of one of the states and aliens, was to secure a tribunal presumed to be more impartial than a court of the state in which one of the litigants resides.

The jurisdiction so conferred upon the national courts cannot be abridged or impaired by any statute of a state. *Hyde* v. *Stone*, 61 U. S. 20 How. 170, 175 [15: 874, 876]; *Smyth* v. *Ames*, 169 U. S. 466, 516 [*ante*, 819, 838]. It has therefore been decided that a statute which requires all actions against a county to be brought in the county court does not prevent the circuit court of the United States from taking jurisdiction of such an action; Chief Justice Chase saying that "no statute limitation of suability can defeat a jurisdiction given by the Constitution." *Mercer County Supers.* v. *Cowles*, 74 U. S. 7 Wall. 118, 122 [19: 86, 88]; *Lincoln County* v. *Luning*, 133 U. S. 529 [33: 766]; *Chicot County* v. *Sherwood*, 148 U. S. 529 [37: 546]. So statutes requiring foreign corporations, as a condition of being permitted to do business within the state, to stipulate not to remove into the courts of the United States suits brought against them in the courts of the state, have been adjudged to be unconstitutional and void. *Home Ins. Co.* v. *Morse*, 87 U. S. 20 Wall. 445 [22: 365]; *Barron* v. *Burnside*, 121 U. S. 186 [30: 915]; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202 [36: 942].

On the other hand, upon the fundamental principle that no one shall be condemned unheard, it is well settled that in a suit against a corporation of one state, brought in a court of the United States held within another state, in which the corporation neither does business, nor has authorized any person to represent it, service upon one of its officers or employees found within the state will not support the jurisdiction, notwithstanding that such service is recognized as sufficient by the statutes or the judicial decisions of the state. *St. Clair* v. *Cox*, 106 U. S. 350 [27: 222]; *Fitzgerald & M. Constr. Co.* v. *Fitzgerald*, 137 U. S. 98, 106 [34: 608, 612]; *Goldey* v. *Morning News*, 156 U. S. 518 [39: 517]. See also *Mexican Central Railway Co.* v. *Pinkney*, 149 U. S. 194 [37: 699].

By the existing act of Congress defining the general jurisdiction *of the circuit courts[**112** of the United States, those courts "shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, when the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars," "in which there shall be a controversy between citizens of different states," "or a controversy between citizens of a state and foreign states, citizens, or subjects;" and, as has been adjudged by this court, the subsequent provisions of the act, as to the district in which suits must be brought, have no application to a suit against an alien or a foreign corporation; but such a person or corporation may be sued by a citizen of a state of the Union in any district in which valid service can be made upon the defendant. Act of March 3, 1887 (24 Stat. at L. 552, chap. 373, § 1), as corrected by the act of August 13, 1888 (25 Stat. at L. 434, chap. 866, § 1); *Shaw* v. *Quincy Mining Co.* [*Ex parte Shaw*], 145 U. S. 444, 453 [36: 768, 773]; *Re Hohorst*, 150 U. S. 653 [37: 1211]; *Galveston*,

H. & S. A. Railway Co. v. *Gonzales*, 151 U. S. 496, 503 [38: 248, 251]; *Re Keasbey & Mattison Co.* 160 U. S. 221, 229, 230 [40: 402, 405, 406].

The present action was brought by a citizen and resident of the state of New Jersey, in a circuit court of the United States held within the state of New York, against a foreign corporation doing business in the latter state. It was for a personal tort committed abroad, such as would have been actionable if committed in the state of New York or elsewhere in this country, and an action for which might be maintained in any circuit court of the United States which acquired jurisdiction of the defendant. *Baltimore & O. Railroad Co.* v. *Harris*, above cited; *Dennick* v. *Central Railroad Co.* 103 U. S. 11 [26: 439]; *Huntington* v. *Attrill*, 146 U. S. 657, 670, 675 [36: 1123, 1129, 1130]; *Stewart* v. *Baltimore & Ohio Railroad Co.* 168 U. S. 445 [*ante*, 537]. The summons was duly served upon the regularly appointed agents of the corporation in New York. *Re Hohorst*, above cited. The action was within the general jurisdiction conferred by Congress upon the circuit courts of the United States. The fact that the legislature of the state of New York has not seen fit to authorize like suits to be brought in its own courts by citizens and residents of other states cannot deprive such **113**] citizens *of their right to invoke the jurisdiction of the national courts under the Constitution and laws of the United States.

The necessary conclusion is that the circuit court had jurisdiction to try the action and to render judgment therein against the defendant, and that the *question certified must be answered in the affirmative.*

THE JOHN G. STEVENS.

(See S. C. Reporter's ed. 113-127.)

Lien upon a tug—when a claim for tort—maritime lien.

1. A lien upon a tug for damages to her tow by negligent towage bringing the tow into collision with a third vessel is to be preferred, in admiralty, to a statutory lien for supplies furnished to the tug in her home port before the collision.
2. A claim by a tow against her tug for damages from coming into collision with a third vessel by reason of negligent towage is a claim in tort.
3. A claim for damages by collision, and a claim for supplies, are both maritime liens.

[No. 25.]

Argued January 27, 1897. Decided April 18, 1898.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit certifying a question of law to this court for decision in a pending appeal in admiralty by Edward H. Loud *et al.*, owners of the schooner C. R. Flint, from a decree of the District Court of the United States for the Eastern District of New York in favor of Frederich H. Gladwish *et al.*, in a libel by Loud *et al.* for a collision damage. *Question answered in the affirmative.*

See same case below, 58 Fed. Rep. 792.

Statement by Mr. Justice **Gray:**

In a pending appeal in admiralty by Edward H. Loud and others, owners of the schooner C. R. Flint, from a decree of the district court of the United States for the eastern district of New York in favor of Frederich H. Gladwish and others, coal merchants under the name of Gladwish, Moquin, & Company, the circuit court of appeals for the second circuit certified to this court a question of the priority of maritime liens on the steamtug John G. Stevens, arising, as the certificate stated, upon the following facts:

"The home port of the tug was New York. Between December 7, 1885, and March 7, 1886, Gladwish, Moquin, & Company furnished coal to the tug in her home port, and filed notices of liens therefor under the laws of the state of New York of 1862, chapter 482, thereby creating statutory liens on her. On March 8, 1886, the tug John G. Stevens was employed in the port of New York to tow the schooner C R. Flint *through the waters of said port, [**114** and, while towing, negligently allowed the C. R. Flint to collide with the bark Doris Eckhoff in tow of the tug R. S. Carter.

"On March 16, 1886, Loud and others, owners of the C. R. Flint, libeled the John G. Stevens and the R. S. Carter in admiralty, in the district court of the United States for the eastern district of New York, for the collision damage. On March 16, 1886, Gladwish and others libeled the John G Stevens, in the same court, to enforce their supply lien under the state law. The Loud libel resulted in a decree condemning both tugs for damages exceeding $15,000. The Gladwish libel resulted in a decree condemning the John G Stevens for the coal supplied, and costs, in all $218.07.

"The district court awarded priority to the supply lien, which exhausts the fund resulting from the sale of the John G. Stevens, leaving the Loud decree unsatisfied." 58 Fed. Rep. 792.

Upon these facts, the circuit court of appeals desired the instruction of this court upon this question of law: "Is the lien for the damages occasioned by negligent towage, which arose on March 8, 1886, to be preferred to the previous state lien for supplies, the libel for supplies being filed last?"

Mr. **Harrington Putnam,** for appellants:

The maritime lien for reparation of damage

NOTE.—*As to collision, measure of damages for*, see notes to Smith v. Condry, 11: 85, and Williamson v. Barrett, 14: 68.

As to collision; rights of steam and sailing vessels with reference to each other, and in passing and meeting; instances,—see note to St. John v. Paine, 13: 537.

As to collision; vessel overtaking another,—see note to The Abbotsford v. Johnson, 25: 168.

As to collision; rules for avoiding; steamer meeting steamer; instances,—see note to Williamson v. Barrett, 14: 68.

As to collision; damages where two vessels are at fault for injury to a third,—see note to The City of Hartford v. Rideout, 24: 930.

As to lien of the contract of affreightment on the vessel, and for damages to goods, see note to The Freeman v. Buckingham, 15: 341.

overreaches prior contract debts in the admiralty, and the right of the suitor in a cause of tort is paramount to the lien of a contract creditor of the owner.

The Aline, 1 W. Rob. 111; *The Linda Flor*, 6 Week. Rep. 197; *The Duna*, 1 Asp. Mar. L. Cas. 159; *The Elin*, 8 Prob. Div. 39; *United States* v. *The Malek Adhel*, 2 How. 233 (11: 249); *The China*, 7 Wall. 68 (19: 73); *The Siren*, 7 Wall. 152 (19: 129); *Norwich & N. Y. Transp. Co.* v. *Wright*, 13 Wall. 104 (20: 585); *The Enterprise*, 1 Low. Dec. 455; *The Arturo*, 6 Fed. Rep. 308; *The America*, 16 Law Rep. 264; *Justi Pon* v. *The Arbustci*, Fed. Cas. No. 7,589; *Force* v. *The Pride of the Ocean*, 3 Fed. Rep. 162; *The Samuel J. Christian*, 16 Fed. Rep. 796; *The Frank G. Fowler*, 17 Fed. Rep. 656; *The Young America*, 30 Fed. Rep. 789; *The Amos D. Carver*, 35 Fed. Rep. 665; *The R. S. Carter*, 38 Fed. Rep. 515; *The John G. Stevens*, 40 Fed. Rep. 331; *The M. Vandercook*, 24 Fed. Rep. 472; *The E. A. Barnard*, 2 Fed. Rep. 712; *Hatton* v. *The Melita*, 3 Hughes, 494; *The Lillie Laurie*, 50 Fed. Rep. 219; *Rusk* v. *The Freestone*, 2 Bond, 234; *The Nettie Woodward*, 50 Fed. Rep. 224; *The Daisy Day*, 40 Fed. Rep. 538; *The F. H. Stanwood*, 49 Fed. Rep. 577.

The lien for negligent collision against the tugboat in favor of a vessel towed is a veritable damage lien, and not *ex contractu*.

The Nightwatch, 1 Lush. 542; *The Robert Pow*, Brown & Lush. 99; *The Quickstep*, 9 Wall. 565 (19: 767); *The L. P. Dayton*, 120 U. S. 337 (30: 669); *The Brooklyn*, 2 Ben. 547; *The Deer*, 4 Ben. 353; *The Liberty, No. 4*, 7 Fed. Rep. 226; *The Frank G. Fowler*, 8 Fed. Rep. 331; *The M. J. Cummings*, 18 Fed. Rep. 178; *The Arturo*, 6 Fed. Rep. 308; *The M. Vandercook*, 24 Fed. Rep. 473; *The Young America*, 30 Fed. Rep. 789; *The Daisy Day*, 40 Fed. Rep. 540.

The statute limiting the liability of vessel owners gives damage liens a priority over earlier supply claims.

The Leonard Richards, 41 Fed. Rep. 818, 820; *Gokey* v. *Fort*, 44 Fed. Rep. 364; *The U. S. Grant*, 45 Fed. Rep. 643; Benedict, Adm. 3d ed. p. 334; *The Belfast*, 7 Wall. 624 (19: 266); *The Sailor Prince*, 1 Ben. 461.

Messrs. **Mark Ash, J. Parker Kirlin,** and *J. H. Lichliter*, for appellees:

A maritime lien is not a mere privilege to arrest the vessel for debt, but a property right or interest in the vessel.

The Guiding Star, 18 Fed. Rep. 263; *The General Burnside*, 3 Fed. Rep. 228; *The Madrid*, 40 Fed. Rep. 677; *The J. E. Rumbell*, 148 U. S. 1 (37: 345); *The J. W. Tucker*, 20 Fed. Rep. 129; *The Arctic*, 22 Fed. Rep. 126; *The Amos D. Carver*, 35 Fed. Rep. 668.

The materialman's lien and the damage lien caused by negligent towage both arise out of a voluntary contract with the tug, and the former lien, being earlier in inception, and for the benefit of the latter, is preferred.

The Jerusalem, 2 Gall. 345; *The Frank G. Fowler*, 17 Fed. Rep. 656; *The Samuel J. Christian*, 16 Fed. Rep. 796; *The J. W. Tucker*, 20 Fed. Rep. 133; *The Young America*, 30 Fed. Rep. 789.

The lien for negligent towage is analogous to that of cargo damage, which is inferior to the lien for materials and supplies.

The Alabama & Gamecock, 92 U. S. 695 (23: 763); *Sturgis* v. *Boyer*, 24 How. 110 (16: 591); *The J. P. Donaldson*, 21 Fed. Rep. 671; *The Young America*, 30 Fed. Rep. 800; *The Daisy Day*, 40 Fed. Rep. 538.

A lien arising *ex delicto* does not outrank one arising *ex contractu*, as a mere matter of legal right, irrespective of other considerations.

The Daisy Day, 40 Fed. Rep. 540; *The R. S. Carter*, 40 Fed. Rep. 332; *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344 (12: 465); *The Samuel J. Christian*, 16 Fed. Rep. 798.

The lien for materials and supplies has been consistently recognized and enforced by this court as contradistinguished from the English courts, from the earliest to the most recent times.

The General Smith, 4 Wheat. 438 (4: 609); *The Lottawanna*, 21 Wall. 558 (22: 654); *The St. Jago de Cuba*, 9 Wheat. 409 (6: 122); *Cunningham* v. *Hall*, 1 Cliff. 43; *Thomas* v. *Osborn*, 19 How. 22 (15: 534); *The St. Lawrence*, 1 Black, 522 (17: 180); *Peyroux* v. *Howard*, 7 Pet. 324 (8: 700); *The J. E. Rumbell*, 148 U. S. 1 (37: 345).

Express mention of damage by collision is found in comparatively few of the modern codes.

The City of Norwalk, 55 Fed. Rep. 98.

Liens for materials and supplies take precedence of liens for collision.

The Young America, 30 Fed. Rep. 799; *The Amos D. Carver*, 35 Fed. Rep. 665.

Mr. Justice **Gray** delivered the opinion of the court:

The question presented by this record is whether a lien upon a tug for damages to her tow, by negligent towage bringing the tow into collision with a third vessel, is to be preferred, in admiralty, to a statutory lien for supplies furnished to the tug in her home port before the collision.

This question may be conveniently divided, in its consideration by the court, as it was in the arguments at the bar, into *two parts: [115 First. Is a claim in tort for damages by a collision entitled to priority over a claim in contract for previous supplies? Second. Is a claim by a tow against her tug, for damages from coming into collision with a third vessel by reason of negligent towage, a claim in tort?

In the case of *The Bold Buccleugh*, 7 Moore, P. C. C. 267, decided in 1852 by the judicial committee of the privy council, upon appeal from the English high court of admiralty, and ever since considered a leading case, both in England and in America, it was adjudged that a collision between two ships by the negligence of one of them created a maritime lien upon or privilege in the offending ship, for the damage done to the other, which attached at the time of the collision, and might be enforced in admiralty by proceedings *in rem* against the offending ship, even in the hands of a bona fide purchaser; and Chief Justice Jervis, in delivering judgment, said: "A maritime lien does not include or require possession. The word is used in maritime law, not in the strict legal

sense in which we understand it in courts of common law, in which case there could be no lien where there was no possession, actual or constructive, but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. . . . This claim or privilege travels with the thing, into whatsoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached." And, after observing that this rule could not be better illustrated than by the circumstances of *The Aline* (1839), 1 W. Rob. 111,—in which Dr. Lushington had expressed the opinion that, in a proceeding *in rem*, the claim for damages must be preferred to a bottomry bond given before the collision, but was not entitled, as against the holder of a like bond given after the collision, to the increased value of the vessel by reason of repairs effected at his cost,—Chief Justice Jervis summed up the matter as follows: "The interest of the first bondholder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at **116**] the date of the collision, *and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim. So by the collision the interest of the claimant attached, and, dating from that event, the ship in which he was interested, having been repaired, was put in bottomry by the master acting for all parties, and he would be bound by that transaction. This rule, which is simple and intelligible, is, in our opinion, applicable to all cases." 7 Moore, P. C. C. 284, 285.

The decision in *The Bold Buccleugh* has never been departed from in England, but has been constantly recognized as sound law in the courts exercising admiralty jurisdiction. *The Europa*, Brown. & L. 89, 91, 97, 2 Moore, P. C. C. N. S. 1, 20; *The Charles Amelia*, L. R. 2 Adm. & Eccl. 330, 333; *The City of Mecca*, L. R. 6 Prob. Div. 106, 113, 119; *The Rio Tinto*, L. R. 9 App. Cas. 356, 360; *The Dictator* [1892] P. 304, 320. And in a very recent case in the House of Lords that decision has been deliberately and finally declared to have established beyond dispute, in the maritime law of Great Britain, that a collision between two vessels by the fault of one of them creates a maritime lien on her for the damage done to the other. *Currie* v. *M'Knight* [1897] A. C. 97.

It has been generally laid down in the English text-books that a maritime lien for damages by a collision takes precedence of all earlier maritime liens founded in contract. Abbott, Shipping, Shee's ed. pt. 6, chap. 4, § 2; Coote, Admiralty Practice, 118; Maclachlan, Merchant Shipping, chap. 15; Foard, Merchant Shipping, 217; Marsden, Maritime Collisions, 3d ed. 82. And the English and Irish courts have ever held that a claim for damages from a collision by the negligence of a foreign ship creates a lien upon the whole value of the ship and freight, without deduction for seamen's wages, because, it has been said, the owner of the ship, being personally liable to the seamen for their wages, should not be permitted to deduct expenses for which he is liable, and thus benefit the wrongdoer at the expense of him to whom the wrong has been done. *The Elin*, L. R. 8 Prob. Div. 39, and 129, and cases there cited.

That a claim for supplies furnished to a vessel should be *preferred to a claim for dam-[**117** ages for a subsequent collision appears never to have been even suggested in England, probably because, by the law of England, materialmen, without possession, have no maritime lien for supplies, even to a foreign ship, but a mere right to seize the ship by process in admiralty, in the nature of an attachment. *The Rio Tinto*, L. R. 9 App. Cas. 356; *The Heinrich Bjorn*, L. R. 10 Prob. Div. 44, and L. R. 11 App. Cas. 270. "Claims for necessaries," said Dr. Lushington, "do not possess *ab origine*, a lien; but carry only a statutory remedy against the *res*, which is essentially different." *The Gustaf*, 1 Lush. 506, 508.

There can be no doubt, therefore, that in the English admiralty courts the lien for damages by collision would take precedence of an earlier claim for supplies.

In this country, the principle applied in the case of *The Bold Buccleugh* to a claim for damages by collision, that a maritime lien is created as soon as the claim comes into being, has long been held to be equally applicable to all claims which can be enforced in admiralty against the ship, whether arising out of tort or of contract. *General Mut. Ins. Co.* v. *Sherwood*, 55 U. S. 14 How. 351, 363 [14: 452, 456]; *Smith* v. *The Creole*, 2 Wall. Jr. 485, 518; *Beane* v. *The Mayurka*, 2 Curt. C. C. 72, 77; *The Young Mechanic*, 2 Curt. C. C. 404; *The Kiersage*, 2 Curt. C. C. 421; *The Yankee Blade* [*Vandewater* v. *Mills*], 60 U. S 19 How. 82, 89 [15: 554, 556]; *The Rock Island Bridge* [*Galena, D. D. & M. Packet Co.* v. *Rock Island R. Bridge*], 73 U. S. 6 Wall. 213, 215 [18: 752, 754]; *The China* [*The China* v. *Walsh*], 74 U. S. 7 Wall. 53, 68 [19: 67, 73]; *The Siren* [*The Siren* v. *United States*,] 74 U. S. 7 Wall. 152, 155 [19: 129, 131]; *The Lottawanna* [*Rodd* v. *Heartt*], 88 U. S. 21 Wall. 558, 579 [22: 654, 663]; *The J. E. Rumbell*, 148 U. S. 1, 10, 11, 20 [37: 345, 347, 350]; *The Glide*, 167 U. S. 606 [42: 296].

Accordingly, in our own law, it is well established that a maritime lien of privilege, constituting a present right of property in the ship, *jus in re*, to be afterwards enforced in admiralty by process *in rem*, arises not only from a collision and for the damages caused thereby (*General Mut. Ins. Co.* v. *Sherwood*, *The Rock Island Bridge*, *The Siren*, and *The China*, above cited) but also for necessary supplies or repairs furnished to a vessel, whether under the general maritime law in a foreign port, or according to a local statute in her home port. *The Young Mechanic*, *The Kiersage*, *The Lottawanna*, *The J. E. Rumbell*, and *The Glide*, above cited.

*Some years before the decision in *The*[**118** *Bold Buccleugh*, Mr. Justice Story had clearly recognized the existence of a maritime lien, as well for damages by collision (*United States* v. *The Malek Adhel*, 43 U. S. 2 How. 210, 234 [11: 239, 249]) as for supplies in a foreign port, regarding which he observed: "A materialman who furnishes supplies in a foreign port, or to a foreign ship, relies on the ship itself as his security. He may, if he pleases, insist upon a bottomry bond with maritime interest, as the

security for his advances; in which case he gives credit exclusively to the ship, and must take upon himself the risk of a successful accomplishment of the voyage. But if he is content with receiving the amount of his advances and common interest, he may rely on that tacit lien or claim which the maritime law gives him upon the ship itself, in addition to the personal security of the owners. Wherever a lien or claim is given upon the thing by the maritime law, the admiralty will enforce it by a proceeding *in rem;* and, indeed, it is the only court competent to enforce it." *The Nestor*, 1 Sumn. 73, 78. And it is worthy of note that the last part of this observation was quoted and relied on in the judgment in *The Bold Buccleugh*, 7 Moore, P. C. C. 284.

By our law, then, a claim for damages by collision, and a claim for supplies, are both maritime liens. The question of their comparative rank is now for the first time presented to this court for adjudication; and it has been the subject of conflicting decisions in other courts of the United States, and especially in those held within the state of New York.

In *The America* (1853) Judge Hall, in the northern district of New York, appears to have held liens for collisions and those for supplies to be of equal rank, without regard to the date when they attached to the ship. 16 Law Rep. 264. A claim for damages by collision has been postponed to an earlier claim for supplies by Judge Brown, in the southern district of New York, in *The Amos D Carver*, 35 Fed. Rep. 665; but has been preferred to such a claim by Judge Benedict, in the eastern district of New York, and by Mr. Justice Blatchford on appeal, in *The R. S. Carter & The John G. Stevens*, 38 Fed. Rep. 515, and 40 Fed. Rep. 331. **119**]And, in an earlier *case, a claim for collision had been allowed by Judge Benedict a like preference over a previous bottomry bond. *Force* v. *The Pride of the Ocean*, 3 Fed. Rep. 162.

The preference due to the lien for damages from collision, over earlier claims founded on contract, has been carried so far as to allow the lien for damages to prevail over the claim of seamen for wages earned before the collision, by Judge Lowell, in the district of Massachusetts, in *The Enterprise*, 1 Low. Dec. 455; by Judge Nixon, in the district of New Jersey, in *The Maria and Elizabeth*, 12 Fed. Rep. 627; by Judges Gresham and Jenkins, in the circuit court of appeals for the seventh circuit, in *The F. H. Stanwood*, 9 U. S. App. 15 [49 Fed. Rep. 577, 1 C. C. A. 379]; and by Judge Swan, in the eastern district of Michigan, in *The Nettie Woodward*, 50 Fed. Rep. 224. The opposite view has been maintained, in the southern district of New York, by Judge Choate, in *The Orient*, 10 Ben. 620, as well as by Judge Brown, in *The Amos D. Carver*, 35 Fed. Rep. 665, above cited; and in the eastern district of New York, by Judge Benedict, in *The Samuel J. Christian*, 16 Fed. Rep. 796; and in the western district of Michigan, by Judge Severens, in *The Daisy Day*, 40 Fed. Rep. 538.

The case at bar, however, presents no question of the comparative rank of seamen's wages, which may depend upon peculiar considerations, and which, according to the favorite saying of Lord Stowell and of Mr. Justice Story, are sacred liens, and, as long as a plank of the ship remains, the sailor is entitled against all other persons, to the proceeds as a security for his wages. *The Madonna D'Idra*, 1 Dodson, Adm. Rep. 37, 40; *The Sydney Cove*, 2 Dodson, Adm. Rep. 11, 13; *The Neptune*, 1 Hagg. Adm. Rep. 227, 239; *Sheppard* v. *Taylor*, 30 U. S. 5 Pet. 675, 710 [8: 269, 282]; *Brown* v. *Lull*, 2 Sumn. 443, 452; *Pitman* v. *Hooper*, 3 Sumn. 50, 58; Abbott, Shipping, pt. 4, chap. 4, § 8; 3 Kent, Com. 197. Yet see *Norwich Co.* [*Norwich & N. Y. Transp. Co.*] v. *Wright*, 80 U. S. 13 Wall. 104, 122 [20: 585, 591].

Nor does this case present any question as between successive liens for repairs or supplies, the general rule as to which is that they are to be paid in inverse order, because it is for the benefit of all the interests in the ship that she should be kept in condition to be navigated. *Abbott, Shipping, pt. 2, chap. 3, § 32; [**120** *The St. Jago de Cuba*, 22 U. S. 9 Wheat. 409, 416 [6: 122, 124]; *The J. E. Rumbell*, 148 U. S. 1, 9 [37: 345, 346]; *The Fanny*, 2 Low. Dec. 508, 510.

Nor does it present a question of precedence between two claims for distinct and successive collisions, as to which there has been a difference of opinion in the southern district of New York; Judge Choate, in the district court, giving the preference to the later claim upon the ground that the interest created in the vessel by the first collision was subject, like all other proprietary interests in her, to the ordinary marine perils, including the second collision; and Mr. Justice Blatchford, in the circuit court, reversing the decree, because the vessel libeled had not been benefited, but had been injured, by the second collision. *The Frank G. Fowler*, 8 Fed. Rep. 331, and 17 Fed. Rep. 653.

Nor yet does it present the question whether a lien for repairs made after the collision, so far as they increase the value of the vessel, may be preferred to the lien for the damages by the collision, in accordance with the English cases of *The Aline* and *The Bold Buccleugh*, cited at the beginning of this opinion.

But the question we have to deal with is whether the lien for damages by the collision is to be preferred to the lien for supplies furnished before the collision.

The foundation of the rule that collision gives to the party injured a *jus in re* in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. This principle, as has been observed by careful text-writers on both sides of the Atlantic, has been more clearly established, and more fully carried out, in this country than in England. Henry, Admiralty, § 75, note; Marsden, Maritime Collisions, 3d ed. 93.

The act of Congress of December 22, 1807, chap. 5, laid an embargo on all ships and vessels within the limits and jurisdiction of the United States, bound to any foreign port or place; and the supplemental act of January 9, 1808, chap. 8, § 3, provided that any ship or vessel proceeding, contrary to the provisions of the *act, to a foreign port or place, should be[**121**

forfeited. 2 Stat. at L. 451, 453. Upon the trial of a libel in the circuit court of the United States to enforce the forfeiture of a vessel under those acts, Chief Justice Marshall said: "This is not a proceeding against the owner; it is a proceeding against the vessel, for an offense committed by the vessel, which is not less an offense, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner." *United States* v. *The Little Charles*, 1 Brock. 347, 354.

Upon a libel of information for the condemnation of a piratical vessel, under the act of Congress of March 3, 1819, chap. 77, continued in force by the act of May 15, 1820, chap. 113 (3 Stat. at L. 510, 600), Mr. Justice Story, delivering the opinion of this court, and referring to seizures in revenue causes, said: "The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offense be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the admiralty." *The Palmyra*, 25 U. S. 12 Wheat. 1, 14 [6: 531, 535].

In *United States* v. *The Malek Adhel*, 43 U. S. 2 How. 210, 233, 234 [11: 239, 249], Mr. Justice Story, in delivering judgment, stated the principle more fully, saying: "It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offense has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offense or wrong, or insuring an indemnity to the injured party." And, after quoting the passages above cited from the opinions in *The Little Charles* and in *The Palmyra*, he added: "The ship is also by the general maritime law held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty; as, for example, in cases of collision or other wrongs done upon the high seas, or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, 122]used as the means *of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."

In *The China* [*The China* v. *Walsh*], 74 U. S. 7 Wall. 53, 68 [19: 67, 73], by the application of the same principle, a ship was held liable for damages by collision through the negligence of a pilot whom she had been compelled by law to take on board; and Mr. Justice Swayne, in delivering judgment, said: "The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors. . . . According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This the vessel carries with it into whosesoever hands it may come. It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings."

The same principle has been recognized in other cases. *The Jas. Gray* v. *The John Fraser*, 62 U. S. 21 How. 184, 194 [16: 106, 110]; *The Merrimac* [*Creery* v. *The Eclipse Tow Boat Co.*], 81 U. S. 14 Wall. 199 [20: 873]; *The Clarita and The Clara* [*The Clara Clarita* v. *Cox*], 90 U. S. 23 Wall. 1 [23: 146]; *Ralli* v. *Troop*, 157 U. S. 386, 402, 403 [39: 742, 750].

That the maritime lien upon a vessel for damages caused by her fault to another vessel takes precedence of a maritime lien for supplies previously furnished to the offending vessel, is a reasonable inference, if not a necessary conclusion, from the decisions of this court, above referred to, the effect of which may be summed up as follows:

The collision, as soon as it takes place, creates, as security for the damages, a maritime lien or privilege, *jus in re*, a proprietary interest in the offending ship, and which, when enforced by admiralty process *in rem*, relates back to the time of the collision. The offending ship is considered as herself the wrongdoer, and as herself bound to make compensation for *the wrong done. The owner of the in [123 jured vessel is entitled to proceed *in rem* against the offender, without regard to the question who may be her owners, or to the division, the nature, or the extent of their interests in her. With the relations of the owners of those interests, as among themselves, the owner of the injured vessel has no concern. All the interests existing at the time of the collision in the offending vessel, whether by way of part-ownership, of mortgage, of bottomry bond, or of other maritime liens for repairs or supplies, arising out of contract with the owners or agents of the vessel, are parts of the vessel herself, and as such are bound by and responsible for her wrongful acts. Anyone who had furnished necessary supplies to the vessel before the collision, and had thereby acquired, under our law, a maritime lien or privilege in the vessel herself, was, as was said in *The Bold Buccleugh*, before cited, of the holder of an earlier bottomry bond, under the law of England, "so to speak, a part owner in interest at the date of the collision and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim." 7 Moore, P. C. C. 285.

We are then brought to the question whether a claim by a tow against her tug for damages from coming into collision with a third vessel because of negligent towage is a claim in tort, standing upon the same ground as a claim of the third vessel for damages against the tug.

Upon this question, again, there have been conflicting opinions in the district courts of the United States.

On the one hand, it has been held by Judge Benedict, in the eastern district of New York, in several cases, including the case at bar, that a claim by a tow against her tug for damages caused by the negligence of the latter is founded

on a voluntary contract between the owner of the tow and the owner of the tug, and should be postponed to a claim against the tug for necessary supplies or repairs furnished before the contract of towage was made. *The Samuel J. Christian*, 16 Fed. Rep. 796; *The John G. Stevens*, 58 Fed. Rep. 792; *The Glen Iris*, 78 Fed. Rep. 511. The same conclusion has been 124]reached *by Judge Brown, in the southern district of New York, proceeding upon the hypothesis that the security for the maritime obligation created by the contract of towage is subject to all liens already existing upon the vessel, and upon the theory that by the general maritime law liens *ex delicto*, including all liens for damage by collision, are inferior in the rank of privilege to liens *ex contractu*. *The Grapeshot*, 22 Fed. Rep. 123; *The Young America*, 30 Fed. Rep. 789; *The Gratitude*, 42 Fed. Rep. 299.

On the other hand, the claim by a tow against her tug for damages caused by negligent towage has been held to be founded in tort, arising out of the duty imposed by law, and independent of any contract made, or consideration paid or to be paid, for the towage, by Mr. Justice Blatchford, when district judge, in *The Brooklyn*, 2 Ben. 547, and in *The Deer*, 4 Ben. 352; by Judge Lowell, in *The Arturo*, 6 Fed. Rep. 308; and by Judge Swing, in the southern district of Ohio, in *The Liberty, No. 4*, 7 Fed. Rep. 226, 230. In *The Arturo*, Judge Lowell said: "These cases of tow against tug are, in form and fact, very like collision cases. The contract gives rise to duties very closely resembling those which one vessel owes to others which it may meet. There is, therefore, an analogy between the two classes of cases so close that the tow may sue, in one proceeding for damage, her own tug and a strange vessel with which there has been a collision." 6 Fed. Rep. 312. And it has accordingly been held, by Judge Nixon, and by Judge Severens, that such a claim by a tow against her tug is entitled to priority of payment over liens on the tug for previous repairs or supplies. *The M. Vandercook*, 24 Fed. Rep. 472, 478; *The Daisy Day*, 40 Fed. Rep. 538.

The decisions of this court are in accordance with the latter view, and are inconsistent with any other.

It was argued that the liability of a tug for the loss of her tow was analogous to the liability of a common carrier for the loss of the goods carried. But even an action by a passenger, or by an owner of goods, against a carrier, for neglect to carry and deliver in safety, is an action for the breach of a duty imposed 125] *by law, independently of contract or of consideration, and is therefore founded in tort. *Philadelphia & Reading Railroad Co.* v. *Derby*, 55 U. S. 14 How. 468, 485 [14: 502, 509]; *Atlantic & Pacific Railroad Co.* v. *Laird*, 164 U. S. 393 [41: 485].

In *Norwich Co.* [*Norwich & N. Y. Transp. Co.*] v. *Wright*, 80 U. S. 13 Wall. 104, 122 [20: 585, 591], Mr. Justice Bradley, referring to Maclachlan on Shipping, 1st ed. 598, laid down these general propositions: "Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, etc. But they stand on an equality with regard to each other if they arise from the same cause." Although these propositions went beyond what was required for the decision of that case, which was one of a collision between two vessels, owing to the fault of one of them, causing the loss of her cargo, as well as of the other vessel and her cargo, yet the very point adjudged was that the lien on the offending vessel for the loss of her own cargo was a lien for reparation of damage, and therefore was upon an equality with the lien upon her for the loss of the other vessel and her cargo.

This court, more than once, has directly affirmed that a suit by the owner of a tow against her tug, to recover for an injury to the tow by negligence on the part of the tug, is a suit *ex delicto* and not *ex contractu*.

In *The Quickstep* [*The Quickstep* v. *Byrne*], 76 U. S. 9 Wall. 665, 670 [19: 767, 769], a libel by the owner of a tow against her tug set forth a contract with the tug, for a stipulated price, to tow directly, and a deviation and unreasonable delay in its performance, and that the tug negligently backed into the tow and injured her. An objection that the libel could not be maintained, because the contract alleged was not proved, was overruled by this court. Mr. Justice Davis, in delivering judgment, said: "The libel was not filed to recover damages for the breach of a contract, as is contended, but to obtain compensation for the commission of a tort. It is true it asserts a contract of towage, but this is done by way of inducement to the real grievance complained of, which is the wrong suffered by the libellant in the destruction of his boat by the carelessness and mismanagement of the captain of the Quickstep."

*Again, in *The Syracuse* [*The Syracuse* 126 v. *Langley*], 79 U. S. 12 Wall. 167, 171 [20: 382, 384], which was a libel by a tug against her tow for negligently bringing her into collision with a vessel at anchor, the court, speaking by the same justice, said: "It is unnecessary to consider the evidence relating to the contract of towage, because, if it be true, as the appellant says, that, by special agreement, the canal boat was being towed at her own risk, nevertheless the steamer is liable, if, through the negligence of those in charge of her, the canal boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require, on the part of the persous engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences." And see *The J. P. Donaldson*, 167 U. S. 599, 603 [42: 292, 295].

The essential likeness between the ordinary case of a collision between two ships and the liability of a tug to her tow for damages caused to the latter by a collision with a third vessel, is exemplified by the familiar practice in admiralty (followed in the very proceeding in which the question now before us arose), which allows the owner of a tow, injured by a collision caused by the conduct of her tug and of another vessel, to sue both in one libel, and to recover against either or both, according to the proof at the hearing. *The Alabama and The Gamecock* [*The Alabama* v. *De Las*

Casas], 92 U. S. 695 [23:763]; *The Atlas* [*The Phœnix Ins. Co.* v. *The Atlas*], 93 U. S. 302 [23:863]; *The L. P. Dayton* [*McNally* v. *The L. P. Dayton*], 120 U. S. 337 [30:669]; *The R. S. Carter & The John G. Stevens*, 38 Fed. Rep. 515, and 40 Fed. Rep. 331.

The result of applying to the case at bar the principles of the maritime law of the United States, as heretofore declared by this court, is that the lien for the damages occasioned by negligent towage must be preferred to the previous lien for supplies.

In the argument of this case, copious references were made to foreign codes and commentaries, which we have not thought it important to consider, because they differ among themselves as to the comparative rank of various maritime liens, and because the general maritime law is in force in this country, **127**] *or in any other, so far only as administered in its courts or adopted by its own laws and usages. *The Lottawanna* [*Rodd* v. *Heartt*], 88 U. S. 21 Wall. 558, 572 [22:654, 661]; *The Belgenland* [*The Belgenland* v. *Jensen*], 114 U. S. 355, 369 [29:152, 157]; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 444 [32:788, 792]; *Ralli* v. *Troop*, 157 U. S. 386, 407 [39:742, 751].

Question certified answered in the affirmative.

LOUISVILLE WATER COMPANY, *Plff. in Err.*, *v.* COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 127-133.)

Exemption from taxation.

The exemption from taxation acquired by the Louisville Water Company under the Kentucky law of 1882, which required it to furnish water to the city of Louisville for fire protection free of charge, although withdrawn by the law of 1886, continued as to taxes which were assessed and became due prior to the time when the act of 1886 took effect.

[No. 179.]

Argued January 11, 1898. Decided April 11, 1898.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment of that court affirming the judgment of the Jefferson Circuit Court in favor of the Commonwealth of Kentucky, plaintiff, against the Louisville Water Company, for the recovery of a lien for taxes amounting to $12,875. *Reversed*, and cause remanded for further proceedings.

See same case below, 18 Ky. L. Rep. 620.

The facts are stated in the opinion.

Mr. **T. L. Burnett**, for plaintiff in error, cited the following authorities:

Louisville Water Co. v. *Clark*, 143 U. S. 1 (36:55); *Com.* v. *The Railroad Companies*, 95 Ky. 68; *Louisville Water Co.* v. *Hamilton*, 81 Ky. 522; *Louisville Water Co.* v. *Com.* 89 Ky. 249, 6 L. R. A. 69; *Louisville Water Co.* v. *Clark*, 94 Ky. 54; *Baldwin* v. *Hewitt*, 88 Ky. 682; *McLean County* v. *Deposit Bank*, 81 Ky. 258; *Meriwether* v. *Garrett*, 102 U. S. 472, 473 (26:197); *Delmas* v. *Merchants' Ins. Co.* 14 Wall. 665 (20:759); *Northwestern University* v. *People*, 99 U. S. 309 (25:387); *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 671 (29:772); *Given* v. *Wright*, 117 U. S. 648 (29:1021); *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 436 (17:173); *Murray* v. *Charleston*, 96 U. S. 432 (24:760); *Proprietors of Bridge* v. *Hoboken Land & Improv. Co.* 1 Wall. 116 (17:571); *Furman* v. *Nichol*, 8 Wall. 44 (19:370).

Messrs. **James P. Helm** and *Helm Bruce*, for defendant in error, cited the following authorities:

Clark v. *Louisville Water Co.* 90 Ky. 515; *Louisville Water Co.* v. *Kentucky*, 143 U. S. 1 (36:55); *Hamblin* v. *Western Land Co.* 147 U. S. 532 (37:270); *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 30 (31:607); *Central Land Co.* v. *Laidley*, 159 U. S. 109 (40:94); *New Jersey* v. *Yard*, 95 U. S. 114 (24:354); *Gordon* v. *Winchester Bldg. & Accumulating Fund*, 12 Bush, 114, 23 Am. Rep. 713; *Louisville Gas Co.* v. *Citizens' Gas Co.* 115 U. S. 694 (29:514).

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought by the commonwealth of Kentucky to enforce a lien in its favor upon certain real and personal property of the Louisville Water Company, a Kentucky corporation, which lien, it was alleged, was for taxes amounting to $12,875 for the year 1886, The property upon which the state claimed this lien included the pipes, mains, buildings, reservoirs, engines, pumping stations, etc., belonging to the Water Company.

The company denied its liability to state taxation for the year 1886 or for any year subsequent to the 22d day of April, 1882, *the[**128** date of the passage of an act to which we will presently refer.

In the court of original jurisdiction a judgment was rendered for the commonwealth, and that judgment was affirmed in the court of appeals of Kentucky.

The history of the legislation in Kentucky in reference to this company appears in *Louisville Water Company* v. *Clark*, 143 U. S. 1 [36:55],—a suit involving the question of the liability of the company for state and county taxes for the year 1887.

The Water Company was incorporated in 1854 without any exemption of its property from taxation. But, as stated in that case, it

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NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23:99.

As to power of states to tax, see note to Dobbins v. Erie County Comrs. 10:1022.

As to exemption from taxation; whether a contract or not, not implied,—see note to Tucker v. Ferguson, 22:805.

As to sale of lands for taxes; strict compliance with statute necessary,—see note to Williams v. Peyton, 4:518.

As to when an injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 20:65.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21:63.

was made its duty to furnish water to the city for the extinguishment of fires and the cleansing of streets, upon such terms "as might be agreed between itself and the municipal authorities;" and, the latter assenting, "the Water Company was to have the exclusive right to furnish water to the inhabitants of Louisville, by means of pipes and aqueducts, upon such terms and for such time as might be stipulated between it and the city." Sess. Acts 1853-54, vol. 2, p. 121.

By an act approved February 14, 1856, it was provided that "all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: Provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." 2 Rev. Stat. Ky. 121.

Subsequently, by an act approved April 22, 1882, which took effect from its passage, it was made "the duty of the Louisville Water Company to furnish water to the public fire cisterns and public fire plugs or hydrants of the city of Louisville for fire protection, *free of charge.*" But the same act provided: "The sinking fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said Water Company by virtue thereof is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempt from the payment of taxes of [129] all kinds, of *whatever character, state, municipal, or special." Sess. Acts 1882, vol. 1, p. 915.

On the 17th of May, 1886, the general assembly of Kentucky passed a general revenue statute—commonly known as the Hewitt statute—which did not take effect until September 14, 1886, after taxes were assessed for 1886. It was conceded in the case of *Louisville Water Company* v. *Clark*, above cited, that the property of the Water Company was subject to taxation under that statute, unless it was exempted from taxation by the above act of April 22, 1882.

The contention of the Water Company was that the exemption from taxation given by the act of 1882 could not be withdrawn by subsequent legislation without violating the contract clause of the Constitution of the United States. This contention made it necessary to inquire whether that exemption was in fact withdrawn, and if so, whether the statute withdrawing it impaired the obligation of any contract the company had with the state by the act of 1882.

This court held that the exemption allowed by the act of 1882 was withdrawn by the revenue statute of 1886; and that, as the Water Company's exemption was acquired in 1882 subject to the power of amendment or repeal reserved by the above act of 1856—which saved, whenever that power was exerted, all rights previously vested—the state could, as it did by the revenue statute of 1886, withdraw the exemption given in 1882.

But the question remained whether the withdrawal of the exemption could take effect while the company was under an obligation imposed upon it by the act of 1882, to furnish water to the public fire cisterns and public fire plugs or hydrants of the city of Louisville for fire protection, "free of charge." The court was of opinion that the contention of the Water Company, that the general statute of 1886 impaired the obligation of its alleged contract, could not be fully disposed of without determining the question just stated. It therefore said:

"It is, however, contended that the exemption from taxation could not be withdrawn while the Water Company *remained under the [130] obligation imposed by the 1st section of the act of 1882 to furnish water to the city for fire protection, free of charge. But no such obligation remained after the passage of the act of 1886, which, as we have seen, had the effect to withdraw the immunity from taxation granted by the second section of the act of 1882. In determining the object and scope of the act of 1882 we must look at all of its provisions. The Water Company was under a duty by its charter, passed before the act of 1856, to furnish water for the extinguishment of fires and the cleansing of streets, not free of charge, but upon such terms as might be agreed upon by it and the city. And the legislature certainly did not assume to impose upon it the obligation to furnish water, for fire protection, free of charge, except in connection with the grant to it of immunity from taxation. Accepting, however, the benefits of this exemption from taxation, it became bound to supply water for public purposes free of charge. But that obligation remained only so long as the exemption continued in force. The act of 1882 is to be regarded as an entirety, and meant nothing more than that the company should furnish water for fire protection, free of charge, so long as the immunity from taxation continued. This view is in harmony with the act of 1856, which expressly declares that whilst privileges and franchises granted to corporations, after its passage, could be changed or repealed, no amendment or repeal should impair other rights previously vested. The effect of the withdrawal of the immunity from taxation was, therefore, to leave the Water Company in the position it was before the passage of the act of 1882 in respect to its right to charge for water furnished for public fire cisterns, fire plugs, or hydrants." 143 U. S. 15, 17 [36:59,60].

It was thus adjudged that the statute of 1886 did not affect the company's exemption from taxation so long as the act of 1882 was in operation; in other words, the exemption, by force of the act of 1882, continued until the statute of 1886 took effect, but no longer. Under this view, the company was held liable to pay taxes assessed for 1887, although not liable for taxes accruing before the statute of 1886 took effect.

*But it is contended that this court [131] should accept the views expressed by the court of appeals of Kentucky in the former case as to the scope and effect of the act of 1882. *Clark* v. *Louisville Water Co.* 90 Ky. 515, 519. In that case two questions were raised in the state court; first, that if it were true that the legislature was moved to the passage of the act of 1882 upon the idea of the rendition of a public service, the company rendered no such public service as the Constitution of Kentucky contemplated, when it declared, in its Bill of Rights, that "no man or set of men are entitled

exclusive, separate, public emoluments or privileges from the community, but in consideration of public services;" second, that this was not the reason for the passage of that act, and that the exemption from taxation was unsupported by any valid consideration, or such as the Constitution recognized. The court waived any consideration of the first question,—stating that there was a difference of opinion upon it,—and held that the sole consideration which moved the legislature to pass the act of 1882 was the fact that the city of Louisville owned the stock of the Water Company. Touching that question the court of appeals of Kentucky said in the former case: "The fact that the furnishing of the water may incidentally protect from fire the public buildings of the state will not support the exemption The privilege was not conferred, as the legislature declared, and as we have otherwise shown, for governmental purposes, but merely for a reason which will not support it. It arose out of considerations relating to the private and pecuniary advantage of the city, and in which the state at large had no interest." Again: "If it be said that the exemption should be upheld if it be, in fact, supported by any valid consideration, although the recited one be invalid, we reply that the real consideration, and the one which moved the parties to the transaction is to be regarded. The one acted upon by the legislature, and expressed in the act, and which must have been understood by the city, was the simple fact that it owned the stock in the Water Company. This was not a valid consideration, and we have already seen that mere incidental protection of the public buildings [132] does not aid the matter. The so-called contract was therefore void at its inception. Instead of being impaired in any way forbidden by law, it never had any existence; and it seems to us well that we feel at liberty to so declare, because we have a general law taxing water companies, and if one company be exempt, that of any other city has an equal right to ask the same privilege. A statute exempting one is certainly open to the objection of impolicy, if, indeed, it be not such unequal and partial legislation as is forbidden by law."

The grounds upon which the state court overruled the contention of the Water Company in the former case were not overlooked And it was, in effect, there adjudged, as the above extract from the opinion of this court shows, that the exemption given by the act of 1882 was partly, at least, in consideration of the agreement of the company to furnish water to the public fire cisterns, plugs, and hydrants "free of charge," and not, as provided in the company's charters, upon such terms as might be agreed upon between it and the city; that this obligation of the company continued while its exemption from taxation continued; and consequently, that such exemption, being a vested right under the act of 1882, to be withdrawn only by statute having a prospective operation, could not be withdrawn except as to taxes accruing after the statute of 1886 took effect.

It is to be observed that the court of appeals in its opinion in the present case states that the authority for reporting to the county court clerk the tax list for 1886 of property omitted to be listed with the auditor, was to be found in the Hewitt bill, which was passed, as we have seen, after the enactment of the act of 1882.

The argument in behalf of the commonwealth in the present case, in effect, calls for a reconsideration of what was said in the former case. We do not regard such reconsideration as necessary; and upon the authority of the decision in the former case, we adjudge that the exemption from taxation acquired by the Water Company under the act of 1882 was not withdrawn except from the day on which the statute of 1886 took effect. It results that the company cannot be held for taxes which [133] were assessed and became due prior to September 14, 1886, when the Hewitt act took effect. The petition of the commonwealth of Kentucky should have been dismissed.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice **Gray** dissents.

AMERICAN SURETY COMPANY OF NEW YORK, *Plff. in Err.*,

v.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California. (No. 1.)

(See S. C. Reporter's ed. 133-160.)

Construction of bond—notice to the obligor—cashier of bank—constructive notice—knowledge of principal—acts of agent—false representations—ledger, when evidence—teller's book—proofs of loss.

1. A bond made by a surety company insuring a bank against any fraud or dishonesty of its cashier, if susceptible of two constructions, one favorable to the bank and the other favorable to the surety company, will be given the former construction, when it was drawn by the attorneys, officers, or agents of the surety company.
2. A provision of such bond requiring written notice to the obligor of any act of the cashier involving loss to the bank, to be given as soon as practicable after the bank has knowledge of such act, does not require notice upon mere suspicion, but only after the bank has knowledge of such facts as would justify the charge of fraud and dishonesty against the cashier.
3. A cashier of a national bank is not retired from

NOTE.—*As to duties of cashier of bank; when his acts bind the bank,*—see note to Cecil Nat. Bank v. Watsontown Bank, 26: 1039.

As to theft of special deposit by cashier, see note to Merchants' Nat. Bank v. Carhart (Ga.) 32 L. R. A. 775.

On guaranty or surety obligation obtained by fraud:—(1) In case of fraud of principal; (2) in case of fraud of obligee; secret stipulation between principal and obligee; concealment of facts; surety for employee; holding agent out as honest; public officers; negligence of surety.—see note to Page v. Krekey (N. Y.) 21 L. R. A. 409.

As to release of surety, see note to Frees v. Baker (Tex.) 13 L. R. A. 840.

its service by its closing its doors, and the entry of the bank examiner upon an investigation of its affairs, so as to fix the time for notice of a claim under a bond guaranteeing the bank against the cashier's fraud or dishonesty, but he remains in its service until the appointment and qualification of a receiver.

4. A bank cannot be deemed to have had constructive notice that its president gave a certificate to enable its cashier to procure a bond insuring his fidelity, where it was not the duty or business of the president, and there was no usage of the bank allowing him to give the certificate.

5. The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations, not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal.

6. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or, having received notice of them, failed to disavow what was assumed to be said and done in his behalf.

7. False representations as to the honesty of a cashier who applies to a surety company for a bond, made by the president of the bank, not in the course of the business of the bank nor within any authority which he possessed, but in pursuance of a scheme between him and the cashier to defraud the bank,—will not be chargeable to the bank or defeat the liability on the bond.

8. The ledger account of the president of the bank and the teller's book are admissible in evidence when duly authenticated, in an action against the surety company on its bond guaranteeing the bank against the fraud or dishonesty of the cashier.

9. Proofs mailed by the receiver of a national bank on June 24, of a loss by fraud of the cashier discovered the latter part of May, are made "as soon as practicable," within the meaning of the cashier's bond, where notice in writing was given to the surety company as soon as the loss was discovered, with a request for blanks to make proofs of loss upon, and such blanks were mailed by the surety company on May 31.

[No. 168].

Argued January 6, 7, 1898. Decided April 18, 1898.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the Southern District of New York, in favor of the plaintiff, Frederick N. Pauly, as receiver of the California National Bank, against the American Surety Company of New York, defendant, for the amount of a bond given by defendant insuring the bank against the fraud or dishonesty of its cashier. *Judgments of Circuit Court and Circuit Court of Appeals affirmed.*

See same case below, 38 U. S. App. 254, 72 Fed. Rep. 470.

The facts are stated in the opinion.

Messrs. **Walter D. Davidge, Henry C. Willcox,** and *W. D. Davidge, Jr.*, for plaintiff in error.

Mr. **Edward Winslow Paige** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The defendant in error as receiver of the California National Bank of San Diego, California, brought this action against the plaintiff in error, a corporation of New York, upon a bond of the latter for $15,000 guaranteeing or insuring the bank, subject to certain conditions, against any act of fraud or dishonesty committed by George N. O'Brien in his position as cashier of that institution.

This bond was based upon an application by O'Brien to the Surety Company accompanied by written declarations and *answers to [135 questions relating to his age, history, habits, financial condition, etc. He presented with the application the following certificate, signed by J. W. Collins as president of the bank: "I have read the foregoing declarations and answers made by George N. O'Brien, and believe them to be true. He has been in the employ of this bank during three years; and to the best of my knowledge has always performed his duties in a faithful and satisfactory manner. His accounts were last examined on the 28th day of March, 1891, and found correct in every respect. He is not, to my knowledge, at present, in arrears or in default. I know nothing of his habits or antecedents affecting his title to general confidence, or why the bond he applies for should not be granted to him."

The bond was executed July 1, 1891. After reciting that the employee, O'Brien, had been appointed in the service of the employer the bank, had been assigned to the office or position of cashier, and had applied to the American Surety Company of New York for a bond, it provided:

"Now, therefore, in consideration of the sum of seventy-five dollars, lawful money of the United States of America, in hand paid to the company, as a premium for the term of twelve months ending on the first day of July, one thousand eight hundred and ninety-two, at 12 o'clock noon, it is hereby declared and agreed that, subject to the provision herein contained, the company shall, within three months next after notice, accompanied by satisfactory proof, of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary l ss sustained by the employer, of moneys, securities, or other personal property in the possession of the employee, or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of the employee, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal or retirement of the employee from the service of *the employer. It being understood that[136 a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employer, shall be prima facie evidence thereof. Provided always, that the company shall not be liable, by virtue of this bond, for

any mere error of judgment or injudicious exercise of discretion on the part of the employee, in and about all or any matters, wherein he shall have been vested with discretion, either by instruction, or rules and regulations of the employer. And it is expressly understood and agreed that the company shall in no way be held liable hereunder to make good any loss which may accrue to the employer by reason of any act or thing done, or left undone, by the employee, in obedience to, or in pursuance of, any direction, instruction, or authorization conveyed to and received by him from the employer or its duly authorized officer in that behalf; and it is expressly understood and agreed that the company shall in no way be held liable hereunder to make good any loss, by robbery or otherwise, that the employer may sustain, except by the direct act or connivance of the employee.

"The following provisions are to be observed and binding as a part of this bond:

"That the company shall be notified in writing, at its office in the city of New York, of any act on the part of the employee, which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer. That any claim made in respect of this bond shall be in writing, addressed to the company, as aforesaid, as soon as practicable after the discovery of any loss for which the company is responsible hereunder, and within six months after the expiration or cancelation of this bond as aforesaid. And upon the making of such claim, this bond shall wholly cease and determine as regards any liability for any act or omission of the employee committed subsequent to the making of such claim, and shall be surrendered to the company on payment of such claim."

137] *"That if the company shall so elect, this bond may be canceled at any time by giving one month's notice to the employer, and refunding the premium paid, less a *pro rata* part thereof for the time said bond shall have been in force, remaining liable for all or any default covered by this bond, which may have been committed by the employee, up to the date of such determination, and discovered and notified to the company within the limit of time hereinbefore provided for.

"That the employer shall, if required by the company, and as soon thereafter as it can reasonably be done, give all such aid and information as may be possible (at the cost and expense of the company), for the purpose of prosecuting and bringing the employee to justice, or for aiding the company in suing for and making effort to obtain reimbursement by the employee or his estate, of any moneys which the company shall have paid or become liable to pay by virtue of this bond.

"That no suit or proceeding at law or in equity shall be brought to recover any sum hereby insured, unless the same is commenced within one year from the time of the making of any claim on the company."

"It is further agreed that this bond may at the option of the employer be continued in force from year to year at the same premium rate as long as the company shall consent to receive the same, in which case the company shall remain liable for any dishonest act of the employee occurring between the original date of this bond and the time to which it shall have been continued."

On the application of Collins a bond, with like conditions, was made the same day by the Surety Company in the penalty of $25,000 guaranteeing the bank against loss by any act of fraud or dishonesty on his part as its President.

The complaint set out certain acts of fraud and dishonesty by O'Brien in his office of cashier whereby, it was alleged, the bank lost an amount in excess of that named in the bond. All the material allegations of the complaint were denied by the answer. The result of the trial was a judgment in favor of the plaintiff for $16,847.50, which was the amount of the *bond with interest; also for [138 $385.73 costs and $202.16 interest on the verdict; in all, $17,435.39. That judgment was affirmed in the circuit court of appeals. 38 U. S. App. 254.

Upon certain issues in the case there was a decided conflict in the evidence, particularly as to the time when the receiver first discovered that O'Brien as cashier had commited an act that might involve a loss for which the Surety Company would be liable and of which it was entitled to be notified in writing as soon as practicable after the occurrence of such act came to the knowledge of the bank.

In view, however, of the verdict, and assuming that the jury had due regard to the instructions of the court, the following facts may be regarded as established by the evidence:

On the 13th and 14th days of October, 1891, O'Brien, being cashier, fraudulently and dishonestly placed to the credit of Collins, the president of the bank, two sums, $20,000 and $24,500.

The bank suspended business on the 12th day of November, 1891, at which time Collins had to his credit on its books only $11,420.90. Of the above sums aggregating $44,500 falsely credited to him, he drew out, on his own checks, $33,029.10, which was wholly lost to the bank.

Immediately upon the suspension of the bank an examiner appointed by the comptroller of the currency (Rev. Stat. § 5240) entered upon an investigation of its affairs.

On the 18th day of December, 1891, Pauly was appointed receiver (Rev. Stat. §§ 5205, 5234), and, having qualified as such, took possession on the 29th day of December, 1891, of the books, papers, and assets of the bank—continuing its employees in his service for a short time.

O'Brien remained in service under the receiver until about March 2, 1892, when he left because the receiver declined to pay his salary—the latter saying that he would regard it as credited or paid on any indebtedness of O'Brien's to the bank.

During January, February, and March, 1892, there was a general examination of the books of the bank under the direction of the receiver. And about April 1, 1892, one Bloodgood, an expert bookkeeper, in connection with another *bookkeeper, entered upon a par [139

ticular examination of such books, with a view of ascertaining the transactions of Collins while he was president. Collins died March 3, 1892. Towards the end of May these experts made certain discoveries involving the fidelity and integrity of O'Brien as cashier, of which Bloodgood gave notice to the receiver. The fact thus discovered related to the false credits which, as above stated, O'Brien as cashier had given to Collins on the books of the bank.

It is to be taken upon this record, after the verdict of the jury, that although the general examination of the bank's books in January, February, and March, 1892, indicated that there were probably irregularities in the conduct of the bank's business, the receiver was not aware of "the amounts and special conditions" of such irregularities nor of any specific act of fraud or dishonesty upon the part of the cashier, until the expert bookkeepers had completed their examination of the books of the bank about May 23, 1892, on which day the receiver wrote to the Surety Company, giving notice of the discovery of fraud that entitled him as receiver to look to that company upon its bonds for the fidelity and integrity of Collins and O'Brien. That letter was as follows: "I write to notify you that the California National Bank held a bond to the amount of $20,000 in its favor for the faithful performance of duties by J. W. Collins, its late president, also in favor for the faithful performance of duties by George N. O'Brien, its cashier, for $15,000. I therefore notify you that a discovery of fraud has been made of sufficient amount to require the payment of those indemnity bonds to the undersigned receiver of the California National Bank. I therefore ask that you forward us the necessary blanks to make the claim or claims in proper form."

This letter appears to be undated, but the time is shown by the following letter, dated May 31, and addressed by the vice president of the Surety Company to the receiver: "We are this morning in receipt of your letter of the 23d inst., stating that you have discovered fraud on the part of J. W. Collins, late president of the California National Bank, and on the 140]*part of George N. O'Brien, late cashier of said bank, sufficient to require payment by this company under bonds heretofore issued upon the parties named in favor of the said California National Bank. I transmit herewith two claim blanks with three continuation sheets with each, upon which please itemize any claim you may have to present under the bond of J. W. Collins; also upon the bonds of George N. O'Brien, showing the precise dates of alleged embezzlements on the part of said John W. Collins and said George N. O'Brien, and the amounts thereof; after which please attest the same under oath and transmit to this office, furnishing to our inspector, Mr. Bradbury Williams, who will call upon you, a duplicate statement of the items, with the dates thereto attached, so that he may be able to verify the account. Will you also please inform me where George N. O'Brien is at present, and whether you have made a formal demand upon him for the amount alleged to be due, and whether he has refused to pay the same; also the date of said demand; and if made in writing will you please send us a copy of said demand and furnish a copy to our inspector, Mr. Bradbury Williams. We desire to have you perfect your claims with the utmost expedition, and when received they will be duly considered."

Under date of June 24, 1892, the receiver wrote to the vice president of the Surety Company: "In reply to yours of the 31st ult., I hand you herewith two affidavits in regard to the embezzlement of the late J. W. Collins and George N. O'Brien, furnished after consultation with my legal adviser, as giving information fuller than I otherwise could do by using the blank sent me in your favor of above date. Mr. G. N. O'Brien is still living in San Diego city. A formal demand was made upon him in writing for the amounts embezzled by his aid and assistance from the California National Bank, to which he has as yet made no reply. The affidavit herein relative to J. W. Collins includes an item of $10,000 discovered after making the affidavit sent you before. Duplicate affidavits and copy of the demand made upon G. N. O'Brien will be furnished your Mr. Bradbury Williams when he calls. *Trusting you will find this [141 statement explicit enough for your purpose, and that we may in the near future receive payment as required under the bonds that should guarantee the California National Bank against loss on the part of the hereinbefore-mentioned J. W. Collins and George N. O'Brien."

The questions of law presented for consideration will be better understood if the following additional facts be stated:

With the above letter of June 24, 1892, was an affidavit of the receiver called in the record "Proof of claim." That document stated among other things that on the 13th and 14th days of October, 1891, O'Brien, as cashier, made entries of the deposit tags, and caused to be entered in the books of the bank credits in favor of Collins amounting to $45,000 without Collins paying any consideration therefor, and without being entitled thereto, as O'Brien well knew; that the nature, extent, amount, and circumstances connected with these wrongful acts of O'Brien had come to the knowledge of the receiver and of the bank since the 1st day of February, 1892; that O'Brien was not entitled to any credits, and the bank was not indebted to him in any sum; that at the date of the suspension of the bank his account was overdrawn, and he was at that date indebted to the bank; that the above statements as to his wrongful, unlawful, and fraudulent acts as cashier of the bank between the 1st of July, 1891, and the 12th of November, 1891, the last date being the date of the suspension of the bank, included all the money misappropriated, wrongful and improper entries and fraudulent and wrongful conduct upon the part of O'Brien that had come to the knowledge of the receiver, and constituted a true and correct statement of the account between him and the bank.

On the same day, June 24, 1892, the receiver mailed to the Surety Company a written notice containing substantially the same statements as were contained in the above affidavit, and concluding: "That in pursuance of a certain bond numbered 85,565, heretofore issued

by your company in which you agree to make good and reimburse the said California National Bank of San Diego all and any pecuniary loss **142**] sustained during the *continuance of the bond on account of the fraud or dishonesty of the said G. N. O'Brien, after a written statement of said loss is presented, this notice is given by the undersigned, Frederick N. Pauly, receiver of the California National Bank of San Diego, appointed such receiver December 18, 1891, by the controller of the currency of the United States, and attached hereto is a statement of the loss, duly certified by the said receiver, now representative of said employer named in said bond; that said George N. O'Brien is insolvent; that demand in writing has been made upon him that he reimburse and repay to said bank the amounts hereinbefore dishonestly and fraudulently obtained of said bank, which he has refused to do. This notice is given you as soon as practicable after the occurrence of the wrongful acts hereinbefore referred to and demand is hereby made upon you by the undersigned, as representative of said bank and as such receiver, for the sum of fifteen thousand dollars ($15,000), the amount in said bond stipulated."

On the 8th day of July, 1892, the Surety Company addressed to the receiver the following letter: "We are in receipt of your two letters of the 24th ultimo, transmitting two affidavits relative to the claim under the bonds of this company to the California National Bank for J. W. Collins and George N. O'Brien in the respective positions of president and cashier of said bank. We have respectfully to request that you will make a statement of each on the claim forms which we use for that purpose, two of which are herewith inclosed. We desire full information in regard to the shortages and credits, of every kind whatever, whether on account of salary due, money paid, or assignments made by either of said persons to the California National Bank. If there has been any action brought against Mr. George N. O'Brien, or any correspondence between the bank or you with either of the persons in regard to the matter, we should be pleased to have copies thereof."

To this letter the receiver, under date of July 18, 1892, made the following reply: "In reply to yours of the 8th instant relative to my claim under the bonds of your company to the **143**]*California National Bank for J. W. Collins and G. N. O'Brien, I beg to herewith send you a statement of account of J. W. Collins, showing the amount of his deficiency to be $374,978.22. A list of the property assigned by J. W. Collins to the California National Bank with the estimation of the value thereof. J. W. Collins under the name of Dare & Collins is a defaulter to the bank in the sum of $348,703.52 in addition to the amount above stated. An itemized statement of the account can also be forwarded you if desired. With regard to G. N. O'Brien, no action has been brought against him, because he is execution proof. In reply to my demand for payment for the amounts embezzled by J. W. Collins during the term covered by these bonds, he replied as per copy of his letter herewith inclosed. In compliance with the request of the U. S. Attorney I appeared before the grand jury and testified as to the state of facts that existed implicating G. N. O'Brien in the defalcations with J. W. Collins. What action the grand jury will take has not yet transpired. Trusting that these statements will meet your requirements, I am, etc."

Other letters passed between the receiver and the company, in respect to which it is only necessary to observe that the company retained the proofs of loss sent to it without objecting that they did not sufficiently indicate the nature and extent of the claim made by the receiver. Finally, the receiver, writing to the vice president of the company, under date of September 21, 1892, said: "There has been so much delay in this matter that I have placed it, under the direction of the controller, in the hands of the U. S. Attorney in New York, Edward Mitchell, Esq., with instructions to collect the same." The company in reply expressed their gratification that when taking up the matter finally it could deal with the United States in New York on the merits of the case.

In the light of the facts, as above stated, we come to the consideration of the controlling questions of law presented for determination. These questions depend largely upon the interpretation to be given to the provisions of the bond in suit.

*If, looking at all its provisions, the **[144** bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the Surety Company, the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers, or agents of the Surety Company. This is a well established rule in the law of insurance. *First National Bank* v. *Hartford F. Insurance Co.* 95 U. S. 673 [24: 563]; *Western Ins. Co.* v. *Cropper*, 32 Pa. 351, 355; *Reynolds* v. *Commerce Fire Ins. Co.* 47 N. Y. 597, 604; *Travelers' Ins. Co.* v. *McConkey*, 127 U. S. 661, 666 [32: 308, 311]; *Fowkes* v. *Manchester Life Assur. & Loan Asso.* 3 Best & S. 917, 925. As said by Lord St. Leonards in *Anderson* v. *Fitzgerald*, 4 H. L. Cas. **483, 507, "It [a life policy] is of course prepared by the company, and if therefore there should be any ambiguity in it, must be taken, according to law, most strongly against the person who prepared it." There is no sound reason why this rule should not be applied in the present case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which in the employer's service he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank.

It was contended in the court below, as it is here, that the receiver did not comply with that provision of the bond requiring written notice to be given to the company, at its office in New York, of any act on the part of O'Brien

"which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer." The company insists that the receiver in January, February, March, and April, 1892, had such information in respect of the acts of O'Brien as cashier as made it his duty long be-
145]fore *his letter of May 23, 1892, to give the required notice to the company. Upon this part of the case Judge Wallace, referring to the clause of the policy requiring notice of acts that might involve loss to the defendant, said to the jury: "Under that condition of the policy the defendant was entitled to notice in writing of any act of the cashier which came to the knowledge of the plaintiff of a fraudulent or a dishonest character as soon as practicable after the plaintiff acquired knowledge. It is not sufficient to defeat the plaintiff's right of action upon the policy that it be shown that the plaintiff may have had suspicions of dishonest conduct of the cashier; but it was plaintiff's duty under the policy, when it came to his knowledge, when he was satisfied that the cashier had committed acts of dishonesty or fraud likely to involve loss to the defendant under the bond, as soon as was practicable thereafter to give written notice to the defendant. Now, the written notice, the first written notice, was given on the 23d day of May, 1892. And in considering this issue you are to inquire, first, when it was that the plaintiff became satisfied that the cashier had committed dishonest or fraudulent acts which might render the defendant liable under this policy. He may have had suspicions of irregularities; he may have had suspicions of fraud, but he was not bound to act until he had acquired knowledge of some specific fraudulent or dishonest act which might involve the defendant in liability for the misconduct. Now, when was it he acquired such knowledge? A good deal of testimony had been introduced here upon that issue. After acquiring it, it was his duty, not as soon as possible, to transmit information of it to the defendant, but to do it with reasonable promptness. He was not bound the first day or the next, necessarily, to give notice, but he was to give notice within a reasonable time; and it is for you to say, upon a consideration of all the circumstances of the case, whether he did, within a reasonable time after acquiring such knowledge, send the letter of May 23d. It might be reasonable under one state of facts; it might be unreasonable under another. What might be very great diligence under one set of circum-
146]stances might be very dilatory *under another. Now, first, you are to determine when he really acquired the knowledge. I am not going to recapitulate the testimony. It is claimed upon his part that he did not acquire the knowledge until the close of the examination by the expert, and that was only within a day or two of the time of mailing the notice; and so testimony has been given to show that such examination commenced on the 1st of April and was continued until the latter part of May. On the other hand, it is claimed that he must have acquired knowledge much earlier than this. Now, there is a circumstance of some significance. It is hardly to be supposed that this receiver, holding an official trust, would retain in his employ a cashier after he had become satisfied that by the dishonesty or the fraud of that cashier the bank had sustained serious loss. He did retain him until the 2d day of March. And it may be that while he and those associated with him were entirely satisfied that there had been irregularities, and even perhaps that there had been frauds on the part of the president, they were not aware of any specific acts which could be designated as fraudulent or dishonest on the part of the cashier until the investigation had progressed for a considerable length of time. On the other hand, you have heard the plaintiff's testimony as given in depositions taken in the west. Various extracts have been read, and it is insisted upon the part of the defendant that he must have known of these acts as early as the early part of February, 1892. Now, I charge you, as a matter of law, that if the facts were as they were assumed to be at the outset of the trial,—that is, that the discovery was made early in February and notice was not given until July,—that was not notice with reasonable promptness. And I do not know but that I should charge you, as a matter of law, that if the fact were discovered in the early part of February, and notice was not given until the latter part of May, that was not notice given with reasonable promptness. But if you come to the conclusion that the discovery was not made until the middle or latter part of May, then, in view of the situation of the plaintiff, you may reasonably come to the conclusion that he exercised proper diligence in sending the notice."

*We preceive no error in these instruc-[**147**
tions. They are entirely consistent with the terms of the contract. Much stress was laid, in argument, upon the words "which may involve loss" in the above extract from the bond. But when those words are taken with the words in the same sentence, "as soon as practicable after such act shall have come to the knowledge of the employer," it may well be held that the Surety Company did not intend to require written notice of any act upon the part of the cashier that might involve loss, unless the bank had knowledge, not simply suspicion, of the existence of such facts as would justify a careful and prudent man in charging another with fraud or dishonesty. If the company intended that the bank should inform it of mere rumors or suspicions affecting the integrity of O'Brien, such intention ought to have been clearly expressed in the bond. It was left to the jury to determine when the receiver first acquired knowledge of acts indicating fraud or dishonesty on O'Brien's part, and they found, in effect, that he had no knowledge of any such act until after the report by the expert bookkeepers made about or a few days before May 23, 1892. The trial court went far enough when it said, in response to an inquiry by a juror, that notice given May 23, 1892, of a fraud by the cashier discovered as early as March 2—the day on which O'Brien left the receiver—was not as soon as practicable after the receiver acquired knowledge of the facts.

We have seen that by the terms of the bond in suit the company agreed to make good and reimburse a loss to the bank caused by any

act of fraud or dishonesty on the part of O'Brien in connection, not only with his duties as cashier, but in connection with "the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during such continuance or within six months thereafter *and* within six months from the death or dismissal or retirement of the employee from the service of the employer."

The frauds to which the verdict of the jury referred occurred in October, 1891, during the **148**]continuance of the bond. *The bank suspended November 12, 1891. The company insists that, within the meaning of the bond, O'Brien's "retirement" occurred when the bank ceased to do business and closed its doors and the bank examiner entered upon an investigation of its affairs; consequently, it was argued, the discovery of the fraud was not within six months from the "retirement of the employee from the service of the employer."

Undoubtedly the company did not agree to be liable for any fraudulent or dishonest act of the cashier not discovered until after six months from his retirement from the service of the bank. But is it true that, within the meaning of the bond, O'Brien retired from the service of the bank when it suspended business on November 12, 1891? We think not. The bank was in existence under its articles of association while the examiner, under the order of the controller of the currency, was engaged in the investigation of its affairs. Such investigation did not of itself have the effect to discharge O'Brien from its service. It is true that when the bank suspended business, and the investigation by the examiner commenced, O'Brien ceased to perform the ordinary duties of a cashier. But within the meaning of the bond O'Brien did not retire from, but remained in, the service of the employer during at least the investigation of the bank's affairs and the custody of its assets by the national bank examiner, which lasted until the appointment of a receiver and his qualification on the 29th day of December, 1891. Certainly, the six months from "the death or dismissal or retirement of the employee from the service of the employer," within which his fraud or dishonesty must have been discovered in order to hold the company liable, did not commence to run prior to the date last named. The bond prescribed at least three limitations of time: First, the company was entitled to written notice of any act of fraud or dishonesty on the part of the employee which might involve loss to it, as soon as practicable after the occurrence of such act should come to the knowledge of the employer; second, it was to be liable only for an act of fraud or dishonesty **149**] *occurring and discovered during the continuance of the bond and within six months thereafter; third, it was not liable, in any event, for any act of fraud or dishonesty, even if committed during the continuance of the bond, unless it was discovered within six months from the death, dismissal, or retirement of the employee from the service of the employer. Of course, O'Brien's death would have terminated his employment as cashier. But he was never dismissed, for his dismissal could only have occurred by the act of the bank or of someone who represented it before or after it suspended business. His "retirement," which would arise from his voluntary act, occurred either when he took service under the receiver, or when he voluntarily left that service on the 2d day of March, 1893. Whether within the meaning of the bond O'Brien was in "the service of the employer" while he was in the service of the receiver, we need not say. It is sufficient for this case to hold that he was in the service of the employer at least up to the time of the receiver's appointment and qualification, which occurred within six months prior to the discovery of his fraud and dishonesty and the giving of notice thereof. We therefore hold that the acts of fraud or dishonesty here involved were discovered during the continuance of the bond and within six months after the retirement of the employee from the service of the employer.

In its charge to the jury the trial court called attention to another defense made by the company, namely, that the bond was void by reason of fraudulent misrepresentations and concealments of Collins acting as the president of the bank. The court said: "It is said that this bond of indemnity was obtained upon an application which was certified to by the bank itself, and that in the application facts were misrepresented and facts were concealed with fraudulent intent on the part of the bank; therefore that the bond is void. The application was accompanied by a certificate of Collins, the president of the bank. The only knowledge of any facts which ought to have been communicated, or were misrepresented, the only knowledge which the bank possessed at the time that application was made, was the knowledge of Collins *himself. Ordina-**[150** rily a corporation, like any other principal, is chargeable with the knowledge of any facts which are known to its agents; but in this case all these transactions, if there were any transactions of a fraudulent and dishonest character on the part of the cashier, were transactions for the benefit of Collins and he was a participator in the fraud, and under those circumstances the law does not infer that the agent or the officer will communicate the fact to his principal, the corporation, and under such circumstances the corporation is not bound by his knowledge. So this defense melts away and there is nothing of it whatever."

The company insists that in obtaining the bond in suit Collins acted for the bank, and as a corporation can only speak by agents, the bank is responsible for any false or fraudulent statements in the certificate given by Collins to the Surety Company, and which he signed as president of the bank.

In support of its contention the company cites *Franklin Bank* v. *Cooper*, 36 Me. 179, 197; *Graves* v. *Lebanon Nat. Bank*, 10 Bush, 23, 29 [19 Am. Rep. 50]; *Veazie* v. *Williams*, 49 U. S. 8 How. 134, 157 [12: 1018, 1028]; *Bennett* v. *Judson*, 21 N. Y. 238; *National L. Ins. Co.* v. *Minch*, 53 N. Y. 144, 149; *Holden* v. *New York & Erie Bank*, 72 N. Y. 286, 292; *Elwell* v. *Chamberlin*, 31 N. Y. 611, 619. What were those cases?

Franklin Bank v. *Cooper* was the case of a suit against the executor of one of the sureties in a cashier's bond. Prior to the acceptance of the bond by the directors of the bank a de-

ficiency or defalcation existed in the cashier's accounts, of which the president and some of the directors had knowledge when the bond was taken, but which fact was not communicated to the surety. After observing that knowledge by the surety of the existing deficiency in the cashier's accounts might have had an important influence on his conduct, the court said: "One who becomes surety for another must ordinarily be presumed to do so upon the belief that the transaction between the principal parties is one occurring in the usual course of business of that description, subjecting him only to the ordinary risks attending it; and the **151**] party to whom he *becomes a surety must be presumed to know that such will be his understanding and that he will act upon it, unless he is informed that there are some extraordinary circumstances affecting the risk. To receive a surety known to be acting upon the belief that there are no unusual circumstances by which his risk will be materially increased, well knowing that there are such circumstances and having a suitable opportunity to make them known, and withholding them, must be regarded as a legal fraud by which the surety will be relieved from his contract."

Graves v. *Lebanon Nat. Bank* was a suit upon the bond of a cashier of the bank. The court stated the case to be one in which the directors of a bank "held out" to others as a trustworthy officer a man who had been guilty of repeated embezzlements and frauds, all of which might have been discovered by the exercise of slight diligence by the directors. The grounds upon which the surety was held discharged were thus stated by the court: "There is no principle of law better settled than that persons proposing to become sureties to a corporation for the good conduct and fidelity of an officer to whose custody its moneys, notes, bills, and other valuables are intrusted have the right to be treated with perfect good faith. If the directors are aware of secret facts materially affecting and increasing the obligation of the sureties, the latter are entitled to have these facts disclosed to them, a proper opportunity being presented."

Veazie v. *Williams* was the case of a purchaser at an auction sale, seeking to be relieved from his purchase because of fraud practised at the sale by the auctioneer, who was the general agent of the owners, and the benefits of which sale the owners received. After a reference to many authorities, the court placed the liability of the owners upon these grounds: "What the vendor may not do in person, or may not employ others to do in his absence—that is, make by-bids to enhance the price—his agent, the auctioneer, cannot rightfully do. But they are held liable on a ground beyond and apart from all this, and as well settled in England as here, that if a principal ratify a sale by his agent, and take the benefit of it, and **152**] it *afterwards turns out that fraud or mistake existed in the sale, the latter may be annulled, and the parties placed *in statu quo;* or they may, where the case and wrong are divisible, be at times relieved to the extent of the injury. . . . But the test here is, Was the purchaser deceived, and has the vendor adopted the sale made by deception, and received the benefits of it? For, if so, he takes the sale with all its burdens. *Wilson* v. *Fuller*, 3 Q. B. 68. The sale thus made here was adopted and carried into effect by the respondents; and hence, on account of the fraud involved in it, they should either restore the consideration, and take back the mills, or indemnify the purchaser to the extent of his suffering."

In *Bennett* v. *Judson*—which was the case of an agent of the vendor of land who made material misrepresentations as to its location and qualities, assuming to have knowledge of the facts, but without express authority from his principal—the court said: "There is no evidence that the defendant authorized or knew of the alleged fraud committed by his agent Davis in negotiating the exchange of lands. Nevertheless, he cannot enjoy the fruits of the bargain without adopting all the instrumentalities employed by the agent in bringing it to a consummation. If an agent defraud the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may no doubt rescind, when he discovers the fraud, on the terms of making complete restitution. But so long as he retains the benefits of the dealing he cannot claim immunity on the ground that the fraud was committed by his agent and not by himself. This is elementary doctrine, and it disposes of one of the questions raised at the trial."

In *National Life Ins. Co.* v. *Minch*—which was an action to recover back money paid on a policy fraudulently obtained by a husband on the life of his wife, the fraud not having been discovered until after the money was paid—the court said: "Again, if the husband, as the agent of the wife, procured the policy by fraud, she cannot retain the benefit of it and be relieved from the consequences of the fraudulent means by *which it was obtained.[**153** It is established that an innocent principal cannot take an advantage resulting from the fraud of an agent, without rendering himself civilly liable to the injured party. [*Cobb* v *Dows*] 10 N. Y. 344; *Graves* v. *Spier*, 58 Barb. 349. If the husband obtained the policy by a fraud, acting as the agent of his wife, he occupies the position of claiming to keep money, as her legal representative, which he fraudulently obtained as her agent. He is defeuding this action upon her title to the policy, which, if procured by his fraud, is invalid."

Holden v. *New York & Erie Bank* was an action grounded on the fraud of a cashier in certain matters with which he was connected, not only as cashier, but individually and as executor of an estate. The court said: "As matter of fact, whatever knowledge, information, or notice he had in either of these capacities he carried with him into his exercise of the other. As agent of the bank he owed it a duty in every transaction in which the bank took a part, under his observation. Hence, as matter of law, whatever notice of facts he had in any capacity, which were material in the performance by him of the part of the bank in any transaction, became notice to the bank, his principal; as it was his duty to give it notice thereof in that matter. It is the rule that the knowledge of the agent is the knowledge of his principal, and notice to the agent of the existence of material facts is notice thereof to

the principal, who is taken to know everything about a transaction which his agent in it knows. This rule is sometimes stated, so as to limit it to notice arising from, or at the time connected with, the subject-matter of his agency. Such notice must have come to the agent, it is said, while he is concerned for the principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it. This limitation, however, applies more particularly to the case of an agent whose employment is short lived, so that the principal shall not be affected by knowledge that came to the agent before his employment began, nor after it was terminated. But where the agency is continuous, and concerned with a business made up of a long series 154]*of transactions of a like nature, of the same general character, it will be held that knowledge acquired as agent in that business in any one or more of the transactions, making up from time to time the whole business of the principal, is notice to the agent and to the principal, which will affect the latter in any other of those transactions in which that agent is engaged, in which that knowledge is material. . . . That Ganson held triple relations to the matter did not alter his relation to the bank, his principal, nor did it hinder his knowledge acquired as an agent from affecting his principal in the part he took as an agent. The subject-matter of his agency was the conduct and direction of the affairs of this bank. He represented the bank in all these transactions. He was every time of them engaged in the business of the bank. Notice to him while so engaged, though not otherwise received than by the possession of knowledge acquired by him while acting in another capacity, was notice to the bank. That is a necessary result of his triple character."

Elwell v. *Chamberlin* related to the exchange of a note, in respect of which fraud was charged. The court said: "It is not material that the plaintiffs authorized or knew of the alleged fraud committed by their agent Mills in negotiating the sale of the note. They cannot be permitted to enjoy the fruits of the bargain without adopting all the instrumentalities employed by the agent in bringing it to a consummation. They have ratified the sale by seeking to enforce payment of the check given for the thing sold. If an agent defrauds the person with whom he is dealing, the principal, not having authorized or participated in the wrong, may, no doubt, rescind, when he discovers the fraud, on the terms of making complete restitution. But so long as he retains the benefits of the dealing, he cannot claim immunity on the ground that the fraud was committed by his agent and not by himself."

These cases, so far as they relate to sureties, rest upon the principle that, "if a *party* taking a guaranty from a surety, conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of the facts, such a conceal- 155] ment will amount to *a fraud, because the party is bound to make the disclosure, and the omission to make it, under such circumstances, is equivalent to an affirmation that the facts do not exist." 1 Story, Eq. Jur. § 215. And the cases of *Veazie* v. *Williams*, *Bennett* v. *Judson*, *National Life Ins. Co.* v. *Minch*, *Holden* v. *New York and Erie Bank*, and *Elwell* v. *Chamberlin*, rest upon the presumption, which the law indulges, that an agent will inform his principal of what it is his duty to communicate to the latter. *The Distilled Spirits* [*Harrington* v. *United States*], 78 U. S. 11 Wall. 356, 367 [20: 167, 171]; *Davis Improved Wrought Iron Wagon Wheel Co.* v. *Davis Wrought Iron Wagon Co.* 20 Fed. Rep. 699, 701. This rule is fully stated in Story on Agency, § 140, in which the author says that "notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and if he has not, still, the principal having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal; otherwise, the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interest of such party."

Without stopping to consider whether each of the above cases was correctly decided, it may be observed that those relating to sureties in bonds given to corporations arose directly between the sureties and corporations represented *by their boards of directors or by some of their officers acting within the authority conferred upon them;* and that those relating to the liability of a principal by reason of the acts or representations of his agent arose out of the agent's acts or declarations *in the course of the business intrusted to him.*

None of the cases cited embrace the present one. In the first place, the procuring of a bond for O'Brien, in order that he might become qualified to act as cashier, was no part of the business of the bank nor within the scope of any duty imposed upon Collins as president of the bank. It was the *business of [156 O'Brien to obtain and present an acceptable bond. And it was for the bank, by its constituted authorities, to accept or reject the bond so presented. The bank did not authorize Collins to give, nor was it aware that he gave, nor was he entitled by virtue of his office as president to sign, any certificate as to the efficiency, fidelity, or integrity of O'Brien. No relations existed between the bank and the Surety Company until O'Brien presented to the former the bond in suit. What therefore Collins assumed in his capacity as president to certify as to O'Brien's fidelity or integrity, was not in the course of the business of the bank nor within any authority he possessed. He could not create such authority by simply assuming to have it. The circuit court of appeals, speaking by Judge Lacombe, well said that there were many acts which the president of a bank may do without express authority of the board of directors, in some cases because the usage of the particular bank impliedly authorized them, in other cases because such acts were fairly within the ordinary routine of his business as president; but that the making of a statement as to the honesty and fidelity of an employee for the benefit of the employee, and to enable the latter to obtain

a bond insuring his fidelity, was no part of the ordinary routine business of a bank president, and there was nothing to show that by any usage of this particular bank such function was committed to its president.

It must therefore be taken, as between the bank and the company, that the former cannot be deemed, merely by reason of Collins's relation to it, to have had constructive notice that he as president gave the certificate in question.

The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, **157**]or,*having received notice of them, failed to disavow what was assumed to be said and done in his behalf.

In *Henry* v. *Allen*, 151 N. Y. 1, 10 [36 L. R. A. 658], the court recognized the general rule. But after observing that it rested upon the agent's duty to disclose such facts to his principal, it held that one of the exceptions was that where the agent was "engaged in a scheme to defraud his principal, the presumption does not prevail, because he cannot in reason be presumed to have disclosed that which it was his duty to keep secret, or that which would expose and defeat his fraudulent purpose."

To the same effect are *Benedict* v. *Arnoux*, 154 N. Y. 715, and *Kettlewell* v. *Watson*, L. R. 21 Ch. Div. 685, 707. In the latter case it was said that the presumption arising from the duty of the agent to communicate what he knows to his principal "may be repelled by showing that, whilst he was acting as agent, he was also acting in another character, *viz.*, as a party to a scheme or design of fraud, and that the knowledge which he attained was attained by him in the latter character, and that therefore there is no ground on which you can presume that the duty of an agent was performed by the person who filled that double character."

In *Commercial Bank* v. *Cunningham*, 24 Pick. 270, 276 [35 Am. Dec. 322], which involved the question whether certain notes held by a bank were to be deemed to have been made for the accommodation of a firm, one member of which was a director of the bank at the time the notes were taken, it was held that the knowledge of the latter, although a director, was no proof of notice to the corporation, "especially as he was a party to all these contracts, whose interest might be opposed to that of the corporation." This principle is reaffirmed in *Innerarity* v. *Merchants' National Bank*, 139 Mass. 332, 333 [52 Am. Rep. 710], in which the court said: "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would *necessarily [**158** prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating,"—citing *Kennedy* v. *Green*, 3 Myl. & K. 699; *Cave* v. *Cave*, L. R. 15 Ch. Div. 639; *Re European Bank*, L. R. 5 Ch. 358; *Re Marseilles Extension Railway & L. Co.* L. R. 7 Ch. 161; *Atlantic National Bank* v. *Harris*, 118 Mass. 147; *Loring* v. *Brodie*, 134 Mass. 453.

In *Terrell* v. *Branch Bank at Mobile*, 12 Ala. 502, 507, the question was as to the liability of the maker of a note executed in blank and delivered by him to a director of a bank to be filled up with a certain sum and to be used in the renewal of a note of the maker already held by the bank. The director (Scott) filled up the note for a larger amount and had it discounted for his own use, he acting as one of the directors when the discount occurred, but concealing the facts from the other directors. It was contended that the knowledge of Scott as director of the circumstances under which the note was made and offered for discount, his connection with the directory, and his presence when it was discounted by the bank, were in law notice to the other directors of the facts. The supreme court of Alabama said: "It cannot be admitted that in receiving the blank of the defendant to be used for his benefit, Scott acted as the agent of the bank; and certainly he did not thus act in abusing the authority conferred on him by the defendant. But in filling up the blank for a larger amount than his authority required, and then offering the note for discount, he was in reality the representative of his own interest. *Pro re nata*, his powers as a director were suspended—he was contracting with the bank through his associates in the directory—he was borrowing, not lending, its money—though a member of the board and present too, it cannot be supposed that he co-operated with them in purchasing paper of which he was the avowed proprietor; and whether he did or not, it cannot be presumed that he made any disclosure which would prejudice his application for a loan."

In his treatise on Equity Jurisprudence, Pomeroy says: "It is now settled by a series of decisions possessing the highest *authority, [**159** that when an agent or attorney has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as, perhaps, the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then, under such circumstances, the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed." Vol. 2, § 675.

Further citation of authorities would seem to be unnecessary to support the proposition that if Collins gave the certificate that he might, with the aid of O'Brien as cashier, carry out his purpose to defraud the bank for his personal benefit, the law will not presume that he communicated to the bank what he had done in order to promote the scheme devised by him in hostility to its interests. In our

judgment the circuit court of appeals [38 U. S. App. 279, 72 Fed. Rep. 483, 18 C. C. A. 656], correctly held that plaintiff's right of action on the bond was not lost because its president, Collins, made to the defendants false representations as to the cashier's honesty; and that when two officers of a corporation have entered into a scheme to purloin its money for the benefit of one of them, "in pursuance of which scheme it becomes necessary to make false representations to a third person, ostensibly for the bank, but in reality to consummate said scheme, and for the benefit of the conspirators, and not in the line of ordinary routine business of such officers, and without express authority—the corporation being ignorant of the fraud—the officers are not, in thus consummating such theft, the agents of the corporation."

It is contended that admitting in evidence Collins's ledger account and the letter [teller's] book was error to the prejudice of the substantial rights of the defendant. We cannot assent to this view, and as the matter was satisfactorily disposed of by the circuit court of appeals, it is sufficient to refer to the opinion of that court for our views on this point.

It is said that the claim or proof of loss mailed to the company on June 24, 1892, and the receipt of which was acknowledged July 8, 1892, was not served as soon as practicable after

160] *the discovery of a loss for which the company was liable, nor within six months after the expiration or cancelation of the bond. We cannot assent to these propositions. It must be assumed from the verdict that, within the meaning of the bond, the loss was discovered the latter part of May, and that written notice of it was given as soon thereafter as was practicable. As, for the reasons heretofore stated, O'Brien did not retire from the service of the bank prior at least to December 29, 1891, it is clear that the objection under consideration is not well taken. Under the facts found it must be held that proper notice of the loss was given as soon as practicable after the discovery of the fraud of O'Brien and within six months after his retirement from the service of his employer, and that the claim was made in such form as to reasonably inform the company of its nature. When received, no objection was made that notice of it was not served in time, nor that it was not sufficiently full to indicate the grounds upon which the receiver would proceed against the company upon its bond.

Having considered all the questions which, in our judgment, need to be examined, and perceiving no error of law in the record to the prejudice of the substantial rights of the Surety Company, *the judgments of the Circuit Court and Circuit Court of Appeals are affirmed.*

AMERICAN SURETY COMPANY OF NEW YORK, *Plff. in Err.*,

v.

FREDERICK N. PAULY, as Receiver of the California National Bank of San Diego, California (No. 2.)

(See S. C, Reporter's ed. 160-182.)

Bond indemnifying bank—question for jury—written statement of loss—construction of Contract—suspension of bank.

1. In an action by a national bank against a surety company on a bond given by it to the bank to indemnify it against loss by fraud or dishonesty of its president, which required notice to the company of any act of the president involving loss to the bank, to be given as soon as practicable after the bank has knowledge of such act, such notice need not be given on mere suspicion, but only when the bank is satisfied of some act of fraud or dishonesty committed by its president likely to involve loss to it.
2. It was not error to leave it to the jury to say whether, under the proof and circumstances, a notice given May 23d of a loss discovered after May 1st was given with reasonable promptness.
3. A provision of the bond that a written statement of such loss certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employee, shall be prima facie evidence thereof, makes such statement such evidence of such loss in a suit brought for the recovery thereof.

NOTE.—*As to powers of president of a corporation*, see note to Walt v. Nashua Armory Asso. (N. H.) 14 L. R. A. 356.

As to liability of surety or guarantor, see note to Best v. Johnson (Cal.) 3 L. R. A. 168.

Bonds of indemnity; liability of sureties thereon; bonds of public officers and of officers of corporations; interest, when may be added to penalty.

Sureties on the bond of a county clerk are liable for the amounts of county orders issued by the clerk and paid to himself in excess of the amounts allowed him by the county board of supervisors. Spindler v. People, Ford County, 154 Ill. 637.

The sureties on a county clerk's bond are not released from liability for money fraudulently obtained by the principal upon county orders, by reason of the negligence or misfeasance of the county treasurer in failing to examine the records of the county board, and ascertain that orders were warranted thereby before countersigning the same. Campbell v. People, Ford County, 154 Ill. 595.

The bond of a city clerk creates no liability for his failure to pay over money which under laws and ordinances he had no right to receive, but which was required to be paid into the city treasury. Orton v. Lincoln, 156 Ill. 499, 602.

A judgment showing the existence of a just demand and cause for attachment must be alleged and proved in an action against a constable and his sureties on his official bond for damages for failure to levy an attachment on property pointed out to him. Shanklin, Wetzler, v. Francis, 59 Mo. App. 178.

Sureties on the bond of a master commissioner to sell land and collect the money are liable thereon, although the money was collected before the execution of the bond, where it was not misappropriated until afterwards. Dowell v. Woodsides, 16 Ky. L. Rep. 325.

4. When a contract is so drawn as to leave room for two constructions of its provisions, it must be interpreted most strongly against the party who prepared it and delivered it to the other party for his protection.

5. The mere suspension of a national bank, followed by an investigation of its affairs by a bank examiner, does not have the effect to retire its president from his position, but he remains in its service until the receiver takes possession.

[No. 169.]

Argued January 7, 1898. Decided April 18, 1898.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the Southern District of New York in favor of the plaintiff Frederick N. Pauly, as receiver of the California National Bank, against the American Surety Company of New York, defendant, for the recovery of the amount of a bond given by defendant to indemnify the said National Bank against loss by the fraud or dishonesty of its president. *Judgments of Circuit Court and Circuit Court of Appeals affirmed.*

See same case below, 38 U. S. App. 280, 72 Fed. Rep. 484.

The facts are stated in the opinion.

Messrs. **Walter D. Davidge, Henry C. Willcox,** and *W. D. Davidge, Jr.*, for plaintiff in error.

Mr. **Edward Winslow Paige** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an action by the receiver of the California National Bank of San Diego, California, upon a bond given July 1, 1891, by the American Surety Company of New York, to indemnify that banking association against

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The failure of a county treasurer to pay orders drawn upon him is not made a breach of a prior bond, instead of his current bond, by the fact that the moneys were deposited by him while the prior bond was in force, in a bank which was insolvent at the time, as the breach of the bond is the failure to pay the money, and not its deposit in the bank, and the custody of the money by the bank is that of the treasurer by his agent. People, Menard County, v. Oeltjen, 56 Ill. App. 138.

That commissioners were allowed by the court, under a mistake of law, to a county collector of revenue in excess of the amount he was lawfully entitled to, does not render him and his sureties liable upon his official bond, in the absence of fraud, collusion, or mistake of fact in making such settlement. State, Lawrence County, v. Shipman, 125 Mo. 436.

The sureties on a tax collector's bond are not entitled to a credit for moneys appropriated by the collector to the payment of a balance remaining from a previous term, where it is impossible to determine whether any of the money collected during the term for which they are sureties was used for such purpose. Com., Sharon School Dist., v. Stambaugh, 164 Pa. 437.

The sureties upon a bond to the United States conditioned that a superintendent of Indian affairs shall carefully discharge the public duties of his office, and honestly account for all moneys and property which shall or may come into his hands, are liable for moneys collected by the principal during a term preceding that for which the bond was given, which were in his hands when it was given and were misappropriated after that date. United States v. Dudley, 21 D. C. 337.

An action on the bond of a trustee of a township, under Ind. act March 5, 1883, giving the benefit of the bond to the holder of any contract or other evidence of indebtedness contracted in the name or on behalf of the township, without an order authorizing it, cannot be maintained without showing that the certificates were issued for a valid debt. Indiana, Stanton, v. Glover, 155 U. S. 513, 39 L. ed. 243.

The obligation of an official bond is not extended by the re-election of the officers where he gives a second bond. Trustees of Schools v. Arnold, 58 Ill. App. 103.

The responsibility of sureties on the bond of an officer elected for a year is not extended by the fact that upon his re-election no bond was given for the new term. Board of Administrators v. McKowen, 48 La. Ann. 251.

Sureties on the bond of an officer elected for a year are not liable for any default of the principal occurring after the expiration of a reasonable time from the end of such term for the appointment and qualification of his successor. Board of Administrators v. McKowen, 48 La. Ann. 251.

Sureties on the official bond of a clerk conditioned upon his faithfully performing all duties required of him by law, and paying over all moneys which come into his hands by virtue of his office, are liable on his failure to pay over, at the expiration of his term, fees earned by the sheriff and collected by the clerk, to which the sheriff was not entitled because of a full settlement of his affairs with the county. Weisenborn v. People, 58 Ill. App. 114, 116.

The principal sureties on a bond conditioned that a village collector will faithfully execute the duties of his office and pay over all moneys as provided by law are liable for the amount lost by reason of the insolvency of a bank in which the money was deposited in good faith. Oneida v. Thompson, 92 Hun, 16.

Obligors on an official bond of a superintendent of a mint binding him to receive and safely keep all moneys or bullion are substantially insurers that he will thus keep and deliver the property, and not merely that he shall exercise ordinary care as a bailee. United States v. Bosbysbell, 73 Fed. Rep. 616.

The sureties upon the bond of the treasurer of a benevolent society, conditioned for the faithful performance of his duty, are not liable for a portion of the funds of the society borrowed by him from it before the day of the bond, and retained by him during its whole term, although he becomes insolvent and fails to pay the amount to his successor. Rowe v. Davenport, 8 Kulp, 81.

A bond to secure the fidelity of an insurance agent in a certain employment "during his employment by said company in whatever capacity he may be engaged, the duties and emoluments of which may be changed from time to time by the company without notice to the sureties," does not cover his employment in a wholly different position with increased responsibilities and under an entirely different contract. Iliff v. Western-Southern L. Ins. Co. 11 Ohio C. C. 426.

Sureties on the bond of a given bank, conditioned that if it is designated as a county depositary, pursuant to the statute, it will pay on demand all the funds deposited with it pursuant to such designation, are not released from liability where such funds are deposited in such bank, by the fact that it was not designated as depositary by the proper officer, or that the sureties did

loss by any act of fraud or dishonesty on the part of John W. Collins in connection with the duties of the office or position as president of the above bank, or the duties to which in the employer's (the bank's) service he might be subsequently appointed, and occurring during the continuance of the bond, "and discovered dur-
162]ing *said continuance or within 6 months thereafter and within 6 months from the death or dismissal or retirement of the employee [Collins] from the service of the employer."

The bond in this case is similar to the bond of the Surety Company, of like date, insuring the fidelity and integrity of George N. O'Brien, as cashier of the bank, and which was involved in the preceding case of *American Surety Co.* v. *Pauly* (No. 1.) With a few exceptions the questions of law raised by the assignments of error in the present case are concluded by what was determined in that case.

1. It is contended that the receiver did not comply with the provision in the bond requiring written notice to the company "of any act on the part of the employee, which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer." The import of this provision was considered in the former case. The material inquiry here is whether notice was given to the company of the acts of fraud and dishonesty on the part of Collins of which complaint is made as soon as practicable after the occurrence of such acts came to the knowledge of the receiver.

The evidence was very conflicting as to the time when the receiver first became aware of the fraudulent acts of Collins as president of the bank. The first written notice by the receiver to the company of any claim under Collins's bond arising out of fraudulent or dishonest acts on his part was given May 23, 1892. The terms of that notice appear in the opinion in the former case. There was evidence tend-

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not know that the bond had been approved or funds deposited with the bank in reliance thereon. Hennepin County Comrs. v. State Bank, 64 Minn. 180.

A bond unlimited as to time, conditioned that an officer of a private corporation will faithfully perform his duties as such, does not, unless renewed, cover breaches occurring during a subsequent term. Grand Lodge, O. D. H. S. v. Freifeld, 20 Misc. 276.

Liability on bond of officer of corporation for breach after expiration of term of office. Elam v. Commercial Bank, 86 Va. 92; Phillips v. Bossard, 35 Fed. Rep. 99; St. Louis Union Soc. v. Mitchell, 26 Mo. App. 206; Black v. Oblender, 135 Pa. 526; Kaw Life Asso. v. Lemke, 40 Kan. 661.

A surety on the bond of the treasurer of a corporation elected for one year, conditioned that such treasurer will pay over to his successor any balance in his hands, and honestly and faithfully serve the corporation during his continuance in office, is not liable for defaults of the treasurer during subsequent years for which he was elected. Ulster County Sav. Inst. v. Ostrander, 15 App. Div. 173.

A surety on the bond of the assistant treasurer of a bank, conditioned that he will duly account for all money or other property which comes into his hands as such treasurer, which bond is to be binding for all the time he holds such office, even though he hold under "successive appointments," is liable for defalcation of such treasurer while holding over without appointment after several successive appointments. Ulster County Sav. Inst. v. Young, 15 App. Div. 181.

Sureties on the bond of a bank cashier, which in its condition is general and unlimited as to the time it shall remain in force, are liable for any defaults occurring by him while cashier, where his original appointment was for an indefinite period and the by laws of the bank provided that his appointment should be during the pleasure of the board of directors, and the statute under which the appointment was made authorized an appointment until dismissal at the pleasure of the board, notwithstanding his formal re election annually thereafter at the time of fixing his salary for the ensuing year. Stevens v. Orton, 18 Misc. 538.

The bond of a cashier of a national bank conditioned for the faithful performance of his duties "for and during all the time he shall hold the said office" covers defaults in years subsequent to that in which it is given, notwithstanding the by-laws of the bank provide that the cashier shall be elected annually and a resolution appointing him to the office was passed in each year. Westervelt v. Mohrenstecher, 40 U. S. App. 221, 76 Fed. Rep. 118, 22 C. C. A. 93, 34 L. R. A. 477.

A statute requiring a treasurer to keep safely and pay over the money received by him in his official capacity merely states his common-law duties, and does not enlarge his responsibility as bailee, or that of his sureties. Healdsburg v. Mulligan, 113 Cal. 205, 33 L. R. A. 461.

An officer is not an insurer of the safety of public funds in his hands, on a bond faithfully to perform his duties and to collect and pay over moneys, but is responsible only for the exercise of good faith, diligence, prudence, caution, and a disinterested effort to keep and preserve the fund for those entitled. State, Overton County, v. Copeland, 96 Tenn. 296, 31 L. R. A. 844.

The forcible taking by robbers of money in the custody of a city treasurer is a defense to an action upon his bond providing that he shall "well and faithfully perform all official duties," where by the Constitution and laws of the state the receipt of the money makes him a bailee, and not a debtor. Healdsburg v. Mulligan, 113 Cal. 205, 33 L. R. A. 461.

The loss of public money by a bank failure will not prevent liability of the county treasurer upon his bond to pay the money as the commissioners shall direct, although he was not negligent in selecting the bank and the county has not provided a suitable and safe place in which to deposit the money. Fairchild v. Hedges, 14 Wash. 117, 31 L. R. A. 851.

Payment of money to the clerk of the court in vacation is not equivalent to the payment of money into court as provided by statute; and the sureties on the clerk's bond cannot be held responsible for its loss, if he fails to return into court. State, Blake, v. Enslow, 41 W. Va. 744.

The sureties on the official bond of a sheriff are not liable to the penalty in treble damages and a fine for which the sheriff is made liable by Mills's Colo. Anno. Stat. § 805, for demanding or receiving greater fees than are allowed by law. State Bank v. Brennan, 7 Colo. App. 427.

The omission from the official bond of a prosecuting attorney of the condition of Ohio Rev. Stat. § 1269, that he shall pay over according to law all moneys by him received in his official capacity, is not a fatal defect. State, Ausberry, v. Slough, 12 Ohio, C. C. 105.

A bond given by a deputy to a sheriff, conditioned for the faithful performance of the duties of his office and for the payment to the sheriff of all moneys coming into the deputy's hands by virtue thereof, is not a mere bond of indemnity; and

ing to show that although the receiver had reason, in the months of January, February, March, or April, 1892, to believe that there were irregularities on the part of Collins, as president of the bank, he did not become aware of any specific acts of fraud or dishonesty by him until the expert bookkeeper employed to examine the bank's books informed him a few days prior to May 23, 1892, that he had discovered false entries showing fraud and dishonesty on the part of both Collins and
163] *O'Brien. The conflict in the evidence upon the issue as to the time when the receiver first acquired knowledge of the frauds in question was submitted to the jury under instructions to which in our judgment no objection can properly be made. The court instructed the jury that it was incumbent upon the receiver to satisfy them by a fair preponderance of evidence that he notified the company of any act on the part of Collins "likely to involve a loss for which the company might become responsible as soon as practicable after the act came to his knowledge." It said: "Now, it was not incumbent upon the plaintiff to give notice as soon as practicable after he may have had suspicions of dishonest conduct on the part of the president, but it was his duty when he became satisfied that the president had committed some specific act of fraud or dishonesty which was likely to involve the defendant in loss to give notice in writing. This provision does not require that the notice shall be given immediately, but it requires that it shall be given with reasonable promptness after the discovery, and it is a question of fact for the jury to

a plea of *non damnificatus* is not applicable to an action thereon. Poling v. Maddox, 41 W. Va. 779.

A bond conditioned for the faithful performance by the cashier of a bank of all his duties "so long as he shall continue in that capacity" will be held to create a liability continuing after the expiration of the term of office to which he was originally elected, if such was the intention of the parties. Fink v. Farmers' Bank, 178 Pa. 154.

Neither the principal nor sureties on a cashier's bond conditioned against loss from the negligence of the cashier in the discharge of his duties are liable for loss through the discount of paper by the cashier under direction of the president who had authority to control discounts, in the absence of fraud or collusion or of notice in the cashier that the paper was unsafe. Pryse v. Farmers Bank, 17 Ky. L. Rep. 1056.

Sureties on the bond of an insurance agent conditioned that he will pay over to the company all moneys received by him from time to time are not relieved from liability by the company's failure to state to them that such agent had formerly been indebted to the company, where no inquiry was made on such point by the sureties. Palatine Ins. Co. v. Crittenden, 18 Mont. 413.

Sureties on constable's bond are liable for an illegal arrest made by him while acting as constable and under color of his office, under N. C. Code, § 1883, providing that constables and the sureties on their bonds shall be liable to a person injured for all acts done by them by virtue and under color of their office. State, Warren, v. Boyd, 120 N. C. 56.

Liability on official bond for illegal arrest: Yount v. Carney, 91 Iowa, 559; Kendall v. Aleshire, 28 Neb. 707. Not liable: see Marquis v. Willard, 12 Wash. 528; Allison v. People, Prisk, 6 Colo. App. 80.

A postmaster is liable on his official bond containing no exception from absolute liability, for money-order funds of which he had the possession, which have been embezzled by a clerk, although such clerk held his office as such under the civil-service laws. United States v. Bryan, 84 Fed. Rep. 290.

Sureties on the bond of an attorney of a building and loan association conditioned for the payment of any default by him during his continuance in office, are liable for any default that may occur during his continuance as such attorney, where he holds his appointment at the pleasure of the board, as his term continues so long as the members are pleased. New German Loan & Bldg. Co. v. Kuehnert, 6 Ohio Dec. 502, citing Anderson v. Longden, 1 Wheat. 85 (4: 42;) Dedham Bank v. Chickering, 3 Pick. 335; Hughes v. Smith, 5 Johns. 168; distinguishing Welch v. Seymour, 28 Conn. 387. Period covered by bond of one employed during pleasure of employee, see Stevens v. Orton, 18 Misc. 538; Phillips v. Bossard, 35 Fed. Rep. 99; Com. v. Reading Sav. Bank, 129 Mass. 73; Westervelt v. Mohrenstecher, 40 U. S. App. 221, 76 Fed. Rep. 118, 22 C. C. A. 93, 34 L. R. A. 477; Hall v. Brackett, 62 N. H. 509.

Bond of cashier of a bank conditioned for the faithful discharge of his duties as cashier forever, so long as he shall occupy the position extends but for one year, where his first election was for the ensuing year, and he was thereafter re-elected annually, and a by-law of the company provided that he should be appointed to hold his office during the pleasure of the board. First Nat. Bank v. Briggs, 69 Vt. 12, 37 L. R. A. 845.

A bond for performance of the duties of an insurance agent is satisfied to the extent of an amount paid by the surety for a defalcation so that, upon a subsequent defalcation, only the difference between the amount paid and that of the bond can be recovered. Metropolitan L. Ins. Co. v. Driess (Pa.) 6 Northampton Co. Rep. 67.

Obligors in joint and several bond by an employee conditioned for the transaction of such business as may be intrusted to the employee, and that he will faithfully perform his duties by virtue of his said employment or otherwise, and whether under or in the absence of "any present or future contract, either with or without notice" to the obligors, other than the employee, are not relieved from liability because of a new contract entered into with the employee, without notice, substantially increasing the risk. Singer Mfg. Co. v. Reynolds, 168 Mass. 588.

Deposit by state treasurer, of public funds in a bank chosen as a state depositary in excess of half the amount of the penalty of the bond given by such bank, in violation of the Nebraska statute, will not release either the bank or the sureties on the bond from their obligation to repay the moneys deposited, to half the amount of the bond and the accretions thereof. Bartley v. Meseroe, 51 Neb. 116, 36 L. R. A. 746.

Sureties on a bond by a firm of insurance agents to secure the company from liability for failure of the firm to pay over all money and other securities received by them as such agents are not liable for failure of a continuing member of the firm to pay over money collected by him after the dissolution of the firm. London & L. F. Ins. Co. v. Holt, 10 S. D. 171, citing Standard Oil Co. v. Arnestad, 6 N. D. 255, 34 L. R. A. 861; Burch v. De Rivera, 53 Hun, 367; Crane Co. v. Specht, 39 Neb. 123; Barnett v. Smith, 17 Ill. 565; Penoyer v. Watson, 16 Johns. 100; White Sewing Mach. Co. v. Hines, 61 Mich. 423; State, Watts, v. Boon, 44 Mo. 254.

The fact that the directors of a bank neglected their duty in not discovering what the sureties on a bond of the cashier covenanted that he would reveal, also did not volunteer information of the fact that the cashier was a director, was held no ground of defense in an action for a breach. Frelinghuysen v. Baldwin, 16 Fed. Rep. 452.

say upon the evidence, in view of the particular circumstances of the case, whether such a notice has been given with reasonable promptness. The notice in this case was given on the 23d day of May, 1892, and it will become necessary for you to inquire and determine when it was that knowledge came to the plaintiff, when he became chargeable with knowledge that the president had committed some specific act of fraud or dishonesty likely to render the defendant liable upon its bond."

Again: "The testimony of Mr. Bloodgood, you will recall, which, if I remember it correctly, is to the effect that he entered upon the investigation of the facts in reference to the president's accounts and the misapplication of funds by him about the 1st of April, and completed that investigation some time in May, and as soon as he completed it he then informed the plaintiff of the result. Now, I will charge you, as matter of law in this case, that if the plaintiff had made discovery of any specific act which he believed might render the defendant liable for loss prior to the 1st day of May, 1892, *the notice was not given[164 with reasonable promptness; but if a discovery was not made until after that time, then you can say and decide, as a question of fact, whether or not it was given with reasonable promptness having been given on the 23d day of May."

These instructions were rather more favorable to the Surety Company than were those

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The bond of a cashier is not discharged because at the time it was given the cashier was a defaulter and the directors failed to ascertain and disclose the fact Tapley v. Martin, 116 Mass. 275; Bowne v. Mount Holly Nat. Bank, 45 N. J. L. 360; Bostwick v. Van Voorhis, 91 N. Y. 353; Atlas Bank v. Brownell, 9 R. I. 168, 11 Am. Rep. 231. *Contra*, Graves v. Lebanon Nat. Bank, 10 Bush, 23, 19 Am. Rep. 50.

But a concealment of facts, by the obligee, material for the surety to know, operates to discharge the surety. Rees v. Berrington, 2 Ves. Jr. 540, 2 White & T. Lead. Cas. 1106; Railton v. Mathews, 10 Clark & F. 934; Hamilton v. Watson, 12 Clark & F. 109; Owen v. Homan, 3 Mann. & G. 378, 4 H. L. Cas. 997; Taylor v. Bank of Kentucky, 2 J. J. Marsh. 565; State Bank v. Chetwood, 8 N. J. L. 1; Morris Canal & Bkg. Co. v. Van Vorst, 21 N. J. L. 100.

A statement in the application of a beneficial association to a surety company, to obtain an indemnity bond against the defalcation of its treasurer, that the accounts of the treasurer were examined two months before the bond took effect, and reported correct by the examiners, does not avoid the bond, although the treasurer was in default at the time, in the absence of evidence that this fact was known to some officer of the order. Supreme Council, C. K. of A. v. Fidelity & C. Co. 22 U. S. App. 429, 63 Fed. Rep. 48, 11 C. C. A. 96.

The fact that it was the prescribed duty of the president to receive money paid the company and deposit the same, and also that he was responsible for any failure of duty on his part, it was held did not relieve the secretary from responsibility for the faithful disposition of any funds confided to his care, under his bond conditioned to faithfully perform his duties as secretary and to account for all the money which should come into his hands as such secretary. Engler v. People's F. Ins. Co. 46 Md. 323.

To the same effect see. In the case of a bond of the treasurer of a building and loan association, People's Bldg. & L. Asso. v. Wroth, 43 N. J. L. 70; Mutual Loan & Bldg. Asso. v. Price, 16 Fla. 204, 26 Am. Rep. 703.

Where in the bond of an insurance agent it is provided, as a condition precedent to the liability of the sureties for a breach of condition, that monthly accounts and payments be exacted from him by the company, the provision must be complied with by the company. Dwelling-House Ins. Co. v. Johnston, 90 Mich. 170.

The sureties on the bond of a sheriff were held not liable for money obtained from a party by the officer on the pretense of having an execution. Com. Richardson, v. Cole, 7 B. Mon. 250, 46 Am. Dec. 506.

Interest accruing after breach of a condition to pay money or to indemnify against the payment of money, may be added, although the penalty is thereby exceeded. Tyson v. Sanderson, 45 Ala. 364; Burchfield v. Haffey, 34 Kan. 42; Wyman v. Robinson, 73 Me. 384, 40 Am. Rep. 360; Lyon v. Clark, 1 E. D. Smith, 250; Beers v. Shannon, 73 N. Y. 292; Daniels v. Moses, 12 S. C. 130.

Where a bond was given, conditioned for the faithful performance of the duties of the office of deputy collector of direct taxes for eight certain townships, and the instrument of the appointment, referred to in the bond, was afterwards altered, so as to extend to another township, without the consent of the sureties,—held, that the surety was discharged from his responsibility for moneys subsequently collected by his principal. Miller v. Stewart, 9 Wheat. 680 (6: 189).

A surety for the agent of an insurance company, not authorized to engage in banking, is not liable for an embezzlement by the agent, committed while conducting the banking operations of the corporation Blair v. Perpetual Ins. Co. 10 Mo. 559, 47 Am. Rep. 129.

L. executed a bond faithfully to do duty as ticket agent at a certain station, but, the railroad being overflowed, the receiver discontinued his salary, and sent him to another parish to superintend a skiff line. Held, that L.'s sureties were not liable for a loss caused by L.'s misconduct in the last position. Green v. Locke, 31 La. Ann. 656.

In Grocer's Bank v. Kingman, 16 Gray, 474, it was held that the sureties on a cashier's bond, in which they undertake to save the bank harmless from every loss that may arise from the cashier's mistakes, as well as from the losses arising from his fraud, inattention, or negligence in the performance of his duties, are exonerated by an increase of the capital stock of the bank after the making of the bond, from liability for acts of the cashier after the additional capital has been paid it. Morris Canal & Bkg. Co. v. Van Vorst, 21 N. J. L. 100.

In New York v. Kelly, 98 N. Y. 467, an action was brought against a surety of the bookkeeper in the department of docks in the city of New York. The bookkeeper was required, in addition to his work at the books, to assist the treasurer in receiving and depositing the funds of the department. He embezzled by means of false entries or omissions to make entries. It appeared that the additional duties required of him did not hinder his faithful performance of the duties of bookkeeper. The court held that the question of damages was for the jury.

See, also, as to liability to sureties of officers of a corporation or public officers: Detroit Sav. Bank v. Ziegler, 49 Mich. 157, 43 Am. Rep. 456; Fourth Nat. Bank v. Spinney, 120 N. Y. 560; Union Dime Sav. Inst. v. Neppert, and Union Dime Sav. Inst. v. Feltz, 21 N. Y. S. R. 723; United States v. Boyd, 15 Pet. 187 (10: 706); Paw Paw Twp. v. Eggleston, 25 Mich. 36; Detroit v. Weber, 29 Mich. 24; Johnston v. Kimball Twp. 39 Mich. 187, 33 Am. Rep. 372; Bullock v. Taylor, 39 Mich. 137, 33 Am. Rep. 356; State v. Cutting, 2 Ohio St. 1; McCluskey v. Cromwell, 11 N. Y. 593; Urmston v. State, Kuehn, 73 Ind. 175.

on the same point in the suit on the bond guaranteeing the fidelity and integrity of the cashier of the bank.

In our judgment, for the reasons stated in the opinion in the former case, it was proper to instruct the jury that the receiver need not have given the required notice on mere suspicion as to acts by Collins involving fraud and dishonesty on his part as president of the bank, but was bound to do so only when satisfied that he had committed some specific act of fraud or dishonesty likely to involve loss to the company. Nor was it error to leave it to the jury to say whether under the proof, and looking at all the circumstances, a notice given May 23 of a loss discovered after May 1 was given with reasonable promptness.

2. It is insisted that the instructions of the trial court in reference to the effect to be given to the written statement of loss made by the receiver were erroneous. The provision in the bond upon which this contention rests is in these words: "Now therefore, in consideration, etc., . . . It is hereby declared and agreed that, subject to the provision herein contained, the company shall, within three months next after notice, accompanied by satisfactory proof, of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer, of moneys, securities, or other personal property in the possession of the employee, or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of the employee, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered **165]** during said continuance, *or within six months thereafter, and within six months from the death or dismissal or retirement of the employee from the service of the employer. It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the account of the employer, shall be prima facie evidence thereof."

The court said to the jury: "Now, there is a provision in the policy to the effect that a written statement of loss, certified by the duly authorized officer or representative of the employer (receiver of the bank in this case) and based upon the accounts of the employer, shall be prima facie evidence thereof. In view of that condition of the policy, I instruct you that the plaintiff has established a prima facie case against the defendant, because he gave the written statement of loss, and subsequently transmitted to the defendant a copy of the account upon which it was based. Nevertheless, the plaintiff has offered additional evidence. He might have rested his case upon the proof that he had complied with this condition of the policy which I have read to you and insisted then that it was incumbent upon the defendant to show that the bank had not sustained a loss within the terms of the policy. But the plaintiff has seen fit to produce further evidence. I am not going to call your attention to that evidence in any detail. Suffice it to say that it tends to prove that on or about the 18th of October the president of the bank procured a discount of certain notes of the bank with the customers' notes belonging to the bank as collateral, to the amount altogether of about $45,000; that about that time he sent telegrams in cipher to the cashier of the bank at San Diego; that about that time the cashier caused a credit to be given in the president's personal account for items amounting to about $45,000; that when the bank failed the apparent balance to the credit of the president in his private account was about $11,000, showing that he had drawn out about $34,000 of the $45,000 which had been placed to his credit on the 13th or 14th of October. It is insisted that this evidence authorizes and requires you to find that the president obtained *an im-**[166** proper credit, and by means thereof appropriated more than $25,000 of the funds of the bank.

"I shall not allude to the evidence which has been given of other improper credits which it is alleged were given to the president in his personal account with the bank. They are only important as tending to characterize the nature of the transactions of October 13th and 14th, and as tending to show the total loss sustained by the bank through its president. But the question for you to determine is whether by reason of these improper credits of the 13th and 14th of October the defendant became liable for a loss within the meaning of the terms of the policy. Was that a fraudulent or dishonest transaction on the part of the president? If it was not, the plaintiff is not entitled to recover. If it was a mere irregularity on his part, an honest irregularity, or if he was not aware of the fact that these credit items were passed to his account, the plaintiff is not entitled to recover. You must find that when he drew his money out he knew or had reason to believe, that these items had been credited to his account; and you must find that in drawing out the money on those credits he was actuated by a fraudulent or dishonest mind. If, upon the evidence in this case, you can come to the conclusion that he believed that if the directors of the bank had known of these transactions they would have acquiesced and regarded them as entirely satisfactory, why, then, it is your duty to find that he was not actuated by a dishonest motive, and therefore his acts in appropriating this money were not fraudulent or dishonest. The burden is upon the plaintiff to satisfy you by a fair preponderance of evidence of the truth of this issue. Fraud is not to be legally presumed, and the law presumes that every man acts honestly until the contrary is shown. On the other hand, fraud or dishonesty is a condition of the mind. It is incapable of direct evidence. It must always be found from circumstance. There is no way in which the plaintiff could show in what state of mind Mr. Collins was while these transactions were taking place, unless he could produce him as a witness on the stand to elicit the truth.

*"Well, as I have said before, the plain-**[167** tiff has made a prima facie case upon this issue because he has complied with that condition of the policy which prescribes that the written statement of claim shall be prima facie evidence of a loss within the terms of the policy.

Now, it is for you to say, upon the other evidence in the case, which has been elicited principally upon the cross-examination of the plaintiff's witnesses, whether the defendant has overcome that case. If you conclude that the defendant has overcome that presumption, and, upon all the evidence before you, that the transactions in controversy are as consistent with the theory of honesty on the part of the president as of his dishonesty or fraud, then the defendant will be entitled to your verdict."

The Surety Company insists that the provisions of the bond referring to the written statement of loss relate exclusively to the presentation of the claim to the company and its acceptance or rejection thereof, and not to the use of such statement as independent evidence in any suit brought for the recovery of such loss; in other words, it is argued, the company was willing in its consideration of the claim of loss to accept as prima facie proof of the claim the statement of loss, duly certified and based upon the accounts of the employer, but did not waive its right, if sued, to demand such proof as was necessary in law to sustain it. The bond may be susceptible of this construction. But is it not also susceptible of the construction placed upon it by the trial court? If the Surety Company intended that the written statement of loss certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employer, should be prima facie evidence only of the right of the employer to bring suit on the bond, if its claim of loss was not paid, it should have so expressly declared. But that was not done. The company agreed to pay any loss covered by the bond within three months next after notice, accompanied by "satisfactory proof of a loss." But that no doubt might arise as to what was satisfactory proof of loss, and that the obligee might be assured of the prompt settlement of any claim it might make under the bond, if accompanied by proper [168] proof of loss, *care was taken to express the understanding that a written statement of such loss, duly certified, "and based upon the accounts of the employer," should be prima facie evidence "thereof," that is, *evidence* of "such *loss*." In our judgment, the circuit court of appeals correctly held that the interpretation placed upon the bond by the trial court was the natural one. The company might well have agreed that, in the event of suit, a written statement of loss arising from the fraud or dishonesty of the employee, and "based upon the accounts of the employer," should be sufficient, *nothing appearing to the contrary*, to establish the loss; and this for the reason that such accounts, if the claim was disputed and made the subject of suit, would be open to examination by the company. The employer could not base its statement of loss on its own accounts, and then withhold such accounts from inspection by the obligor on the bond.

If the latter construction of the bond be not clearly right, it cannot be said to be inconsistent with its provisions. And it would be going very far to say that the construction given to it by the company was so clearly right that a different construction would be unreasonable or entirely inadmissible. We have then a contract so drawn as to leave room for two constructions of its provisions, either of which, it may be conceded, is reasonable, one favorable to the company, and the other favorable to the bank and most likely to subserve the purposes for which the bond was given. In such a case the terms used must be interpreted most strongly against the party who prepared the bond and delivered it to the party for whose protection it was executed. It has been so held in the case just decided.

8. We have seen that the company agreed to reimburse the bank for loss "by any act of fraud or dishonesty" on the part of Collins as president of the bank in connection with the duties of his office, occurring during the continuance of the bond, and discovered during said continuance or within six months thereafter, *and* within six months from the death or dismissal or retirement of the employee from the service of the employer.

*As evidence of the dismissal or retire- [169
ment of Collins from his position as president of the bank, the company refers to paragraph 6 of the original bill of particulars filed by the receiver:

"6. The following is the date of the dismissal and retirement of said John W. Collins and of the discovery of the acts of fraud or dishonesty referred to as alleged in the ninth paragraph of said complaint:

"'The said J. W. Collins ceased to act as president of the said California National Bank upon the same going into insolvency and coming into the possession of the controller of the currency of the United States, which took place December 12, 1891; that on the 29th day of December, 1891, Frederick N. Pauly, the plaintiff herein, qualified as the receiver of said bank, and took full possession of its assets under his trust, and that the acts of fraud and dishonesty referred to in paragraph 9 of said complaint were discovered during the months of February and March, 1892.'"

Paragraphs 9, 10, and 11 of the complaint were as follows: "IX. That on or about June 18, 1892, and as soon as practicable after the occurrence of the aforesaid wrongful acts of the said Collins, this plaintiff duly mailed at San Diego, California, in an envelope addressed to the said defendant at its office in the city of New York, a notice, in writing, of the acts of fraud and dishonesty of said Collins, and a written statement of the loss sustained by said bank by reason of the acts of fraud and dishonesty of said Collins, certified by the plaintiff and based upon the accounts of said Collins, and presented satisfactory proofs of the loss sustained by said bank by reason of the acts of said Collins during the continuance of said bond, and duly demanded from this defendant that this defendant make good and reimburse to this plaintiff the sum of twenty-five thousand dollars, the amount of pecuniary loss sustained by said bank by reason of the acts of fraud and dishonesty of said Collins, being the amount conditioned to be paid by the terms of the said guarantee bond heretofore mentioned. X. That the said defendant received each and all of the papers mentioned in paragraph 9 of this complaint within at least *ten days after the date of mail- [170
ing thereof, as alleged in paragraph nine of this

complaint. XI. That the said defendant has retained in its possession each and all of the papers mentioned in paragraph 9 of this complaint since the receipt thereof by said defendant, and has never up to the time of the commencement of this action objected thereto, either to this plaintiff or to said bank, as not being sufficient as a notice or statement of loss or proofs of loss, as provided by the said bond heretofore mentioned, nor has said defendant raised any objection of any kind or nature whatsoever thereto, either to this plaintiff or to the said bank." The following entry appears in the record: "Plaintiff amends his bill of particulars by omitting all of sixth after first paragraph and inserting in lieu thereof, that the date of the dismissal or retirement was the 1st of March, 1892; that the acts of fraud and dishonesty referred to in paragraph 9 of said complaint were discovered between the 1st and 23d of May, 1892; and amends his complaint by striking out paragraphs 10 and 11 and inserting in lieu thereof, that between the 22d day of May, 1892, and the 18th of June, 1892, and again on the 24th of June, 1892, and as soon as practicable after the discovery of the aforesaid wrongful acts of the said Collins, this plaintiff duly notified the defendant in writing at his office at the city of New York, and on the 24th of June, 1892, and, as soon as practicable after the discovery of said acts, presented to the defendant a claim in writing for the losses occasioned by such acts of the said J. W. Collins. And the plaintiff has duly performed all the acts and things which the employer in and by said bond was obligated to do; all of which notices and claims were received and accepted by the defendant as in all things sufficient and in time. Plaintiff thereupon duly demanded from defendant that it make good and reimburse to plaintiff the sum of $25,000 and interest towards the amount of pecuniary loss sustained by said plaintiff by said acts."

Independently of the statement in the receiver's original bill of particulars (which, after being filed, was modified as just stated), there is no direct evidence in the record that Collins ceased to be president of the bank by 171] any formal act *on his part. He died March 3, 1892. It is true that he does not appear to have performed, or that he attempted to perform, any distinct act as president after the suspension of the bank on November 12, 1891. We have held, in the other case, that the mere suspension of the bank on November 12, 1891, followed by an investigation of its affair by a national bank examiner, did not have the effect to retire O'Brien from his position as cashier. The same rule must be applied in the case of the president of the bank, whose functions were only suspended while the affairs of the bank were being investigated by a national bank examiner. The circuit court of appeals well said, in support of this view, that if at any time before the receiver took possession on the 29th of December, 1891, the parties interested in the bank had made good its deficit and the bank examiner had restored its assets, no new appointment as president would have been necessary. In the former case there was evidence showing that O'Brien was, in fact, continued in the service of the receiver until about March 2, 1892, and that he claimed compensation for his services. On the day last named he left or retired from that service. There is no evidence in this case that Collins was formally retained by the receiver in his service. But even if, for that reason, it were held that he retired from the service of the employer, when the receiver qualified on December 29, 1892, still the six months from the "retirement of the employee from the service of the employer" would not have expired until June 29, 1892. It is sufficient in this case to adjudge that Collins, within the meaning of the bond, was in the service of the bank up at least to the date on which the receiver took possession, and that his fraudulent acts were discovered and notice thereof given within six months after that date. The acts of fraud and dishonesty complained of were discovered a few days prior to May 23, 1892, and notice thereof to the company was given on that day, and was followed by a claim or proof of loss mailed June 24, 1892, and received by the company July 1, 1892. Such are the facts which the verdict of the jury must be taken to have established. And if it be further true, as the verdict imports, that *the notice of May 23, 1892, was given as [172 soon as practicable after the occurrence of the alleged fraudulent acts came to the knowledge of the receiver, then the loss was discovered during the continuance of the bond and "within six months from the . . . retirement of the employee from the service of the employer." And if the bond is to be regarded as having expired upon the death of Collins, it also results that the claim of loss was made within the time required.

The objection that error was committed in admitting in evidence Collins's ledger account and proof of alleged prior frauds, as well as evidence showing the extent of Collins's indebtedness to the bank, is not well taken. The case was fairly tried, and there is no ground for supposing that any error of law was committed by the trial court.

The judgments of the Circuit Court and of the Circuit Court of Appeals are affirmed.

Mr. Justice **White**, with whom concurs Mr. Justice **Shiras** and Mr. Justice **Peckham**, dissenting:

The plaintiff in error was surety on a bond guaranteeing the faithful discharge by Collins of his duties as president of the bank. The object of the suit is to enforce the penalty of the bond, on the ground that the president, whose conduct it guaranteed, had been unfaithful, and hence that the surety had become liable.

On the trial of the cause the court instructed the jury that by the terms of the bond the burden of proof was shifted from the plaintiff (the receiver of the bank) to the defendant (the Surety Company), and that the former was entitled to recover against the latter without making any proof whatever of its claim if it had been shown that a proof of loss made in accordance with certain requisites specified in the bond had been transmitted to the Surety Company; that is to say, the jury were instructed that in case a proof of loss in a particular form had been made, its legal effect

was to create a rule of evidence to govern in 173] any litigation *as to the bond which might thereafter arise between the parties. The result of this conclusion was to hold that the normal rule by which, in judicial proceedings, the burden is cast on a plaintiff to establish his case, was dispensed with, and therefore that the Surety Company, when sued under the contract, was called upon to establish the negative fact that it did not owe, and if it did not do so, a verdict was to be rendered against it. These conclusions of the trial court were affirmed by the court of appeals, and upon their correctness the validity of the judgment rendered below necessarily depends.

That there may be no mistake as to what was held by the trial court in its charge to the jury and what was decided by the court of appeals in affirming that charge, I excerpt passages from the charge of the trial court and the opinion of the appellate court.

In its charge to the jury the trial court said:

"Now, there is a provision in the policy to the effect that a written statement of loss, certified by the duly authorized officer or representative of the employer (receiver of the bank in this case) and based upon the accounts of the employer, shall be prima facie evidence thereof. In view of that condition of the policy, I instruct you that the plaintiff has established a prima facie case against the defendant, because he gave the written statement of loss, and subsequently transmitted to the defendant a copy of the account upon which it was based.

. . . . . .

"Well, as I have said before, the plaintiff has made a prima facie case upon this issue because he has complied with that condition of the policy which prescribes that the written statement of claim shall be prima facie evidence of a loss within the terms of the policy. Now, it is for you to say, upon the other evidence in the case, which has been elicited principally upon the cross-examination of the plaintiff's witnesses, whether the defendant has overcome that case. If you conclude that the defendant has overcome that presumption, and, upon all the evidence before you, that the transactions in controversy are as consistent with the theory of honesty on the part of the 174] *president as of his dishonesty or fraud, then the defendant will be entitled to your verdict."

The reasoning of the court of appeals [38 U. S. App. 287, 72 Fed. Rep. 487, 18 C. C. A. 651] in affirming these instructions, was as follows:

"III. The court charged the jury that the 'plaintiff has established a prima facie case against the defendant, because he gave the written statement of loss, and subsequently transmitted to the defendant a copy of the account upon which it was based.' To this and to its repetition, in other words, defendant duly excepted.

"This part of the charge was based upon a provision of the bond which reads as follows: 'It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employer, shall be prima facie evidence thereof.'

"It is contended that this does not mean that such statement shall be prima facie evidence in an action upon the bond; that 'no such contingency was in the minds of the parties;' that it only refers to a consideration by the company of the question whether it will pay without suit; that it only indicates in what way the preliminary proof of a loss shall be made to the company. But neither the phraseology of the clause, nor its collocation with the rest of the bond, thus restricts its meaning. It is certainly open to the construction put upon it by the trial judge; such construction is a most natural one; nor is there anything extraordinary or startling in an agreement by the company that it pay upon proof in a prescribed form being made to it, nor in its agreeing to accept such proof as prima facie sufficient to entitle the insured to a recovery in case of default. Conceding that it is also open to a construction which would confine it as plaintiff in error contends, it would be at least ambiguous, and it is elementary law that all obscurities and ambiguities in a policy of insurance are to be resolved against the underwriter, who has himself drafted the instrument. There was no error, therefore, in the charge in the particular complained of."

The opinion of this court just announced affirms the correctness *of the foregoing [175 propositions, and, because it does so, I am unable to give my assent to it.

The necessary effect of the construction given to the contract is to decide that by its terms the receiver of the bank was entitled to recover on the contract of suretyship for an alleged default of the president, whose fidelity the contract guaranteed, *without making any legal proof whatever of the fact of a loss.* This consequence inevitably results from holding that on its being made to appear that the bank had furnished a formal proof of loss under the contract, it was consequently entitled to recover without any proof of its right to do so. The contract did not require the bank in making the particular form of proof referred to in the bond as acceptable for the consideration of the Surety Company to verify it under oath, nor did it exact that it should be supported by any legal evidence whatever. Hence, by the contract, the bank could fulfil all the requirements referred to in that instrument as to the particular formal proof alluded to by simply making an unsworn statement to the guaranty company of what it claimed to be due, accompanying that statement with excerpts from the books of the bank. But as this mere unsworn statement of claim is now held by the court to constitute, in an action which might thereafter be brought to recover upon the bond, affirmative evidence of the liability of the Surety Company, which casts upon the latter the burden of showing that it did not owe, I submit that the ruling now made is exactly what I understand it to be—that is, a decision that under this contract the regular course of judicial proceedings between parties litigant is overthrown and a new rule is introduced, by which, when demand is made against the Surety Company, the person making the demand is relieved from proving the justice of his claim; and, on the contrary, the person against whom it is made, though called in as a defendant, is compelled as such to affirmatively establish the negative fact that it

is not liable. So novel, so extreme, and, as it seems to me, so unjust a result, should not, in my opinion, be maintained unless the terms of the contract unmistakably make that con-
176] struction necessary. Instead of *this being the case, I think that not only the letter but the manifest purpose of the contract, as shown by its context, refutes the extreme construction now affixed to it. The provisions of the bond, which are pertinent to the question under consideration, are as follows:

After reciting the parties to the contract, that is, the American Surety Company of New York as party of the first part, Collins, as president of the bank, as party of the second part, and the bank as party of the third part, the bond states the employment of Collins in the capacity of president of the bank, and the application made to the Surety Company to guarantee the faithful performance of his duties. The bond then stipulates as follows:

"Now, therefore, in consideration of the sum of one hundred and twenty-five dollars, lawful money of the United States of America, in hand paid to the company, as a premium for the term of twelve months ending on the first day of July, one thousand eight hundred and ninety-two, at 12 o'clock noon, it is hereby declared and agreed that, subject to the provision herein contained, the company shall, within three months next after notice, accompanied by satisfactory proof, of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer of moneys, securities, or other personal property in the possession of the employee or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of the employee, in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal or retirement of the employee from the service of the employer. It being understood that a written statement of such loss, certified by the duly authorized officer or representative of the employer, and based upon the accounts of the employer, shall be prima facie evidence thereof."

177] *It is, I submit, plainly shown by the foregoing language, that the Surety Company reserved the right to decline to admit the validity of and to pay without suit any claim made upon the bond, unless notice of the loss was given accompanied by "satisfactory proof" thereof. The words, "satisfactory proof," must have some meaning. But, in reason, the only effect now given to them is that the proof of loss must have been satisfactory to the one who made it; that is, that the parties to the contract meant to say, that whenever the bank was satisfied it had a claim, the fact of its being so satisfied was sufficient to relieve it of all obligation to prove such claim, and to cast upon the Surety Company the duty of showing that the bank was not warranted in asserting a right to recover. The deduction to which the construction thus referred to leads is a conclusive demonstration of its unsoundness. Indeed, if it were the true one, the words "satisfactory proof" have no place in the contract, for it follows that, if the bank preferred a claim under the bond, it would do so because it was satisfied it had a claim, and, therefore, satisfactory proof of a loss under the construction given to it, if it means anything, means only this, that the bank was to be the sole judge of whether a claim existed in its favor, and that this judgment of the bank in advance in its own favor was to be the determinative rule controlling, not only the mind of the guaranty company, but regulating any judicial proceeding which might thereafter arise concerning the obligations created by the contract. But, manifestly, the words, "after notice, accompanied by satisfactory proof of loss," referred, not to the bank by whom the claim was to be made as the person to whom the proof should be satisfactory, but the Surety Company against whom the claim might be asserted. In other words, the contract plainly declares that the Surety Company only agrees to pay within three months next after notice accompanied by satisfactory proof of loss, that is, by a proof of loss with which it was satisfied. But it is said that, whatever may be the meaning of the particular clause in the contract to which I have just referred, it is controlled by the concluding sentence found in the excerpt which has been made *from the bond. Between the sen-
178] tences relating to the satisfactory proof of a loss and that relied upon the contract contains an enumeration of the character of acts which the bond is intended to guarantee against, and affixes certain limitations of time within which the acts therein referred to must have been discovered. These stipulations intervening between the one as to satisfactory proof and the one relied upon as modifying or controlling the former, bear no relation to the matter under consideration, and, therefore, may be omitted from view for the purpose of the question in hand. To test, then, the correctness of the construction now upheld I eliminate these intervening stipulations and bring into juxtaposition the provision as to satisfactory proof and the subsequent language which it is claimed destroys the legal effect of the prior clause. The contract thus arranged would then read as follows:

"The company shall within three months next after notice, accompanied by satisfactory proof of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer. . . . It being understood that written statement of such loss certified by the duly authorized officer or representative of the employer and based upon the accounts of the employer shall be prima facie evidence thereof."

Construing the whole of this clause, it strikes me that its purport is free from real difficulty. The first provision reserves a full right to the company to reject a claim, provided the proof is not satisfactory to it, of the fact of the loss; the second provision stipulates that the company is bound to treat a statement made in a particular form as being presumptive evidence which must be considered by it in arriving at a conclusion as to whether the loss itself was

established to its satisfaction. In other words, the one provision, that of satisfactory proof of a loss, refers to the state of mind of the corporation which is to result from the proof in order that it may admit the validity of the claim without suit; the second relates merely to the form in which a claim may be preferred, and provides that if it is preferred in that form
179] the company *shall be put to a decision as to whether its substantive effect as evidence is satisfactory to it. Consider also the object of the stipulation. The ninety days for voluntary payment of the claim could only begin to run after the furnishing of the proof of loss. The company, however, had a right to pass upon the sufficiency of such proof, not merely as to form, but as to its probative effect, whether it constituted satisfactory evidence of the liability of the Surety Company or not; and in order to exclude all questions as to the period when this time should commence a stipulation was inserted that proof presented in a particular form would be accepted as prima facie or presumptive evidence of the fact of a loss. The stipulation, therefore, that a particular form of proof when furnished to the company should be prima facie evidence, did not amount to a declaration by the company that it would also be "satisfactory proof" within the meaning of the previous clause. To say that it did would be to give to the words "prima facie" the meaning of "conclusive." Can it be doubted that under the contract the company would have had a right to call upon the bank to make a sworn statement or comply with other reasonable requirements, although the bank had made the formal statement referred to? Clearly not, I submit. In other words, then, the Surety Company, despite the receipt of the written statement referred to, retained the right to determine whether it satisfactorily proved or established the fact of a loss. The difference between the two clauses is that which must ever exist between form and substance, and the failure to appreciate this fact is exemplified in the reasoning of the court of appeals, where it was declared that the provision as to "satisfactory proof" amounted to an agreement by the Surety Company that it would pay "upon proof in a prescribed form being made to it," and that the stipulation as to the furnishing of a written statement based upon the accounts of the bank was an agreement "to accept such proof as prima facie sufficient to entitle the insured to a recovery in case of default." And the necessary consequence of this ruling was to hold that the right to judge whether there had been a loss
180] under the contract was taken *away from the company, and that it was bound to make a voluntary payment upon the mere unsworn statement of the party making the claim based upon the accounts of the bank, even though, upon investigation, it developed that the accounts of the bank were utterly unreliable and manifestly insufficient as the foundation of a claim.

It being in reason unquestionable that the company only agreed to pay without suit in case the evidence presented to it was satisfactory *as proof*, can it be held that its agreement that a certain form of proof should be treated by it in its consideration of the claim as prima facie evidence of the loss, constituted a contract to accept the designated form as proof, having the effect to overthrow the previous express stipulation and as denying the right of the Surety Company to decline to pay without suit if the proof in its opinion did not satisfactorily establish the loss? In other words, that the implied stipulation, that a certain class of proof had been tendered to the company for the exercise of its judgment should be treated as sufficient in form, should be construed as meaning that it should be regarded as adequate in substance, and as establishing a right to payment of the loss.

As I have said, it seems to me the two provisions of the bond are harmonious, and are susceptible of a construction which will give a fair and reasonable effect to both. They ought not, therefore, to be so construed as not only to make the one destroy the other, but so as to give a significance to the contract never intended by the parties, and thereby to overthrow the elementary rule governing all judicial proceedings, that is, that upon the one who makes a claim there rests the burden of establishing it.

That the parties did not intend by the contract to create a rule of evidence to govern any suit which might arise on the bond is in addition shown by another and subsequent provision of the contract, wherein it is stated that an action or suit to recover upon the bond shall be barred if not brought within a year from the presentation of the claim. If the purpose of the contracting parties had been to regulate and control subsequent proceedings in the courts growing out of the *coutract, the [**181**] natural place to have expressed that purpose would have been in the clause of the contract treating of actions upon the bond. But no such stipulation is therein found.

It is, of course, unquestioned that many authorities hold that where there is an ambiguity in a contract of insurance a reasonable doubt as to its construction will be resolved in favor of the insured, because the policy is presumed to have been drawn by the officers or agents of the insurer. But granting *arguendo* that this rule applies to a contract of suretyship of the character of that under consideration, I know of no case which pushes the principle to the extent of holding that the express provisions of a contract must be destroyed and thereby a liability be enforced against the insurer, not in harmony with the contract, in conflict with its spirit, in violation of the manifest intention of the parties, and productive of great injustice. In other words, that where by the express terms of a contract the insurer agrees to pay without litigation only where the proof of the validity of the claim is satisfactory to him, that it is to be held that because he has declared that in making up his judgment as to whether the evidence is satisfactory he will treat a statement of the loss certified by the claimant as prima facie evidence, he thereby renounces his right to form a judgment as to the satisfactory nature of that evidence. Indeed, the doctrine goes not only to the extent of depriving the insurer of his right to pass judgment upon the evidence submitted, but it causes the contract to operate beyond the minds of the contracting parties and to control the judgment of

any judicial tribunal subsequently called to pass upon any controversy arising upon the bond. Does not this follow from the fact that it is declared that the stipulation that a statement made by the claimant in a peculiar form shall be prima facie evidence, not only nullifies the provision that the whole proof must be satisfactory to the person against whom the claim is made, but also compels a court to say that although no legal proof whatever under the rules of evidence has been offered at the trial on behalf of the claimant, yet that the liability **182**] of *the defendant has been established, and there must be a judgment against him, unless he conclusively shows that no loss had been sustained by the plaintiffs?

JOSEPH KIPLEY, *Plff. in Err.*,
v.
PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* EDWARD C. AKIN, Attorney General.

SAME
v.
SAME.

(See S. C. Reporter's ed. 182-189.)

Federal question—motion for leave to answer—motion to quash proceedings.

1. An averment in a suit in a state court, that a state statute is unconstitutional and void, is not sufficient to raise a Federal question, but is to be taken as applying to the Constitution of the state, and not to the Constitution of the United States.
2. Federal questions which would have been raised if an answer had been amended as proposed cannot be considered upon their merits on writ of error to a state court, merely because a motion for leave to amend the answer was made without showing any reasons therefor, but was overruled and no exception taken to the ruling.
3. The denial of a motion to discharge a rule requiring an answer to a petition, and to quash all proceedings taken under an alleged unconstitutional statute, does not bring any Federal question into the record, as the denial may have been made upon the ground that the questions might more properly arise upon demurrer, plea, or answer.

[No. 586, 601.]

Submitted March 14, 1898. Decided April 18, 1898.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment of that court that a mandamus issue commanding the superintendent of police of Chicago, Joseph Kipley, to notify the civil service commissioners of vacancies in certain offices and the civil service commissioners to submit to him as such superintendent the names of applicants for promotion. There are two writs of error. The cases were consolidated in this court. *On motion to dismiss each writ of error for want of jurisdiction. Dismissed.*

See same case below, 171 Ill. 44.

Messrs. **Edward C. Akin**, Attorney Gen-

NOTE.—*As to adoption by Federal courts of remedies created by state statutes; preservation of equity jurisdiction; enlargement of equitable remedies; limitation or enlargement of equity powers; extending legal remedies; limiting equitable jurisdiction,*—see note to Leighton v. Young (C. C. A. 8th C.) 18 L. R. A. 266.

As to effect of decisions of state courts in Federal courts; rule of property; questions of general or commercial law; effect of state decisions in other states; Federal questions,—see note to Forepaugh v. Delaware, L. & W. R. Co. (Pa.) 5 L. R. A. 508.

Jurisdiction of the Supreme Court of the United States to review state judgments; Federal question.

The decision in the state court which involved no question of Federal law is not reviewable here. Santa Cruz County Supers. v. Santa Cruz R. Co. 111 U. S. 361 (28: 456); Christ Church v. Philadelphia County, 20 How. 26 (15: 802).

This court will not entertain jurisdiction of state judgments where, besides the Federal question decided by the state court, there is another and distinct ground on which the judgment can be sustained. Kennebec & P. R. Co. v. Portland & K. R. Co. 14 Wall. 23 (20: 850); Rector v. Ashley, 6 Wall. 142 (18: 753); Gibson v. Chouteau, 8 Wall. 314 (19: 317); Klinger v. Missouri, 13 Wall. 257 (20: 635).

To give this court jurisdiction it must appear affirmatively on the face of the record, not only that a Federal question was raised, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case. Detroit City R. Co. v. Guthard, 114 U. S. 133 (29: 118).

It is not enough to give this court jurisdiction over the judgment of a state court, for the record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment could not have been given without deciding it. Moore v. Mississippi, 21 Wall. 638 (22: 653); Bolling v. Lersner, 91 U. S. 594 (23: 366); Brown v. Atwell, 92 U. S. 327 (23: 511); Citizens Bank v. Louisiana Bd. of Liquidation, 98 U. S. 140 (25: 114).

To give this court jurisdiction to revise the judgment of the state court, it must appear that the point on which plaintiff relies was made in the state court and decided against him, and that the section of the Constitution of the United States relied on was brought to the notice of the state court, and the right which he now claims here claimed under it. Poydras de la Lande v. Louisiana, 18 How. 192 (15: 350); Maxwell v. Newbold, 18 How. 511 (15: 506); Hoyt v. Thompson, 1 Black, 518 (17: 65); Farney v. Towle, 1 Black, 350 (17: 216); Taylor v. Morton, 2 Black, 481 (17: 277); The Victory v. Boylan, 6 Wall. 382 (18: 848); Worthy v. The Commissioners, 9 Wall. 611 (19: 565); Messenger v. Mason, 10 Wall. 507 (19: 1028); Cockroft v. Vose, 14 Wall. 5 (20: 875); Caperton v. Bowyer, 14 Wall. 216 (20: 882); Susquehanna Boom Co. v. West Branch Boom Co. 110 U. S. 57 (28: 69); Santa Cruz County Supers. v. Santa Cruz R. Co. 111 U. S. 361 (28: 456).

The final judgment or decree of the highest court of a state in which a decision could be had may be re-examined by the Supreme Court of the United States only where the decision involved a Federal question and was adverse to the right claimed under it. The form of the decision is immaterial. Gordon v. Caldcleugh, 3 Cranch, 268 (2: 436); Montgomery v. Hernandez, 12 Wheat. 129 (6: 575); Williams v. Morris, 12 Wheat. 117 (6: 571); Menard v. Aspasia, 5 Pet. 505 (8: 207); Fulton v. M'Affee, 16 Pet. 149 (10: 918); Strader v. Baldwin, 9 How. 261 (13: 130); Calcote v. Stanton, 18 How. 243 (15: 348); Burke v. Gaines, 19 How. 388 (15: 655); Verden v. Coleman, 1 Black, 472 (17: 161); Roosevelt v. Meyer, 1 Wall. 512 (17: 500); Buck v. Colbath, 3 Wall.

eral of Illinois, **George W. Smith, Frank P. Blair,** and **Murry Nelson,** Jr., for defendant in error, in favor of motion to dismiss.

Mr. **Charles S. Thornton** for plaintiff in error, in opposition to motion.

Mr. Justice **Harlan** delivered the opinion of the court:

The attorney general of Illinois filed in the supreme court of Illinois, at its June term, 1897, an original petition against Joseph Kipley, superintendent of police of the city of Chicago, and Adolph Kraus, Dudley Winston, and Hempstead Washburne, commissioners appointed under the act of the legislature of Illinois in force on and after March 20, 1895, entitled "An Act to Regulate the Civil Service of Cities."

183] *The application for leave to file the petition was accompanied by a suggestion upon the part of the attorney general that the case involved an interpretation of the above act.

The prayer of the petition was that a writ of mandamus issue commanding Kipley, as superintendent of police of Chicago, to notify the civil service commissioners of all vacancies existing in the positions of assistant superintendent of police, inspectors of police and captains of police in the city of Chicago, and commanding the civil service commissioners to submit to Kipley, as superintendent of police, the names of not more than three applicants for promotion for each vacancy from the grade next below that in which such vacancy or vacancies exist, and that the petitioner have such other or further relief as the nature of the case required.

Kipley filed a separate answer, in which he insisted that he had acted, in all respects, in conformity with law. He also averred that although the act regulating the civil service of cities was passed and approved substantially as stated in the petition, and was afterwards submitted to a vote of the electors of Chicago and adopted by a large majority of votes, it was "unconstitutional and void," in that it purported to confer judicial powers and authority to make and enforce judgments and decisions of a nonjudicial body, described and set forth in the act as the civil service commission.

Subsequently, June 28, 1897, the city council of Chicago passed an ordinance designating certain public officers who should be selected by the mayor with the concurrence of the council. Kipley, July 10, 1897, filed a plea, setting forth this ordinance, and alleging, in relation, the appointment by the civil service commissioners of certain subordinate police officers of the city, that they "have been, if they ever were within the same, wholly taken away from and removed out of the control, jurisdiction, and power of the said civil service commissioners, so that such matters are now expressly excepted by its very terms from the force and effect of said civil service act.

On the 7th day of October, 1897, Kipley asked leave of the *court to withdraw his plea, **[184** and also to amend his answer so as to embody therein averments to the effect that the relator was not entitled to a writ of mandamus and that the court had no jurisdiction or power to grant the same, because the said civil service act of March 20, 1895, was null and void and

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334 (18: 257); Ryan v. Thomas, 4 Wall. 603 (18: 460); Mullingar v. Hartupee, 6 Wall. 258 (18: 829); Furman v. Nicholl, 8 Wall. 44 (19: 370); Smith v. Adsit, 16 Wall. 185 (21: 310); Murray v. Charleston, 96 U. S. 432 (24: 760); Williams v. Bruffy, 102 U. S. 248 (26: 135); Daniels v. Tearney, 102 U. S. 415 (26: 187); Hartman v. Greenhow, 102 U. S. 672 (26: 271).

A judgment by the supreme court of the state of Washington, on denial of a rehearing for which an application made to the supreme court of the territory was pending at the admission of the state, is not a judgment of a territorial court, but of a state court, which can be reviewed by the Supreme Court of the United States only on the ground of a Federal question. Northern P. R. Co. v. Holmes, 155 U. S. 137 (39: 99); Northern P. R. Co. v. O'Brien, 155 U. S. 141 (39: 100).

An affirmance by a state court of a decision dismissing a suit for want of equity cannot be brought to the Supreme Court of the United States. Winter v. Montgomery, 156 U. S. 385 (39: 460).

The denial by a state court of an application to amend a petition for removal is not the denial of any right secured by the Constitution of the United States, and is not the subject of review in the Supreme Court of the United States. Stevens v. Nichols, 157 U. S. 370 (39: 736).

Rulings on evidence made by state courts cannot give jurisdiction for a writ of error from the United States Supreme Court on the ground that constitutional rights were denied. Sayward v. Denny, 158 U. S. 180 (39: 941).

A claim that the appointment of a receiver is an unconstitutional deprivation of property does not raise a real, as distinguished from a fictitious, Federal question, which will sustain a writ of error to a state court from the Supreme Court of the United States. St. Louis, G. & Ft. S. R. Co. v. Missouri, Merriam, 156 U. S. 478 (39: 502).

The claim that due process of law was denied by a state court cannot be made for the first time in the Supreme Court of the United States to sustain a writ of error to the state court. *Re* Robertson, 156 U. S. 183 (39: 389).

A claim that a state court did not give full faith and credit to a statute of another state and judicial decisions thereon does not make a Federal question, where such statute and decisions were not proved. Lloyd v. Matthews, 155 U. S. 222 (39: 128).

A definite issue as to the validity of a statute or the possession of a right must be distinctly deducible from the record before a state court can be held to have disposed of a Federal question, by its decision. Louisville & N. R. Co. v. Louisville, 166 U. S. 709 (41: 113).

An allegation that a statute as construed by the court is in violation of the Constitution of the state and of the United States, made in a motion to set aside a judgment on an agreed case which presents no issue as to the validity of the statute, is not sufficient to present a Federal question. Louisville & N. R. Co. v. Louisville, 166 U. S. 709 (41: 1173).

A Federal question is sufficiently set up and denied when distinctly asserted by the defendant in a written motion to set aside the verdict and grant a new trial in a condemnation case in which no provision is made for filing an answer, but is denied by the overruling of the motion, and is again asserted in an assignment of errors filed in the supreme court, but necessarily denied by that court in its decision, although the opinion does not expressly refer to the Federal question. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 258 (41: 979, 992).

A decision by a state court as to the power of a

contrary to the Constitution of the state of Illinois and the Constitution of the United States in that—

"1. It abridges the privileges and immunities of the citizens of the United States, because it operates to exclude from the classified service of such city as therein specified all such citizens as do not apply for office or for place of employment.

"2. The said act of March 20, 1895, deprives a duly elected and qualified officer of the right to select his subordinates and provide the requisite agencies for performing his official duties, thus abridging the rights, privileges, and immunities belonging and guaranteed by the said Constitutions, respectively, to every citizen thereof.

"3. The said act of March 20, 1895, provides for the invasion of the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.

"4. The said act of March 20, 1895, purports to prescribe for the criminal trial of public officers for nonfeasance, for misfeasance, for malfeasance in office, and for the infliction of penalties therefor, of deprivation of office, of fine, of imprisonment, and incapacity to hold office thereafter by a nonjudicial body, and in such manner that the accused shall not enjoy the right to a speedy and public trial by an impartial jury of the state or district wherein the crime shall have been committed; and without informing the accused of the nature and cause of the accusation, and without confronting the accused with the witnesses against him, and without permitting the accused to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for the defense.

"5. That the said act denies to the citizens the freedom of political action, making it highly penal for the citizen to take part in party politics.

"6. That said act of March 20, 1895, [185 provides for the creation and maintenance of an office-holding class, at the expense of the people who are excluded therefrom by the operation of the said act.

"7. And generally said act of March 20, 1895, is directly in contravention of the right of that clause of the United States Constitution which prescribes that 'all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the laws.'

"8. And further, the said act of March 20, 1895, generally denominated the civil service act, is absolutely null and void because the same purports to require the civil officers of the city of Chicago to undergo tests as to qualification for office and public employment in addition to the requirement of section 25 of article 5 of said Constitution of the state of Illinois, and because it provides for a political test for the said commissioners respectively therein named, and because, further, the same

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national bank to become a stockholder in a savings bank presents a Federal question. California Bank v. Kennedy, 167 U. S. 362 (*ante*, 198).

A decision by the highest court of a state against the validity of a lease made by a national banking association which is not yet authorized to commence business, but which has made and filed its articles of association, is subject to review by writ of error from the Supreme Court of the United States, when the lessor specially set up and claimed a right to recover on the lease under U. S. Rev. Stat. § 5136, on the ground that the lease was within the exception of incidental and preliminary business and also that the prohibition of business by that section did not make prohibited contracts invalid as between the parties. McCormick v. Market Nat. Bank, 165 U. S. 538 (41: 817).

The alleged unconstitutionality of a state statute will not sustain a writ of error from the Supreme Court of the United States to a state court, where the plaintiff in error in the state court alleged its repugnancy merely to the Constitution of the state, and did not claim that it was repugnant to the Constitution of the United States. Levy v. San Francisco Super. Ct. 167 U. S. 175 (*ante*, 126).

The validity of subscriptions by a county court to the stock of a railroad company, and of a conveyance to that company, and the matter of fraud in a decree, are questions of local law or practice on which the judgment of a state court cannot be reexamined by the Supreme Court of the United States. Oxley Stave Co. v. Butler County, 166 U. S. 648 (41: 1149).

The general allegation or claim that a decree was passed against some persons who were at the time dead, and against others who were necessary parties, but who had no notice of the proceedings, does not set up a right or immunity under the 14th Amendment of the Constitution of the United States. Oxley Stave Co. v. Butler County, 166 U. S. 648 (41: 1149).

A claim for the rescission of a contract for the exchange of an inveution for a stock of merchandise, which is denied by a state court, does not present any ground for a writ of error from the Supreme Court of the United States to a state court. Wade v. Lawder, 165 U. S. 624 (41: 851).

An appeal in a suit in which it is claimed in good faith that a state statute is in contravention of the Federal Constitution is within the appellate jurisdiction of the United States Supreme Court. Hastings v. Ames, 32 U. S. App. 485, 68 Fed. Rep. 726, 15 C. C. A. 628.

A decision that one was not in possession of land involves no Federal question which can be reviewed by the Supreme Court of the United States on writ of error to a state court. Turner v. New York, 168 U. S. 90 (*ante*, 392).

A claim that a statute is unconstitutional and denies "inherent indefeasible rights" and a "remedy by the due course of law" (using the words of a state Constitution), is presumed to refer to the state Constitution only, and is insufficient to raise a Federal question. Miller v. Cornwall R. Co. 168 U. S. 131 (*ante*, 409).

A Federal question not specially set up or claimed prior to the decision in the supreme court of a state will not sustain a writ of error from the Supreme Court of the United States to the state court. Winona & St. P. Land Co. v. Minnesota, 159 U. S. 540 (40: 252).

The fact that a state court, while declaring a statute to be in violation of the Federal Constitution, yet by its judgment gave effect to it, does not make a case for a writ of error from the Supreme Court of the United States, when the decision of the Fed-

is in contravention of section 22 of article 4 of said Constitution as well as many other provisions of said state Constitution."

Kipley also asked leave to file "a supplemental answer," averring that since the filing of his original answer the city council had passed the above ordinance of June 28, 1897.

The motions for leave to withdraw the plea, to amend the answer, and to file a supplemental answer were severally denied.

On a subsequent day of the term Kipley entered a motion to discharge the rule requiring the respondents to answer the petition, and to quash all proceedings that had been taken, assigning as reason therefor that the civil service act of March 20, 1895, was contrary to the Constitution of Illinois and the Constitution of the United States upon certain specified grounds. They were the same as those specified **186**] in the *above motion for leave to amend the answer. That motion was also denied.

On the 22d day of December, 1897, the supreme court of Illinois rendered its final judgment, granting the relief asked in the petition for mandamus.

The final order of the court was that a writ of mandamus issue, commanding Kipley, superintendent of police of Chicago, to notify the civil service commissioners of all vacancies existing in the positions of assistant superintendent of police, inspectors of police and captains of police in that city, and the civil service commissioners to submit to him, as such superintendent of police, the names of not more than three applicants for promotion for each vacancy from the next grade below that in which such vacancy or vacancies existed.

Kipley, having given previous notice thereof, filed a petition for rehearing on the 8th day of January, 1898, but before that petition was disposed of he sued out a writ of error to this court. That constitutes case No. 586. The rehearing having been denied, he sued out another writ of error, and that constitutes case No. 601. The citation in each case was signed by the chief justice of the state court. The cases on motion were consolidated in this court, and are before us on motion to dismiss each writ of error for want of jurisdiction.

We are of the opinion that this court is without jurisdiction to review the final judgment of the supreme court of Illinois in these cases. The answer makes no reference whatever to the Constitution or laws of the United States. It is true that it avers that the Illinois civil service act was "unconstitutional and void." But when the jurisdiction of this court is invoked for the protection, against the final judgment of the highest court of a state, of some title, right, privilege, or immunity secured by the Constitution or laws of the United States, it must appear expressly or by necessary intendment, from the record, that such right, title, privilege, or immunity was "specially set up or claimed" under such Constitution or laws. Rev. Stat. 709. Our jurisdiction cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing *the case up intended to assert a Federal [**187** right. *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648 [41:1149]; *Levy* v. *San Francisco Superior Court*, 167 U. S. 175, 177 [42:126]. The averment in the answer, that the statute of Illinois was unconstitutional and void, must be taken as intended to apply to the Constitu-

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eral question was not an essential element in determining the right adjudicated. Ruthland R. Co. v. Central Vermont R. Co. 159 U. S. 630 (40: 284).

A Federal question involved in a decision of a state court will not be looked into by the Supreme Court of the United States if there is another independent ground of the decision by the state court upon which its judgment can rest. Bacon v. Texas, 163 U. S. 207 (41: 132); Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556 (40: 536); Chemical Nat. Bank v. City Bank, 160 U. S. 646 (40: 568).

A decision which does not deny the validity of an act of Congress or deny any right claimed under it does not present a Federal question merely because the rights of the parties were in some respects based upon an act of Congress. Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556 (40: 536).

Jurisdiction having been acquired on the ground that the constitutionality of a law of the United States is drawn in question, the Supreme Court of the United States on writ of error to a district court has power to dispose of the entire case, including all questions whether of jurisdiction or of merits. Chappell v. United States, 160 U. S. 499 (40: 510).

An assignment of errors cannot be availed of to import into a cause questions which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to the Supreme Court of the United States under the act of Congress of March 3, 1891, § 5. Cornell v. Green, 163 U. S. 75 (41: 76).

A writ of error to a state court will not lie from the Supreme Court of the United States on the ground that the obligation of a contract is impaired by a decision construing a valid statute. Central Land Co. v. Laidley, 159 U. S. 103 (40: 91).

The erroneous decision of a Federal question by a state court will not give jurisdiction to the Supreme Court of the United States, if questions of fact adequate to determine the controversy and broad enough to maintain the judgment independent of any Federal question were decided. Egan v. Hart, 165 U. S. 188 (41: 680).

A denial by a state court of the effect claimed for an equitable title apparently conveyed by proceedings in the United States land office presents a Federal question. Hussman v. Durham, 165 U. S. 144 (41: 664).

A Federal question presented by an unsuccessful claim of title under a congressional land grant is not made ineffectual as the basis of a writ of error by the fact that the answer also sets up certain proceedings in the land department, the decision of which was adverse and has not been set aside. Northern P. R. Co. v. Colburn, 164 U. S. 383 (41: 479).

An alleged conflict between proceedings confirmed by a state court and rights claimed unsuccessfully under the Constitution of the United States, including the contention that a party is deprived of property without due process of law, presents a Federal question. Tregea v. Modesto Irrig. Dist. 164 U. S. 179 (41: 395).

The question whether private property has been taken for any other than a public use is a Federal question. Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112 (41: 369).

A decision sustaining plaintiff's claim in ejectment based upon a patent of the United States for a mining claim does not present any Federal question, when the defenses were based solely upon an estoppel *in pais* and a statute of limitations. Carothers v. Mayer, 164 U. S. 325 (41: 453).

tion of that state, and not to the Constitution of the United States. In *Miller* v. *Cornwall R. R. Co.* 168 U. S. 131, 134 [42: 409, 410], this court, speaking by the chief justice, said: "We have no jurisdiction on a writ of error to a state court to declare a state law void on account of its collision with a state Constitution, and it was long ago held that where it was objected in the state courts that an act of the state was 'unconstitutional and void,' the objection was properly construed in those courts as raising the question whether the state legislature had the power under the state Constitution to pass the act, and not as having reference to any repugnance to the Constitution of the United States. *Porter* v. *Foley*, 65 U. S. 24 How. 415 [16: 740].

It is manifest that, when the answer was drawn, neither the defendant Kipley nor the learned counsel representing him intended to raise any question of a Federal nature. We cannot suppose that it occurred to either of them at that time that the civil service act of Illinois was repugnant to the Constitution of the United States.

Nor was any question of a Federal character raised or intended to be raised by the plea which brought before the court the city ordinance of June 28, 1897.

It is, however, said that the motion for leave to amend the answer did specially set up and claim that the Illinois civil service act violated certain rights, privileges, and immunities belonging to the plaintiff in error under the Constitution of the United States. But as the supreme court of Illinois did not allow the proposed amendment of the answer the questions suggested by the amendment did not arise for determination. To the action of the court in disallowing the amendment, no exception was taken. The grounds upon which these motions were denied appear from the opinion of the court as follows: "By this motion respondent Kipley asks, first, for leave to withdraw his plea; second, to file an amended answer; and **188**] *third, to file a supplemental answer. Nothing more is before us than the bare motion. No showing has been made nor reasons filed in support of the motion, and we are unable to say whether the motion should be allowed or not, and it must therefore be overruled." *People, Akin*, v. *Kipley*, 167 Ill 638. This action of the state court does not raise a Federal question which this court can examine. The suggestion that the Federal questions which would have been raised, if the answer had been amended as proposed, should be considered upon their merits precisely as they might have been if the motion to amend had been allowed, cannot be entertained for a moment. It was in the discretion of the court to deny the motion to amend, when no reasons were assigned for its allowance, and to hold the parties to the issues made by the original petition and answers; and there is nothing in the record justifying the couclusion that its discretion, in that regard, was exercised with the intent or so as to deprive the defendant either of any right or immunity to which he was entitled under the Constitution or laws of the United States, or of the privilege of setting up or claiming in due time and in proper form any such right or immunity.

It may be observed that the opinion of the state court delivered upon final hearing contains nothing to show that any Federal question was considered or determined. The general subject to which the attention of the court was directed is shown by the following extract from its opinion delivered by Mr. Justice Magruder: "The evils sought to be remedied by legislation of this character are well known and well understood. These evils are such as grow out of what is generally called the 'spoils system.' . . . The foundation principles of the act are, that appointments to municipal offices or employment must be made according to merit and fitness, to be ascertained by competitive examinations, free to all; and that promotions from lower to higher grades in the public service must be made upon the basis of merit." *People, Akin*, v. *Kipley*, 171 Ill. 44-93. The validity of the enactment in question was considered by that court with reference only to the state Constitution.

*In respect of the motion to discharge [**189** the rule and all preceedings against the respondents it need only be said that it could have been denied upon the ground that the questions sought to be raised by it might more properly arise upon demurrer, plea, or answer. Its denial did not have the effect to bring any Federal question into the record to be determined. It may also be observed that no exception was taken to the action of the state court in relation to this motion.

This court having no jurisdiction to re examine the final judgments of the state court in these cases, the motion to dismiss the writs of error is sustained.

Dismissed.

Mr. Justice **White** dissents.

BENJAMIN HAWKER, *Plff. in Err.*,
v.
PEOPLE OF THE STATE OF NEW YORK.

(See S. C. Reporter's ed. 189-205.)

State law as to practice of medicine—evidence of character—conviction of crime—ex post facto law.

1. Legislation by the state which simply defines the qualifications of one who attempts to practise medicine is a proper exercise of its police power.
2. A state may require good character as a condition of the practice of medicine, and may rightfully determine what shall be the evidences of that character.

NOTE.—*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.

As to retrospective statutes, when valid, see note to Otoe County v. Baldwin, 28: 331.

As to constitutionality of ex post facto laws, see notes to Calder v. Bull, 1: 648; and Sturges v. Crowninshield, 4: 529.

As to constitutionality of regulations as to practice of medicine, see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 579, 581.

As to experience and skill required of physicians; liability for malpractice,—see note to Nelson v. Harrington (Wis.) 1 L. R. A. 719, 720.

3. The legislature of a state may enact that one who has been convicted of crime shall no longer engage in the practice of medicine.

4. Such legislation is not an additional punishment for past offenses or an *ex post facto* law, but prescribes the qualifications for the position and the appropriate evidence of such qualifications.

[No. 415.]

Argued November 10, 1897. Ordered for Reargument December 20, 1897. Reargued March 9, 1898. Decided April 18, 1898.

IN ERROR to the Court of General Sessions of the Peace for the City and County of New York, State of New York, to review a judgment of that court entered in pursuance of a decision of the Court of Appeals of that State convicting Benjamin Hawker of the crime of abortion. *Affirmed.*

See same case below, 152 N. Y. 234.

Statement by Mr. Justice **Brewer:**

In 1878 the plaintiff in error, defendant below, was tried and convicted in the court of sessions of Kings county, New York, of the crime of abortion, and sentenced to imprison-**190**] ment *in the penitentiary for the term of ten years. In 1893 the legislature of the state of New York passed an act entitled "The Public Health Law" (Laws 1893, chap 661), which, as amended by the Laws of 1895, chap. 398, provides, among other things, as follows:

"Sec. 153. Any person who, . . . after conviction of a felony, shall attempt to practise medicine, or shall so practise, . . . shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than two hundred and fifty dollars, or imprisonment for six months for the first offense, and on conviction of any subsequent offense, by a fine of not more than five hundred dollars, or imprisonment for not less than one year, or by both fine and imprisonment."

Under this statute defendant was indicted in April, 1896, in the court of general sessions of the peace for the city and county of New York. The indictment alleged the conviction in 1878, and charged that, having been so convicted of the crime and felony of abortion, defendant did, on the 22d day of February, 1896, in the city of New York, unlawfully practise medicine "by then and there unlawfully examining, treating, and prescribing for one Dora Henig." To this indictment he demurred. The demurrer was overruled, and, upon a plea of not guilty, he was tried, convicted, and sentenced to pay a fine of $250. That conviction having been sustained by the court of appeals of the state (152 N. Y. 234), and a remittitur sent down, a final judgment was entered in the court of general sessions, whereupon he sued out this writ of error.

Mr. **Hugh O. Pentecost** for plaintiff in error, on first argument.

Messrs. **John D. Lindsay,** *Robert C. Taylor,* and *W. M. K. Olcott,* for defendant in error, on first argument.

Mr. **Hugh O. Pentecost,** for plaintiff in error, on reargument:

In practising medicine, as alleged, after having been convicted of a felony, as alleged, defendant committed no crime.

The statute should be construed prospectively.

Amsbry v. *Hinds*, 48 N. Y. 57; *Johnson* v. *Burrell*, 2 Hill, 238; *Fairbanks* v. *Wood*, 17 Wend. 329; *Wood* v. *Oakley*, 11 Paige, 400; *Quinn* v. *New York*, 63 Barb. 595; *Wilson* v. *Baptist Education Soc.* 10 Barb. 308; *Quackenbush* v. *Danks*, 1 Denio, 128, 1 N. Y. 129.

If said law is construed retrospectively, then it is null and void, because it is in conflict with the Constitution of the United States.

The law in question in this case, if construed retrospectively, is *ex post facto* in that it aggravates a crime and makes it greater than it was when committed, and in that it changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed.

Calder v. *Bull*, 3 Dall. 386 (1: 648); *Cummings* v. *Missouri*, 4 Wall. 321 (18: 362).

It deprives the defendant of liberty and property without due process of law.

Bertholf v. *O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Livestock D. & B. Asso.* v. *Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 388, 398; *Slaughter-House Cases*, 16 Wall. 36, 106 (21: 394, 418); *People* v. *Marx*, 99 N. Y. 377, 52 Am. Rep. 34; 5 Webster's Works, p. 487; *Dartmouth College Case*, 4 Wheat. 519 (4: 630); *People* v. *Gillson*, 109 N. Y. 398-404; *Mugler* v. *Kansas*, 123 U. S. 661 (31: 210); *Cummings* v. *Missouri*, 4 Wall. 277 (18: 356); *Ex parte Garland*, 4 Wall. 333 (18: 366); *Ex parte Tenney*, 2 Duv. 351; *Ex parte Law*, 35 Ga. 285; *Re Dorsey*, 7 Port. (Ala.) 293; *Green* v. *Shumway*, 39 N. Y. 418.

Messrs. **Asa Bird Gardiner** and **Robert C. Taylor,** for defendant in error, on reargument:

The police power extends to the protection of the public health, and comprises the regulation of the practice of medicine.

18 Am. & Eng. Enc. Law, p. 748 and cases cited; *Orr* v. *Meek*, 111 Ind. 40; *Dent* v. *West Virginia*, 129 U. S. 114 (32: 623); *Eastman* v. *State*, 109 Ind. 278, 58 Am. Rep. 400; *Richardson* v. *State*, 47 Ark. 562.

In the proper exercise of this right the state has the power to exclude from practice any person whose character is admittedly or adjudicatedly bad.

Cummings v. *Missouri*, 4 Wall. 277 (18: 356); *Ex parte Garland*, 4 Wall. 333 (18: 366).

The character of a physician is an important element in determining whether he possesses the necessary qualifications for the practice of his profession.

State, Powell, v. *State Medical Examining Bd.* 32 Minn. 324.

The legislature has the same power to require, as a condition of the right to practice this profession, that the practitioner shall be possessed of the qualifications of honor and good moral character, as it has to require that he shall be learned in the profession.

Thompson v. *Hazen*, 25 Me. 104; *State* v. *Hathaway*, 115 Mo. 36; *Eastman* v. *State*, 109 Ind. 278, 58 Am. Rep. 400; *State* v. *Call*, 121 N. C. 643.

Conviction of a felony is proof of bad moral character.

Ex parte Wall, 107 U. S. 265 (27: 552).

If the legislation is calculated, intended, convenient, and appropriate to accomplish the good of protecting the public health and of serving the public comfort and safety, the exercise of the legislative discretion is not the subject of judicial review.

People v. *Gillson*, 109 N. Y. 389; *People* v. *King*, 110 N. Y. 418, 1 L. R. A. 293; *People* v. *Ewer*, 141 N. Y. 129, 25 L. R. A. 794; *People, Nechamcus*, v. *Warden of City Prison*, 144 N. Y. 529, 27 L. R. A. 718; *People* v. *Havnor*, 149 N. Y. 195, 31 L. R. A. 689.

The necessity of arbitrary determination of the qualification of physicians has been fully recognized and sustained.

Ex parte Spinney, 10 Nev. 323; *Hewitt* v. *Charier*, 16 Pick. 353; *People* v. *Phippin*, 70 Mich. 6.

A physician's right to practice is a mere license; analogy of a druggist's, an attorney's, and a liquor license.

Cooley, Const. Lim. 6th ed. p. 745; *State* v. *Proudfit*, 3 Ohio, 63; *Gray* v. *Connecticut*, 159 U. S. 76 (40: 81); *State* v. *Hibbard*, 3 Ohio, 63. *State* v. *Gazlay*, 5 Ohio, 14; *Metropolitan Bd. of Excise* v. *Barrie*, 34 N. Y. 657

The exaction of a new requirement as to character in physicians deprives Hawker of no vested right.

Gray v. *Connecticut*, 159 U. S. 76, 77 (40: 81); *Re Percy*, 36 N. Y. 651; *Mugler* v. *Kansas*, 123 U. S. 643 (31: 205); *New York Health Department* v. *Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710; *Gibson* v. *Mississippi*, 162 U. S. 565 (40: 1075); *Munn* v. *Illinois*, 94 U. S. 134 (24: 87); *Douglas* v. *Kentucky*, 168 U. S. 488 (*ante*, 553).

The right of the state of New York to deny to Hawker a future privilege upon the ground that his unfitness has been proved by his past conduct is abundantly justified.

Murphy v. *Ramsey*, 114 U. S. 15 (29: 47); *Washington* v. *State*, 75 Ala. 582, 51 Am. Rep. 479; *United States* v. *Chew Cheong*, 61 Fed. Rep. 200.

Mr. Justice **Brewer** delivered the opinion of the court:

The single question presented is as to the [191 consititutionality *of this statute when applied to one who had been convicted of a felony prior to its enactment. Its unconstitutionality is alleged on the ground of an alleged conflict with article 1, § 10, of the Constitution of the United States, which forbids a state to pass "any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The arguments for and against this contention may be thus briefly stated:

On the one hand, it is said that defendant was tried, convicted, and sentenced for a criminal offense. He suffered the punishment pronounced. The legislature has no power to thereafter add to that punishment. The right to practise medicine is a valuable property right. To deprive a man of it is in the nature of punishment, and after the defendant has once fully atoned for his offense a statute imposing this additional penalty is one simply increasing the punishment for the offense, and is *ex post facto*.

On the other, it is insisted that within the acknowledged reach of the police power, a state may prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine. It may require both qualifications of learning and of good character, and, if it deems that one who has violated the criminal laws of the state is not possessed of sufficient good character, it can deny to such a one the right to practise medicine, and, further, it may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law and of the absence of the requisite good character. In support of this latter argument counsel for the state, besides referring to the legislation of many states prescribing in a general way good character as one of the qualifications of a physician, has made a collection of special provisions as to the effect of a conviction of felony. In the footnote† will be found his collection.

*We are of opinion that this argument [192 is the more applicable and must control the answer to this question. No precise limits have been placed upon the police power of a state. *and yet it is clear that legislation which [193 simply defines the qualifications of one who attempts to practise medicine is a proper exercise of that power. Care for the public health is *something confessedly belonging to the [194 domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting, not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or

†Colorado—The state board of medicine may refuse certificates to individuals who have been convicted of conduct of a criminal nature, and they may revoke certificates for like cause. (Mills, Anno. Stat. 1891, § 3556.)

Iowa—May revoke a certificate to a person who has been convicted of felony committed in the practice of his profession, or in connection therewith; or may revoke for like cause; . . . and such refusal or revocation prohibits such person from practising medicine, surgery, or obstetrics. (Laws 1888, chap. 104, § 7.)

Louisiana—The board is required to strike from the said list (of registered names) the names of persons convicted of any infamous crimes by any court . . . whether prior or posterior to registration. (Act 1882, No. 31, § 5.)

New Jersey—May refuse or revoke a license for chronic and permanent inebriety, the practice of criminal abortion, conviction of a crime involving moral turpitude, or for publicly advertising special ability to treat or cure disease which, in the opinion of the board, it is impossible to cure (after hearing). (Act 1890, chap. 190, § 5.)

North Dakota—Substantially the same. (Act 1890, chap. 93, § 3.)

Vermont—May revoke or annul a certificate if, in their judgment, the person holding it has obtained it fraudulently, or has forfeited his right to public confidence by conviction of crime. (Rev. Laws 1880, § 3915.)

Washington—The board will refuse or revoke a license for unprofessional or dishonorable conduct subject to the right of appeal. . . . "Unprofessional or dishonorable conduct" means procuring or aiding or abetting in a criminal abortion or employing what are popularly known as cappers or steerers; or obtaining any fee on the assurance that any manifestly incurable disease can be permanently cured; or wilfully betraying a professional secret; or advertisements of medical business in which untruthful or improbable statements are made; or advertising any medicine or means whereby the monthly periods of women can be reg-

a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished. These propositions have been often affirmed. In *Dent* v. *West Virginia*, 129 U. S. 114, 122 [32: 623, 626], it was said in respect to the qualifications of a physician: "The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud."

We note also these further declarations from state courts. In *State* [*Powell*], v. *State Medical Examining Board*, 32 Minn. 324, 327, 50 Am. Rep. 575, it was said: "But the legislature has surely the same power to require, as a condition of the right to practise this profession, that the practitioner shall be possessed of the qualifications of honor and a good moral character, as it has to require that he shall be learned in the profession. It cannot be doubted that the legislature has authority, in the exercise of its general police power, to make such reasonable requirements as may be calculated to bar from admission to this profession dishonorable men, whose principles or practices are such as to render them unfit to be intrusted with the discharge of its duties." In *Thompson* v. *Hazen*, 25 Me. 104, 108: "Its authors were careful that human health and life should not be exposed without some restraint, by being committed to the charge of the unprincipled and vicious. . . . It could not have been intended that persons destitute of the moral qualification required should have full opportunity to enter professionally the families of the worthy, but unsuspecting, and be admitted to the secrets which the sick chamber must often intrust to them." In *State* v. *Hathaway*, 115 Mo. 36, 47: "The *legislature then in the interest of society [195 and to prevent the imposition of quacks, adventurers, and charlatans upon the ignorant and credulous, has the power to prescribe the qualifications of those whom the state permits to practise medicine. . . . And the objection now made that because this law vests in this board the power to examine, not only into the literary and technical acquirements of the applicant, but also into his moral character, it is a grant of judicial power, is without force." In *Eastman* v. *State*, 109 Ind. 278, 279 [58 Am. Rep. 400]: "It is, no one can doubt, of high importance to the community that health, limb, and life should not be left to the treatment of ignorant pretenders and charlatans. It is within the power of the legislature to enact such laws as will protect the people from ignorant pretenders, and secure them the services of reputable, skilled, and learned men." In *State* v. *Call*, 121 N. C. 646, 28 S. E. 517: "To require this is an exercise of the police power for the protection of the public against incompetents and imposters, and is in no sense the creation of a monopoly of special privileges. The door stands open to all who possess the requisite age and good character, and can stand the examination which is exacted of all applicants alike."

But if a state may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidences of that character. We do not mean to say that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to

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ulated, or the menses re-established if suppressed: or the conviction of any offense involving moral turpitude, or habitual intemperance. (Act March 28, 1890, §§ 3, 4.)

Great Britain and Ireland.—If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanor, or in Scotland of any crime or offense, or shall be, after due inquiry, judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the register to erase the name of such medical practitioner from the register. (Acts 21 & 22 Vict. chap. 90, § 29.)

New Brunswick—Substantially same. (Act 1881, chap. 19, § 22.)

Northwest Territory—Substantially same. (Ord. 5, 1888, § 37, as substituted by Ord. 24, 1892, § 1.)

Nova Scotia—Substantially same. (Rev. Stat. 5th ser. chap. 24, § 19.)

Manitoba—Any registered medical practitioner convicted of felony or misdemeanor, before or after the passage of this act or his registration, forfeits his rights to registration, and by direction of the council his name shall be erased. If a person known to have been convicted of felony or misdemeanor presents himself for registration, the register may refuse registration. If any person registered be judged after due inquiry . . . to have been guilty of infamous or unprofessional conduct in any respect, the council may direct the register to erase his name. (Rev. Stat. of Manitoba 1891, chap. 98, § 40.)

British Columbia—Any registered practitioner convicted of any felony thereby forfeits his right to registration, and . . . his name is required to be erased from the register; or, in case a person known to be convicted of felony presents himself for registration, the register has the power to refuse such registration. (Cons. Act 1888, chap. 81, § 32; substantially same as to Quebec; Rev. Stat. 1888, § 3996.)

Ontario—A practitioner is liable to have his name erased from the register where he has been convicted, before or after registration, of an offense which, if committed in Canada, would be a felony or misdemeanor, or where he has been guilty of any infamous or disgraceful conduct in a professional respect. (Rev. Stat. 1887, chap. 148, § 34.)

Newfoundland—The . . . board may try and expel any member of the profession for acts of malpractice, misconduct, or immoral habits. . . . (Act 1893, chap. 12, § 32.)

Prince Edward's Island—A medical practitioner guilty of infamous or disgraceful conduct in a professional respect is liable to have his name erased, and, if he apply for registration, the council may refuse it. (Act 1892, chap. 42, § 22.)

New Zealand—If any registered person shall be or shall have been convicted of any felony or misdemeanor in Great Britain or Ireland, or in any of the British Dominions, the register general and register, respectively, shall erase the name of any such person from the register, and such erasure shall be notified by the register general in the New Zealand Gazette. (Medical Practitioner's Act 1869, No. 51.)

Hawaii—It shall not be lawful for any person to practise in this kingdom as a physician or surgeon for compensation or reward unless he shall have first presented to the board of health satisfactory evidence of his professional qualifications and good moral character. (Act 1876, chap. 11, § 3.)

St. Lucia—If any registered medical practitioner is convicted of any felony, the register shall erase the name of such practitioner from the medical register. If any registered medical practitioner is convicted of any misdemeanor, a report shall be submitted . . . to the governor in council, who . . . shall determine whether (he) has been guilty of infamous conduct in any professional or other respect, and may thereupon, if he sees fit, direct the register to erase the name. . . . (Medical Practitioner Ordinance No. 17 of 1865, § 11.)

prove the fact and make it a test. *County-Seat of Linn County*, 15 Kan. 500-528. Whatever is ordinarily connected with bad character or indicative of it, may be prescribed by the legislature as conclusive evidence thereof. It is not the province of the courts to say that other tests would be more satisfactory, or that the naming of other qualifications would be more conducive to the desired result. These are questions for the legislature to determine. "The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity." *Dent* v. *West Virginia, supra*, p. 122 [32: 626].

196] *It is not open to doubt that the commission of crime, the violation of the penal laws of a state, has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule,—one having no relation to the subject-matter,—but is only appealing to a well-recognized fact of human experience; and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the state? The conviction is, as between the state and the defendant, an adjudication of the fact. So, if the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of *res judicata* and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care.

That the form in which this legislation is cast suggests the idea of the imposition of an additional punishment for past offenses is not conclusive. We must look at the substance, and not the form, and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the state should be deemed of such bad character as to be unfit to practise medicine, and that the record of a trial and conviction should be conclusive evidence of such violation. All that is embraced in these propositions is condensed into the single clause of the statute, and it means that and nothing more. The state is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character. The vital matter is not the conviction, but the violation, of law. The former is merely the prescribed evidence of the latter. Suppose the statute had contained only a clause declaring that no one should be permitted to act as a physician who had violated the criminal laws of the state, leaving the question of violation to be deter-

197] mined according *to the ordinary rules of evidence, would it not seem strange to hold that that which conclusively established the fact effectually relieved from the consequences of such violation?

It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist. Illustrations of this are abundant. At common law one convicted of crime was incompetent as a witness, and this rule was in no manner affected by the lapse of time since the commission of the offense, and could not be set aside by proof of a complete reformation. So in many states a convict is debarred the privileges of an elector, and an act so debarring was held applicable to one convicted before its passage. *Washington* v. *The State*, 75 Ala. 582 [51 Am. Rep. 479]. In *Foster* v. *Police Commissioners*, 102 Cal. 483, 492, the question was as to the validity of an ordinance revoking a license to sell liquor on the ground of misconduct prior to the issue of the license, and the ordinance was sustained. In commenting upon the terms of the ordinance the court said: "Though not an *ex post facto* law, it is retrospective in so far as it determines from the past conduct of the party his fitness for the proposed business. Felons are also excluded from obtaining such license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons as a class; nor can we perceive why such evidence should be more conclusive of unfitness were the act done after the passage of the ordinance than if done before." In a certain sense such a rule is arbitrary, but it is within the power of a legislature to prescribe a rule of general application based upon a state of things which is ordinarily evidence of the ultimate fact sought to be established. "It was obviously the province of the state legislature to provide the nature and extent of the legal presumption to be deduced from a given *state of facts, and the

[198 creation by law of such presumptions is after all but an illustration of the power to classify." *Jones* v. *Brim*, 165 U. S. 180, 183 [41: 677, 679].

Defendant relies largely on *Cummings* v. *The State of Missouri*, 71 U. S. 4 Wall. 277 [18: 356], and *Ex parte Garland*, 71 U. S. 4 Wall. 333 [18: 366]. In the first of these cases a test oath, containing some thirty distinct affirmations respecting past conduct, extending even to words, desires, and sympathies, was prescribed by the state of Missouri upon all pursuing certain professions or avocations; and in the second a similar oath, though not so far reaching in its terms, was required by act of Congress of those who sought to appear as attorneys and counselors in the courts of the United States. It was held that, as many of the matters provided for in these oaths had no relation to the fitness or qualification of the two parties, the one to follow the profession of a minister of the gospel and the other to act as an attorney and counselor, the oaths should be considered, not legitimate tests of qualifications, but in the nature of penalties for past offenses. These cases were called to our attention in *Dent* v. *West Virginia*, *supra*, in which the validity of a statute of West Virginia imposing new qualifications upon one already engaged in the practice of medicine was

preseuted for consideration. After pointing out the distinguishing features of those cases this court summed up the matter in these words (p. 128 [32:628]):

"There is nothing in these decisions which supports the positions for which the plaintiff in error contends. They only determine that one who is in the enjoyment of a right to preach and teach the Christian religion as a priest of a regular church, and one who has been admitted to practise the profession of the law, cannot be deprived of the right to continue in the exercise of their respective professions by the exaction from them of an oath as to their past conduct, respecting matters which have no connection with such professions. Between this doctrine and that for which the plaintiff in error contends there is no analogy or resemblance. The Constitution of Missouri and the act of Congress in question in those cases were designed to deprive parties **199**] of their right *to continue in their professions for past acts or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their professions. The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiviug a license under authority of the state."

Ex parte Wall, 107 U. S. 265 [27:552], is also worthy of notice. In that case the circuit court had stricken the petitioner's name from the roll of practising attorneys, on the ground that he had committed a crime, although not in the presence of the court, nor interfering with it in the discharge of its duties. The petitioner here insisted that the act which was charged against him was one for which he was, if guilty, liable to trial and conviction under the law of the state, and that the Federal court had no power on account of such act, one having no connection with his obligations to that court, to disbar him. In reply to this contention it was said (p. 273 [27:556]):

"It is laid down in all the books in which the subject is treated, that a court has power to exercise a summary jurisdiction over its attorneys to compel them to act honestly towards their clients, and to punish them by fine and imprisonment for misconduct and contempts, and, in gross cases of misconduct, to strike their names from the roll. If regularly convicted of a felony, an attorney will be struck off the roll as of course, whatever the felony may be, because he is rendered infamous. If convicted of a misdemeanor which imports fraud or dishonesty, the same course will be taken. He will also be struck off the roll for gross malpractice or dishonesty in his profession. . . . Where an attorney was convicted of theft, and the crime was condoned by burning in the hand, he was nevertheless struck from the roll. 'The question is,' said Lord Mansfield, 'whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion. . . . It is not by way of punishment; but the courts in such cases exercise their discretion, whether a man **200**] *whom they have formerly admitted is a proper person to be continued on the roll or not.'"

The thought which runs through these cases and others of similar import which might be cited, is that such legislation is not to be regarded as a mere imposition of additional penalty but as prescribing the qualifications for the duties to be discharged and the position to be filled, and naming what is deemed to be and what is in fact appropriate evidence of such qualifications.

In *Gray* v. *Connecticut*, 159 U. S. 74, 77 [40:80, 82], this court considered the effect of a statute prescribing additional qualifications for one acting as a pharmacist who already had a license from the state therefor, and said: "Whatever provisions were prescribed by the law previous to 1890, in the use of spirituous liquors in the medicinal preparations of pharmacists, they did not prevent the subsequent exaction of further conditions which the lawful authority might deem necessary or useful." See also *Foster* v. *Police Commissioners*, *supra*, and *State* [*Chapman*], v. *State Bd. of Medical Examiners*, 34 Minn. 387.

We find no error in the record, and, therefore, *the judgment of the state court is affirmed.*

Mr. Justice **Harlan** dissenting:

By an indictment in the court of sessions of Kings county, New York, the present plaintiff in error was charged with the crime of abortion, committed September 1, 1877. He was found guilty and sentenced, March 6, 1878, to imprisonment in the penitentiary for the term of ten years.

Chapter 661 of the laws of New York of 1893, as amended by the laws of 1895 [chap. 398], provides that "any person who, after conviction of a felony, shall attempt to practise medicine, or shall so practise, . . . shall be guilty of a misdemeanor," etc.

The present indictment charged the plaintiff in error with the commission of the offense last stated, in that having been convicted in 1878, of the above crime of abortion committed *in 1877, he unlawfully, on the 22d day [**201** of February, 1896, in the city of New York—nearly twenty years after the commission of the crime of abortion—practised medicine by "then and there unlawfully medically examining, treating, and prescribing for Dora Hoenig."

If the statute in force when the offense of abortion was committed had provided that, *in addition* to imprisonment in the penitentiary, the accused, if convicted, should not thereafter practice medicine, no one, I take it, would doubt that such prohibition was a part of the *punishment* prescribed for the offense. And yet it would seem to be the necessary result of the opinion of the court in the present case, that a statute passed after the commission of the offense in 1877 and which, by its own force, made it a crime for the defendant *to continue* in the practice of medicine, is not an addition to the punishment inflicted upon him in 1878. I cannot assent to this view. It is, I think, inconsistent with the provision of the Constitution of the United States declaring that no state shall pass an *ex post facto* law.

The scope and meaning of the *ex post facto* clause of the Constitution was determined in *Calder* v. *Bull*, 3 U. S. 3 Dall. 386 [1:648], the opinion being delivered by Mr. Justice Chase. The classification there made of cases embraced

by that provision has been universally accepted in the courts of this country, although this court said in *Kring* v. *Missouri*, 107 U. S. 221, 228 [27: 506, 509], that it was not to be supposed that the opinion in *Calder* v. *Bull* undertook to define, by way of exclusion, all the cases to which the constitutional provision would be applicable. That classification was as follows: "1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was, when committed. 3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender."

202] *In *United States* v. *Hall*, 2 Wash. C. C. 366, Mr. Justice Washington said that "an *ex post facto* law is one which, in its operation, makes that criminal or penal which was not so at the time the action was performed; or which *increases the punishment;* or, in short, which, in relation to the offense, *or its consequences, alters* the situation of a party *to his disadvantage.*" And so it was held in *Kring* v. *Missouri*, 107 U. S. 221, 228 [27: 506, 509]; and in *Medley Petitioner*, 134 U. S. 160, 171 [33: 835, 840].

If long after the commission of a crime, and long after the offender has suffered all the punishment prescribed at the time for its commission, a statute should, by its own force, and *solely because of his conviction of that offense*, take from him the right to further pursue his profession, would not such a statute inflict upon him a greater punishment than was annexed to the crime when committed, and alter the situation to his disadvantage, "in relation to the offense or its consequences?" In my opinion, this question should receive an affirmative answer.

It was said in argument that the judgment below was sustained by *Dent* v. *West Virginia*, 129 U. S. 114 [32: 623]. That case presented no question under the *ex post facto* clause of the Constitution. It only involved the question whether anyone could, of right, pursue the practice of medicine without obtaining a license to do so, if the state required a license as a condition of exercising the privilege of pursuing that profession. This court held that such a statute was within the reserved police power of the state, and consistent with the due process of law enjoined by the 14th Amendment. It said: "The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure, or tend to secure, them against the consequences of ignorance and incapacity, as well as of deception and fraud." It was not the case of a state enactment which, by its own force, made it a crime for any person, *lawfully engaged, when such act was passed*, in the practice of the medical profession, to continue to do so, if he had *at any time* in his past life committed a felony, although he may have suffered all the punishment pre-
203] scribed for such felony when it *was committed. If the statute of West Virginia had been of that character, the same question would have been presented that arises under the statute of New York.

In *Cummings* v. *Missouri*, 71 U. S. 4 Wall. 277, 321 [18: 356, 362], this court said: "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined." The court now holds that a legislative enactment does not inflict punishment for past conduct when it makes it a crime for anyone lawfully engaged in the practice of medicine—as was the plaintiff in error—to continue in the pursuit of his chosen profession, if at any time in the past, and although a half century may have intervened, he was convicted of a felony of any character, notwithstanding he suffered the entire punishment prescribed for such felony when committed.

In *Ex parte Garland*, 77 U. S. 4 Wall. 333, 377 [18: 366, 370], which involved the validity of an act of Congress requiring, among other things, a certain oath to be taken as a condition of the right of one to appear and be heard as an attorney at law by virtue of any previous admission to the bar, this court, referring to certain clauses of the act relating to past conduct, said: "The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act as against them operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for past conduct. The exaction of the oath is the mode of providing for ascertaining the parties upon whom the act is intended to operate, and, instead of lessening, increases its objectionable character. All enactments *of this kind partake of the nature [204 of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included. In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts *it adds a new punishment* to that before prescribed and it is thus brought within the further inhibition of the Constitution against the passage of an *ex post facto* law."

The statute in question, it is to be observed, takes no account whatever of the character, at the time of the passage, of the person whose previous conviction of a felony is made an absolute bar to his right to practise medicine. The offender may have become, after conviction, a new man in point of character, and so conducted himself as to win the respect of his

fellow men, and be recognized as one capable, by his skill as a physician, of doing great good. But these considerations have no weight against the legislative decree embodied in a statute which, without hearing, and without any investigation as to the character or capacity of the person involved, takes away from him absolutely a right which was being lawfully exercised when that decree was passed. If the defendant had been pardoned of the offense committed by him in 1877, he would still, under the statute of 1895, have become a criminal if he continued in the practice of his profession.

It will not do to say that the New York statute does nothing more than prescribe the qualifications which, after its passage, must be possessed by those who practise medicine. Upon this point, Mr. Justice Patterson of the supreme court of New York well said [14 App. Div. 188]: "Assuming, for the purposes of the argument, that the legislature may require for the continuance of the practice of medicine, that the practitioner shall possess professional knowledge and skill and also good moral character, it is obvious that such requirement must relate to a present status or condition of a person coming within the terms of the act. The law under which this appellant was indicted does not deal with his present moral charac-
205] ter. It seizes upon *a past offense and makes that, and that alone, the substantial ingredient of a new crime, and the conviction of it years ago the conclusive evidence of that new crime. It will be observed that this statute includes any and all felonies, not only those committed in connection with the profession of medicine and surgery, but any and every felony in the whole catalogue of crime, whether committed here or in another jurisdiction. Its design is to deprive convicted felons of the right of practising at all. Clearly, it acts directly upon and enhances the punishment of the antecedently committed offense by depriving the person of his property and right, and preventing his earning his livelihood in his profession, only because of his past, and in this case expiated, offense against the criminal law. This prisoner has committed no new crime except that which the statute has created out of the old one. He had absolutely the right to practise medicine the day before that statute was passed. His former conviction entailed the punishment of imprisonment and disfranchisement as a voter, but it did not take away from him his property in the right to earn his living on the expiration of his imprisonment by engaging in the profession of which he was and is a member. His civil rights were not extinguished, but only suspended, during his imprisonment. 2 Rev. Stat. p. 701, § 19; Penal Code, § 710.

I concur entirely in these views, and must withhold my assent to the opinion of the majority.

Mr. Justice Peckham and **Mr. Justice McKenna** concur in this dissent.

P. H. KIRWAN, as United States Surveyor General for the District of Minnesota, and Thomas H. Crosswell, *Appts.*,

v.

SIMON J. MURPHY *et al.*

(See S. C. Reporter's ed. 205-210.)

Appeal from circuit court of appeals—interlocutory order not appealable.

1. Section 6 of the act of March 3, 1891, giving the right of review by this court in cases where the judgments or decrees of the circuit court of appeals are not made final, applies only to final orders, judgments, or decrees.
2. An interlocutory order for a temporary injunction, affirmed by the circuit court of appeals without direction, is not appealable to this court.

[No. 550.]

Submitted March 28, 1898. Decided April 25, 1898.

APPEAL from a decree of the United States Circuit Court of Appeals for the Eighth Circuit affirming an order for a temporary injunction of the Circuit Court of the United States for the district of Minnesota in an action in equity brought by Simon J. Murphy *et al.*, for plaintiffs, against P. H. Kirwan as United States surveyor *et al.*, for an injunction from entering into any contract for the survey or surveying certain lands in St. Louis county, Minnesota, and to establish the boundaries of the same lands, etc. *On motion to dismiss. Dismissed.*

See same case below, 49 U. S. App. 658.

Statement by Mr. Chief Justice **Fuller:**

Simon J. Murphy and others filed a bill against P. H. Kirwan, as United States surveyor general for the district of Minnesota, and Thomas H. Crosswell, in the circuit court of the United States for the district of Minnesota, which alleged in substance that complainants were the owners of certain lands on the shores of Cedar Island lake, in St. Louis county, Minnesota, specifically described in the bill; that the township in which the lands lie was surveyed in 1876, and the survey approved by the United States surveyor general for Minnesota and by the Commissioner of the General Land Office; that prior to April 1, 1887, all the lands in the township were sold or otherwise disposed of by the United States according to the official plat of the survey, and patents therefor were issued to the various purchasers and entrymen; that Cedar Island lake is in fact smaller than it is represented to be on the plat, and that several of the fractional lots owned by complainants about said lake contain more land than is represented, while as to some of the lots

NOTE.—*As to jurisdiction in the United States Supreme Court where Federal question arises or where are drawn in question statutes, treaty, or Constitution*, see notes to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; and Williams v. Norris, 6: 571.

As to jurisdiction of the United States Supreme Court to declare state law void as in conflict with state Constitution; to revise decrees of state courts as to construction of state laws,—see notes to Jackson, Hart, v. Lamphire, 7: 679; and Commercial Bank v. Buckingham, 12: 169.

the waters of the lake extend upon the areas shown by the plat to be land; that the lands owned by complainants, lying between the meander line and the actual shore line of the lake now claimed by defendants to be unsurveyed, are of the value of $2,000. The bill further averred that complainants became the owners of the land described, with other lands, by virtue of mesne conveyances from the patentees; that they paid a valuable consideration for each parcel and purchased the same in good faith, believing the titles of their grantors extended to the lake, in reliance upon the government plat, and being in ignorance of any fraud or mistake in the survey. It was then stated that proceedings had been had to secure a resurvey of the lands between Cedar Island lake and the old meander line, and that on October 31, 1893, the Commissioner of the General Land Office directed a resurvey, which order was affirmed by the Secretary of the Interior, and final instructions for such resurvey given to the surveyor general November 5, 1896; that Kirwin, surveyor general of Minnesota, thereupon let the contract to make the survey to his codefendant, Thomas H. Cross-**207**] well, a deputy surveyor, who *was about to commence such survey. All which orders were charged to be void, and it was prayed that defendant Kirwan be enjoined from entering into any contract for the survey of the lands described or from surveying the same, and that the boundaries of the lands be defined by decree and established, and complainants be protected in the use and enjoyment of such lands, extending to and including the shores of Cedar Island lake, and to the center of said lake, and that defendant Kirwan and his successors be perpetually enjoined from surveying the same, etc. Affidavits and exhibits were filed in support of the bill. A rule to show cause was issued and argument had on the application for a temporary injunction, and the matter taken under advisement, whereupon defendants, January 11, 1897, filed their joint answer to the bill. The answer set up that in 1876, under authority from the Commissioner of the General Land Office, a contract was made by the then surveyor general of Minnesota with a deputy surveyor to make a survey of certain lands in the township in question; that thereafter, on certain pretended field notes of the survey returned by the deputy surveyor, a plat of the land was made by the surveyor general and filed with the commissioner; that no survey was in fact made; that the exterior boundaries of the land only were run; that no divisions into sections or smaller subdivisions were attempted; that no streams or bodies of water were meandered; that the field notes were false and fictitious, and the plat thereon based false and incorrect.

The answer alleged that about 1,200 acres of the township were never sold, disposed of, or patented, and were still unsurveyed land belonging to the government, and lying between the shore of Cedar Island lake and certain enumerated government lots, a part of which lots had been patented and conveyed to complainants; that by the plat made from the deputy's field notes, all of said unsurveyed land is indicated as being a part of Cedar Island lake. In 1893 an application of certain settlers upon this intervening tract for a survey thereof, so as to enable them to enter the lands as homesteads, was made, and the Secretary of the *Interior, after many hearings, com [**208** plainants being represented, adjudged the former survey fraudulent, and in 1896 a resurvey of the tract was ordered, in accordance with which defendant Kirwan, as surveyor general of the United States, entered into a contract with Crosswell, a deputy surveyor, on December 10, 1896, to survey and subdivide the lands.

On January 22, 1897, complainants filed a replication.

The circuit court, on April 3, 1897, granted complainants' prayer for a temporary injunction, and an injunction was ordered to issue, on bond being filed, restraining defendants "during the pendency of the above entitled action or until the further order of this court from entering into any contract or perfecting a contract partially entered into for the survey of the lands hereinbefore described, or any part thereof, or from surveying the same or causing the same to be surveyed." From this order defendants appealed to the circuit court of appeals for the eighth circuit, and, after argument, that court ordered, adjudged, and decreed "that the order and decree of the said circuit court awarding a temporary injunction in this cause be, and the same is hereby, affirmed without costs to either party in this court September 27, 1897."

From this decree, appellants in that court, defendants below, prayed and were allowed an appeal to this court, which, having been docketed, appellees now move to dismiss.

Messrs. **S. D. Luckett** and **Henry N. Copp** for appellees, in favor of motion to dismiss.

Messrs. **John K. Richards,** Solicitor General, and **W. J. Hughes** for appellants, in opposition to motion.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By the 6th section of the act of March 3, 1891 (26 Stat. at L. 826, chap. 517), the judgments or decrees of the circuit courts of appeals are made final in that court in the classes of cases therein enumerated, of which the present is not one, and it is provided that in all cases not made final, there shall be of right, within one year, an appeal or writ of error or review of *the case by this court, where[**209** the matter in controversy exceeds $1,000, exclusive of costs.

But this applies only to final orders, judgments, or decrees. *Young* v. *Grundy*, 10 U. S. 6 Cranch, 51 [3: 149]; *Keystone Manganese & Iron Company* v. *Martin*, 132 U. S. 91 [33:275]; *McLish* v. *Roff*, 141 U. S. 661 [35: 893]; *American Construction Company* v. *Jacksonville, T. & K. W. Railway Company*, 148 U. S. 372, 378 [37: 486, 489].

The order sought to be reviewed was simply an interlocutory order of the circuit court for the issue of a temporary injunction, which order was affirmed by the circuit court of appeals without direction. If we should take jurisdiction, it is this order we should revise in also reviewing that of the circuit court of

appeals, and our mandate would go directly to the circuit court. *Louisville Railway Company* v. *Behlmer*, 169 U. S. 644 [*ante*, 589].

In *Smith* v. *Vulcan Iron Works*, 165 U. S. 518 [41: 810], it was held that the circuit courts of appeals on an appeal from an interlocutory order or decree of the circuit courts granting an injunction and ordering an accounting in a patent suit, might consider and decide the case on its merits, and thereupon render or direct a final decree dismissing the bill; and this course might be pursued in other cases. *Mills* v. *Green*, 159 U. S 651 [40: 293]. Here, however, the court of appeals did not finally determine the case by its judgment, and whether the temporary injunction should be made permanent or not was left to the circuit court to decide when the final decree was entered.

And we may add, that in concluding its opinion, the circuit court of appeals said: "In view of these considerations, we are not satisfied that an error was committed in awarding a temporary injunction. It cannot be said, we think, that the injunction was improvidently issued, and the order appealed from is therefore affirmed," 49 U. S. App. 658.

Moreover, by § 6, the circuit courts of appeals are empowered to review final decisions of the district and circuit courts, except where cases are carried, under § 5, directly to this court, but, by the 7th section, as amended by the act of February 18, 1895 (28 Stat. at L. 666, **210**] chap. 96) jurisdiction *is given to the courts of appeals from appeals from interlocutory orders in injunction proceedings. And it was under that section that the appeal was taken to the court of appeals in this case.

But there is no provision in the act of March 3, 1891, or any other act, authorizing an appeal to this court from interlocutory orders or decrees, and whether certiorari would lie is a question that does not arise. *Re Tampa Suburban Railroad Company*, 168 U. S. 583 [*ante*, 589].

Appeal dismissed.

LOWREY W. HUMES, *Plff. in Err.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 210-213.)

Omission of court to give instructions—instructions not excepted to—instructions already given—verdict against evidence.

1. The omission of the court to give instructions which are not asked is not error.
2. Instructions given, but not excepted to, are not subject to review.
3. Refusal of instructions requested is not error, when the instructions already given are sufficiently full and elaborate.
4. This court cannot consider whether the verdict was against the weight of evidence, if there was any evidence proper to go to the jury in support of the verdict.

[No. 150.]

Submitted February 21, 1898. Decided April 25, 1898.

IN ERROR to the Circuit Court of the United States for the Western District of Tennessee to review a judgment of that court convicting Lowrey W. Humes for violating § 5486, U. S. Rev. Stat., by withholding and detaining certain sums of money for pension fees in excess of the amount allowed by the statute to be charged. *Affirmed.*

Statement by Mr. Justice **McKenna**:

The plaintiff in error was indicted for violating § 5486 of the Revised Statutes of the United States. The indictment contained nine counts. They respectively charged the withholding and detention of certain sums of money for pension fees in excess of the amount allowed by the statute to be charged, to wit, the first, third, fifth, seventh, and ninth counts; that defendant withheld, respectively, from William Anderson, Isaac Bloodson, Ann Galloway, and Whitfield Pryor the several sums of $486.40, $517.20, $120.13, $116, and $15.80; the second, fourth, sixth, and eighth counts charged that he "did demand from said persons, respectively, the said several sums." The jury returned a verdict of guilty as to the first and third counts, a verdict of not guilty as to the second, fourth, seventh, eighth, *and ninth counts, and a *nolle prosequi* [**211** was entered by the United States attorney as to the fifth and sixth counts.

There are eleven assiguments of error. The first part of the eighth and eleventh assignments relate to a failure on the part of the court to give certain instructions. The record does not show that there was a request for such instructions. The second, fourth, fifth, sixth, seventh, part of the eighth, ninth, and tenth assignments relate to alleged error iu the instructions given by the court. No exception is shown by the record to have been taken. The twelfth and thirteenth assignments of errors are based upon the alleged fact that the verdict was against the weight of evidence. The third assignment of error is based upon the refusal of the court to give an instruction which was requested.

The statement of the record is: "The defendant asked the following special instruction, which was refused: 'Unless you find from the evidence that the defendant was the attorney, agent, or other person engaged in prosecuting the pension claims of Anderson, Haynes, and Bloodson, the court instructs you to find for the defendant. I think I have given this instruction in the general charge, and, believing the charge on this point is sufficiently full, further instruction is declined. Clark, J.' To which action and ruling of the court in so refusing to give said special instructions the defendant then and there excepted."

Mr. **James M. Greer** for plaintiff in error.

Mr. **James E. Boyd**, Assistant Attorney General, for defendant in error.

NOTE.—*As to exception, when must be taken to be available on review*, see note to Phelps v. Mayer, 14: 643.

As to what questions the United States Supreme Court will review on writ of error; bill of exceptions, —see note to Parks v. Turner, 13: 883.

Mr. Justice **McKenna** delivered the opinion of the court:

We cannot regard as error the omission of the court to give instructions which were not asked. In *Isaacs* v. *United States*, 159 U. S. 487, 491 [40: 229, 230], Mr. Justice Brown said: "It is no ground for reversal that the 212]court omitted to[give instructions,*where they were not requested by the defendant. It is sufficient that the court gave no erroneous instructions. *Pennock* v. *Dialogue*, 27 U. S. 2 Pet. 1, 15 [7: 327, 332]; *Texas and Pacific R'y Co.* v. *Polk*, 151 U. S. 73, 78 [38: 78, 80]." Nor are instructions which were given but not excepted to subject to review. *Tucker* v. *United States*, 151 U. S. 170 [38: 115]; *St. Clair* v. *United States*, 154 U. S. 134, 153 [38: 936, 943].

We are confined, therefore, to the consideration of the second assignment of error. It is not well taken. As the court said in refusing it, the charge of the court was "sufficiently full." The court read to the jury § 5485 of the Revised Statutes, and stated that the indictment was predicated on it. The statute provides that "any agent or attorney, or any other person instrumental in prosecuting any claim for pension or bounty land, who shall wrongfully withhold or wrongfully demand from a pensioner or claimant any portion of the pension or claim allowed, shall be guilty of a high misdemeanor."

And then, after explaining the indictment and stating the rules of evidence, degrees of proof required, the court said: "Now, with these general observations that are applicable and will be kept in mind by you throughout the case, we come to the testimony in the case, and, in respect to that it appears from the statute, as you have observed, that it is necessary in order to make the case against the defendant (first) that he must have been the agent or attorney of the pensioner, or he must have been instrumental in the prosecution of the pension claim before he falls within the category of the persons who are subject to the provisions of the statute, and (secondly) he must withhold from the pensioner all or a part of what was due the pensioner claimant, so that the two propositions are necessary to be established: The defendant was an agent or instrumental in the prosecution of the claim, and, secondly, that he withheld from the pensioner money that belonged to the pensioner, some part of the pension that was allowed."

The language of the court was explicit and unmistakable. It is fuller and more elaborate than the instruction requested.

The alleged fact that the verdict was against 213]the weight of *evidence we are precluded from considering, if there was any evidence proper to go to the jury in support of the verdict. *Crumpton* v. *United States*, 138 U. S. 361 [34: 958]; *Moore* v. *United States*, 150 U. S. 57, 61 [37: 996, 998].

In this case there was certainly evidence proper to go to the jury.

There is no error in the record, and *the judgment of the Circuit Court is affirmed.*

HENRY WILLIAMS, *Plff. in Err.*,
v.
STATE OF MISSISSIPPI.

(See S. C. Reporter's ed. 213-225.)

Abridgment of rights of colored persons.

The equal protection of the laws is not denied to colored persons by a state Constitution and laws which make no discrimination against the colored race in terms, but which grant a discretion to certain officers, which can be used to the abridgment of the right of colored persons to vote and serve on juries, when it is not shown that their actual administration is evil, but only that evil is possible under them.

[No. 531.]

Argued and Submitted March 18, 1898. Decided April 25, 1898.

IN ERROR to the Supreme Court of the State of Mississippi to review a judgment of that court affirming the judgment of the Circuit Court of Washington County, Mississippi, convicting Henry Williams of murder *Affirmed.*

Statement by Mr. Justice **McKenna:**

At June term, 1896, of the circuit court of Washington county, Mississippi, the plaintiff in error was indicted by a grand jury composed entirely of white men for the crime of murder. On the 15th day of June he made a motion to quash the indictment, which was in substance as follows, omitting repetitions and retaining the language of the motion as nearly as possible:

Now comes the defendant in this cause, Henry Williams by name, and moves the circuit court of Washington county, Mississippi, to quash the indictment herein filed and upon *which it is proposed to try him for [214 the alleged offense of murder: (1) Because the laws by which the grand jury was selected, organized, summoned, and charged, which presented the said indictment, are unconstitutional and repugnant to the spirit and letter of the Constitution of the United States of America, 14th Amendment thereof, in this, that the Constitution prescribes the qualifications of electors, and that to be a juror one must be an elector; that the Constitution also requires that those offering to vote shall produce to the election officers satisfactory evidence that they have paid their taxes; that the legislature is to provide means for enforcing the Constitution, and in the exercise of this authority enacted § 3643, also § 3644 of 1892, which respectively provides that the election commissioners shall appoint three election managers, and that the latter shall be judges of the qualifications of electors, and are required "to examine on oath any person duly registered and offering to vote touching his qualifications as an elector." And then the motion states that "the registration roll is not prima facie

NOTE.—*As to civil rights in places of public accommodation and amusement*, see note to Cecil v. Green (Ill.) 32 L. R. A. 566.

As to what is due process of law, see note to Pearson v. Yewdall, 24: 436.

evidence of an elector's right to vote, but the list of those persons having been passed upon by the various district election managers of the county to compose the registration book of voters as named in § 2358 of said Code of 1892, and that there was no registration book of voters prepared for the guidance of said officers of said county at the time said grand jury was drawn." It is further alleged that there is no statute of the state providing for the procurement of any registration books of voters of said county, and (it is alleged in detail) the terms of the Constitution and the section of the Code mentioned, and the discretion given to the officers, "is but a scheme on the part of the framers of that Constitution to abridge the suffrage of the colored electors in the state of Mississippi on account of the previous condition of servitude by granting a discretion to the said officers as mentioned in the several sections of the Constitution of the state and the statute of the state adopted under the said Constitution, the use of said discretion can be and has been used in the said Washington county to the end complained 215]of." After some detail to the *same effect it is further alleged that the constitutional convention was composed of 134 members, only one of whom was a negro; that under prior laws there were 190,000 colored voters and 69,000 white voters, the makers of the new Constitution arbitrarily refused to submit it to the voters of the state for approval, but ordered it adopted, and an election to be held immediately under it, which election was held under the election ordinances of the said Constitution in November, 1891, and the legislature assembled in 1892 and enacted the statutes complained of, for the purpose to discriminate aforesaid, and but for that the "defendant's race would have been represented impartially on the grand jury which presented this indictment," and hence he is deprived of the equal protection of the laws of the state. It is further alleged that the state has not reduced its representation in Congress, and generally for the reasons aforesaid, and because the indictment should have been returned under the Constitution of 1869 and the statute of 1889, it is null and void. The motion concludes as follows: "Further, the defendant is a citizen of the United States, and for the many reasons herein named asked that the indictment be quashed, and he be recognized to appear at the next term of the court."

This motion was accompanied by four affidavits, subscribed and sworn to before the clerk of the court, on June 15, 1896, to wit:

1st. An affidavit of the defendant, "who, being duly sworn, deposes and says that the facts set forth in the foregoing motion are true to the best of his knowledge, of the language of the Constitution and the statute of the state mentioned in said motion, and upon information and belief as to the other facts, and that the affiant verily believes the information to be reliable and true."

2d. Another affidavit of the defendant, "who, being first duly sworn, deposes and says: That he has heard the motion to quash the indictment herein read, and that he thoroughly understands the same, and that the facts therein stated are true, to the best of his knowledge and belief. As to the existence of the several sections of the state Constitution, and the several *sections of the state statute, men- [216 tioned in said motion to quash, further affiant states: That the facts stated in said motion, touching the manner and method peculiar of the said election, by which the delegates to said constitutional convention were elected, and the purpose for which said objectional provisions were enacted, and the fact that the said discretion complained of as aforesaid has abridged the suffrage of the number mentioned therein, for the purpose named therein; all such material allegations are true, to the best of affiant's knowledge and belief, and the fact of the race and color of the prisoner in this cause, and that race and color of the voters of the state whose elective franchise is abridged as alleged therein, and the fact that they who are discriminated against, as aforesaid, are citizens of the United States, and that prior to the adoption of the said Constitution and said statute the said state was represented in Congress by seven Representatives in the lower House, and two Senators, and that since the adoption of the said objectionable laws there has been no reduction of said representation in Congress. All allegations herein, as stated in said motion aforesaid, are true to the best of affiant's knowledge and belief."

3d. An affidavit of John H. Dixon, "who, being duly sworn, deposes and says that he had heard the motion to squash the indictment filed in the Henry Williams case, and thoroughly understands the same, and that he has also heard the affidavit sworn to by said Henry Williams carefully read to him, and thoroughly understands the same. And in the same manner the facts are sworn to in the said affidavit, and the same facts alleged therein upon information and belief are hereby adopted as in all things, the sworn allegations of affiant, and the facts alleged therein, as upon knowledge and belief, are made hereby the allegations of affiant upon his knowledge and belief."

4th. An affidavit of C. J. Jones, "who, being duly sworn, deposes and says he has read carefully the affidavit filed in the John Dixon case sworn to by him (said C. J. Jones), and that he, said affiant, thoroughly understands the same, and adopts the said allegations therein as his deposition in *this case upon hear [217 ing this motion to quash the indictment herein, and that said allegations are in all things correct and true as therein alleged."

The motion was denied and the defendant excepted. A motion was then made to remove the cause to the United States circuit court based substantially on the same grounds as the motion to quash the indictment. This was also denied and exception reserved.

The accused was tried by a jury composed entirely of white men, and convicted. A motion for a new trial was denied, and the accused sentenced to be hanged. An appeal to the supreme court was taken and the judgment of the court below was affirmed.

The following are the assignments of error:

1. The trial court erred in denying motion to quash the indictment, and petitioned for removal.

2. The trial court erred in denying motion

for new trial, and pronouncing death penalty under the verdict.

3. The supreme court erred in affirming the judgment of the trial court.

The sections of the Constitution of Mississippi and the laws referred to in the motion of the plaiutiff in error are printed in the margin.†

Mr. **Cornelius J. Jones** for plaintiff in error.

Mr. **C. B. Mitchell** for defendant in error.

219] *Mr. Justice **McKenna** delivered the opinion of the court:

The question presented is, Are the provisions of the Constitution of the state of Mississippi and the laws enacted to enforce the same repugnant to the 14th Amendment of the Constitution of the United States? That Amendment and its effect upon the rights of the colored race have been considered by this court in a number of cases, and it has been uniformly held that the Constitution of the United States, as amended, forbids, so far as civil and political rights are concerned, discriminations by the general government, or by the states, against any citizen because of his race; but it has also been held, in a very recent case, to justify a removal from a state court to a Federal court of a cause in which such rights are alleged to he denied, that such denial must he the result of the Constitution or laws of the state, not of the administration of them. Nor can the conduct of a criminal trial in a state court he reviewed hy this court unless the trial is had under some statute repugnant to the Constitution of the United *States, or was so **[220** conducted as to deprive the accused of some right or immunity secured to him by that instrument. Upon this general subject this court in *Gibson* v. *Mississippi*, 162 U. S. 566, 581 [40: 1075, 1078], after refcrring to previous cases, said: "But those cases were held to have also decided that the 14th Amendment was broader than the provisions of § 641 of the Revised Statutes; that since that section authorized the removal of a criminal prosecution before trial, it did not embrace a case in which a right is denied by judicial action during a trial, or in the sentence, or in the mode of executing the sentence; that for such denials arising from judicial action after a trial commenced, the remedy lay in the revisory power of the higher courts of the state, and ultimately in the power of review which this court may exercise over their judgments whenever

†The three sections of article 12 of the Constitution of the state of Mississippi above referred to read as follows:

Sec. 241. "Every male inhabitant of this state except idiots, insane persons, and Indians not taxed, who is a citizen of the United States, twenty-one years old and upwards, who has resided in this state two years, and one year in the election district, or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, or bigamy, and who has paid, on or before the 1st day of February of the year in which he shall offer to vote, all taxes which may have been legally required of him, and which he has had an opportunity of paying according to law for the two preceding years, and who shall produce to the officers holding the election satisfactory evidence that he has paid said taxes, is declared to be a qualified elector; but any minister of the Gospel in charge of an organized church shall be entitled to vote after six months' residence in the election district, if otherwise qualified."

Sec. 242. "The legislature shall provide by law for the registration of all persons entitled to vote at any election, and all persons offering to register shall take the following oath or affirmation: 'I, ——, do solemnly swear [or affirm] that I am twenty-one years old [or I will be before the next election in this county] and that I will have resided in this state two years and —— election district of —— county one year next preceding the ensuing election [or if it be stated in the oath that the person proposing to register is a minister of the Gospel in charge of an organized church, then it will be sufficient to aver therein two years' residence in the state and six months in said election district], and am now in good faith a resident of the same, and that I am not disqualified from voting by reason of having been convicted of any crime named in the Constitution of this state as a disqualification to be an elector; that I will truly answer all questions propounded to me concerning my antecedents so far as they relate to my right to vote, and also as to my residence before my citizenship in this district; that I will faithfully support the Constitution of the United States and of the state of Mississippi, and will bear true faith and allegiance to the same. So help me God.' In registering voters in cities and towns not wholly in one election district the name of such city or town may be substituted in the oath for the election district. Any willful and corrupt false statement in said affidavit, or in answer to any material question propounded as herein authorized, shall be perjury."

Sec. 244. "On and after the first day of January, A. D. 1892, every elector shall, in addition to the foregoing qualifications, be able to read any section of the Constitution of this state; or he shall be able to understand the same when read to him, or give a reasonable interp etation thereof. A new registration shall be maderbefore the next ensuing election after January the first, A. D. 1892."

Section 264 of article 14 of the Constitution of the state of Mississippi, above referred to, reads as follows:

Sec. 264. "No person shall be a grand or petit juror unless a qualified elector and able to read and write; but the want of any such qualification in any juror shall not vitiate any indictment or verdict. The legislature shall provide by law for procuring a list of persons so qualified, and the drawing therefrom of grand and petit jurors for eaoh term of the circuit court."

The three sections of the Code of 1892 of the state of Mississippi, above referred to, read as follows:

Sec. 2358. How list of jurors procured.—"The board of supervisors, at the first meeting in each year, or a subsequent meeting if not done at the first, shall select and make a list of persons to serve as jurors in the circuit court for the next two terms to be held more than thirty days afterwards, and, as a guide in making the list, they shall use the registration books of voters; and it shall select and list the names of qualified persons of good intelligence, sound judgment, and fair character, and shall take them, as nearly as it conveniently can, from the several election districts, in proportion to the number of the qualified persons in each, excluding all who have served on the regular panel within two years, if there be not a deficiency of jurors."

Sec. 3643. Managers of election appointed.—"Prior to every election the commissioners of election shall appoint three persons for each election district to be managers of the election, who shall not all be of the same political party if suitable persons of different political parties can be had in the district, and, if any person appointed shall fail to attend and serve, the managers present, if any, may designate one to fill his place, and if the commissioners of election fail to make the appointments, or, in case of the failure of all those appointed to attend and serve, any three qualified electors present when the polls should be opened may act as managers."

Sec. 3644. Duties and powers of managers.—"The managers shall take care that the election is conducted fairly and agreeably to law, and they shall be judges of the qualifications of electors, and may examine, on oath, any person duly registered and offering to vote touching his qualifications as an elector, which oath any of the managers may administer."

rights, privileges, or immunities claimed under the Constitution or laws of the United States are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the states rights secured by any law providing for the equal civil rights of citizens of the United States to which § 641 refers, and on account of which a criminal prosecution may be removed from a state court, is primarily, if not exclusively, a denial of such rights or an inability to enforce them resulting from the Constitution or laws of the state rather than a denial first made manifest at or during the trial of the case.

It is not asserted by plaintiff in error that either the Constitution of the state or its laws discriminate in terms against the negro race, either as to the elective franchise or the privilege or duty of sitting on juries. These results, if we understand plaintiff in error, are alleged to be effected by the powers vested in certain administrative officers.

Plaintiff in error says:

"Section 241 of the Constitution of 1890 prescribes the qualifications for electors; that residence in the state for two years, one year in the precinct of the applicant, must be effected; that he is twenty-one years or over of age, having paid all taxes legally due of him for two years prior to 1st day of February of [221] the year he offers to vote. Not *having been convicted of theft, arson, rape, receiving money or goods under false pretenses, bigamy, embezzlement.

"Section 242 of the Constitution provides the mode of registration. That the legislature shall provide by law for registration of all persons entitled to vote at any election, and that all persons offering to register shall take the oath; that they are not disqualified for voting by reason of any of the crimes named in the Constitution of this state; that they will truly answer all questions propounded to them concerning their antecedents so far as they relate to the applicant's right to vote, and also as to their residence before their citizenship in the district in which such application for registration is made. The court readily sees the scheme. If the applicant swears, as he must do, that he is not disqualified by reason of the crimes specified, and that he has effected the required residence, what right has he to answer all questions as to his former residence? Section 244 of the Constitution requires that the applicant for registration after January, 1892, shall be able to read any section of the Constitution, or he shall be able to understand the same (being any section of the organic law), or give a reasonable interpretation thereof. Now, we submit that these provisions vest in the administrative officers the full power, under § 242, to ask all sorts of vain, impertinent questions, and it is with that officer to say whether the questions relate to the applicant's right to vote; this officer can reject whomsoever he chooses, and register whomsoever he chooses, for he is vested by the Constitution with that power. Under § 244 it is left with the administrative officer to determine whether the applicant reads, understands, or interprets the section of the Constitution designated. The officer is the sole judge of the examination of the applicant, and even though the applicant be qualified, it is left with the officer to so determine; and the said officer can refuse him registration."

To make the possible dereliction of the officers the dereliction of the Constitution and laws, the remarks of the supreme court of the state are quoted by plaintiff in error as to their intent. The Constitution provides for the payment of a poll *tax, and by a section of [222] the Code its payment cannot be compelled by a seizure and sale of property. We gather from the brief of counsel that its payment is a condition of the right to vote, and in a case to test whether its payment was or was not optional (*Ratliff* v. *Beale* [74 Miss. 247, 34 L. R. A. 472], 20 So. 865), the supreme court of the state said: "Within the field of permissible action under the limitations imposed by the Federal Constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race." And further the court said, speaking of the negro race: "By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it, as a race, from that of the whites —a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the Federal Constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone." But nothing tangible can be deduced from this. If weakness were to be taken advantage of, it was to be done "within the field of permissible action under the limitations imposed by the Federal Constitution," and the means of it were the alleged characteristics of the negro race, not the administration of the law by the officers of the state. Besides, the operation of the Constitution and laws is not limited by their language or effects to one race. They reach weak and vicious white men as well as weak and vicious black men, and whatever is sinister in their intention, if anything, can be prevented by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime.

It cannot be said, therefore, that the denial of the equal protection of the laws arises primarily from the Constitution and laws of Mississippi, nor is there any sufficient allegation of an evil and discriminating administration of them. The only allegation is "by granting a discretion to the said officers, as mentioned in the several sections of the *Constitution of [223] the state, and the statute of the state adopted under the said Constitution, the use of which discretion can be and has been used by said officers in the said Washington county to the end here complained of, to wit, the abridgement of the elective franchise of the colored voters of Washington county, that such citizens are denied the right to be selected as jurors to serve in the circuit court of the county, and that this denial to them of the right to equal protection and benefits of the laws of the state of Mississippi on account of their color and race, resulting from the exercise of the discre-

tion partial to the white citizens, is in accordance with and the purpose and intent of the framers of the present Constitution of said state."

It will be observed that there is nothing direct and definite in this allegation either as to means or time as affecting the proceedings against the accused. There is no charge against the officers to whom is submitted the selection of grand or petit jurors, or those who procure the lists of the jurors. There is an allegation of the purpose of the convention to disfranchise citizens of the colored race, but with this we have no concern, unless the purpose is executed by the Constitution or laws or by those who administer them. If it is done in the latter way, how or by what means should be shown. We gather from the statements of the motion that certain officers are invested with discretion in making up lists of electors, and that this discretion can be and has been exercised against the colored race, and from these lists jurors are selected. The supreme court of Mississippi, however, decided, in a case presenting the same questions as the one at bar, "that jurors are not selected from or with reference to any lists furnished by such election officers." *Dixon* v. *State* [74 Miss. 278] November 9, 1896.

We do not think that this case is brought within the ruling in *Yick Wo* v. *Hopkins, Sheriff*, 118 U. S. 356 [30: 220] In that case the ordinances passed on discriminated against laundries conducted in wooden buildings. For the conduct of these the consent of the board of supervisors was required, and not for the conduct of laundries in brick or stone buildings. It **224** was *admitted that there were about 320 laundries in the city and county of San Francisco, of which 240 were owned and conducted by subjects of China, and of the whole number 310 were constructed of wood, the same material that constitutes nine tenths of the houses of the city, and that the capital invested was not less than $200,000.

It was alleged that 150 Chinamen were arrested, and not one of the persons who were conducting the other eighty laundries and who were not Chinamen. It was also admitted "that petitioner and 200 of his countrymen similarly situated petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than twenty years, and such petitions were denied, and all the petitions of those who were not Chinese, with one exception of Mrs. Mary Meagles, were granted."

The ordinances were attacked as being void on their face, and as being within the prohibition of the 14th Amendment, but even if not so, that they were void by reason of their administration. Both contentions were sustained.

Mr. Justice Matthews said that the ordinance drawn in question "does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure." The ordinances, therefore, were on their face repugnant to the 14th Amendment. The court, however, went further and said: "This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency *and ultimate actual operation. **225** In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the 14th Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned in *Henderson* v. *Mayor of New York* [*Henderson* v. *Wickham*], 92 U. S. 259 [23: 543]; *Chy Lung* v. *Freeman*, 92 U. S. 275 [23: 550]; *Ex parte Virginia*, 100 U. S. 339 [25: 676]; *Neal* v. *Delaware*, 103 U. S. 370 [26: 567]; and *Soon Hing* v. *Crowley*, 113 U. S. 703 [28: 1145]."

This comment is not applicable to the Constitution of Mississippi and its statutes. They do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them.

It follows, therefore, that the judgment must be affirmed.

226] GALVESTON, HARRISBURG, & SAN ANTONIO RAILWAY COMPANY and E. P. Hill and W. N. Shaw, *Plffs. in Err.*,

v.

STATE OF TEXAS.

(See S. C. Reporter's ed. 226-243.)

Removal of case—impairing obligation of contract—Federal question.

1. Where it does not appear from plaintiff's statement of the case that the suit in the state court was one arising under the Constitution or laws of the United States, it is not removable into the Federal circuit court.
2. A state constitutional provision against granting lands does not impair the obligation of a contract to grant certain lands to a railroad company for every mile of road built, when the constitutional restriction is applied only to preclude grants of land for the construction of railroads on lines which were not authorized to be built until after the Constitution was adopted.
3. A state decision that no defense under state Constitution and laws, by way of set-off, counterclaim, or otherwise, can be set up against the cancelation of land certificates and patents by reason of the defendant's possession of other certificates, without determining whether any vested right had been impaired or taken away—does not involve a Federal question.

[No. 421.]

Argued January 21, 24, 1898. Decided April 25, 1898.

IN ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District of the state of Texas to review a judgment of that Court affirming the judgment of the District Court of Brewster County, Texas, in favor of the state of Texas for the recovery of land situated in various counties and the cancelation of patents issued to the railroad company therefor. *Affirmed.*

See same case below, 89 Tex. 340.

Statement by Mr. Chief Justice **Fuller:**

227] *This was a suit commenced on behalf of the state of Texas against the Galveston, Harrisburg, & San Antonio Railway Company, in the district court of Brewster county, to recover 1,383 tracts of land, containing in the aggregate eight hundred and seventy-nine thousand and seventy-eight acres, situated in various counties, and to cancel certificates and patents issued to the railway company therefor. The railway company filed a petition for the removal of the cause to the circuit court of the United States, which was overruled. The company then presented its defenses by demurrer, plea, and answer, relying on its charters, and the laws, general and special, of the state of Texas, by reason whereof and action thereunder, it asserted it had become entitled to the lands in question; also setting up that it had in 1880 mortgaged the land in controversy to Andrew Pierce and George F. Stone; that Pierce was dead, and that Stone was the sole surviving trustee and was a necessary party to the suit; and the grounds on which it insisted that the state was estopped from recovering the lands; and in its answer prayed for affirmative relief.

The cause was tried, and judgment entered therein in favor of the state of Texas, and was thereupon carried by appeal to the court of civil appeals for the fourth supreme judicial district of the state of Texas, which court then certified the following statement and questions to the supreme court of the state for adjudication:

"The state of Texas instituted suit against appellant to cancel certain land certificates and patents issued by the state to appellant, for land, amounting to 879,078$\frac{1}{20}$ acres. It was alleged and proved that the certificates and patents were issued to the Galveston, Harrisburg, & San Antonio Railway Company, for a portion of its railroad constructed, between the Colorado river and Guadalupe river, between the time of the adoption of the Constitution of 1869 and the passage of the act of August 16, 1876 (arts. 4267 to 4277, Rev. Stat). On July 27, 1870, by special act of the legislature, appellant was chartered and recognized as the successor of the Buffalo, Bayou, Brazos, & Colorado Railway Company. After the passage of the act of August 16, 1876, and before its repeal *in 1882, appellant constructed about [228 163 miles of railroad, from San Antonio westward towards El Paso, for which the state refused to issue land certificates, the governor refusing the application for inspection on May 22, 1882, on the ground that the law granting certificates had been repealed.

"Question 1. Did § 6, article 10, of the Constitution of 1869 repeal all laws giving railroad companies the right to earn lands from the state by the construction of railroads; and, if so, would this repeal apply as well to the right to earn lands given through charters as through general laws?

"Question 2. If the above be answered in the negative, did appellant succeed to the rights of the Buffalo, Bayou, Brazos, & Colorado Railway Company by virtue of the special act of 1870, said Buffalo, Bayou, Brazos, & Colorado Railway Company being restricted by special act of February 11, 1854, to run its line to Austin?

"Question 3. If the laws as to land grants to railroads passed prior to 1869 were repealed by the Constitution of that year, can appellant interpose and maintain in this suit the equitable defense that if the certificates issued for that portion of the road between the Colorado and Guadalupe rivers from 1870 to 1876 were illegally obtained, that the state is in no position to ask the relief sought by reason of the fact that appellant has earned the certificates for said 163 miles of road?

"Question 4. If the last question be affirmatively answered, would the fact that at the time the land for the 163 miles west of San

NOTE.—*As to constitutionality of law altering charter, as impairing contract*, see note to Dartmouth College v. Woodward, 4: 629.

As to what laws are void, as impairing obligations of contracts, see note to Fletcher v. Peck, 3: 162.

As to land grants to railroads, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

As to nature of suits removable, see note to Whelan v. New York, L. E. & W. R. Co. (C. C. N. D. Ohio) 1 L. R. A. 65.

Antonio was earned by appellant, the public lands were exhausted, affect the equities of the case?"

The supreme court was of opinion "that the Galveston, Harrisburg, & San Antonio Railway Company did not by virtue of the act of July 27, 1870, acquire the right to earn lands by the construction of its line to San Antonio." This answered the second question and rendered an answer to the first unnecessary.

As to the third question, the supreme court was "of the opinion that it is no defense to an action of the state for the recovery of the lands involved in this suit, that the company may have been entitled to certificates for the one hundred [229] and *sixty-three miles of additional road, constructed under the law of 1876." The fourth question, therefore, required no answer.

The case is reported, 89 Tex. 340.

The opinion of the supreme court having been transmitted to the court of civil appeals, that court proceeded to dispose of the case, and held that there was no error in the refusal to remove the cause; that Stone was not a necessary party to the suit; that the state of Texas was not estopped, by "the illegal acts of the land commissioner in granting the land certificates and of the governor in granting patents to the land," from recovering the lands sued for; and overruled the other assignments of error in view of the answers of the supreme court to the questions propounded. Thereupon the judgment of the district court was affirmed. A motion for rehearing having been made and overruled, the company applied to the supreme court for a writ of error, which was denied, whereupon a writ of error from this court was allowed by the chief justice of the court of civil appeals.

The Buffalo Bayou, Brazos, & Colorado Railroad Company was incorporated by an act approved February 11, 1850, and authorized to construct and maintain a railroad as therein described. Laws Tex. 1849–50, pp. 194, 198.

By an act approved January 29, 1853, the route was defined as follows: "Commencing at a suitable point on Buffalo bayou in the county of Harris, thence running by such course and to such point or points at or near the Brazos and Colorado rivers, or across the same as said company shall deem advisable, with the privilege of making, owning, and maintaining such branches to said road as they may deem expedient." By the 2d section of this act there was "granted to said company eight sections of land, of six hundred and forty acres each, for every mile of railway actually completed and ready for use," for which the Commissioner of the General Land Office of Texas was authorized to issue certificates under restrictions mentioned, and upon location and survey patents were to be issued as provided. Special Laws 1853, p. 3.

On January 30, 1854, the legislature passed a general land grant act, entitled "An Act to [230] Encourage the Construction *of Railroads in Texas by Donations of Lands." Section 1 provided "that any railroad company chartered by the legislature of this state, heretofore or hereafter, constructing within the limits of Texas a section of twenty-five miles or more of railroad, shall be entitled to receive from the state a grant of sixteen sections of land for every mile of road so constructed and put in running order." Railroad companies applying for land under this act were required by § 3 to cause the land to be surveyed into sections of 640 acres each, and in square blocks of not less than 6 miles, and the field notes of the survey and map or maps to be deposited with the commissioner of the general land office. Section 6 related to patents, certificates, surveys, etc.

By § 11 all the alternate or even sections of lands surveyed in pursuance to the provisions of this act were "reserved to the use of the state, and not liable to locations, entries, or pre-emption privileges, until otherwise provided by law." Section 12 provided: "That the provisions of this act shall not extend to any company receiving from the state a grant of more than sixteen sections of land, nor to any company for more than a single-track road, with the necessary turnouts; and any company now entitled by law to receive a grant of eight sections of land per mile for the construction of any railroad accepting the provisions of this act shall not be entitled to receive any grant of land for any branch road; provided, this act shall not be so construed as to give to any company now entitled by law to receive eight sections of land more than eight additional sections, provided, that no person or company shall receive any donation or benefit under the provisions of this act, unless they shall construct and complete at least twenty-five miles of the road contemplated by their charter within two years after the passage of this act," etc.; and that the act should continue in force for ten years from the time it took effect, and no longer. Laws 1854, p. 11.

On the same day a supplemental act was approved providing that no railroad company benefited by the act should receive any donation of land under its charter, or under the *act of which this was a supplement, [231] for any work not done within ten years after the passage of the act. Laws 1854, p. 16.

By a special act of February 4, 1854, the charter of the Buffalo Bayou, Brazos, & Colorado Railroad Company was amended, and it was provided that the company should be "entitled to all the rights, privileges, and benefits accruing from any general law or laws that have or may be hereafter passed by this state to encourage the construction of railroads in the same manner and to the same extent as if the gauge of said road was the same as now fixed, or which may be hereafter fixed, upon by this state." Special Laws 1854, p. 69. On the same day another special act was passed providing "that if the Buffalo Bayou, Brazos, & Colorado Railroad Company shall avail themselves of the act to which this is a supplement, or accept any donation of land from the state, they shall not be entitled to receive any such donation from the state under the provisions of this law or any law that has heretofore been passed for their benefit, for any portion of their road which shall not be completed and ready for use within ten years from and after the passage of this act; provided that said company shall restrict themselves to the following route: *viz.*, to an extension of their existing road to Austin, in the county of Travis, cross-

ing the Brazos river at any point between the town of Richmond, in Fort Bend county, and Hidalgo, in Washington county, and with the right of extending their road from Austin to connect with any road running north of Austin towards the Pacific ocean. Provided, such connections be made between the 96th and the 98th parallels of longitude; and provided further, that said company shall have no right to build branches from their main road." Special Laws 1854, p. 70.

During the period of the civil war, two laws were passed which had the effect to relieve the existing railroad companies from the limitations as to time embraced in the act of January 30, 1854, until two years after the close of the war. Laws 1862, pp. 43, 46.

232] *On November 13, 1866, an act was approved to this effect: "That the grant of sixteen sections of land to the mile to railroad companies heretofore or hereafter constructing railroads in Texas shall be extended, under the same restrictions and limitations heretofore provided by law, for ten years after the passage of this act." Laws 1866, p. 212.

The state Constitution of 1869 was adopted December 3, 1869, and accepted by Congress March 30, 1870, the 6th section of article 10 of which instrument read as follows: "The legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the land office, except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres."

July 27, 1870, the legislature passed an act entitled "An Act Supplementary to the Act to Incorporate the Buffalo Bayou, Brazos, & Colorado Railway Company, and to the Other Special Acts Relating to Said Company." The preamble recited:

"Whereas, on the seventh of July, 1868, 'the roadbed, tracks, franchise, and chartered rights and privileges' of the Buffalo Bayou, Brazos, & Colorado Railway Company were sold on executions issued on judgments against said company; and on the twenty-fourth of January, 1870, the railroad of said company from Harrisburg to Alleyton, and its franchise, rights, and other property appertaining thereto, were sold under the provisions of a mortgage or deed of trust made by said company on the first November, 1860, all of which appears of record; and whereas, the act of December 19, 1857, 'supplementary to and amendatory of an act to regulate railroad companies,' provides that the purchasers at such sales, and their associates, 'shall be entitled to have and exercise all the powers, privileges, and franchises granted to the company sold out by its charter, or by virtue of the general laws of this state;' and 'shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges, and benefits thereof;' and whereas, the purchasers at said sales, and their associates, have formed a new company under said old name, and have expended large sums of money in the reconstruc-

233] tion of said railroad, in the *purchase and completion of the Columbus Tap Railroad, and the bridge of the Brazos Iron Bridge Company over the Brazos river at Richmond; and, whereas, said new company desires to be distinguished by name from said 'sold-out' company, to consolidate its property, and to extend said line of railroad."

Section 1 provided:

"That the new company heretofore known as the Buffalo Bayou, Brazos, & Colorado Railway Company, referred to in the preamble of this act, shall be hereafter known by the corporate name of 'The Galveston, Harrisburg, & San Antonio Railway Company,' and may alter its seal to conform to its name; provided, that said new company shall be liable to the state of Texas for the debt of said 'sold out' company for loans made to the latter company from the special school fund, in the same manner and to the same extent as said 'sold-out' company was liable; and that said change of name shall in no respect impair or affect said liability, or the existing lien or mortgage of the state upon the railroad of said company as security for said loans. Also, provided, that said change of name shall in no respect impair or affect any of the obligations of said new company to other parties, or the obligations of other parties to said new company; all of which may be enforced by or against said new company under said new name."

Section 3:

"That said new company is hereby authorized to extend the existing line of railroad owned and operated by said company from Columbus, in Colorado county, to San Antonio in the county of Bexar, within four years from the passage of this act; and hence to a terminus on the Rio Grande, by such route as the directors shall deem most feasible, with a branch from the most suitable point to New Braunfels in Comal county, within four years from the passage of this act; or said new company may connect with any line of railroad that may be constructed or under construction to San Antonio or the Rio Grande, south of the latitude of the city of Austin and the Colorado river instead of building its own line beyond the point of such connection; and may build to and connect with any line of railroad that may be constructed, or *under construction, and[234 designed to form part of any railroad line to the Pacific, south of the thirty-fifth parallel of latitude; nothing herein being so construed as to exclude said new company from the right to construct also any part of the line up the Colorado Valley, formerly designed by said 'sold-out' company as its route under the provisions of the eleventh section of the act of December 19, 1857; provided, that if the said road shall not be completed within the time specified in this section, then this charter shall be forfeited."

Sections 11 and 12:

"Sec. 11. That said new company shall be entitled to the same or similar rights and relief, except state aid in bonds, or indorsement of or guaranty of interest on bonds, granted to or provided for any other railroad company by the legislature, and upon the same or similar terms and conditions, so far as such rights and relief are, in their character, applicable to said new company or its line or lines of railroad.

"Sec. 12. That nothing in this act shall be so construed as to deprive any party interested of the right to disprove any assumed fact stated in the preamble; provided, that nothing in

this act contained shall be construed as reviving or renewing any land grant to said company for road hereafter to be completed, which it does not possess by existing law." Special Laws 1870, p. 45.

Section 6 of article 10 of the Constitution of 1869 was subsequently amended, the amendment taking effect March 19, 1873. The section, as amended, read as follows:

"The legislature of the state of Texas shall not hereafter grant lands except for purposes of internal improvement, to any person or persons, nor shall any certificate for land be sold at the land office, except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres; provided, that the legislature shall not grant, out of the public domain, more than twenty sections of land for each mile of completed work, in aid of the construction of which land may be granted; and provided further, that nothing in the foregoing proviso shall affect any rights granted or secured by laws passed prior to the final adoption of this amendment."

235] *August 16, 1876, a general law was enacted entitled "An Act to Encourage the Construction of Railroads in Texas by Donations of Lands," whereby it was provided that any railroad company theretofore chartered or which might be thereafter organized under the general laws of the state should, upon the completion of a section of 10 miles or more of its road, be entitled to receive, and there was thereby granted to every such railroad from the state, sixteen sections of land for every mile of its road so completed and put in good running order. The act prescribed the usual formalities for ascertaining compliance on the part of railroad companies with the provisions of the act, the issue of certificates, etc. Laws 1876, 153.

April 22, 1882, the legislature passed an act repealing all laws in force granting lands for the construction of railroads. Laws 1882, 3.

Messrs. **Joseph Paxton Blair,** *James A. Baker*, and *R. S. Lovett* for plaintiffs in error.

Mr. **M. M. Crane,** Attorney General of Texas, for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

1. The state of Texas, as owner of the lands in question, sought by its petition the removal of the cloud cast upon its title by reason of certain certificates and patents. The petition averred that those certificates were issued to the railway company for the construction of its road from the town of Columbus to the Guadalupe bridge during a period of time when there was no law in existence authorizing the issue of land certificates and patents, and charged that the action of the commissioner of the general land office of the state in issuing and delivering the certificates, and permitting them to be located and surveyed upon the lands and returned to and filed in the general land office, and in the issue of the patents, was had and done wholly without authority of law and 236]in *violation of the Constitution and laws of the state. It did not appear from the state's statement of its case that the suit was one arising under the Constitution or laws of the United States, and the court of civil appeals properly held that the petition to remove the cause into the circuit court of the United States came within the rule laid down in *Tennessee* v. *Union and Planters' Bank*, 152 U. S. 454 [38:511], and subsequent cases, and that there was no error in overruling the application.

2. The railroad franchises, rights, and property of the Buffalo Bayou, Brazos, & Colorado Railroad Company had been sold on execution and under foreclosure, and the purchasers at the sales and their associates had formed a new company under the old name. By the act of July 27, 1870, this new company was given the name of "The Galveston, Harrisburg, & San Antonio Railway Company," to distinguish it from the "'sold-out' company;" was endowed with various franchises; and, among other things, was authorized to extend the existing line of railroad owned and operated by the company from Columbus, in Colorado county, to San Antonio, in the county of Bexar, and thence to a terminus on the Rio Grande.

At this time the Constitution of Texas provided: "The legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the land office, except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres."

The certificates and patents in question in this suit were issued to the company for a portion of its railroad constructed between the Colorado and the Guadalupe rivers, under the act of July 27, 1870, and before the act of August 16, 1876, took effect.

Plaintiff in error contends that by virtue of the charter of the old company and the amendments thereto, and the general laws, prior to 1869, it had a vested and contract right to receive and hold these lands, which was impaired or of which it was deprived, in violation of § 10 of article 1 of the Constitution of the United States, and § 1 of *the 14th Amendment[237 thereof, by § 6 of article 10 of the state Constitution of 1869, as given effect by the state courts.

The supreme court of Texas considered the legislation at length in replying to the questions propounded by the court of civil appeals.

Conceding, for the purposes of argument, that the original company acquired a right to sixteen sections of land per mile of constructed railroad under the general law of January 30, 1854, and the special acts amendatory of its charter; that this right was preserved by the general law of November 13, 1866; and that § 6 of article 10 of the Constitution of 1869 did not operate to repeal either of those acts in respect of the right of existing companies to lands in aid of the construction of the lines of road specifically defined in their charters, the court was nevertheless unable to conclude that after the constitutional provision took effect an act of the legislature which authorized the company to change its former route and to construct a different line of road would carry with it the right to acquire land by the construction of the new line.

In its view the law of January 30, 1854, applied only to companies then chartered, and

was intended to grant lands for the construction of those roads only which the companies were authorized by their charters to build. And while in the absence of any constitutional inhibition on granting lands in aid of railroads, it might be that legislative authority to a company to change its line could properly be treated as carrying with it the privilege of earning lands for the construction of the new line, this did not follow as to new routes authorized after such land grants had been forbidden by the fundamental law. And here the act of February 4, 1854, supplementary to the act of the same date which extended the privileges of the law of January 30, 1854, to the company, restricted those privileges to the line to Austin and to the extension of that line. If, then, the new company had succeeded to the right to acquire lands by the construction of the line fixed by the supplementary act, the construction of a different road in the exercise of the power given by the act of 1870 could not involve an obligation to furnish lands in aid of such construction.

238] *And the court said: "The company, before the passage of the act of 1870, had no right to acquire lands by the building of a railroad to San Antonio; to complete that right, a new grant was requisite; but at that time the legislature was prohibited in the broadest terms from making any grant whatever. It matters not that the transaction may be looked upon as being somewhat in the nature of an exchange, and that the building of the new line may have involved a grant of no more, or even of less, land than may have been acquired by the construction of the old line. It involved a grant of land as to the new line and that the legislature had no right to make. Let us state the proposition in another form. If it were the right of the company, under the existing laws, to acquire lands by doing a specific thing, the legislature, having no power under the Constitution to make any grant of lands, could not confer upon it the right to earn lands by doing another—a different thing.

"So far we have discussed the question, as if in passing the act of 1870 the legislature had intended to transfer the right of the company as to the lands to be acquired, from the old to the new line. But we find nothing in the act which manifests such intention. On the contrary, the 12th section of the act as above quoted indicates that it was not the purpose in any manner to extend the existing rights of the company with reference to the acquisition of lands from the state.

"It is to be noted that the 3d section of the act of 1870 not only authorized the company to change its route so as to run to San Antonio, instead of Austin, but in addition thereto reserved to it the right to build upon the route formerly designated by the sold-out company. It is evident, therefore, that to concede to the company the right to earn lands by the construction of the new line involves a new and additional grant—a grant which the legislature under the Constitution of 1869, could have made neither expressly nor by implication." *Galveston, H. & S. A. Railway Company* v. *State*, 89 Tex. 340, 354; *Quinlan* v. *Houston & T. C. Railway Company*, 89 Tex. 356; *Galveston, H. & S. A. Railway Company* v. *State*, 81 Tex. 573.

*In our judgment the constitutional [239 provision as thus enforced involved no infraction of the Federal Constitution.

The Galveston Company was not identical with the Buffalo Bayou Company, but a new company in succession to the old.

The Buffalo Bayou Company became entitled to the benefits of the general law of January 30, 1854, by the first of the special acts of February 4, 1854, but by the supplemental special act of that date was restricted to the route to Austin, "with the right of extending their road from Austin to connect with any road running north of Austin towards the Pacific ocean; provided, such connections be made between the ninety-sixth and ninety-eighth parallels of longitude; and provided further, that said company shall have no right to build branches from their main road."

Construing these two acts together, as we must, the contract between the state and the Buffalo Bayou Company would appear to have been that the company would build a line of road to Austin and northerly to some line of road going west to the Pacific ocean, and the state would give the company sixteen sections of land per mile, but the company was restricted to the particular line and had no right to build branches from the main line. The state did not contract with the old corporation to build the road from Columbus to San Antonio, and the new company could not claim to earn lands by building this road, by virtue of what the old company had been empowered to do. The old company did not possess the right by existing law to build the road in question or branch lines, and the authority to construct it was not given until July 27, 1870, at which time the Constitution of Texas forbade the granting of lands to railroad companies. And if there were no contract prior to July 27, 1870, to give land for the construction of a line of road from Columbus to San Antonio and thence west, the Constitution of 1869 could not operate to impair any such.

But it is said that the right to a land grant of sixteen sections per mile under the act of 1854 had become a corporate franchise of the Buffalo Bayou Company, exercisable on every mile of road it might construct under competent legislative *authority; that it was [240 subject in the first instance to a restriction as to route, which the legislature could at any time remove, and did remove by the act of July 27, 1870; and that the privilege of earning lands for the construction of the new line was included in the grant of authority to construct it. This is to assert that the Buffalo Bayou Company acquired by the legislation of 1854 a vested right to lands for the construction of whatever line of road, other than that then authorized and defined, it might in the future be empowered to build, though in the meantime the power to grant lands had been withdrawn from the legislature.

It is impossible to assent to such an application of the doctrine of vested rights. That subject was much considered and the authorities cited in *Pearsall* v. *Great Northern Railway Company*, 161 U. S. 646 [40:838], and it

was there held that a clause in a charter of a railroad corporation granting it certain powers to consolidate with or become the owner of other railroads was not such a vested right that it could not be rendered inoperative by a subsequent statute passed before the company had availed itself of the power granted. Provisions granting such rights or powers to a corporation, as observed in *Bank of Commerce* v. *Tennessee, Memphis*, 163 U. S. 425 [41:214], "do not partake of the nature of a contract, which cannot for that reason be in any respect altered or the power recalled hy subsequent legislation. Where no act is done under the provision and no vested right is acquired prior to the time when it was repealed, the provision may be validly recalled, without thereby impairing the obligation of a contract."

The supreme court of Texas did not hold that the right to construct the line defined in the second special act of February 4, 1854, and to earn lands by such construction, was affected by the constitutional provision; but held, in effect, that there could be no obligation, express or implied, to bestow lands for the construction of lines of roads not authorized to be constructed until after the adoption of that provision.

The road from Columbus to San Antonio had not only not been constructed in 1869, but [241] its construction had not *been authorized, and no principle of contract or vested rights intervened to defeat the power of the state in 1869 to modify or even repeal the general law of 1854.

Argument was earnestly made at the bar that by reason of the amendment of § 6 of article 10 of the Constitution of 1869 in 1873, and the subsequent passage of numerous acts granting land in aid of railroad construction, this company was entitled, under § 11 of the act of July 27, 1870, which gave it the same rights or relief granted to other companies, to receive the certificates in controversy even though it was not entitled to them under previous legislation. That section apparently refers to existing rights or relief, and not to such as might afterwards be acquired or obtained. But this was matter of construction for the state courts, and was disposed of by the decision of the court of civil appeals, on whose attention the point was pressed, though no allusion is made to it in the opinion of that court.

3. The constitutional amendment of 1873 having relieved the legislature of the restriction imposed by the Constitution of 1869, the act of August 16, 1876, granted to railroad companies, on the completion of 10 miles or more of their roads, sixteen sections of land for every mile so completed and put in good running order. On April 22, 1882, an act was passed repealing "all laws or parts of laws now in force granting lands or land certificates to any person, firm, corporation, or company for the construction of railroads, canals, and ditches." This act stated that the exhaustion of the public domain subject to location created an imperative public necessity for the act to take effect on its passage; and the record shows that there was a deficiency in the public domain, August 31, 1882, of 6,136,615 acres.

After August 16, 1876, the railway company constructed its road between San Antonio and El Paso, amounting to 623.14 miles, much the largest portion thereof prior to April 22, 1882. No land certificates were issued or located for the construction of the road between these points. The company contended that by the construction of its road between San Antonio and El Paso it acquired under the act of August 16, 1876, a *contract and vested right to [242] sixteen sections of land for each mile of road so constructed; that the issue of certificates had been prevented by the passage of the act of April 22, 1882; and that, consequently, that act impaired the obligation of the contract created by the act of August 16, 1876, and devested the company of its right to lands in contravention of the Constitution of the United States. And further insisted that it was entitled to avail itself in this suit of this alleged unlawful deprivation, not merely as a set-off or counterclaim against the state, but as an absolute defense.

The case in this aspect is briefly this: The railway company sought and obtained certificates for building the road from Columbus to San Antonio, and had them located on the lands in question. But at that time the state Constitution forbade the granting of lands for railway construction and the issue of certificates therefor, and the state brought suit for the recovery of the lands and the cancelation of the illegally issued muniments of title, which went to a decree in its favor.

The question was as to whether the railroad company was entitled to the particular lands in controversy by virtue of the location thereon of certificates issued for building the road from Columbus to San Antonio. The ruling was that, as the law stood, no title was acquired thereby, and the state was entitled to recover. But it was also contended that no recovery could be had because the company had earned other lands of which it had been, as it alleged, unlawfully deprived.

The supreme court of the state held that it was no defense to the suit, by way of set-off, counterclaim, or otherwise, that the company might have been entitled to land certificates for road constructed under the law of 1876, and said that it had "never been ruled that the claimant of land against the state under a location made by virtue of a void certificate has any equity in the premises by reason of being the possessor of another valid certificate."

In arriving at this conclusion the state courts did not determine whether as to those other lands any vested right of the railway company had or had not been impaired or *taken [243] away; and we cannot hold that the company was denied by the judgment of those courts in this respect any title, right, privilege, or immunity secured by the Constitution or laws of the United States.

Judgment affirmed.

HOUSTON & TEXAS CENTRAL RAILWAY COMPANY *et al., Plffs. in Err.*, *v.* STATE OF TEXAS.

(See S. C. Reporter's ed. 243-261.)

Unconstitutional impairment of contract—subsequent state Constitution—denial of vested right.

1. A railroad company's acceptance of a charter and subsequent legislation entitling it to construct a line of road and thereby earn certain grants of land, and its completion of an important part of the road before the adoption of a state Constitution prohibiting grants, gives a vested right to the grants to be earned by the building of the road; and the prohibition of such grants is an unconstitutional impairment of the obligation of the contract.

2. The lawful purchase of the railroad from Hempstead to Brenham, and its incorporation as part of a branch road which a railroad company was authorized to build from Hempstead to Austin under a contract entitling it to grants of land for each mile of road constructed, will not make the construction of the remainder of the branch from Brenham to Austin, after the adoption of a state Constitution prohibiting grants of land, amount to the building of an independent line which is subject to such constitutional prohibition.

3. The denial of a vested right under a contract, by a state Constitution subsequently adopted, impairs the obligation of the contract, and is a deprivation of property without due process of law.

[No. 406.]

Argued January 24, 25, 1898. Decided April 25, 1898.

IN ERROR to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas to review a judgment of that court affirming the judgment of the District Court of Nolan County, Texas, in favor of the state of Texas, in a suit brought by that state against the Houston & Texas Central Railway Company for the recovery of land located in said county. *Reversed*, and cause remanded for further proceeding.

See same case below, 36 S. W. 819, 90 Tex. 607.

Statement by Mr. Chief Justice **Fuller**:

This was a suit instituted by the state of Texas in the district court of Nolan county, Texas, February 3, 1890, to recover of the Houston & Texas Central Railway Company and the purchaser under it, sixteen sections of land of 640 acres each, located in that county by virtue of certificates issued by the state to the 244] railway company. It was alleged *that the certificates were issued by the commissioner of the general land office of Texas without authority of law, and that the action of the commissioner in issuing and delivering them and permitting them to be located and allowing the lands to be surveyed thereunder, and in receiving and filing the field notes in the general land office of the state, was without authority of law and in violation of the Constitution and laws of the state at that time. And also that the certificates were located in territory reserved by an act passed May 2, 1873, for the location of certificates issued to the Texas & Pacific Railway Company. It appeared from the state's complaint that the certificates were in part of those issued for the construction and completion of about 94 miles of main track and about 2½ miles of side track of that part of the company's railway extending from Brenham to Austin.

The district court gave judgment in favor of the state, which was affirmed by the court of civil appeals. 36 S. W. 819. Application was made to the supreme court of the state for a writ of error, which was denied. [90 Tex. 607] 40 S. W. 402. This writ of error was then allowed.

The Galveston & Red River Railway Company was incorporated by a special act of the legislature of Texas, approved March 11, 1848. Special Laws 1848, 370. By the 2d section of that act the company was "invested with the right of making, owning, and maintaining a railway from such point on Galveston bay, or its contiguous waters, to such point upon the Red river, between the eastern boundary line of Texas and Coffee's station, as the said company may deem most suitable, with the privilege of making, owning, and maintaining such branches to the railway as they may deem expedient."

A special act supplementary to that act was approved February 14, 1852, by § 14 of which there was granted to the company "eight sections of land of 640 acres each, for every mile of railway actually completed by them and ready for use;" and provision was made for the inspection of the road from time to time by the state *engineer, or a commissioner[245 to be appointed by the governor, as any section of 5 miles thereof should be completed, on whose certificate that said section had been completed in a good and substantial manner and ready for use, the controller should give information of that fact to the commissioner of the General Land Office, whose duty it should be to issue land certificates for the lands thus granted, which should be located upon the public domain of the state, survey be made, the field notes returned, and patents issued. Special Laws 1852, 142.

By another special act of February 7, 1853, the preliminary action of the incorporators in commencing the survey and grade of the railway at the city of Houston was confirmed; and by § 2, the company was "further authorized and empowered to extend said railway to the city of Galveston, and also to make and construct simultaneously with the main railway, described in the original acts establishing said company, a branch thereof towards the city of Austin, under the

NOTE.—*As to what laws are void, as impairing obligations of contracts*, see note to Fletcher v. Peck, 3: 162.

As to constitutionality of law altering charter, as impairing contract, see note to Dartmouth College v. Woodward, 4: 629.

As to what is due process of law, see note to Pearson v. Yewdall, 24: 436.

As to land grants to railroads, see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

As to grant of right of way, see note to Gulf, C. & S. F. R. Co. v. Smith (Tex.) 2 L. R. A. 281.

same restrictions and stipulations provided in said original acts, etc." Special Laws 1853, Extra Sess. 36, 37.

January 30, 1854, the legislature passed a general law granting sixteen sections of land to the mile for constructed railroad, which is sufficiently set forth in the preceding case, as well as the supplementary act approved the same day. It was provided that companies accepting the provision of the act and already entitled to eight sections per mile should not be entitled to receive any grant for branch roads.

January 23, 1856, the legislature passed a special act entitled "An Act for the Relief of the Galveston & Red River Railway Company, and Supplementary to the Several Acts Incorporating Said Company," by which, after providing that the company should have six months after January 30, 1856, to complete the first 25 miles of its road, commencing at the city of Houston, it was declared that "said company shall be entitled to the rights, benefits, and privileges granted by an act approved January thirtieth, eighteen hundred and fifty-four, entitled 'An Act to Encourage the Construction of Railroads in Texas, by Dona-
[246]tions of Land,' *upon the completion of said twenty-five miles within said six months," etc., upon certain conditions, to wit: That the company should construct 25 miles of its road each year after the expiration of said time; that it should maintain its principal office and keep its records on the line of its road; that a majority of its directors should reside in the state; that it should build its main line to a certain point before commencing any branch road; that the act of February 7, 1853, to regulate railroads, should apply to the charter; and that it should "yield all general branching privileges, except such as are expressly granted by the provisions of its charter to certain points, and shall be required to expend only so much of its capital stock upon any branch as shall be expressly subscribed to such branch, and shall not spend upon its trunk any moneys subscribed for any branch, and shall be required to complete its main trunk to the point on Red river contemplated in its charter, or to such point of intersection between said road and some other road running from the northern or eastern boundary of Texas towards El Paso, as shall be agreed upon between the directors of said company." It was provided that the company might assign certificates for lands granted it; that it might borrow money for the construction of the railway and secure the same by mortgage and the issue of bonds; and that it should have the right after location and survey of the lands granted it or any part thereof, to mortgage or sell any part of the same. The 6th section read: "That nothing in this act shall be so construed as to affect the right of the state to repeal or modify the act of January 30, 1854, entitled 'An Act to Encourage the Construction of Railroads in Texas by Donations of Land;' provided, that the right of lands acquired before said repeal or modification shall in all cases be protected." Special Laws 1856, 28, 30.

By another special act approved September 1, 1856, the Galveston & Red River Railway Company was authorized to change its name to "The Houston & Texas Central Railway Company," and it was also provided that the failure of the company to build the second section of its road within *one year after the [247 completion of the first section should not work a discontinuance as to said company of the benefits of the general act of January 30, 1854, or of any other general or special laws relative to railroads," if said company shall have completed their second and third sections, amounting to at least fifty miles, at the expiration of two years after the construction of said first section." Special Laws 1856, 259, 260.

By another special act passed February 4, 1858, it was, among other things, provided that the failure of the company to complete the third section of its road by July 30, 1858, should not work a discontinuance as to the company of the benefits of the act of January 30, 1854, or any other general laws in reference to railroads, if the company should complete the third section by July 30, 1859, and that on the completion of subsequent sections of 25 miles annually after July 30, 1859, or 50 miles every two years, "said company shall be entitled to sixteen sections of land per mile, as contemplated in said last-mentioned act, for each section so completed;" and "that the benefits of the provisions in the general laws shall only inure to the said company while said laws shall remain in force." Special Laws 1858, 94, 95.

By still another special act, approved February 8, 1861, any failure to complete the fourth and fifth sections was condoned, and the company given until January 30, 1863, in which to complete those sections. Special Laws 1861, 11, 12.

When the civil war began in 1861, the company had completed and had in operation its main line for about 80 miles from the terminus at Houston. January 11, 1862, the legislature passed two general acts, continuing in force all laws granting lands to railway companies and extending the time in which they were required to construct certain parts of their lines until two years after the close of the war. These acts provided that the president and directors of this railway company should, before the provisions of the acts might extend to the benefit of the company, pass a resolution restoring the original bona fide stockholders of the company to the rights, privileges, and immunities to which they were entitled previous *to the sale of the road as mentioned in [248 the acts, provided the stockholders should pay into the treasury of the company 10 per cent upon their stock on or before the expiration of the extension of time provided, or otherwise should forfeit their rights, privileges, and property interests as stockholders. Laws 1862, 43, 44, 46, 47. The resolution required by these acts was duly passed by the company.

On September 21, 1866, a special act was passed, entitled "An Act Granting Lands to the Houston & Texas Central Railway Company," by which a specific grant was made to that company "of sixteen sections of land, of six hundred and forty acres each, for every mile of road it has constructed, or may construct, and put in running order, 'in accordance with the provisions of the charter of

said railway company;'" provided that the lands theretofore received under the general act of January 30, 1854, should be deducted from the grant thus made, and that the certificates issued on the first three sections should "be included in the terms, benefits, and conditions of this act as if issued by virtue of its provisions;" and that the company should construct and put in running order a section of 25 miles of additional road to that now built, within one year from January 1, 1867, or 50 miles within two years from that date; and that the road should be put in running order to Bryant's station by September 1, 1867. Provision was made for the inspection of the road from time to time as the sections should be completed, and for the issue and location of certificates and the survey of the lands thereby granted. Special Laws 1866, 33, 34.

November 13, 1866, a general law was passed whereby the grant of sixteen sections per mile under prior laws was continued for ten years from that date. Laws 1866, 212. This act also provided "that all tap roads over twenty-five miles long shall be entitled to the benefits of this act."

By the Constitution of 1869, art. 12, § 43, the statutes of limitation of civil suits were declared suspended by the act of secession of January 28, 1861, and to be considered as suspended until the acceptance of that Constitution by Congress, which acceptance occurred March 30, 1870.

249] *The Washington County Railroad Company was incorporated by a special act approved February 2, 1856, and was invested "with the right of locating, constructing, owning, and maintaining a railway commencing at such point on the trunk of the Galveston & Red River Railroad as said corporation shall deem most suitable, crossing the Brazos river within the limits of Washington county, and then running by the most suitable and direct line to Brenham in said county." Special Laws 1856, 49. This railroad company was organized and thereafter constructed and put in running order from a junction with the Houston & Texas Central Railway Company at Hempstead, thence directly towards the city of Austin to Brenham, a distance of 25 miles.

Some time prior to August 29, 1868, the Houston & Texas Central Railway Company purchased the Washington County Railroad at foreclosure sale. On that day the convention which had assembled to frame a new Constitution, and which did frame the Constitution adopted in 1869, passed an ordinance reciting that the Houston & Texas Central Railway Company had become the owner by purchase of the Washington County Railroad; that both of said companies were indebted to the state for sums borrowed from the special school fund; and that the Houston & Texas Central Railway Company desired to extend the Washington county branch to the city of Austin as soon as it could be done, and to extend its main line to Red river; and it was declared "that the Washington County Railroad is hereby made and declared to be a branch of the Houston & Texas Central Railroad, and shall henceforth be known and called the 'Western Branch of the Houston & Texas Central Railway,' and shall be controlled and managed by said Houston & Texas Central Railway Company, and the Houston & Texas Central Railway Company shall have the right to extend said western branch of their road from the town of Brenham, in Washington county, to the city of Austin, in Travis county, by the most eligible route as near an air line as may be practicable."

The same convention also passed, December 23, 1868, *a "declaration for the relief of [250 the Houston & Texas Central Railway Company," which provided that the company should not suffer "any forfeiture of any rights secured to it by existing laws by reason of the failure of said company to construct and put in running order their said railway to the town of Calvert in Robinson county, by the first day of January, A. D. 1869, as required by the act of the 21st of September, A. D. 1866, provided said railway shall be constructed and put in good running order for the use of the public, to the said town of Calvert, by the first day of April, A. D. 1869."

The Constitution framed by this convention was adopted by a vote of the people at an election held November 30 to December 3, 1869 and was accepted by Congress March 30, 1870 (16 Stat. at L. 80, chap. 39). Section 6, article 10, of that Constitution read as follows:

"The legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the land office, except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres."

August 15, 1870, the legislature of Texas passed a special act entitled "An Act for the Relief of the Houston & Texas Central Railway Company," which recited substantially the same matters as were recited in the declaration of the convention, and provided in §1 as follows:

"That the Washington County Railroad is hereby made and declared to be, to all intents and purposes in law, a part of the Houston & Texas Central Railway, and shall be under the control and management of the Houston & Texas Central Railway Company in like manner as every other part of said railway, and the Houston & Texas Central Railway Company shall have the right to build and extend the part of its railway heretofore known as the 'Washington County Railroad' from the town of Brenham, in the county of Washington, to the city of Austin, in the county of Travis, by the most eligible route to be selected by engineers of the company; and the said company shall also have the right to build a branch road diverging from the main trunk at some point in Navarro county and striking Red river at such point as will *enable such railway com- [251 pany to make a connection with any railroad which may be built to said river from the northward, and the said Houston & Texas Central Railway Company, by reason of the construction of said railway from the town of Brenham to the city of Austin, and by reason of the construction of said branch from Navarro county to Red river, shall have and enjoy all the rights, privileges, grants, and benefits that are now, or may at any time hereafter be, secured to any railroad company in the state of Texas by

any general law of the state, and shall be subject, in respect of said railway and said branch, to all the duties and responsibilities imposed upon the said Houston & Texas Central Railway Company by its charter and by other laws of the state."

Section 4 read thus:

"No forfeiture of any of the rights or privileges secured to it by existing laws shall be enforced against the said Houston & Texas Central Railway Company, by reason of its failure to comply with the conditions as to construction, imposed by the first section of the act of the twenty first of September, A. D. 1866, entitled 'An Act Granting Lands to the Houston & Texas Central Railway Company;' but the said company shall have and enjoy all the rights and privileges secured to it by existing laws, the same as if the conditions embraced in the first section of the said act of the twenty-first of September, A. D. 1866, had been, in all respects, complied with; provided that the land grant to said company shall cease, unless the said company sball complete their main trunk, east of the Brazos river, to Richland creek, in Navarro county, within twelve months from the first day of October, A. D. 1870, and shall also complete their road to the city of Austin within two years after the passage of this act." Special Laws 1870, 325

The company completed its road to the city of Austin December 25, 1871, and completed its main line to Richland creek, September 26, 1871.

Section 6 of article 10 of the Constitution of 1869 was amended as of March 19, 1873, so as to authorize the legislature to grant lands for purposes of internal improvement. Thereupon the legislature of Texas passed many special [252] laws *granting lands to railroads, and, afterward, on August 16, 1876, the legislature passed another general law granting sixteen sections of land per mile in aid of the construction of railroads Laws 1876, 153.

It appeared "that the defendants paid taxes on the lands sued for continuously since they were located and up to the present time," and "that the defendants paid all the fees of locating and surveying the said land sued for, as well as for the same number of alternate sections known as the even numbers for the public free school fund." Application for the inspection of the Austin line, as well as for the main line to Corsicana, was made by the company to the governor February 9, 1872, which was done, and report showing the completion of the road made February 21, 1872. The certificates were issued in July of that year. The lands were placed on the maps of the General Land Office and always recognized as the company's land. They were all mortgaged by the company and sold on foreclosure in September, 1888.

Messrs. **R. S. Lovett**, *James A. Baker*, and *J. P. Blair* for plaintiffs in error.

Mr. **M. M. Crane**, Attorney General of the state of Texas, for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The supreme court of Texas held in *Galveston, Harrisburg, and San Antonio Railway Company* v. *Texas*, 89 Tex. 340, that, conceding that § 6 of article 10 of the Constitution of 1869 did not repeal prior laws granting lands in aid of the defined lines of existing railroad companies, the section did operate to cut off the right to earn lands by the construction of lines not authorized until after the provision took effect. We have just considered that case, and expressed the opinion that the constitutional provision as thus enforced involved no infraction of the Constitution of the United States. *In the present case the state courts [253 have decided that although the Houston & Texas Central Railway Company may have had the right under legislation prior to the adoption of the Constitution of 1869 to construct a road from its main line to Austin and to earn lands by such construction, yet that the purchase by the company prior to 1869 of the Washington Railroad, running from Hempstead on the company's main line to Brenham in the direction of Austin, should not be treated as making that road part of the line the company was authorized to build; and that the extension from Brenham to Austin must be held to have been built as an independent line under the act of August 15, 1870, which having been passed while the Constitution of 1869 was in force, the company could not acquire any right to the land grant by the construction of road between the latter points. The question does not arise in respect of lands for the 25 miles from Hempstead to Brenham, but in respect of lands allowed as earned for the distance from Brenham to Austin, for which the certificates were duly issued, and were located; and which have always, prior to this suit, been recognized as lands of the company, and have been sold as such.

In other words, the state courts have applied to the road from Brenham to Austin the same rule laid down as to new lines authorized to be constructed, for the first time, after the Constitution of 1869 was adopted. We cannot concur in this view, but, on the contrary, are of opinion that the constitutional provision as thus enforced impairs the obligation of the contract between the state and the company and cannot be sustained.

The Houston & Texas Central Railway Company, then styled the Galveston & Red River Railway Company, was authorized by its act of incorporation not only to construct the main line therein specified, but, by its 2d section, such branches as it should deem expedient; and by the 14th section of the special act of February 14, 1852, eight sections of land were granted to the company for every mile of railroad it should construct, no distinction being made between branch and main lines. By § 2 of the special act of *February 7, 1853, the [254 company was empowered "to make and construct, simultaneously with the main railway described in the original acts establishing said company, a branch thereof towards the city of Austin."

The general act of January 30, 1854, granted to all railroad companies constructing a section of 25 miles or more of railroad, sixteen sections of land for every mile of road so constructed and put in running order; though by § 12 it was provided that any company then entitled to a grant of eight sections of land

per mile, which should accept the provisions of the act, should not be entitled to receive the grant thereby made for any branch road. This company was then entitled to eight sections per mile, but the special act of January 23, 1856, supplementary to the several acts incorporating the company, expressly extended the rights, benefits, and privileges of the general act of January 30, 1854, to the company, subject to certain conditions not material to be enumerated, and with the limitation as to branch lines that the company should "yield all general branching privileges *except such as are expressly granted by the provisions of its charter to certain points*," and requiring it to spend on the branch only the money subscribed for the branch, and on the trunk only the money subscribed therefor.

By § 2 of the original act of incorporation general branching privileges had been conferred, and by § 2 of the special act of February 7, 1853, express authority to construct a branch to the city of Austin. It would seem plain, then, that § 5 of the act of January 23, 1856, distinctly referred to the right to construct this particular branch, and so preserved it that the benefits of the act of January 30, 1854, were extended to that branch and its construction, and no other. In other words, all branching privileges except for the Austin line were yielded in accepting the benefits of the act of 1854, but as to that expressly authorized branch the right to construct it was preserved with the benefits according to its construction. The act of February 4, 1858, repeated the assurance of the benefits of the act of 1854.

But it is said that by the 6th section of the [255] act of 1856 the *right to repeal or modify the act of 1854 was reserved, and that by the 2d section of the act of 1858 the benefits of any general law inured only so long as such law remained in force. Rights to lands acquired before such repeal or modification would not, however, be affected thereby, nor is it important to specially discuss the operation of the Constitution of 1869 in this regard, as the special act of September 21, 1866, made a specific grant to the company of "sixteen sections of land of six hundred and forty acres each for every mile of road it has constructed or may construct and put in running order in accordance with the provisions of the charter of said company." We think that this plainly applies to the construction of the Austin line as well as the main line of the company. It applied to all lines constructed by the company in accordance with the provisions of its charter. And the right to construct the Austin line had been specifically conferred by the special act of February 7, 1853. The general branching privileges which the company possessed under its original act of incorporation it had been required to surrender by the act of 1856, except such as were "expressly granted by the provisions of its charter to certain points," and Austin was a point to which the company was expressly authorized to build. So that the Austin branch was one of the lines covered by the charter when the act of September 21, 1866, was passed, and the grant thereby made applied to it. And there was no reservation of a right to repeal or modify the act.

This legislation secured the construction of the branch to Austin, the capital of the state, an obvious necessity, and especially as that important point was then without any line of railway whatever.

Counsel for the state contended that the act granted lands for the construction only of the main line, and not of the Austin line. The last clause of the 3d section of the act was: "And said railroad company shall construct their road in the line heretofore prescribed by 'An Act for the Relief of the Houston & Texas Central Railway Company,' approved February 8, 1861."

*The line defined in the act referred to [256] was: "Provided, said railroad shall run on the nearest and most practicable route from its line at or near Horn Hill to Dresden, in Navarro county, and thence to the town of Dallas or within one and a half miles of said town, and thence to the terminus of Red river, within fifteen miles of Preston." Special Laws 1861, 11.

This fixed the route of the main line by Dresden and Dallas to the vicinity of Preston instead of Coffee's station. The route of the Austin line had been provided for by the act of February 7, 1853, and there was evidently no occasion to change it.

But it does not follow that because of this definition of the main line in the 3d section the grant in the 1st section of the act of September 21, 1866, should be confined to that line.

The company already had a grant of sixteen sections per mile for its main line under the general act of January 30, 1854, and there was no controversy over that, nor any need of further legislation in that regard when this act was passed. As to the branch line there might be dispute, and, furthermore, the right to repeal the grant was reserved in the act of January, 1856, and February, 1858; and it may well be assumed that the object of the act of September 21, 1866, was to remove any doubt on the subject of the grant for the Austin line and remove the danger of a possible repeal. We are the more constrained to this conclusion by the language of the subsequent general act of November 13, 1866, "that all tap roads over 25 miles long shall be entitled to the benefits of this act," which modified the policy as to branch roads indicated in the act of 1854.

We find, then, that the company was granted by the state, prior to the adoption of the Constitution of 1869, sixteen sections of land per mile for the construction of the Austin line by the special act of January 23, 1856, and by the special act of September 21, 1866. And the rights of the company to the lands granted were preserved by extensions of time, as occasion required, within which to comply with conditions respecting the rate of construction. By the act of September 1, 1856, the *failure of [257] the company to complete the second section of its road within one year after the completion of the first section was waived; again, by the act of February 4, 1858, the company was granted further time in which to complete con-

struction; again, by the act of February 8, 1861, it was given until January 30, 1863, to perform the work required of it; and during the war the laws of January 11, 1862, were passed extending the time until two years after the close of the war on the condition that the extension should inure to the benefit of the company only in the event that it should restore the rights of the stockholders which had been foreclosed, which condition was complied with by the company; after this further time was given by the act of September 21, 1866; again, by the act of November 13, 1866; and again, by the ordinance of December 23, 1868; and finally, by § 4 of the special act of August 15, 1870.

Before the Constitution of 1869 was adopted, the company had acquired the Washington County Railroad, and the convention which framed that instrument on August 29, 1868, ratified and confirmed the purchase of that road, and declared that the Washington County Railroad was thereby made and declared to be a branch of the Houston & Texas Central Railroad, to be controlled and managed by the Houston & Texas Central Railway Company, with the right to extend the road from Brenham to Austin by the most eligible route.

The company had completed and had in operation five sections of 25 miles each of its main line, and, by the acquisition of the Washington County Railroad, had in operation that part of the Austin branch extending from the junction of the main line at Hempstead to Brenham directly toward Austin.

Thus it is seen that the company had been granted sixteen sections of land per mile for the construction of the Austin branch as well as the main line; that it had accepted the grant; and had commenced to earn it, and had actually acquired the right to earn it, by the construction of an important part of the line which the state by the grant intended to promote, before the adoption or acceptance of the 258]Constitution *of 1869. The company had not merely organized and commenced the work it was incorporated to carry on, but had completed a large part of it. It had completed 125 miles of main line prior to June 15, 1869, and manifestly had much more in process of construction, for it appears from the record that several additional sections were completed and put in operation soon after that date. It had also acquired and had in operation that part of the Austin branch extending from the junction at Hempstead to Brenham, a distance of 25 miles, originally constructed by the Washington County Railroad Company and afterwards purchased by this company.

We do not understand the state courts to have decided that the purchase of the Washington County road was *ultra vires*, but to have held that the construction of the line from Brenham to Austin was an independent enterprise authorized for the first time by the act of August 15, 1870, and being a new and additional line no land grant could be claimed for it because the constitutional provision was then in force.

In our opinion, however, if the Washington County road was lawfully acquired by the Houston & Texas Central Railway in 1868, it became as much a part of the Austin branch as if it had been constructed by the company, and its subsequent completion to Austin placed that part of the line from Brenham to Austin in the same situation as if the entire line from Hempstead to Austin had been in fact so constructed. And this would have been so if the company had built 95 miles from Hempstead towards Austin, and then lawfully obtained 25 miles of existing road to complete the branch. Of course the company was not entitled to land grant for the 25 miles from Hempstead to Brenham, nor is any such claim made, but that 25 miles became by the purchase a part of the branch with like effect as if originally part of it, and to treat the completion of the branch as a new and independent enterprise we cannot but regard as inadmissible in view of the facts. For this 25 miles had been purchased, was controlled and operated, and existed as a part of the company's Austin branch in fact.

*The Houston Company and the Wash-[259 ington Company were both endowed with the capacity to make contracts, and generally to do and perform all such acts as might be necessary and proper for or incident to the fulfilment of their obligations. Act March 11, 1848, § 1 (Special Laws 1848, 370); Act Feb. 2, 1856, § 2 (Special Laws 1856, 49). They were both required to afford the public the advantages of a continuous line. Act of Feb. 14, 1852, § 9 (Special Laws 1852, 142); Act of Feb. 2, 1856, § 12 (Special Laws 1856, 49). The acquisition of the Washington road was in accomplishment of the object of securing a line to the capital, and was not in contravention of the general intention of the legislature. The ordinances of the convention in terms ratified the transaction and reiterated the previous authority to extend to Austin. These ordinances are part of the history of the case, and reference to them in connection with the alleged scope of the particular provision of the Constitution framed by that convention and submitted to the vote of the people may not improperly be made. In *Quinlan* v. *Houston & T. C. Railway Company*, 89 Tex. 356, it was held that a convention called to frame a Constitution to be submitted to a popular vote cannot pass ordinances and give them validity without submitting them to the people for ratification as part of the Constitution

These ordinances were not so submitted, and we are not called on to express any opinion as to whether, in view of the anomalous circumstances under which this particular convention met, the previous decisions of the supreme court of the state, or any other considerations, they, or either of them, could be regarded as valid.

For, irrespective of that, the act of August 15, 1870, expressly recognized and ratified the purchase of the Washington Railroad and the state could not deny the validity of that which it had expressly validated, if otherwise open to question.

In *Galveston, H. & H. R. Co.* v. *Cowdrey*, 78 U. S. 11 Wall. 459 [20: 199], referring to a mortgage executed by a railroad company in Texas when there was no statute of that state expressly authorizing railroad companies to mortgage their roads as such, Mr. Justice

Bradley, speaking for this court, said: "Without examining *how far the operative effect of a mortgage executed by a railroad company upon its road, works, and franchises may extend, *per se*, without statutory aid, it is sufficient to say that, in our opinion, the legislature of Texas has validated the mortgages, and given them the effect which, by their terms, they were intended to have."

It appears to us that this purchase comes within the rule thus expressed, and if there had originally been objection it was technical merely and removed by the act of 1870.

Now the latter act authorized no new line nor made any new grant of lands to which no previous right existed, nor restored lands which had been forfeited. If ground of forfeiture had accrued by reason of failure to complete as rapidly as required, it had not been enforced, and if outstanding was waived by the act.

If there had been a failure to construct in time so that a forfeiture would have been justified, no such forfeiture was declared by any judicial proceeding, or by any legislative action equivalent to office found. *St. Louis, I. M. & S. R. R. Co.* v. *McGee*, 115 U. S. 469 [29: 446]; *Bybee* v. *Oregon & C. Railroad Co.* 139 U. S. 663 [35: 205]; *Galveston, H. & S. A. Railway Co.* v. *State*, 81 Tex. 573.

And the executive officers of the state, charged with the administration of the laws granting lands to railroads, and vested with jurisdiction to determine the facts, had ascertained and determined the facts here, and issued the certificates because in their judgment the road had been completed in accordance with the law.

No argument was made that any ground of forfeiture could be availed of in the case, nor was any such point ruled by the court of civil appeals, or by the supreme court.

The judgment of the court of civil appeals may have been rested in part on the view that the Constitution of 1869 repealed all laws granting lands to railroad companies regardless of the acceptance of such laws and the construction of the lines of road thereunder.

The supreme court proceeded on the ground that the road from Brenham to Austin was 261] not authorized until after 1869 and *fell into the category of a new line, and therefore the company had no right to the land grant.

From what we have said it will be perceived that we are unable to accede to either of these propositions.

In our opinion it results from the legislation and the facts that the company had the right to construct the line to Austin and earn sixteen sections per mile by so doing, prior to 1869; that by the acceptance of its charter and the subsequent legislation, and by the completion of an important part of its road before the adoption of the Constitution of 1869, the company had acquired a vested right to the land grant; that the purchase of the Washington county road must be regarded as valid, and that thereby that road became part of the Austin line in operation as such before 1869; that the extension of the branch from Brenham to Austin cannot properly be treated as a new and independent line, and that there therefore was a contract between the state and the company in respect of lands earned by the construction thereof.

It follows that § 6 of article 10 of the Constitution of Texas as given effect by the state courts impairs the obligation of the contract and deprives the company of its property without due process of law.

Argument was also urged on behalf of defendant in error that the particular lands sued for are situated in what is known as the Pacific reservation being a reservation for the benefit of the Texas & Pacific Railway Company, created by a special act of May 2, 1873, and hence that, though the certificates were valid, they were not located, as the law required, on unappropriated public domain.

This question was not determined by either of the appellate tribunals, but, on the contrary, their judgments rested distinctly on the invalidity of the certificates for reasons involving the disposition of Federal questions. We must decline to enter on an examination of the controversy now suggested on this point.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

A. J. SELVESTER, *Plff. in Err.*, [262
v.
UNITED STATES.

(See S. C. Reporter's ed. 262–271.)

Valid verdict.

A verdict of guilty on three counts of an indictment is good and sufficient, although the jury disagree on the fourth count of the indictment.

[No. 397.]

Argued March 14, 1898. Decided April 25, 1898.

IN ERROR to the District Court of the United States for the Northern District of California to review a judgment of that court convicting A. J. Selvester for violations of U. S. Rev. Stat. § 5457, by the unlawful possession and the illegal passing of counterfeit coin. *Affirmed.*

Statement by Mr. Justice **White**:

The plaintiff in error was indicted for alleged violations of § 5457 of the Revised Statutes. The indictment contained four counts. The first charged the unlawful possession of two counterfeit half dollars; the second an illegal passing and uttering of two such pieces; the third, an unlawful passing and uttering of three pieces of like nature, and the fourth, the counterfeiting of five like coins. The case came on for trial, and, after the jury had retired, they returned into court and stated that, whilst they were agreed as to the first three counts, they could not do so as to the fourth, and the court was asked if a verdict to that effect could be lawfully rendered. They were instructed that it could be. The district attorney thereupon

NOTE.—*As to consolidation of indictments; effect of,* —see note to Howard v. United States of America (C. C. App. 6th C.) 84 L. R. A. 509.

asked leave to enter a *nolle prosequi* as to the fourth count, but, upon objection by the accused, the motion was withdrawn, and the jury rendered the following verdict:

263] *"We, the jury, find James Selvester, the prisoner at the bar, guilty on the first, second, and third counts of the indictment, and disagree on the fourth count of the indictment."

Despite objection and exception by the accused, the court received this verdict and discharged the jury.

By motion in arrest of judgment, to set aside the verdict, and for a new trial, the defendant asserted that the verdict was a nullity, because "insufficient, incomplete, and uncertain." Exceptions were duly noted to the overruling of these several motions, and the court having imposed sentence a writ of error was allowed.

Mr. **Arthur English** for plaintiff in error.

Mr. **James E. Boyd,** Assistant Attorney General, for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

The assignments of error challenge the sufficiency of the verdict to support the judgment which was entered thereon. The claim is that as the verdict expressed the agreement of the jury as to the guilt of the accused as to the distinct crimes charged in three of the counts, and stated a disagreement as to the distinct crime covered by the fourth count, the verdict was not responsive to the whole indictment, and was void. That is to say, the proposition is that the verdict of guilty as to the separate offenses covered by the three first counts was in legal intendment no verdict at all, because the jury stated their inability to agree as to the fourth count, covering a different offense from those embraced in the other counts.

Reduced to its ultimate analysis, the claim amounts to this: That an indictment, although consisting of several counts, each for a distinct offense, is in law an indivisible unit, must be treated as an entirety by the jury in making up their verdict, and such verdict in order to be valid must finally pass upon and dispose of 264] all the accusations contained in the *indictment. In effect it is claimed that where an indictment consists of several counts, repeated trials must be had until there is an agreement either for acquittal or conviction as to each and every count contained in the indictment. It needs but a mere statement of the proposition to demonstrate that it in reason rests necessarily on the premise just stated. That this is its essential postulate is conclusively shown by the authorities which are cited to sustain it. They are: *Hurley* v. *State*, 6 Ohio, 399; *Wilson* v. *State*, 20 Ohio, 26, 31; *Williams* v. *State*, 6 Neb. 343; *Casey* v. *State*, 20 Neb. 139; and *Muller* v. *Jewell*, 66 Cal. 216.

In the *Hurley Case*, upon the assumption that the same rules, as respects the sufficiency of verdicts, governed in criminal as in civil cases, the supreme court of Ohio held that a trial court acted properly in refusing to enter a verdict which found the defendant not guilty on one count of an indictment, and stated their inability to agree as to other counts; and further held that no error was committed in discharging the jury and again putting the accused upon trial.

In the *Wilson Case*, the opinion in the *Hurley Case* was criticised, but it was held to be "prudent," where in one indictment distinct offenses were charged in separate counts, especially when these offenses might subject the accused to different degrees of punishment, to require the jury in their finding, in the absence of a general verdict, to affirm or negative each charge. In consequence of this view the court reversed, because the verdict had found the defendant guilty as charged in one series of counts in the indictment, but had omitted any reference whatever to his guilt or innocence as to certain other offenses charged in another series of counts. The rule thus applied was declared to be necessary because of a possible doubt as to whether a defendant might not be subject to further prosecution for an offense not passed upon by a jury in a verdict under an indictment consisting of several counts.

The Nebraska cases followed the ruling in the *Wilson Case*, mainly, however, because the Ohio decision was regarded as a construction of a statute existing in Ohio, and which had been adopted into the Nebraska Code.

*The California case relied upon may [265 be dismissed from view, as it related to a verdict in a civil cause.

In passing, we note that the doctrine that a verdict in a criminal case must respond to every count in an indictment in order to warrant a judgment thereon, as stated in the Ohio cases just referred to, seems to be no longer maintained in that state. *Jackson* v. *State*, 39 Ohio St. 37. In the *Jackson Case* the issues presented were as follows: The trial court had refused to receive a verdict on an indictment containing several counts for distinct offenses, which found the defendant "guilty as charged in the first count of the indictment." The jury thereupon after further deliberation returned a general verdict of guilty. The supreme court of the state of Ohio, in considering an exception taken to the entry of the general verdict, said: "The objection was untenable. The prisoner might have been sentenced under the first verdict, for the count on which it was based was sufficient. Whart. Crim. Pl. & Pr. § 740. But the proper course was to endeavor to obtain a verdict responding to both counts, and that course was pursued."

Whatever may be the present rule in Ohio, it is manifest from the foregoing brief analysis of the cases cited by the plaintiff in error to sustain the contention upon which reliance is placed, that they rest upon the theory that, even although the offenses charged in the several counts of an indictment be distinct and separate crimes, such a solidarity is created between them by charging them in several counts of one indictment as to render void any verdict which does not specifically and affirmatively respond to each and every count. But this proposition, whatever may be the support found for it in early cases, is not sound in reason, and is negatived by the decisions of this court and the opinion of text-writers, that is to say, it is refuted by the conclusive weight of authority.

The erroneous theory as to the indivisible union presumed to arise from charging dis-

tinct offenses in separate counts of one indictment, applied in the cases referred to and in some other early American cases, took its origin 266] from the case *of *King* v. *Hayes* (1727) 2 Ld. Raym. 1518. (See observations in the opinion in *State* v. *Hill*, 30 Wis. 421.) But it has been held in England that that case did not justify the view which had sometimes been taken of it (*Latham* v. *Queen*, 5 Best & S. 635), and that it was a mistake to apply to the several counts of distinct offenses in one indictment the rule which obtains as to verdicts in civil cases. In the course of his opinion, in the case just cited, Mr. Justice Blackburn said (p. 642):

"Then it is said we are concluded by authority. There is only one case which has the least bearing on the question, namely, *King* v. *Hayes*, 2 Ld. Raym. 1518. In that case the indictment contained three counts, and a special verdict was returned, finding the prisoners guilty on two of them, but said nothing on the third, and the question was whether judgment could be given against them as guilty on the whole. The court held, that as the jury had virtually found, and the facts showed, the prisoners not guilty on the third count, the record established that they were guilty on two counts, and not on the third. The counsel who argued that case for the defendants referred to authorities to show that where a verdict finds but a portion of an issue, or only one of several issues, it is bad and ground for a *venire de novo;* but the court did not determine that point at all—there was no occasion to decide that no verdict being given on one count vitiates a verdict on another count which is good. In civil cases there is only one process against the defendant, and therefore if a new trial is granted on one part of the case it is granted on the whole. But in a criminal case, where each count is as it were a separate indictment, one count not having being disposed of no more affects the proceedings with error than if there were two indictments. In *O'Connell* v. *Queen*, 11 Clark & F. 155, which has been referred to, Parke, B., says, pp. 296, 297: 'So in respect of those counts on which the jury have acted incorrectly, by finding persons guilty of two offenses (on a count charging only one), if the Crown did not obviate the objection, by entering a *nolle prosequi* as to one of 267] the *offenses (*Rex* v. *Hempstead*, Russ. & R. C. C. 344), and so in effect removing that from the indictment, the court ought to have granted a *venire de novo* on those counts, in order to have a proper finding; and then upon the good counts it should have proceeded to pronounce the proper judgment. In short, I should have said that the defendants should on the face of the record be put precisely in the same condition as if the several counts had formed the subject of several indictments.' That is exactly what I say here. Each count is in fact and theory a separate indictment, and no authority has been produced to show that we ought to defeat the ends of justice by such a technical error as this."

And the rule in England thus clearly announced is clearly applied in the American cases. Whart. Crim. Pl. & Pr. § 740; 1 Bishop, New Crim. Proc. § 1011. Indeed, the doctrine, as settled by repeated adjudications of this court, is in entire harmony with the English rule as announced in the *Latham Case*. In *Claasen's Case*, 142 U. S. 140 [35: 966], it was held that where a jury found an accused guilty on some counts of an indictment, and the trial judge imposed a general sentence, which did not exceed the punishment authorized by law to be inflicted for a single offense, it was immaterial whether some of the counts upon which conviction was had were bad, as the judgment was valid if only one of the counts was legally sufficient. In *Dealy* v. *United States*, 152 U. S. 539 [38: 545], it was held that the reception of a verdict on an indictment containing numerous counts was valid, although the verdict, which set out an affirmative finding as to all but one count, was silent as to that count. The discharge of the jury under such circumstances was conceded to have been proper, and it was observed (p. 542 [38: 546]), as to the count upon which a verdict was silent, that such silence "was doubtless equivalent to a verdict of not guilty as to that count." In *Ballew* v. *United States*, 160 U. S. 187 [40: 388] it was found that a judgment entered upon a general verdict of guilty on an indictment consisting of several counts was erroneous as respects one of the counts alone, and for this cause the judgment was not reversed *in toto*, but was only set aside as to the count in regard to which error had been committed, and the case was remanded to the *trial court for sentence [268 on the count as to which no error was found to have arisen, and for further proceedings as to the other count. In *Putnam* v. *United States*, 162 U. S. 687 [40: 1118], where distinct sentences of concurrent imprisonment had been imposed under separate counts of an indictment, reversible error having been found to exist as to one of the counts only, the judgment was affirmed as to the count where there was no error and was reversed as to the other, and the cause was remanded for further proceedings with respect to the count as to which error had been committed.

These rulings are absolutely in conflict with the proposition upon which the plaintiff in error relies, and conclusively demonstrates its unsoundness. True, it is claimed that there is a distinction between the doctrine announced in these cases and the proposition here relied on. Thus, it is urged that in the *Claasen Case* there was no question presented of a failure of the verdict to affirmatively respond to all the counts in the indictment, but that the sole issue was where the verdict did respond to all the counts and thereafter some of the counts were found to be bad, whether the verdict and sentence, which did not exceed the punishment imposed by law for the offense specified in the good counts, would be held to relate alone to the good counts, and be therefore not subject to reversal. Whilst it is true that the claimed distinction between the facts in the *Claasen Case* and those in this exists, it is one, however, which in no way distinguishes the two cases, in so far as the legal principle is concerned by which they are to be determined. This is at once made apparent by considering that if the charging of distinct offenses in several counts in one indictment so unified the various offenses that action on

all of them was necessary to action on any one, the conclusion reached in the *Claasen Case* was erroneous. The necessary effect of the decision in that case was to establish that, although distinct offenses were charged in separate counts in one indictment, they nevertheless retained their separate character to such an extent that error or failure as to one had no essential influence upon the other. It is also asserted that the ruling in *Dealy's Case* does 269] not control the question *here raised. There on an indictment charging distinct offenses in several counts, the jury returned a verdict of guilty as to certain of the counts and were silent as to the other. The maintaining of this verdict, it is urged, did not import the right of a jury to agree to convict as to some counts and disagree as to others, since the court in that case imputed the verdict to all the counts and therefore treated it as affirmatively responsive to all. That is, the argument by which alone it is possible to distinguish this case from the *Dealy Case* must rest on the extreme and unsound assertion that in that case, although the record plainly disclosed that the jury had found only as to certain counts, nevertheless the court, as a matter of fact, held that the jury had found as to all. The statement in the opinion in the *Dealy Case* to which we have already referred and cited, that the silence of the verdict as to a particular count "was equivalent to a verdict of not guilty as to that count," when properly understood, does not lend itself to the construction which the argument seeks to place upon it. The contention arises from a failure to observe the difference between discharging a jury on mere silence on their part as to the guilt or innocence of an accused as to a particular count, and doing so only after a formal disagreement, and its entry of record. Doubtless, where a jury, although convicting as to some, are silent as to other counts in an indictment, and are discharged without the consent of the accused, as was the fact in the *Dealy Case*, the effect of such discharge is "equivalent to acquittal," because, as the record affords no adequate legal cause for the discharge of the jury, any further attempt to prosecute would amount to a second jeopardy, as to the charge with reference to which the jury has been silent. But such obviously is not the case, where a jury have not been silent as to a particular count, but where, on the contrary a disagreement is formally entered on the record. The effect of such entry justifies the discharge of the jury, and therefore a subsequent prosecution for the offense as to which the jury has disagreed and on account of which it has been regularly discharged would not constitute second jeopardy. The error in 270] the *conviction may additionally be shown by presupposing that each crime charged in several counts of one indictment, instead of being included in one, had been prosecuted by way of separate indictments as to each. Under these conditions, if a charge contained in any one of the indictments had been submitted to the jury, and the court had, after such submission, and without verdict, undertaken of its own motion, over objection, to discharge the jury, it is elementary that such discharge would be equivalent to an acquittal of the particular charge for which the accused was tried, since it would bar a subsequent prosecution. But if, on the other hand, after the case had been submitted to the jury, they reported their inability to agree, and the court made record of it and discharged them, such discharge would not be equivalent to an acquittal, since it would not bar the further prosecution. This distinction was illustrated by the rulings in the cases of *Putnam* and *Ballew*, *supra*. In those cases, as the error found to exist as to the particular counts which cause the reversal prevented the trial as to these counts from constituting legal jeopardy, the case as to such counts was remanded for further proceedings thereunder, although the conviction as to the counts in which there was no error was maintained.

Affirmed.

Mr. Justice **Gray**, Mr. Justice **Brown**, and Mr. Justice **Shiras** concurred in part, as follows:

We concur in the judgment of affirmance, and upon this short ground: The indictment contained four counts. The defendant pleaded not guilty to the whole indictment, and thereby joined issue on each and all of the counts; and the jury might find the defendant guilty upon all or any of them. The jury did return a verdict of guilty upon each of the first three counts, and disagreed as to the fourth count. The jury thus answered the whole of the issue presented by the plea to each of the first three counts, and failed to answer the issue presented by the plea to the fourth count. The failure to return a verdict on the fourth count did not affect the validity *of the verdict re- [271 turned on the other three counts, or the liability of the defendant to be sentenced on that verdict. The defendant was sentenced upon those counts only upon which he had been convicted by the jury. There is no error, therefore, in the judgment rendered upon the verdict.

But in so much of the opinion of the court as suggests that the plaintiff in error may be hereafter tried, convicted, and sentenced anew upon the fourth count, we are unable to concur. No attempt has been made to try him anew, and the question whether he may be so tried is not presented by this record. Upon principle, on one indictment and against one defendant there can be but one judgment and sentence, and that at one time, and for the offense or offenses of which he has been convicted; and a sentence upon the counts on which he has been convicted by the jury, definitely and conclusively disposes of the whole indictment, operates as an acquittal upon, or a discontinuance of any count on which the jury have failed to agree, and makes any further proceedings against him on that count impossible. No case has been found in which, after a conviction and sentence, remaining unreserved, on some of the counts in an indictment, a second sentence, upon a subsequent trial and conviction on another count in the same indictment, has been affirmed by a court of error.

In *Ballew* v. *United States*, 160 U. S. 187, 203 [40:388, 395], and in *Putnam* v. *United States*, 162 U. S. 687, 715 [40:1118, 1128]; in each of which a judgment upon conviction on

an indictment containing two counts was affirmed as to one count, and reversed as to the other count, the order of reversal did not direct a new trial on the latter count, but was guardedly framed in general terms "for such proceedings with reference to that count as may be in conformity to law;" and under such an order it would be open to the defendant, if set at the bar to be tried again on that count, to plead the previous verdict and sentence in bar of the prosecution.

272] CLIMACO CALDERON, *Appt.*,
v.
ATLAS STEAMSHIP COMPANY, Limited.

(See S. C. Reporter's ed. 272-282.)

Liability of carrier—stipulation void under Harter act.

1. Under the Harter act of February 13, 1893, which provides that the carrier shall not be relieved from liability for loss or damage arising from negligence in the proper stowage or proper delivery of the goods, and forbidding the insertion of any covenant or agreement in the bill of lading whereby the obligations of the carrier carefully to stow and deliver the cargo shall be lessened, weakened, or avoided, the liability of a steamship company for negligence in failing to deliver goods cannot be avoided by stipulation in the bill of lading.

2. A stipulation in a bill of lading, that the carrier shall not be liable for goods of any description which are above the value of $100 per package, unless special agreement is made therefor, does not mean that the liability is limited to $100 per package for such goods, but that the carrier shall not be liable for them to any amount, and is therefore void, under the Harter act, as an attempt of the carrier to exonerate itself from all responsibility for such goods.

[No. 83.]

Argued March 8, 9, 1898. Decided April 25, 1898.

ON CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review a decree of that court affirming the decree of the District Court for the Southern District of New York in a suit instituted in admiralty by Climaco Calderon against the Atlas Steamship Company to recover the value of goods shipped from New York to Savanilla, which were not delivered at the port of destination and were subsequently lost by the sinking of the ship through a peril of the sea. *Decree of District Court reversed*, and case remanded to that court with directions to assess the value of the goods and to enter a decree in conformity with the opinion of this court.

See same case below, 64 Fed. Rep. 874, 35 U. S. App. 587.

Statement by Mr. Justice **Brown:**

This was a suit instituted in the district court for the southern district of New York, in admiralty, by the *libellant, Calderon, who was[273 at that time consul general for the United States of Columbia at New York, to recover for the respondent, the Atlas Steamship Company, the sum of $5, 413.18, the value of a consignment of goods shipped from New York to Savanilla by the libellant on the Steamer Ailsa, which goods the master failed to deliver at the port of destination, and thereafter brought back to New York, where they were reshipped by the respondent on the steamer Alvo. The goods were lost by the sinking of this ship through a peril of the sea.

It seems the respondent owned both the Ailsa and the Alvo, and ran them between New York, Kingston, Savanilla, Carthegena, and Port Limon, from which last-named port they sailed direct to New York, usually carrying a cargo of fruit. Libellant had frequently shipped goods by this line and over the same route, and on July 19, 1893, about two hours before the Ailsa sailed on its regular voyage from New York, delivered to the company on its pier, under authority of a special permit from the company, the consignment of goods in question, which consisted of twenty-six bales and three crates of duck government uniforms, for transportation to the port of Savanilla, and from thence to Baranquilla in the United States of Columbia. The receipt given by the company to the truckman who delivered the goods stated that they had been received "at the shipper's risk from fire, and subject to the conditions expressed in the company's form of bill of lading."

The bill of lading, subsequently obtained in lieu of the receipt, and a copy of which was sent by mail to the consignee by the same

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NOTE.—*From what liability a contract that a common carrier is not to be responsible for loss or damage will exonerate*, see note to New Jersey Steam Nav. Co. v. Merchants' Bank, 12: 465.

As to liability of common carrier for goods to be transported beyond termination of its line, see note to Michigan C. R. Co. v. Mineral Springs Mfg. Co. 21: 297.

As to liability of carrier by water, for loss or damage of goods, see note to Moore v. American Transp. Co. 16: 674.

As to delivery by common carrier by water, see note to Richardson v. Goddard, 16: 412.

As to what is included in baggage for which carrier is responsible, see note to Hannibal & St. J. R. Co. v. Swift, 20: 423.

As to common carriers of live animals; duty and liability of,—see note to New York, L. E. & W. R. Co. v. Estill, 37: 292.

As to liability of carrier for the baggage of the passenger; nature and amount allowed; what is sufficient delivery to carrier; liability for contents of passenger's trunk lost; proof of loss,—see note to Humphreys v. Perry, 37: 587.

As to rights, duties, and obligations of carriers in general, see note to Fox v. Boston & M. R. Co. (Mass.) 1 L. R. A. 702.

As to liability for goods in transit; inquiry as to value; extent of liability; effect of seizure by judicial process,—see note to Bennett v. American Exp. Co. (Me.) 13 L. R. A. 33.

As to goods taken from carrier on legal process, see note to National Bank of Commerce v. Chicago, B. & N. R. Co. (Minn.) 9 L. R. A. 263, 264.

As to bill of lading a receipt and a contract, see note to Louisville, E. & St. L. R. Co. v. Wilson (Ind.) 4 L. R. A. 244.

As to carrier's liability for loss of goods; liability as insurer; bill of lading; restriction of liability,—see note to Richmond & D. R. Co. v. Payne (Va.) 6 L. R. A. 849.

steamer, contained on its face the provision: "And finally, in accepting this bill of lading, the shipper, owner, and consignee of the goods, and the holder of the bill of lading, agree to be bound by all its stipulations, exceptions, and conditions, as printed on the back hereof, whether written or printed, as fully as if they were signed by such shipper, owner, consignee, or holder."

Of the stipulations, exceptions, and conditions printed on the back, only the following are material:

"1. It is also mutually agreed that the carrier **274**]shall not be *liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made."

"9. Also, in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by the first opportunity, when found, at the company's expense, the steamer not to be held liable for any claim for delay or otherwise."

"14. This agreement is made with reference to, and subject to, the provision of United States carrier's act, approved February 13, 1893."

It appeared from the testimony taken that these goods were the last to be loaded, and that instead of being stowed with other freight for Savanilla, the port of destination, they were placed in another hold of the ship and in the "last tier to come out" of the Carthegena freight. It also appeared that the consignment was not discharged at Savanilla, and that it was not discovered to be on board until the ship was well on its way to Carthegena. The ship, however, proceeded on its voyage without attempting to make the delivery of the goods, and, upon receiving a cargo of fruit at Port Limon, sailed for New York, where the consignment was reshipped August 16, 1893, on the steamer Alvo. No notice was given to libellant of the return of the goods or their reshipment. The Alvo was caught in a hurricane and lost at sea with her entire cargo.

The district court held that there was a "failure in the proper delivery" of the goods at Savanilla, but that inasmuch as bills of lading were not signed specially designating the value of each of the twenty-nine packages, as provided by clause one on the back of the bill of lading, the liability of the company was limited to $100 for each of the twenty nine packages, or $2,900 in all. 64 Fed. Rep. 874.

From this decree the libellant alone appealed, **275**] and upon the *hearing the circuit court of appeals for the second circuit, by a majority opinion, sustained the decree of the court below. 35 U. S. App. 587.

Mr. **J. Langdon Ward** for appellant.
Mr. **Everett P. Wheeler** for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

Two questions are presented by the record in this case: First, whether the steamship company was liable at all under its bill of lading for the nondelivery of the goods at Savanilla; second, whether such liability was limited to the sum of $100 for each package.

1. Both the district court and the court of appeals held the company to be liable under § 1 of the Harter act (27 Stat. at L. 445, chap. 105) which provides "that it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect," and this, notwithstanding the provision in the bill of lading that "in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by the first opportunity, when found, at the company's expense, the steamer not to be held liable for any claim for delay or otherwise."

As the company did not appeal from this decree it must be regarded as acquiescing in the justice of such decree to the *amount [**276** therein awarded to the libellant; but as we should not make a further decree against the company for the amount now claimed by the libellant in excess of $100 per package, if we were satisfied that the company was not liable at all, we have thought it best to consider whether the courts below were correct in their construction of the Harter act.

It may well be questioned whether the provision "that in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination" has any application to a case where the goods were not placed in the proper compartment when stowed on board the vessel, and for which it appears no search was made upon the arrival at Savanilla, notwithstanding the fact that a bill of lading had been given for them and their shipment had been entered upon the manifest or other "cargo books" of the steamer. It appears that after leaving Savanilla the purser discovered that these goods had not been "tallied out" on the cargo books for that port, and he at once made search for them, and found them stowed with the Carthegena cargo.

It was clearly the duty of the master of the vessel before leaving Savanilla to examine the manifests or other memoranda of the vessel to ascertain whether the portion of the cargo consigned to that place had been delivered, and if not, to search for the missing consignment before leaving the port. His failure to do this was obviously a breach of his general obligation to deliver his cargo to its consignee, and it is exceedingly doubtful whether, even in the absence of the Harter act, the provision in the bill of lading would have excused him. But as the stipulation in the bill of lading was one which the Harter act prohibited, it is only necessary to refer to this act to hold the com-

pany chargeable with negligence. Regard may doubtless be had to the custom of the port as to what shall be termed a proper delivery with respect to the time and manner of such delivery, but a failure to deliver at all was negligence. No such want of delivery can be excused under the terms of either the 1st or 2d section of the Harter act. Not only was there negligence in failing to examine the ship's papers to ascertain what goods were consigned **277**] to Savanilla, *but there was also negligence in stowing such goods under that portion of the cargo destined for Carthegena, and thus concealing them from observation. If these goods were the last received by the vessel before her departure from New York, they would naturally have occupied a position which would have called attention to them upon arrival at the first port of destination, but they were so concealed beneath the goods consigned to another port that they were not discovered untill after the vessel had left Savanilla.

The words "cannot be found" would seem to apply to a case where the goods had been misplaced, and an effort had been made to find them which had proved unsuccessful, and not to a case where no attempt whatever was made to deliver them. But however this may be, we are clearly of opinion that provisions of § 1 of the Harter act supersede and overide this stipulation in the bill of lading, particularly as it is expressly provided that the agreement was "made with reference to, and subject to, the provisions of the United States carriers' act, approved February 13, 1893" (Harter act). The 1st section of the act is cited above, but the 2d section further provides "that it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement . . . whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided."

It is to be noticed that by the 1st section the carrier shall not be "relieved from liability" for loss or damage arising from negligence in the proper stowage or proper delivery of the goods, while by the 2d section the carrier shall not insert any covenant or agreement in the bill of lading whereby the obligations of the carrier to carefully stow and properly deliver the cargo shall be "lessened, weakened, or avoided." These two sections, in their general purport, so far as respects the care and delivery of the cargo, are not essentially different, al- **278**] though *it is possible that a somewhat ampler measure of liability was intended under the 2d section, which denounces any covenant whereby the obligations of the ship to properly deliver the cargo shall in any wise be lessened, weakened, or avoided. As the negligence of the respondent in this connection was clearly proved, there can be no doubt of its liability under either of these sections of the Harter act.

2. The alleged limitation of respondents' liability to the sum of $100 per package depends upon that clause of the bill of lading which declares "that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made." Respondent insists that the words of this clause, "which are above the value of $100 per package," should be read as limiting its liability to $100 per package, and should be construed as if the words used were "beyond the sum or value of $100 per package." The courts below agreed in putting this interpretation upon it. Acting upon this view, it was held that the liability of the respondent was limited to $100 per package, following in this particular the rulings of this court in *New York C. & H. R. Railroad Company* v. *Fraloff*, 100 U. S. 24, 27 [25:531, 533]; and *Hart* v. *Pennsylvania R R. Co.* 112 U. S. 331 [28:717]; and the principle announced in *Magnin* v. *Dinsmore*, 56 N. Y. 168, 62 N. Y. 35 [20 Am. Rep. 442], 70 N. Y. 410 [26 Am. Rep. 608]; *Wescott* v. *Fargo*, 61 N. Y. 542 [19 Am. Rep. 300]; and *Graves* v. *Lake Shore & M. S. R. R. Co.* 137 Mass. 33 [50 Am. Rep. 282]. In this last case the rule obtaining in this court is adopted to its full extent by the supreme judicial court of Massachusetts. In these cases it was held to be competent for carriers of passengers or goods, by specific regulations brought distinctly to the notice of the passenger or shipper, to agree upon the valuation of the property carried, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, and that such contracts will be upheld as a lawful method of securing *a due proportion between the amount [**279** for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. See also *Ballou* v. *Earle*, 17 R. I. 441 [14 L. R. A. 433]; *Richmond & Danville R. R. Co.* v. *Payne*, 86 Va. 481 [6 L. R. A. 849]; *J. J. Douglass Company* v. *Minnesota Transfer Co.* 62 Minn. 288 [30 L. R. A. 860].

We are, however, not content with the construction put upon the contract by the courts below. Whether the limitation of liability to goods above the value of $100 per package applies to "gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks," as well as to goods of other descriptions, may admit of some doubt, in view of the fact that by Rev. Stat. § 4281, the vessel and her owners would not be liable for such articles at all, unless specifically mentioned at a valuation agreed upon. This stipulation in the bill of lading having been inserted by the shipowner for its own benefit could scarcely have been intended to enlarge its statutory liability, and the more reasonable interpretation would seem to be that the company was not intended to be held liable at all for these articles. But whether this be so or not, the stipulation may be read as if those words were omitted, namely, that the carrier shall not be liable for goods

of any description "which are above the value of $100 per package." The plain and unequivocal meaning of these words is that the carrier shall not be liable to any amount for goods exceeding in value $100 per package. It is true that contracts for the carriage of goods by water as well as by land frequently contain a provision limiting the liability of the carrier to a certain amount, usually $100 per package, and it was apparently in view of this custom that the courts below gave a like interpretation to the words of this stipulation. But this certainly does violence to its language. If it had been intended to so limit the respondent's liability, it would have been easy to say so, and the very fact that different language was used from that ordinarily employed indicates a desire on the part of the carrier to limit his liability to goods which are of less value than $100 per package. It is possible that the draughtsman of this bill of [280] *lading may have had the more common limitation in his mind, and may have intended that the carrier should incur a liability upon all goods to the extent of $100 per package, but he certainly was unfortunate in the language he chose for that purpose. If, as we have already intimated, the carrier intended to exempt itself from all liability for the articles specifically mentioned in this clause, it is scarcely to be supposed that it intended to make itself liable to the amount of $100 for goods of other descriptions, which were above that value per package. It was probably intended that the carrier should incur no liability whatever for the value of the articles specifically mentioned, as well as for all other goods exceeding the value of $100 per package, while it remained liable to the full amount for goods of other descriptions which were of less value.

It is true that in cases of ambiguity in contracts, as well as in statutes, courts will lean toward the presumed intention of the parties or the legislature, and will so construe such contract or statute as to effectuate such intention; but where the language is clear and explicit there is no call for construction, and this principle does not apply. Parties are presumed to know the force and effect of the language in which they have chosen to embody their contracts, and to refuse to give effect to such language might result in artfully misleading others who had relied upon the words being used in their ordinary sense. In construing contracts words are to receive their plain and literal meaning, even though the intention of the party drawing the contract may have been different from that expressed. A party to a contract is responsible for ambiguity in his own expressions, and has no right to induce another to contract with him on the supposition that his words mean one thing while he hopes the court will adopt a construction by which they would mean another thing more to his advantage. Clark, Contracts, p. 593.

It was said of penal statutes by Mr. Chief Justice Marshall in *United States* v. *Wiltberger*, 18 U. S. 5 Wheat. 76, 95 [5: 37, 42], that "the intention of the legislature is to be collected from the words they employ. Where there is no am- [281] biguity in the words, *there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially, in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so."

Similar language was used by Mr. Justice Swayne in *United States* v. *Hartwell*, 73 U. S. 6 Wall. 385, 396 [18: 830, 833]: "If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and overstrict construction. The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity, which the legislature ought not to be presumed to have intended. When the words are general and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all." See also Endlich, Interpretation of Statutes, § 4.

In this case the contract is one prepared by the respondent itself for the general purposes of its business. With every opportunity for a choice of language, it used a form of expression which clearly indicated a desire to exempt itself altogether from liability for goods exceeding $100 in value per package, and it has no right to complain if the courts hold it to have intended what it so plainly expressed. If the language had been ambiguous we might have given it the construction contended for, which probably conforms more nearly to the clause ordinarily inserted in such cases, but such language is too clear to admit of a doubt of the real meaning. The clause in question seems to have been taken from the English carriers' act (11 Geo. IV. and 1 Wm. IV. chap. 68) which received a construction similar to that we have given to it in *Morritt* v. *North Eastern Railway Co.* L. R. 1 Q. B. Div. 302.

*Under this interpretation there is a [282] clear attempt on the part of the carrier to exonerate itself from all responsibility for goods exceeding the value of $100 per package. Such exemption is not only prohibited by the Harter act, but is held to be invalid in a series of cases in this court, culminating in *Chicago, Milwaukee & St. P. R. Co.* v. *Solan*, 169 U. S. 133, 135 [*ante*, 688, 690], wherein it was said that "any contract by which a common carrier of goods or passengers undertakes to exempt himself from all responsibility for loss or damage arising from the negligence of himself or his servants, is void as against public policy, as attempting to put off the essential duties resting upon every public carrier by virtue of his employment, and as tending to defeat the fundamental principle on which the law of common carriers was established." The difficulty is not removed by the fact that the carrier may render itself liable for these goods, if "bills of lading are signed therefor, with the value therein expressed, and a special agreement is made. This would enable the carrier to do as was

done in this case—give a bill of lading in which no value was expressed, under which it would not be liable at all for the safe transportation and proper delivery of the property. This would be in direct contravention of the Harter act. Indeed, we understand it to be practically conceded that under the construction we have given to this clause of the contract the exemption would be unreasonable and invalid.

The decree of the District Court is therefore reversed and the case remanded to that court with directions to assess the value of the libellant's goods, and to enter a decree in conformity with the opinion of this court.

Mr. Justice **White** concurred in the result.
Mr. Justice **Brewer** dissented.

283] JESSIE NORTON TORRENCE MAGOUN, *Appt.*, *v.* ILLINOIS TRUST & SAVINGS BANK *et al.*

(See S. C. Reporter's ed. 283-303.)

Legacy and inheritance taxes—equal protection of the laws—classes—amount of exemption—14th Amendment—rule of equality—Illinois law.

1. Legacy and inheritance taxes are constitutional.
2. The equal protection of the laws given by the Federal Constitution only requires that the law shall have the attribute of equality of operation, which does not mean indiscriminate operation on persons merely as such, but on persons according to their relations.
3. Classes based on lineal and collateral relationship to the testator or intestate, made by a statute taxing inheritances, depend on substantial distinctions, and are not arbitrary.
4. The determination of the amount of exemptions in a statute taxing successions is a legislative, and not a judicial, function.
5. Exemptions from a statute taxing inheritances do not render its operation unequal within the meaning of the 14th Amendment.
6. A collateral inheritance tax which does not impose a uniform rate, but classifies legacies to strangers to the blood and imposes higher rates on the larger sums, is not in violation of the rule of equality of the 14th Amendment to the Federal Constitution.
7. The Illinois law taxing gifts, legacies, and inheritances is constitutional.

[No. 464.]

Argued January 28, 1898. Decided April 25, 1898.

APPEAL from a decree of the Circuit Court of the United States in and for the Northern District of Illinois dismissing a suit in equity brought by Jessie Norton Torrence Magoun, plaintiff, against the Illinois Trust & Savings Bank *et al.*, to remove a cloud from the real estate devised to plaintiff by the last

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NOTE.—*As to direct taxes*, see notes to Scholey v. Rew, 23: 99.

As to power of states to tax, see note to Dobbins v. Erie County Comrs. 10: 1022.

That taxation of stock or shares in corporation does not impair obligations of contracts; taxation of shares of national banks and other corporations,—see note to Providence Bank v. Billings, 7: 939.

As to exemption from taxation; whether a contract or not; not implied,—see note to Tucker v. Ferguson, 22: 805.

As to exemption of church property, see note to Gibbons v. District of Columbia, 29: 680.

As to sale of lands for taxes; strict compliance with statute necessary,—see note to Williams v. Peyton, 4: 518.

As to when an injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 20: 65.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

As to transfer or succession tax of foreigners to estate, see note to Rixner's Succession (La.) 32 L. R. A. 177.

As to due process of law in assessment of tax matter, see note to Kuntz v. Sumption (Ind.) 2 L. R. A. 656.

Inheritance and succession taxes, when valid; operation and effect of; what subject to.

A tax upon the right or privilege of taxing property by will or descent under the law of the state is an excise or duty, and not a tax on property. State v. Hamlin, 86 Me. 495, 25 L. R. A. 632; Minot v. Winthrop, 162 Mass. 113, 26 L. R. A. 259.

A reasonable excise tax on the transmission of decedent's property is not in violation of the owner's right of transmission as a necessary incident of property. Minot v. Winthrop, 162 Mass. 113, 26 L. R. A. 259; State v. Alston, 94 Tenn. 674, 28 L. R. A. 178.

The statute in force at a person's death governs the decision as to a collateral inheritance tax on his estate. *Re* Roosevelt, 143 N. Y. 120, 25 L. R. A. 695.

The state may tax the right to receive property by will or inheritance. State, Schwartz, v. Ferris, 53 Ohio St. 314, 30 L. R. A. 218.

The tax imposed by Ohio act April 20, 1894, declaring that all property passing by will or the intestate laws or by deed of gift, intending to take effect after the grantor's death to an heir, shall be liable to certain taxes, is a tax upon the right or privilege of succession, and not upon the property itself. State, Schwartz, v. Ferris, 53 Ohio St. 314, 30 L. R. A. 218.

The right of succession to property by will or descent is a proper subject or object for taxation, as the word "privilege" in Ill. Const. art. 9, § 1, is broad enough to cover it. *Re* Benton, 28 Chicago Legal News, 418.

The so-called exemptions in Ill. act June 15, 1895, taxing succession to property by will or descent, are not exemptions within Ill. Const. art. 9, § 3, providing for the exemption of property from taxation. *Re* Benton, 28 Chicago Legal News, 418; *Re* Strobel, 39 N. Y. Supp. 109.

Statutes creating classes of property of deceased persons for the purpose of a succession tax, although it exempts some classes from taxation and provides different rates for other classes, but is uniform as to all property in the same class, does not violate Ill. Const. 1870, art. 9, requiring property to be taxed according to value. Kochersperger v. Drake, 167 Ill. 122.

Classes or discrimination in succession taxes as uniform taxation. People, Kochersperger, v. Drake, 29 Chicago Legal News, 110; State, Schwartz, v. Ferris, 9 Ohio C. C. 298; Dyer v. Hagerty, 12 Ohio C. C. 606; *Re* Benton, 28 Chicago Legal News, 418; State v. Hamlin, 86 Me. 495, 25 L. R. A. 362; Minot v. Winthrop, 162 Mass. 113, 26 L. R. A. 259; State v. Alston, 94 Tenn. 674, 28 L. R. A. 178.

will of Joseph T. Torrence, deceased, and to enjoin the paying, collecting, or receiving an inheritance tax. *Affirmed.*

Statement by Mr. Justice **McKenna:**

This is a bill in equity filed in the circuit court of the United States in and for the northern district of Illinois by Jessie Norton Torrence Magoun, a resident and citizen of New York, against the Trust Company, as executor of and trustee under the last will and testament of Joseph T. Torrence, deceased, and the county treasurer of Cook county, Illinois, both residents and citizens of Illinois, to remove a cloud from the real estate devised by said decedent to the complainant, and to enjoin the first named defendant from voluntarily paying, and the county treasurer from collecting or receiving, the inheritance tax, amounting to more than $5,000, alleged to be due upon the entire estate of said decedent, and for which the complainant's interest in said estate was contended by the county treasurer to be liable.

The bill set forth the will of the decedent, a description and valuation of the real estate and personal property left by him, amounting in all to $600,000 above his debts, and the demand of the county treasurer for the inheritance tax, which, by the act in question, is made a lien upon all of said property, the request of the complainant to the defendant Trust Company not to pay the same and to contest the constitutionality of the act; to refrain from paying the same voluntarily and without protest, and to await the commencement of legal proceedings to enforce the same; the refusal of the Trust Company to comply with this request, and its threat and intention *to pay said tax at once voluntarily, which[284 payment could not be recovered if said law should hereafter be declared unconstitutional.

The bill also alleged that such payment would result in waste of the estate, and would be a breach of trust on the part of said executor, to the irreparable loss and injury of the complainant; that the alleged lien of the tax clouds the title to the real property and renders the

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Requirement of Cal. Const., that all property shall be taxed according to its value, is inapplicable to the tax contemplated by Cal. act March 23, 1893 (collateral inheritance tax act), as such tax is upon the right of succession, and not upon property. *Re* Wilmerding, 117 Cal. 281.

Discrimination in favor of surviving brothers and sisters of the deceased and against the children of deceased brothers or sisters, in Cal. act March 23, 1893, imposing a collateral inheritance tax upon the right of succession to the property of the decedent, does not render the act invalid as class legislation. *Re* Wilmerding, 117 Cal. 281.

Discrimination among collateral kindred of different classes, by 91 Ohio Laws, p. 169, amending "An Act Imposing a Collateral Inheritance Tax," does not render the act unconstitutional. Hagerty v. State, Dyer, 55 Ohio St. 613.

A tax on the succession to property of a deceased person is not a tax upon the property itself, but on the right of succession thereto. Kochersperger v. Drake, 167 Ill. 122.

Collateral inheritance tax imposed by Cal. act March 23, 1893, providing that all property passing by will or the intestate laws from any person who may die seised or possessed of the same while a resident of the state, to any person other than those belonging to the excepted class, shall be subject to a tax of $5 on every $100 of its market value, is a tax upon the right of succession, and is within the constitutional power of the legislature. *Re* Wilmerding, 117 Cal. 281.

"Inheritance tax" is not such tax property as is contemplated by Colo. Const. art. 10, § 3, but rather a contribution which the state levies for itself as a condition upon which title to property shall pass upon the death of its owner. *Re* Inheritance Tax, 23 Colo. 492.

Subject of tax act under the New York transfer tax act is not the property that passes by will, but the right of succession vesting in the legatee. *Re* Sloane, 19 App. Div. 411, Affirmed in 154 N. Y. 109.

The New York transfer tax is not a tax on property, but on the right of succession to property, so far as residents of the state are concerned, and the true test by which the tax is to be measured in such a case is the value of the estate at the time of the transfer of title, and not its value at the time of the transfer of possession. *Re* Sloane, 154 N. Y. 109, Affirming 19 App. Div. 411.

Word "sale" as used in 91 Ohio Laws, p. 169, imposing an inheritance tax upon property "which shall pass by will, . . . sale, or gift," includes only transactions which, though in form sales, are in effect gifts; and the act does not, therefore, invade the right of sale guaranteed by the Ohio Constitution to the owners of property. Hagerty v. State, Dyer, 55 Ohio St. 613.

The provision of N. Y. Laws 1896, chap. 908, § 230, that whenever an estate for life or for years can be devested by the act or omission of the legatee or devisee, it shall be taxed as if there were no possibility of such limitation, does not apply to an estate in remainder which cannot be so devested. *Re* Sloane, 154 N. Y. 109, Affirming 19 App. Div. 411.

Pendency of an action on a single outstanding claim in favor of an estate does not show such a lack of settlement as will postpone the payment of a collateral inheritance tax. *Re* Miller, 182 Pa. 157.

The question of the liability of property of a decedent to collateral inheritance tax depends upon his status at the instant of his death. *Re* Handley, 181 Pa. 339.

The time when the surrogate shall proceed to fix the tax under the New York transfer tax acts is in general within his sound judgment; and he is not required to wait until it has been ascertained whether or not there are claims against the estate. *Re* Westurn, 152 N. Y. 93, Reversing 8 App. Div. 59.

The ascertainment of the persons entitled to the property of a decedent must precede the imposition of any tax under the New York transfer tax acts. *Re* Westurn, 152 N. Y. 93. Reversing 8 App. Div. 59.

A second appraisement cannot be had under the Pennsylvania collateral inheritance tax acts because of the omission of the auditor on the first appraisement to make an appraisement of the proceeds of land in another state sold by direction of the executors under direction of the will. Moneypenny's Estate, 181 Pa. 309.

Debts, commissions, and expenses of administration should be deducted in ascertaining taxable values under the New York transfer tax acts. Re Westurn, 152 N. Y. 93.

By whom succession tax must be paid, see *Re* Botsford, 33 N. B. 55; *Re* Crosby, 46 N. Y. S. R. 442; *Re* Wolfe, 137 N. Y. 205; *Re* Singer, 48 Phila. Leg. Int. 136; *Re* Cayuga County Surrogate, 46 Hun, 657.

The executors of an estate given them in trust for testatator's widow for life, with remainder over to persons who take subject to the collateral inheritance tax, cannot be required to pay such

same unmarketable, and that the act is in conflict with the provisions of the 14th Amendment.

The Trust Company answered, admitting the allegations of fact in the bill, but submitting the question of the constitutionality of the law to the court and praying to be advised of its rights and duties in the premises as executor and trustee aforesaid and as an officer of the court.

The county treasurer denied that the act was unconstitutional, and admitted the allegations respecting the estate of the deceased, the interest of the complainant therein, the lien of the inheritance tax thereon and the demand made therefor.

The cause was heard on bill and answers, and a decree was entered dismissing the bill from which an appeal was prayed to this court and allowed.

The act under which the taxes complained of were assessed is entitled "An Act to Tax Gifts, Legacies, and Inheritances in Certain Cases and to Provide for the Collection of the Same." It is only necessary to quote its 1st and 2d sections, which are as follows:

"Sec. 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, All property, real, personal, and mixed, which shall pass by will or by the intestate laws of this state from any person who may die seised or possessed of the same while a resident of this state, or if decedent was not a resident of this state at the time of his death, which property or any part thereof shall be within this state or any interest therein or income therefrom, which shall be transferred by deed, grant, sale, or gift, made in contemplation of the death of the grantor or bargainor or intended to take effect, in possession or enjoyment after such death, to any *person or persons or to any body politic [285 or corporate in trust or otherwise, or by reason whereof any person or body politic or corpo-

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tax under Pa. act May 6, 1887, making the tax not payable until the person or persons liable for the same come into actual possession, but the tax is payable by the remaindermen upon coming into possession. Coxe's Estate, 181 Pa. 369.

Property devised by one who died before the enactment of any statute imposing a transfer tax, to her husband for life with the right to dispose of the same by will, with remainder to specified persons if not disposed of under the power, passes directly to the remaindermen under such will so as not to be subject to the transfer tax, under N. Y. Laws 1893, chap. 399. *Re* Langdon, 153 N. Y. 6.

The inclusion of the United States bonds in the valuation under laws of a state for taxation of inheritances, for the purpose of ascertaining the amount of the tax, is a valid exercise of the legislative powers, and does not constitute a taxation of Federal securities. *Re* Sherman, 153 N. Y. 1.

Land situated outside of the state is not subject to the collateral inheritance tax until actual conversion by the direction of the will that it shall be converted into personalty. *Re* Handley, 181 Pa. 339.

A remainder limited on a prior vested remainder in fee subject to be devested in a certain event is not subject to any tax under N. Y. Laws 1892, chap. 399 (transfer tax act), where it had become a vested remainder by the happening of the contingency before the passage of the act. *Re* Travis, 19 Misc. 393.

An appraiser to appraise the estate of a decedent for the purposes of the transfer tax under N. Y. Laws 1892, chap. 399, may make deductions for the estimated probable amount of commissions and the expenses of administration, and it is not necessary to wait until such commissions and expenses have been definitely ascertained. *Re* Gould, 48 N. Y. Supp. 872.

The assessment of a tax under the New York transfer tax act is fatally defective as to a daughter of the intestate who never received a notice of the proceedings against her, and of the hearing or an opportunity to be heard in reference to the value of the property and the amount of the tax. *Re* Winters, 21 Misc. 552.

A transfer tax is properly imposed on personal property as such under the New York statute, although the will directs such property to be used in payment of mortgages on real estate owned by the testator. *Re* Offerman, 25 App. Div. 94.

The jurisdiction of the surrogate to assess and fix the transfer tax under N. Y. Laws 1892, chap. 399, upon property left in the state by a testator who resided in another state and whose executors never took out letters in New York state, cannot be defeated by a distribution of the entire estate without assessment of a tax or a request by the executors that an assessment be made. *Re* Hubbard, 21 Misc. 566.

The provision of N. Y. Laws 1896, chap. 908, § 230, that whenever an estate for life or for years can be devested by the act or omission of the legatee or devisee, it shall be taxed as if there were no possibility of such limitation, does not apply to an estate in remainder which cannot be so devested. *Re* Sloane, 154 N. Y. 109.

The New York transfer tax is not a tax on property, but on the right of succession to property, so far as residents of the state are concerned, and the true test by which the tax is to be measured in such a case is the value of the estate at the time of the transfer of title, and not in its value at the time of the transfer of possession. *Re* Sloane, 154 N. Y. 109.

The right of succession to the property of a deceased person whether by law or inheritance is a creature of statute law, and not a natural right beyond legislative control. State v. Alston, 94 Tenn. 674, 28 L. R. A. 178.

A tax on the privilege of receiving property by inheritance or will or otherwise at the death of the former owner is not a tax on the property or on the right of alienation. State v. Alston, 94 Tenn. 674, 28 L. R. A. 178.

A state tax levied on the succession by foreign heirs, legatees, or donees to property of a deceased person is inoperative as to a citizen and subject of Italy, who by treaty is entitled to the same right to acquire property in this country that our citizens have. *Re* Rixner's Succession, 48 La. Ann. 552, 32 L. R. A. 177.

The amount of a transfer tax on a devise in remainder to the children of a designated person, living at the death of the life tenant, will be fixed in accordance with the value of such remainder at the time of the testator's death, although the tax cannot be imposed until the death of the life tenant. *Re* Davis, 149 N.Y. 539, Affirming 91 Hun, 53.

The remaindermen in a will devising certain property in trust to pay the income to a designated person for life, and "upon her decease" devising it to the children of a specified person living at the time of the life tenant's death, are not subject to a collateral inheritance tax, where the testator died before and the life tenant after the passage of N. Y. Laws 1892, chap. 399, § 1, subdiv. 3. *Re* Seaman, 147 N. Y. 69.

rate shall become beneficially entitled in possession or expectation to any property or income thereof, shall be, and is, subject to a tax at the rate hereinafter specified to be paid to the treasurer of the proper county for the use of the state, and all heirs, legatees, and devisees, administrators, executors, and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. When the beneficial interest to any property or income therefrom shall pass to or for the use of any father, mother, husband, wife, child, brother, sister, wife, or widow of the son or the husband of the daughter, or any child or children adopted as such in conformity with the laws of the state of Illinois, or to any person to whom the deceased, for not less than ten years prior to death, stood in the acknowledged relation of a parent, or to any lineal descendant born in lawful wedlock, in every such case the rate of tax shall be one dollar on every hundred dollars of the clear market value of such property received by each person, and at and after the same rate for every less amount, provided that any estate which may be valued at a less sum than twenty thousand dollars shall not be subject to any such duty or taxes, and the tax is to be levied in above cases only upon the excess of twenty thousand dollars received by each person. When the beneficial interest to any property or income therefrom shall pass to or for the use of any uncle, aunt, niece, nephew, or any lineal descendant of the same, in every such case the rate of such tax shall be two dollars on every one hundred dollars of the clear market value of such property received by each person on the excess of two thousand dollars so received by each person. In all other cases the rate shall be as follows: On each and every hundred dollars of the clear market value of all property and at the same rate for any less amount; on all estates of ten thousand dollars and less, three dollars; on all estates of over ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, **286**] five dollars; and on *all estates over fifty thousand dollars, six dollars: Provided, That an estate in the above case which may be valued at a less sum than five hundred dollars shall not be subject to any duty or tax.

"Sec. 2. When any person shall bequeath or devise any property or interest therein or income therefrom to mother, father, husband, wife, brother and sister, the widow of a son, or a lineal descendant during the life or for a term of years or remainder to the collateral heir of the decedent, or to the stranger in blood or to the body politic or corporate at their decease, or, on the expiration of such term, the said life estate or estates for a term of years shall not be subject to any tax and the property so passing shall be appraised immediately after the death at what was the fair market value thereof at the time of the death of the decedent in the manner hereinafter provided, and after deducting therefrom the value of said life estate, or term of years, the tax transcribed by this act on the remainder shall be immediately due and payable to the treasurer of the proper county, and, together with the interests thereon, shall be and remain a lien on said property until the same is paid: Provided, That the person or persons or body politic or corporate beneficially interested in the property chargeable with said tax elect not to pay the same until they shall come into the actual possession or enjoyment of such property, or, in that case said person or persons or body politic or corporate shall give a bond to the people of the state of Illinois in the penalty three times the amount of the tax arising upon such estate with such sureties as the county judge may approve, conditioned for the payment of the said tax, and interest thereon, at such time or period as they or their representatives may come into the actual possession or enjoyment of said property, which bond shall be filed in the office of the county clerk of the proper county: Provided, further, That such person shall make a full, verified return of said property to said county judge, and file the same in his office within one year from the death of the decedent, and within that period enter into such securities and renew the same for five years."

*Two other cases were argued and sub-[**287** mitted with this case, to wit, *Josephine C. Drake et al.*, Executors, etc., *Plaintiffs in Error*, v. *Daniel H. Kochersperger*, County Treasurer, etc., Cook County, Illinois, Error to the Supreme Court of the State of Illinois; and *Elizabeth Emerson Sawyer et al.*, Executors, etc., *Plaintiffs in Error*, v. *The Same*, Error to the Circuit Court of the United States for the Northern District of Illinois.

In the *Drake Case* the supreme court of the state of Illinois sustained the statute as consonant with the Constitution of the state. 167 Ill. 122.

Messrs. **Benjamin Harrison, William D. Guthrie,** and *Eugene E. Prussing* for appellant.

Messrs. **Thomas A. Moran, Edward C. Akin,** Attorney General of Illinois, *Robert S. Iles*, and *Frank L. Shepard* for appellees.

Mr. Justice **McKenna** delivered the opinion of the court:

Legacy and inheritance taxes are not new in our laws. They have existed in Pennsylvania for over sixty years, and have been enacted in other states. They are not new in the laws of other countries. In *State* v. *Alston*, 94 Tenn. 674 [28 L. R. A. 178], Judge Wilkes gave a short history of them as follows: "Such taxes were recognized by the Roman law. 1 Gibbon, Decline and Fall of the Roman Empire, pp. 163, 164. They were adopted in England in 1780, and have been much extended since that date. Dowell, History of Taxation in England, 148; Acts 20 Geo. III. chap. 28; 45 Geo. III. chap. 28; 16 & 17 Vict. chap. 51; *Green* v. *Croft*, 2 H. Bl. 30; *Hill* v. *Atkinson*, 2 Meriv. 45. Such taxes are now in force generally in the countries of Europe. Review of Reviews, February, 1893. In the United States they were enacted in Pennsylvania in 1826; Maryland, 1844; Delaware, 1869; *West [**288** Virginia, 1887, and still more recently in Connecticut, New Jersey, Ohio, Maine, Massachusetts, in 1891; Tennessee in 1891, chapter 25, now repealed by chapter 174, acts 1893. They

were adopted in North Carolina in 1846, but repealed in 1883. Were enacted in Virginia in 1844, repealed in 1855, re enacted in 1863, and repealed in 1884." Other states have also enacted them—Minnesota by constitutional provision.

The constitutionality of the taxes has been declared, and the principles upon which they are based explained in *United States* v. *Perkins*, 163 U. S. 625, 628 [41: 287, 288]; *Strode* v. *Com.* 52 Pa. 181; *Eyre* v. *Jacob*, 14 Gratt. 422 [73 Am. Dec. 367]; *Schoolfield* v. *Lynchburg*, 78 Va. 366; *State* v. *Dalrymple*, 70 Md. 298 [3 L. R. A. 372]; *Clapp* v. *Mason*, 94 U. S. 589 [24: 212]; *Re Merriam's Estate*, 141 N. Y. 479; *State* v. *Hamlin*, 86 Me. 495 [25 L. R. A. 632]; *State* v. *Alston*, 94 Tenn. 674 [28 L. R. A. 178]; *Re Wilmerding*, 117 Cal. 281; Dos Passos, Collateral Inheritance Tax, 20; *Minot* v. *Winthrop*, 162 Mass. 113 [26 L. R. A. 259]; *Gelsthorpe* v. *Furnell* (Mont.) 51 Pac 267. See also *Scholey* v. *Rew*, 90 U. S. 23 Wall. 331 [23: 99].

It is not necessary to review these cases, or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective state Constitutions requiring uniformity and equality of taxation.

The second principle was given prominence in the arguments at bar. The appellee claimed that the power of the state could be exerted to the extent of making the state the heir to everybody, and the appellant asserted a natural right of children to inherit. Of the former proposition we are not required to express an opinion. Nor indeed of the latter, for appellant conceded that testamentary disposition and **289**]inheritance *were subject to regulation. However, as pertinent to the subject, decisions of this court may be cited.

In *United States* v. *Fox*, 94 U. S. 315-321 [24: 192, 193], a law of the state of New York confining devises to natural persons and corporations created under its laws was considered, and a devise of land to the United States was held void. The court said:

"The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick* v. *Sullivant*, 23 U. S. 10 Wheat. 202 [6: 303]. . . . Statutes of wills, as is justly observed by the court of appeals, are enabling acts, and prior to the statute of 32 Hen. VIII. there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. The English statute of wills became a part of the law of New York upon the adoption of her Constitution in 1777; and, with some modifications in its language, remains so at this day. Every person must, therefore, devise his lands in that state within the limitations of the statute or he cannot devise them at all. His power is bounded by its conditions."

In *Mager* v. *Grima*, 49 U. S. 8 How. 493 [12. 1170], there was considered the validity of a law of Louisiana imposing a tax of 10 per cent upon legacies, when the legatee was neither a citizen of the United States nor domiciled therein. Mr. Chief Justice Taney considered the legal question of easy solution, and disposed of it summarily. He said: "This is a plain case, and when the facts are stated, the questions of law may be disposed of in a few words." After stating the case briefly, he further said:

"Now, the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of *regulating[**290** the manner and term upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. Every state or nation may unquestionably refuse to allow an alien to take either real or personal property, situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the state. In many of the states of this Union at this day, real property devised to an alien is liable to escheat. And if a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take is given to the alien, subject to a deduction of 10 per cent for the use of the state."

"In some of the states laws have been passed at different times imposing a tax similar to the one now in question upon its own citizens as well as foreigners; and the constitutionality of these laws has never been questioned. And if a state may impose it upon its own citizens, it will hardly be contended that aliens are entitled to exemption; and that their property in our own country is not liable to the same burdens that may lawfully be imposed upon that of our own citizens.

"We see no objection to such a tax, whether imposed on citizens and aliens alike, or upon the latter exclusively."

In *United States* v. *Perkins*, 163 U. S. 625-631 [41: 287-289], the inheritance tax law of the state of New York was involved. Mr. Justice Brown, speaking for this court, said:

"While the laws of all civilized states recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the state may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of stat-

ute and within legislative control. 'By the common law, as it stood in the reign of Henry II., a man's goods were to be divided into three
291] equal parts; of which one went to *his heirs or lineal descendants, another to his wife, and a third was at his own disposal, or if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so, *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal. 2 Bl. Com. 492.

"Prior to the statute of wills, enacted in the reign of Henry VIII. the right to a testamentary disposition of the property did not extend to real estate at all, and as to personal estate was limited as above stated. Although these restrictions have long since been abolished in England, and never existed in this country, except in Louisiana, the right of a widow to her dower and to a share in the personal estate is ordinarily secured to her by statute.

"By the Code Napoleon, gifts of property, whether by acts *inter vivos* or by will, must not exceed one half the estate if the testator leave but one child; one third, if he leaves two children; one fourth, if he leaves three or more. If he have no children, but leaves ancestors, both in the paternal and maternal line, he may give away but one half of his property, and but three fourths if he have ancestors in but one line. By the law of Italy, one half a testator's property must be distributed equally among all his children; the other half he may leave to his eldest son or to whomsoever he pleases. Similar restrictions upon the power of disposition by will are found in the codes of other continental countries, as well as in the state of Louisiana. Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of the parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good."

Against the cases sustaining inheritance taxes and their classifications and exemptions, appellants cite *State* [*Sanderson*] v. *Mann*, 76 Wis. 469; *State* [*Davidson*] v. *Gorman*, 40 Minn. 232 [2 L. R. A. 701]; *Curry* v. *Spencer*, 61 N. H. 624 [60 Am. Rep. 337]; *State* [*Schwartz*] v. *Ferris*, 53 Ohio St. 314 [30 L. R. A. 218], and *State of Missouri* [*Garth*] v. *Schwitzler* [45 S. W. 245], lately decided.

292] *These cases are not in all points irreconcilable with those first cited. *Curry* v. *Spencer* is extreme. It was held that an exception from an otherwise general inheritance law of legacies to husband or wife, children or grandchildren, of the person who died last seised offended the rigid uniformity of the Constitution of that state and its Bill of Rights. The court however said, speaking by Blodgett, J.: "It is not to be questioned that the power to tax is vested in the legislature; that it is unrestricted, except when it is opposed to some provision of the Federal or state Constitution; and that it extends 'to every trade or occupation, to every object of industry, use, or enjoyment, and to every species of possession.'" And quoting 2 Bl. Com. 12, he further said: "Wills, therefore, and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them."

In *State* [*Sanderson*] v. *Mann* and *State* [*Davidson*] v. *Gorman*, the distinction between a tax on successions and one on property was not necessary to observe. *State* [*Davidson*] v. *Gorman*, however, may be claimed as deciding that a tax based on the value of the estate is contrary to the rule of equality; also that exemptions are. *State* [*Schwartz*] v. *Ferris* and *State* [*Garth*] v. *Schwitzler* do not oppose the principles upon which inheritance taxes are sustained, but only decide that the statutes passed on were repugnant to equality and uniformity of taxation as prescribed by the state Constitutions. They are authority against the Illinois statute. But it is not necessary to dwell on the points of agreement of the cases. Our inquiry must be, not what will satisfy the provisions of the state Constitutions, but what will satisfy the rule of the Federal Constitution. The power of the states over successions may be as plenary in the abstract as appellee contends for, nevertheless it must be exerted within the limitations of that Constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws.

This brings us to the law in controversy. The appellant attacks both its principles and its provisions—its principles as necessarily arbitrary and its provisions as causing discriminations and creating inequality in the burdens of taxation.

*Is the act open to this criticism? The[293
clause of the 14th Amendment especially evoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been, and probably never can be precisely defined. Generally it has been said that it "only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances." *Kentucky Railroad Tax Cases*, 115 U. S. 321 [29: 414]. It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. *Hayes* v. *Missouri*, 120 U. S. 68 [30: 578]. Similar citations could be multiplied. But what is the test of likeness and unlikeness, of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition, when connected with the facts of the cases in which they are employed. With these for illustration it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the state a wide latitude as far as interference by this court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice Field said in *Mobile County* v. *Kimball*,

102 U. S. 704 [26: 214], that this court is not a tribunal in which can be found a refuge from ill advised, unequal, and oppressive state legislation. And he observed in another case: "It is hardly necessary to say that hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity."

The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relation. In some circumstances it may not tax A more than **294**] B, but if A be of a different trade *or profession than B, it may. And in matters not of taxation, if A be a different kind of corporation than B, it may subject A to a different rule of responsibility to servants than B (*Missouri P. R'y Co.* v. *Mackey*, 127 U. S. 205 [32: 107]), to a different measure of damages than B (*Minneapolis & St. L. R'y Co.* v. *Beckwith*, 129 U. S. 26 [32: 585]), and it permits special legislation in all of its varieties. *Missouri P. R'y Co.* v. *Mackey*, 127 U. S. 205 [32: 107]; *Minneapolis and St. Louis R'y Co.* v. *Herrick*, 127 U. S. 210 [32: 109]; *Duncan* v. *Missouri*, 152 U. S. 377 [38: 485].

In other words, the state may distinguish, select, and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitation, of course. "Clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition," said Mr. Justice Bradley, in *Bell's Gap R'd Co.* v. *Pennsylvania*, 134 U. S. 232-240 [33: 892-896].

And Mr. Justice Brewer, in *Gulf, Colorado, & Santa Fé R'y Co.* v. *Ellis*, 165 U. S. 150 [41: 666], after a careful consideration of many cases said: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

Two principles, therefore, must be reconciled in the Illinois inheritance law if it is to be sustained, the equality of the protection of the laws guaranteed by the 14th Amendment, and the power of the state to classify persons and property. The latter principle needs further consideration. What test is there of the reasonableness of a classification—of one based upon "some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection?" Legislation special in character is not forbidden by it, as we have seen. Treating **295**]mechanics as a class, and *giving them a lien for the amount of their work, has been held reasonable. Charging a railroad corporation, and not other corporations or persons, with an attorney's fee has been held unreasonable, yet the former would seem to be as much an exclusive favor as the latter an exclusive burden.

Of taxation, and the case at bar is of taxation, Mr. Justice Bradley said in the *Bell's Gap R'd Co.* v. *Pennsylvania*, *supra*, and Mr. Chief Justice Fuller in *Giozza* v. *Tiernan*, 148 U. S. 657 [37: 599], that the 14th Amendment was not intended to compel the state to adopt an iron rule of equal taxation. The range of the state's power was expressed by Mr. Justice Bradley, as follows: "It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their Constitution."

And so Mr. Justice Miller, speaking for the court in *Davidson* v. *New Orleans*, 96 U. S. 97 [24: 616], said: "The Federal Constitution imposes no restraints on the state in regard to unequal taxation."

The court, through Mr. Justice Lamar, in *Pacific Express Co.* v. *Seibert*, 142 U. S. 339 [35: 1035, 3 Inters. Com. Rep. 810], was equally emphatic. He said on page 351 [35: 1039]: "This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive *of the principles of [**296** uniformity and equality in taxation and of a just adaptation of property to its burdens." And it was said in *Merchants' & Mfrs. Nat. Bank* v. *Pennsylvania*, 167 U. S. 461 [42: 236]: "Indeed, this whole argument of a right under the Federal Constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap R'd Co.* v. *Pennsylvania*."

There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things. Bearing these considerations in mind we can solve the question in controversy.

There are three main classes in the Illinois statute, the first and second being based, respectively, on lineal and collateral relationship to the testator or intestate, and the third being composed of strangers to his blood and distant relatives. The latter is again divided into four subclasses dependent upon the amount of the estate received. The first two classes, there-

fore, depend on substantial differences, differences which may distinguish them from each other and them or either of them from the other class—differences, therefore, which "bear a just and proper relation to the attempted classification"—the rule expressed in the *Gulf, Colorado, & Santa Fé R. Co.* v. *Ellis, supra.* And if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates "equally and uniformly upon all persons in similar circumstances."

But the appellant asserts discrimination, and claims that the exemptions produce the greatest inequality. As stated above, the supreme court of the state of Illinois passed on and sustained the law in the *Drake Case*, and, claiming the opinion for support, the appellant contends that there are two distinct systems and principles applied in the act, the one basing the tax on the amount received or the value of
297] the *privilege of succession; the other basing the tax upon the estate owned by the decedent, irrespective of the amount or value of the legacy. And discriminations hence resulting, or rather which are claimed as hence resulting, are detailed.

We, however, do not read the opinion as counsel do. In answer to the objection that the statute offended against uniformity or proportion to valuation as prescribed by the Constitution of Illinois, the court said:

"That statute provides certain classes of property which were a part of an estate shall be exempt from taxation under these provisions, and when the legislature provides other classes of property, some of which shall pay one dollar per hundred, others two, others three, and others four, and still others five, and again others six dollars per hundred, six different classes are created, under and by which a tax is levied by valuation on the right of succession to a separate class of property.

"The class on which a tax is thus levied is general, uniform, and pertains to all species of property included within that class. A tax which affects the property within a specific class is uniform as to that class, and there is no provision of the Constitution which precludes legislative action from assessing a tax on that particular class. By this act of the legislature six classes of property are created heretofore absolutely unknown. *It is those classes of property depending upon the estate owned by one dying possessed thereof, which the state may regulate as to its descent and the right to devise.* The tax assessed on classes thus created is absolutely uniform on the classes upon which it operates, and under the provisions of the statute is to be determined by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property inherited, and is not inconsistent with the principle of taxation fixed by the Constitution, and is clearly within the sections of the Constitution quoted. No want of uniformity with one living who owns property can be urged as a reason why the statute makes an inconsistent rule. No person inherits property or can take by devise except by the statute, and the state, having power to
298] regulate this question, *may create classes and provide for uniformity with reference to classes which were before unknown."

The words which we have italicized are urged to support appellant's contention, but it is manifest that they do not do so when considered in relation to that which precedes and follows them, and it is therefore the estates which descend or are received which the court decides are new property, and which are to pay a tax in proportion to their value.

Appellant, however, says: "The progression is likewise unnecessarily arbitrary if we take the view that the tax is levied on the amount received. . . . Under such an assumption those taking the larger amounts are required to pay a larger rate on the same sums upon which those taking smaller sums pay a smaller rate; that is to say, one who receives a legacy of $10,000 pays 3 per cent, or $300, thus receiving $9,700 net, while one receiving a legacy of $10,001 pays 4 per cent on the whole amount, or $400.04, thus receiving $9,600.96, $99.04 less than the one whose legacy was actually $1 less valuable. This method is applied throughout the class. Other examples might be stated."

The reasoning of appellant is based on the view that the tax is one on property instead of one on the succession, as held by the supreme court of the state. Being on the succession, the court further held, as we have seen, that the latter is to be regarded as new property, and the $20,000 and other property not taxed are not, therefore, exemptions.

In this view the Illinois court is in harmony with the majority of other courts of the country. We concur in the reasoning. It is true that the amount of the exemption is greater in the Illinois law than in any other, but the right to exempt cannot depend on that. Whether it shall be $20,000 as in Illinois law or $10,000 as in that of Massachusetts, or other amounts as in other laws, must depend upon the judgment of the legislature of each state, and cannot be subject to judicial review. If such review could ascertain the factors of judgment and could apply them with indisputable wisdom to the different conditions existing, it would be outside of its province to do so. That manifestly is a legislative, not a judicial, function.

*The first and second cases, therefore,
[299 of the statute depend on substantial distinctions and their classifications are not arbitrary. Nor do the exemptions of the statute render its operation unequal within the meaning of the 14th Amendment. "The right to make exemptions is involved in the right to select the subjects of taxation and apportion the public burdens among them, and must consequently be understood to exist in the lawmaking power wherever it has not in terms been taken away. To some extent it must exist always; for the selection of subjects of taxation is of itself an exemption of what is not selected." Cooley, Taxn. 200. See, also, the remarks of Mr. Justice Bradley in *Bell's Gap R'd Co.* v. *Pennsylvania, supra.*

The provisions of the statute in regard to the tax on legacies to strangers to the blood of an intestate need further comment. These provisions are as follows:

"On each and every hundred dollars of the

clear market value of all property and at the same rate for any less amount; on all estates of ten thousand dollars and less, three dollars; on all estates over ten thousand dollars and not exceeding twenty thousand dollars, four dollars; on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars; and on all estates over fifty thousand dollars six dollars: Provided, that an estate in the above case which may be valued at a less sum than five hundred dollars shall not be subject to any duty or tax."

There are four classes created, and manifestly there is equality between the members of each class. Inequality is only found by comparing the members of one class with those of another. It is illustrated by appellant as follows: One who receives a legacy of $10,000 pays 3 per cent or $300, thus receiving $9,700 net, while one receiving a legacy of $10 001 pays 4 per cent on the whole amount, or $400 04, thus receiving $9,600.96, or $99.04 less than the one whose legacy was actually $1 less valuable. This method is applied throughout the class.

These, however, are conceded to be extreme illustrations, and we think, therefore, that they **300**]furnish no test of the *practical operation of the classification. When the legacies differ in substantial extent, if the rate increases the benefit increases to greater degree.

If there is unsoundness it must be in the classification. The members of each class are treated alike, that is to say, all who inherit $10,000 are treated alike—all who inherit any other sum are treated alike. There is equality, therefore, within the classes. If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such upon no distinctions justifying it. This is claimed It is said that the tax is not in proportion to the amount but varies with the amounts arbitrarily fixed, and hence that an inheritance of $10,000 or less pays 3 per cent, and that one over $10,000 pays not 3 per cent on $10,000 and an increased percentage on the excess over $10,000 but an increased percentage on the $10,000 as well as on the excess, and it is said, as we have seen, that in consequence one who is given a legacy of $10,001 by the deduction of the tax receives $99.04 less than one who is given a legacy of $10,000 But neither case can be said to be contrary to the rule of equality of the 14th Amendment. That rule does not require, as we have seen, exact equality of taxation It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money, it is on the right to inherit, and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality, nevertheless *they are universally imposed and[**301** their illegality has never been questioned. We think the classification of the Illinois law was in the power of the legislature to make, and *the decree of the Circuit Court is affirmed.*

Mr. Justice **Brewer** dissenting:

I am unable to concur in the foregoing opinion, in so far as it sustains the constitutionality of that part of the law which grades the rate of the tax upon legacies to strangers by the amount of such legacies. If this were a question in political economy I should not dissent, but it is one of constitutional limitations. Equality in right, in protection, and in burden is the thought which has run through the life of this Nation and its constitutional enactments from the Declaration of Independence to the present hour. Of course, absolute equality is not attainable, and the fact that a law, whether tax law or other, works inequality in its actual operation does not prove its unconstitutionality. *Merchants' & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 461 [*ante*, 236]. But when a tax law directly, necessarily, and intentionally creates an inequality of burden, it then becomes imperative to inquire whether this inequality thus intentionally created can find any constitutional justification.

That this is a law imposing taxes is not open to question. The title of the act is "An Act to Tax Gifts, Legacies, etc.," and the 1st section provides that "all property . . . which shall pass by will or by the intestate laws of this state . . . shall be, and is, subject to a tax at the rate hereinafter specified." Classifying inheritors and legatees into the three classes of near relatives, remote relatives, and strangers, and imposing a different rate of taxation as to each of these classes, may not be objectionable. The classification is based upon differences which bear just and proper relation to it, and where classification is rightful, differences in the rate of taxation may be, so far as the Federal Constitution is concerned, permissible. But beyond this classification the statute provides that as to the third class, that is, strangers, the rate of taxation shall vary with the amount of the estate. In other *words, the actual tax to be paid does not[**302** increase simply as the legacy increases, which would be the rule of equality, but the rate of taxation is also increased as the amount of the legacy passes from one sum to another. Upon a legacy over $50,000 it is 6 per cent, while upon one under $10,000 it is only 3 per cent.

It seems to be conceded that if this were a tax upon property such increase in the rate of taxation could not be sustained, but being a tax upon the succession it is held that a different rule prevails. The argument is that because the state may regulate inheritances and the extent of testamentary disposition it may impose thereon any burdens, including therein taxes, and impose them in any manner it chooses. There are doubtless some matters over which the state has purely arbitrary power. For instance, it is under no obligation to grant any charters, and the legislature may undoubt-

edly in giving a charter to one set of persons impose one series of burdens, and in granting a similar charter to another set may impose entirely different burdens. But these are cases of mere gratuities, mere favors and privileges, and any donor of such may add to them the burdens he pleases. But I do not understand that legacies and inheritances stand upon the same footing. True, the state may regulate, but it has no arbitrary power in the matter. The property of a decedent does not at his death become the property of the state, nor subject to its disposal according to any mere whim or fancy. And yet if it is a purely arbitrary power I do not see what constitutional objection could be raised to any disposition which a legislature might make of the property of any decedent. Take the illustration made by counsel for appellant: Could the legislature of Illinois, which passed this statute, constitutionally enact that the estate of every person dying within the limits of the states should be given to the members of that legislature? Or, if the matter of personal benefit be interposed as against the validity of such legislation, could it enact that the property of A, on his death, should pass to the state; the property of B to some religious or charitable institution; **303**]and the property of C be divided *among his children? Can there be a doubt that such inequality of legislation would vitiate it? But whatever may be the power of the legislature, Illinois has regulated the matter of descents and distributions and had granted the right of testamentary disposition. And now by this statute upon property passing in accordance with its statutes a tax is imposed; a tax unequal because not proportioned to the amount of the estate; unequal because based upon classification purely arbitrary, to wit, that of wealth—a tax directly and intentionally made unequal. I think the Constitution of the United States forbids such inequality.

JOSEPHINE C. DRAKE *et al.*, Executors, etc., *Plffs. in Err.*,
v.
DANIEL H. KOCHERSPERGER, County Treasurer, etc., of Cook County, Illinois.

(See S. C. Reporter's ed. 303.)

Review of state judgment.

A writ of error to a state court will be dismissed if the judgment is not final.

[No. 425.]

Argued January 28, 1898. Decided April 25, 1898.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment of that court reversing the judgment of the County Court of Cook County dismissing proceedings for the appointment of an appraiser to fix the value of estates for the purpose of collecting inheritance taxes. The judgment of the Supreme court remanded the case to the County Court with directions to appoint an appraiser to assess the taxes. *Dismissed.*

See same case below, 167 Ill. 122.

The facts are stated in the opinion.

This case was argued with *Magoun* v. *Illinois Trust & Savings Bank*, No. 464, *ante*, 1037.

Messrs. **Benjamin Harrison, William D. Guthrie** and *Eugene E. Prussing* for plaintiffs in error.

Messrs. **Thomas A. Moran, Edward C. Akin,** Attorney General of Illinois, *Robert S. Iles*, and *Frank L. Shepard* for defendant in error.

Mr. Justice **McKenna:** The judgment of the supreme court of the state was not final, and *the writ of error must be dismissed.*

So ordered.

ELIZABETH EMERSON SAWYER *et al.*, Executors, etc., *Plffs. in Err.*,
v.
DANIEL H. KOCHERSPERGER, County Treasurer, etc., of Cook County, Illinois.

(See S. C. Reporter's ed. 303.)

When case removable to Federal court.

A petition for the collection of taxes is not removable to a Federal court on the ground that a Federal question is involved, merely because it includes a statement that the defendants decline to pay on the ground that the law imposing taxes is in violation of the Constitution of the United States.

[No. 463.]

Argued January 28, 1898. Decided April 25, 1898.

IN ERROR to the Circuit Court of the United States for the District of Illinois to review a decree in proceedings by the County Treasurer of Cook County *et al.*, against Elizabeth Emerson Sawyer *et al.*, executors, etc., for the collection of inheritance taxes, which were removed from the County Court of Cook County to said Circuit Court, and in which the decree of the Circuit Court was for the recovery of said taxes. *Reversed*, the cause remanded to said Circuit Court with direction to remand the same to the said County Court.

The facts are stated in the opinion.

This case was argued with *Magoun* v. *Illinois Trust & Savings Bank*, No. 464, *ante*, 1037.

Messrs. **Benjamin Harrison, William D. Guthrie,** and *Eugene E. Prussing* for plaintiffs in error.

Messrs. **Thomas A. Moran, Edward C. Akin,** Attorney General of Illinois, *Robert S. Iles*, and *Frank L. Shepard* for defendant in error

Mr. Justice **McKenna:** This was a petition by Kochersperger, as county treasurer and collector of Cook county, Illinois, filed in the county court of that county, against Elizabeth E. Sawyer and others seeking the collection of certain taxes. The case was removed into the circuit court of the United States, but improvidently, as it falls within the rule laid down in *Tennessee* v. *Union & P. Bank*, 152 U. S. 454 [38: 511], notwithstanding the petition stated that defendants declined to pay on the ground that the law imposing the

taxes was in violation of the Constitution of the United States.

Decree reversed, and cause remanded to the circuit court with a direction to remand the case to the county court of Cook county, the costs of this court and of the circuit court to be paid by plaintiffs in error.

304] S. H. WILLIAMS, Treasurer of the Town of Glastonbury, Hartford County, State of Connecticut, *Plff. in Err.*,

v.

ARTHUR F. EGGLESTON, Attorney for the State of Connecticut.

(See S. C. Reporter's ed. 304-312.)

Federal question—breach of contract—equal protection of the laws—municipal corporation—state law that five towns shall maintain a bridge and highway—power of legislature—decision of the court—opportunity to be heard.

1. Where the plaintiff in error, when sued in the state court, specifically set up certain sections of the Federal Constitution as a bar to the proceedings against him, and the judgment of the state court was that they constituted no such bar, this raises a Federal question that gives this court jurisdiction of the case.
2. The parties to a contract are the ones to complain of a breach thereof, and if they are satisfied with the disposition which has been made of it, and of all claims under it, a third party has no right to insist that it has been broken.
3. The equal protection of the laws is not denied because five towns are put into a class by themselves, organized into a single municipal corporation, and separated from other towns in the state by being subjected to different control in respect to highways.
4. A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature.
5. A state law directing that five towns shall maintain a bridge and highway, each bearing a share in the expense thereof, and creating them a body corporate, under a particular name, for the care and maintenance of the bridge and highway, does not deprive of property without due process of law.
6. The power of the legislature over all local municipal corporations is unlimited, save by the restrictions of the state and Federal Constitutions.
7. That there was a division of opinion between the members of a court does not prevent the opinion of the majority from becoming the decision of the court, and as such conclusive.
8. In casting such burdens upon the towns, the legislature did not proceed without a hearing from the towns, where their representatives were in the legislature and took part in the proceedings by which the act was passed, and thus had an opportunity to be heard.

[No. 210.]

Argued April 19, 20, 1898. Decided May 2, 1898.

IN ERROR to the Supreme Court of Errors of the State of Connecticut to review a judgment of that court affirming the judgment of the Superior Court of Hartford County in favor of the Commissioners for the Connecticut River Bridge and Highway District, plaintiffs, for a writ of madamus against S. H. Williams, treasurer of the town of Glastonbury, commanding him to pay to the plaintiffs a certain sum of money in accordance with their order and requisition. There was also a motion to dismiss or affirm. *Affirmed.*

See same case below, 68 Conn. 131.

Statement by Mr. Justice **Brewer**:

For three quarters of a century prior to 1887, the Hartford Bridge Company had, under a charter from the state (Priv. Laws Conn. vol. 1, p. 254), maintained a toll bridge over the Connecticut river at the city of Hartford. It also maintained on the east side of the bridge and connected therewith a causeway across the lowlands adjacent to the river.

On May 19, 1887, the legislature of the state passed an act making said bridge and causeway a free public highway and providing for the condemnation of the franchise and other property of the bridge company. Pub. Acts Conn. 1887, chap. 126, p. 746. Proceedings were directed to be instituted in the superior court of the county of Hartford for ascertaining the value of the property, determining the towns benefited by the establishment of the public highways, and apportioning the assessed damages. In this proceeding the damages assessed to the bridge company were $210,000, and apportioned between five towns, as follows: To the town of Hartford, ninety-five two hundred and tenths; East Hartford, sixty-six two hundred and tenths; Glastonbury, twenty-five two hundred and tenths, and the towns of South Windsor and Manchester each twelve two hundred and tenths.

*The state, however, appropriated out[305 of its treasury 40 per cent of the entire amount, to wit, $84,000, leaving the balance to be paid by these several towns, and such sums were paid. The act also provided that this public highway should thereafter be maintained by the towns assessed in proportion to their assessments, and that the first selectmen of each of said towns should become *ex officio* member of a board, constituted a body politic and corporate, and charged with this duty of care and maintenance.

On June 29, 1893, the legislature passed an act providing that said bridge and causeway should thereafter "be maintained by the state of Connecticut at its expense;" and that the governor, with the consent of the senate, should appoint three commissioners, who should constitute "a board for the care, maintenance, and control" of such bridge and highway. Pub. Acts Conn. 1893, chap. 239, p. 395. The bridge was a covered wooden bridge, which had been in existence for many years. On November 13, 1894, that board, acting

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NOTE.—*As to what is due process of law*, see note to Pearson v. Yewdall, 24: 436.

As to bridges; legislative power to authorize erection,—see note to Weightman v. Washington, 17:52.

As to delegation of municipal power as to bridges, see note to St. Louis v. Russell (Mo.) 20 L. R. A. 726.

As to legislative regulation of rates of, see note to Winchester & L. Turnp. Road Co. v. Croxton (Ky.) 33 L. R. A. 181.

As to municipal law; limitation of province of,—see note to Chambers v. Baldwin (Ky.) 11 L. R. A. 545.

through a majority of its members, made a contract with the Berlin Iron Bridge Company for the construction of a new bridge to cost $274,900. Some work had been done and some material furnished by the company, when on May 17, 1895, the old wooden bridge was entirely destroyed by fire. A week thereafter, and on May 24, 1895, the legislature passed an act (Pub. Acts Conn. 1895, chap. 168, p. 530) repealing the act of January 29, 1893, and directing that thereafter the five towns which had been assessed for the benefits accruing from the establishment of the public highway should maintain that highway, each of them bearing the share of the expense thereof fixed in the assessment proceedings. By the same act a commission was appointed to hear and determine all legal claims and demands (that of the Berlin Iron Bridge Company being specially named) arising under or by virtue of any contract made and executed by the board appointed under the act of 1893. The act provided that if the award of such commission was less than $40,000 the controller should draw his warrant on the treasurer for the amount thereof, to be paid upon the delivery of proper receipts, releases, and discharges. It also [306]*provided that if any party, particularly the Berlin Iron Bridge Company, should not be satisfied with the decision of said commission it might within three years commence and prosecute a suit against the state in the superior court of Hartford county for any legal claim, debt, or demand arising under or by virtue of any valid contract made and executed by said board, and that in any event such Berlin Iron Bridge Company should be entitled to recover for all material furnished and all expenses of every kind actually incurred under said contract, including therein all legal and personal expenses; that on final judgment being rendered in such suit the controller should draw his order on the treasurer for the amount of the judgment; and, further, if the contract which had been entered into should be declared valid and binding, the controller should carry out and complete the contract according to its provisions and draw his orders on the state treasurer for the cost thereof. Under this act the Berlin Iron Company presented its claim to the commission, which, on December 7, 1895, awarded to it the sum of $27,526. On December 13, 1895, the directors of the Berlin Iron Bridge Company voted to accept this award, and on the same day the company received the money and executed its release in the following words:

"$27,526.

"Hartford, Conn., December 13, 1895.

"Received of the state of Connecticut the sum of twenty seven thousand, five hundred and twenty-six dollars in full of award made on the 7th day of December, 1895, by Hon. Dwight Loomis, Hon. Benj. P. Meade, controller, and Hon. George W. Hodge, treasurer of the state of Connecticut, acting as a commission constituted by chapter 168 of the Public Acts of 1895, and all other claims presented by this company to said commission are hereby withdrawn, and this payment is received in full satisfaction and discharge of all claims and demands of every nature which this company has or ought to have, arising under or by virtue of any contract made and executed by the commission appointed under chapter 239 of the Public Acts of 1893 with this company, and the within contract is hereby surrendered to the state of Connecticut."

*On June 23, 1895, the legislature passed [307]an act (Special Acts Conn. chap. 343, p. 485), the 1st section of which is as follows:

"Sec. 1. That the towns of Hartford, East Hartford, Glastonbury, Manchester, and South Windsor be, and they are hereby, created a body politic and corporate, with power to sue and be sued, under the name of the Connecticut River Bridge and Highway District, for the construction, reconstruction, care, and maintenance of a free public highway across the Connecticut river at Hartford and the causeway and approaches appertaining thereto, as described in a decree of the superior court of Hartford county, passed on the 10th day of June, 1889, in which decree said highway was laid out and established."

It also created a board of commissioners for such district, to consist of eight members, four from the town of Hartford and one from each of the other towns, who were given authority to maintain such free public highway and to erect new bridges along or upon said highway, to reconstruct, raise, and widen the causeway and approaches appurtenant thereto or a part of said highway, at the expense of the towns composing the district. In case of a vacancy in the board, the vacancy was to be filled by the town in which the retiring member resided. This board was authorized to issue the bonds of the district, if need be, to an amount not exceeding $500,000 for the construction of a new bridge or causeway. The burden of construction and maintenance of this public highway was distributed in a proportion different from that named in the original assessment proceedings, the town of Hartford being required to pay seventy nine one hundredths, East Hartford twelve one hundredths and Glastonbury, Manchester, and South Windsor each three one hundredths. For all expenditures the board was directed to draw warrants upon the several towns, and such orders were declared sufficient authority for the treasurer of each of said towns to pay the amounts named therein, and the board was authorized to apply to any court of competent jurisdiction for proper writs to compel the enforcement and execution of its orders. The board, having expended the sum of $500 in the ordinary support and maintenance of this *highway, on September 14, 1895, passed [308]a resolution apportioning the amount, and drew a warrant on the treasurer of the town of Glastonbury for the sum of $15, its proportion of the sum expended. The treasurer of that town refused to pay this order, whereupon, on October 16, 1895, the board presented an application to the superior court of Hartford county for an alternative writ of mandamus against him. The writ was answered by the treasurer, and in his answer he set forth, among other defenses, that the act of May 24, 1895, repealing the act of June 29, 1893, was in violation of the Constitution of the United States, § 10, article 1, because it impaired the obligation of a contract; that the proceedings of the board were also in violation of the 14th Amendment to the Constitution of the United States, because they

deprived the towns and the citizens thereof of their property without due process of law, and denied to them the equal protection of the laws. The superior court rendered judgment *pro forma* in favor of the board, and directed the issue of a peremptory writ of mandamus. On appeal to the supreme court of the state this judgment was affirmed June 25, 1896 (68 Conn. 131), whereupon this writ of error was sued out.

Messrs. **Lewis E. Stanton, John R. Buck,** and *Olin R. Wood* for plaintiff in error.

Messrs. **Lewis Sperry,** *George P. McLean,* and *Austin Brainard* for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

Inasmuch as the plaintiff in error, when sued in the state court, specifically set up certain sections of the Federal Constitution as a bar to the proceedings against him, and the judgment of the state court was that they constituted no such bar, it is not open to question that this court has jurisdiction, and the motion to dismiss must therefore be overruled.

309] *The first contention of plaintiff in error is that the contract of November 13, 1894, made between the state board and the Berlin Iron Bridge Company, was a valid contract, and that the two acts of May 24, 1895, and June 28, 1895, together with the orders and proceedings of the board of commissioners thereunder, are in violation of the 10th section of article 1 of the Federal Constitution, because they impair the obligation of that contract. A sufficient answer to this contention is, that the contract, if valid—and upon that we express no opinion—was between the state of Connecticut and the Berlin Iron Bridge Company, and that they have fully settled all differences in respect thereto. The parties to a contract are the ones to complain of a breach, and if they are satisfied with the disposition which has been made of it and of all claims under it, a third party has no right to insist that it has been broken. Counsel for plaintiff in error, conceding that an entire stranger cannot take advantage of any breach, insist that the town, though not a party to the contract, had an interest in its execution, for if it had been executed and the new bridge constructed and paid for by the state, the town would not now be under any obligations to assist in the construction of the new bridge. But this results, not from the mere adjustment between the state and the Berlin Iron Bridge Company, but by reason of the fact that the legislature, in the exercise of its unquestioned powers, has seen fit to cast the burden of the construction of a new bridge—which, as claimed, it had once assumed—upon the towns. Even if the contract had been carried into effect, according to its terms, the legislature might, at the time of passing the act of 1895, have provided that the cost of such construction should be borne by the towns specially benefited thereby. It is not the breach of any contract, but an independent act of the legislature which casts the burden on the town of Glastonbury. The town is therefore an entire stranger to the contract, and this contention must be overruled.

Again, it is insisted that the plaintiff in error is denied the equal protection of the laws because these five towns are put into a class by themselves, organized into a single municipal corporation, *and separated from other towns[**310** in the state by being subjected to different control in respect to highways. But this overlooks the fact that the regulation of municipal corporations is a matter peculiarly within the domain of state control; that the state is not compelled by the Federal Constitution to grant to all its municipal corporations the same territorial extent, or the same duties and powers. A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature. That body may place one part of the state under one municipal organization and another part of the state under another organization of an entirely different character. These are matters of a purely local nature, in respect to which the Federal Constitution does not limit the power of the state. "Whether territory shall be governed for local purposes by a county, a city, or a township organization is one of the most usual and ordinary subjects of state legislation." *Kelly* v. *Pittsburgh*, 104 U. S. 78, 81 [26: 658, 660]. See also *Forsyth* v. *Hammond*, 166 U. S. 506, 518, 519 [41: 1095, 1100], and cases cited in the opinion; 1 Dill. Mun. Corp. 4th ed. p. 52, and following.

It is further contended that the acts of May 24, 1895, and June 28, 1895, are in conflict with that portion of the 14th Amendment which forbids the depriving of any person of life, liberty, or property without due process of law, because, first, "they deprive the town of the right to perform its town duties by officers of their own choosing, which is contrary to the settled practice and law of the state, and arbitrarily destroys the right which those towns had before the Constitution of Connecticut was adopted and which was not taken away by that instrument; and, secondly, because the acts provide for arbitrarily taking the property of the inhabitants of Glastonbury without proper notice of any proceeding under which the property is to be taken and without opportunity to be heard." Whatever may have been the practice of the state in the past, it cannot be doubted that the power of the legislature over all local municipal corporations is unlimited save by the restrictions of the state and Federal Constitutions; and *that [**311** these acts in no way violate any provision of the state Constitution is settled by the decision of the state supreme court. *Backus* v. *Fort Street Union Depot Company*, 169 U. S. 557, 566 [*ante*, 481, 484], and cases cited. It is true there was a division of opinion between the members of the state supreme court, but such division, although a close one, does not prevent the opinion of the majority from becoming the decision of the court, and as such conclusive upon us. When the state court decides that municipal corporations within the territorial limits of the state are subject to the control of the state legislature, and that its act in creating for certain purposes a new corporation, and merging therein five separate towns, was valid, this court cannot hold that the state

court was mistaken in its construction of the state Constitution or in its declaration as to the extent of the power of the legislature over municipal corporations.

Neither can it be doubted that, if the state Constitution does not prohibit, the legislature speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited. *Spencer* v. *Merchant*, 125 U. S. 345, 356 [31: 763, 768]; *Parsons* v. *District of Columbia* [170 U. S. 45, *ante*, 943]. It should be noticed that no question is presented as to the necessity of notice before any property tax is cast upon the citizen. The only question is as to the power of the legislature to cast the burden of this improvement upon the five towns, towns which have been already judicially determined to be towns benefited thereby. Although the apportionment made between the towns was not that determined by the judicial proceedings, yet it was one of which certainly the town of Glastonbury cannot complain, for the judicial apportionment was as to it reduced by the legislative act. In casting this burden upon the towns the legislature did not proceed **312**] without a hearing from the *towns, for their representatives were in the legislature and took part in the proceedings by which the act was passed. So they had an opportunity to be heard, if such hearing was necessary, prior to the enactment of the law. These are all the questions made by counsel. We see nothing in the proceedings which can be said to be in violation of any provisions of the Federal Constitution, and therefore *the judgment of the Supreme Court of Errors of Connecticut is affirmed.*

QUINCY A. SHAW, *Plff. in Err.*,
v.
MURRAY M. KELLOGG.

(See S. C. Reporter's ed. 312-343.)

Mexican grant—unauthorized limitation—valid title.

1. The act of June 21, 1860, authorizing the heirs of Luis Maria Baca to select lands in the territory of New Mexico, instead of land claimed by them under the Mexican grant, with the approved survey and location therein required, made a full transfer of the title to them, having all the efficacy of a patent.

2. The limitation of the approval entered upon the plat by the surveyor general under the direction of the Land Department, that it was "subject to the conditions and provisions of § 6" of said act, was a limitation beyond the power of executive officers to impose, and did not make the title conditional.

3. More than thirty-four years after the Land Department took its final action, during which the locators and their grantees had possession and paid the taxes, the title of the locators and their grantees is not subject to challenge, and it is a full, absolute, and unconditional title.

[No. 154.]

Argued December 15, 16, 1897. Returned to docket and certiorari ordered December 20, 1897. Submitted February 23, 1898. Decided May 2, 1898.

ON CERTIFICATE from and writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of the Circuit Court of the United States for the District of Colorado in favor of the defendant, Murray M. Kellogg, in an action brought by Quincy A. Shaw, plaintiff, of ejectment to recover possession of a tract of land in Saguache county, state of Colorado. *Reversed*, and case remanded for a new trial.

Statement by Mr. Justice **Brewer**:

*This was an action of ejectment [**313** brought in the circuit court of the United States for the district of Colorado on July 3, 1893, to recover possession of a certain tract in Saguache county, in the state of Colorado described as follows:

"Section twenty-two (22), township (1) north, one (1) east according to the plat of said Baca Grant No. 4, as filed and recorded in the office of the county clerk and recorder of said Saguache county, and including in said section twenty-two certain mineral-bearing property designated by the defendant as the Eastern Star Mine, with other mining lands adjacent thereto within said section twenty two."

After answer a trial was had before a jury, which resulted in a verdict under instructions of the judge for defendant. Upon this verdict judgment was entered May 22, 1895. Thereupon the plaintiff sued out a writ of error from the circuit court of appeals for the eighth circuit. On March 30, 1896, that court certified certain questions. Upon an examination of those questions and after argument of counsel, this court, on December 22, 1897, ordered a certiorari to bring up the entire record, and upon such entire record the case was submitted for consideration.

The premises in question are within the limits of the so called Baca Grant No. 4. The plaintiff is the owner of that grant, and the question presented is as to the validity and extent of his title. Prior to the treaty of Guadalupe Hidalgo between Mexico and the United States of date February 2, 1848 (9 Stat. at L. 922), by which New Mexico and other territory in the southwest was ceded to this government, Mexico had made some quite extensive grants of tracts of land within the territory ceded. Since then Congress has provided for the several portions of the ceded territory different modes of determining the validity and extent of those grants. By the act of July 22, 1854 (10 Stat. at L. 308, chap. 103), the office of surveyor general for the territory of

NOTE.—*As to pre-emption rights*, see note to United States v. Fitzgerald, 10: 785.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 881.

As to errors in surveys and descriptions in patents for lands; how construed,—see note to Watts v. Lindsey, 5: 423.

As to Missouri private land claims, see note to Les Bois v. Bramell, 11: 1051.

New Mexico was created, and by § 8 it was made his duty to examine into all claims for lands within the limits of that territory and to make full report thereof to Congress. In pursuance of this authority the surveyor general examined and reported upon various claims, and **314**]*on June 21, 1860 (12 Stat. at L. 71, chap. 167), Congress passed an act confirming several of them. There were two opposing claimants for a large tract of land in the vicinity of the town of Las Vegas. In settling the dispute between them Congress enacted, in § 6:

"Sec. 6. And be it further enacted, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, to select, instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: Provided, however, that the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer."

On July 26, 1860, a letter of instructions was issued by the Land Department to the surveyor general of New Mexico in reference to these private land claims. In that letter, after directing a survey of the Las Vegas grant, and a determination of the area thereof, the instructions were as follows:

"The exact area of the Las Vegas town tract having been thus ascertained, the right will accrue to the Baca claimants to select a quantity equal to the area of the town tract elsewhere in New Mexico of vacant land, not mineral, in square bodies not exceeding five in number.

"You will furnish them with a certificate, transmitting at the same time a duplicate to this office, of their right and the area they are to select in five square parcels. Should they select in square forms according to the existing line of the public surveys, the matter may be properly disposed of by their application duly indorsed and signed with your certificate designating the parts selected by legal divisions or subdivisions, and so selected as to form five separate bodies in square form. Then the certificate thus indorsed is to be noted on the records of the register and receiver at Santa Fé, and sent on here by those officers for approval. **315**]Should the Baca *claimants select outside of the existing surveys, they must give such distinct descriptions and connection with natural objects, in their applications to be filed in your office, as will enable the deputy surveyor when he may reach the vicinity of such selections in the regular progress of the surveys, to have the selections adjusted as near as may be to the lines of the public surveys, which may hereafter be established in the region of those selections.

"In either case, the final condition of the certificate to this office must be accompanied by a statement from yourself and register and receiver that the land is vacant and not mineral."

The survey made of the grant to the town of Las Vegas showed an acreage of 496,446.96 acres, a certificate of which fact was given to the heirs of said Baca.

On December 12, 1862, the following selection was filed with the surveyor general of New Mexico:

"Santa Fé, New Mexico, Dec. 12, 1862.

"To Surveyor General John A. Clark,

"Surveyor General of New Mexico:

"I, John S. Watts, attorney of the heirs of Luis Maria Baca, have this day selected, as one of the five locations belonging to the said heirs under the sixth section of the act of Congress approved June 21, 1860, a tract of land in the territory of New Mexico, described as follows:

"Beginning at a point on the eastern edge of the valley of San Luis, where the thirty-eighth parallel of north latitude crosses the base of the snowy range, dividing the waters of the rivers Arkansas and Del Norte; thence east along said parallel, four and one half miles; thence south along a meridian line twelve miles, thirty six (chains) and forty-four links distance; thence west at a right angle twelve miles, thirty six chains and forty-four links distance; thence north to the said specified parallel of latitude; thence east with said parallel to the place of beginning.

"I further state that the said land is entirely vacant, not claimed by anyone, is not mineral, but located for purposes *of arable and [**316** pastoral agriculture, and is within the limits of the territory of New Mexico as established in the organic act. I hereby accordingly make application for the survey and location of the tract of land in accordance with the provisions of the above act of Congress.

"John S. Watts,

"Attorney for Heirs of Luis Maria Baca."

Prior to this time the territory of Colorado had been organized and a portion of the territory of New Mexico included within its boundaries, and the land described in this application was within the territory thus included in Colorado. The surveyor general of New Mexico, on the receipt of this application, forwarded it to the Land Department at Washington, and also transmitted a copy to the surveyor general of Colorado. The surveyor general of Colorado, writing on February 24, 1863, to the Land Department, informed it of the receipt of the copy above referred to, and at the close of his letter made this statement:

"I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca 'floats,' and should locate it as this is located, for the reason that, in his opinion, it would cover rich minerals in the mountains."

In reply the Land Department, on March 13, 1863, wrote as follows:

"It is necessary before the application can be approved by this office, that it be accompanied by the certificates of the surveyor general and the register and receiver that the land selected *is vacant and not mineral.* This is in accordance with our instructions to the surveyor general of New Mexico, extracts from which were furnished your office in our communication of June 7, 1862; especially should the character of the location as to minerals be carefully ascertained after the important statement of ex-Governor Gilpin, which you communicated in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in this selection are vacant and not mineral, to enable

317] *you to do, you will transmit to this office your official certificate setting forth these facts

"You will also correspond with the register and receiver of Colorado, when they enter upon their official duties, communicating to them the substance of this communication, and call upon them to furnish their certificate, when able, under the same conditions that your own is to be furnished under, which, when received, you will forward to this office."

During the year 1863 ex-Governor Gilpin, who had become the owner, or at least interested in this location, made application to the surveyor general of Colorado for a survey of the tract. As the land was beyond the limits of the public surveys then completed, the surveyor general made a contract with Deputy Surveyor A. Z. Sheldon for its survey, and forwarded the same to the Land Department for approval. On November 2, 1863, that office wrote to the surveyor general disapproving of the contract, and adding:

"In your letter dated the 10th March last, transmitting the application of the attorney of said heirs for the location of this claim, you say, 'I suppose this selection has been made by ex-Governor Gilpin, as he told me last summer he was in possession of one of the Baca floats, and should locate it as this is located, for the reason that, in his opinion, *it would cover rich minerals* in the mountains.'

"Upon the receipt of your letter you were expressly informed, under date of the 13th March, 1863, that before the application could be approved it must be accompanied by the certificates of the surveyor general and the register and receiver that the land is *vacant and not mineral*, and I then took occasion to communicate the following explicit instructions: 'Especially should the character of the locations as to minerals be carefully ascertained after the important statement of ex-Governor Gilpin, which you communicate in your official letter to this office. Whenever you shall acquire good and satisfactory information that the lands included in the selection are vacant and not mineral, to enable you to do so, you will transmit to this office your official certificate setting forth these facts.'

318] *"In our communication of the 7th June, 1862, you were also furnished with extracts from our instructions to the surveyor general of New Mexico, referring to the location of these claims, in which it was plainly indicated that should selections be made outside of the existing surveys, the survey thereof must be postponed until the vicinity is reached by the regular progress of the public surveys. You will be guided in your official acts by our instructions, which are full and explicit, in relation to the location of the claims referred to. The contract and instructions for the survey of the above-mentioned claim are herewith returned."

On December 12 the surveyor general wrote to the Land Office a letter containing this statement:

"Sir: I have the honor to acknowledge the receipt of your letter of the 2d of November last disapproving of the contract for the survey of Grant No. 4 of the floats belonging to the heirs of Luis Maria Baca.

"I herewith transmit my certificate that the lands are 'not mineral and are vacant.' You refer to a letter of the former surveyor general of this district, in which he says that he supposes that this location was made by Mr. Gilpin 'for the reason that in his opinion it would cover rich mineral lands.' I do not believe that at the time Mr. Case wrote that letter he had the least idea that the float as located covered any mineral lands I have signed the accompanying certificate partly from my own knowledge of the country, but mostly for the following reasons:

"1st. The discoveries of gold thus far go to show that the gold lands of Colorado commence at the base of Long's Peak and extend in a course about 30° west of south to the headwaters of the San Juan covering a belt of country about 30 miles in width of which the line indicated will be near the western boundary; outside of this no gold or silver lodes have been discovered.

"2d. The grant is located on the great line of travel between Denver and Santa Fé, and thousands of experienced miners have been traveling over the Sangre de Christo and Mosca passes and have found no gold or other valuable minerals.

*"3d. In the summer of 1860 a party of[319 one hundred and fifty miners from here under one Roeder went to the San Luis valley and prospected the whole of the Sangre de Christo range, but found no gold anywhere on the eastern run of the park. Many of the men who were in this expedition have been in my employ, and from them I have had this history of the expedition.

"Such are the grounds on which I have signed the certificate, and to me they are satisfactory."

He inclosed in it certificates of himself and the register and receiver of the local land office in the following language:

"Denver, C. T., December 5, 1863.

"Sir: This is to certify that from good and sufficient evidence I am perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their Grant No. 4, in the San Luis valley, and marked out by a survey made by Albinus Z. Sheldon in November, 1863, is not mineral and is vacant.

"Very truly, your ob't servant,

John Pierce,

"Surveyor General of Colorado and Utah."

"Colorado Territory, Golden City, December 5, 1863

"Sir: This is to certify that from good and sufficient evidence we are perfectly satisfied that the land on which the heirs of Luis Maria Baca have located their Grant No. 4, in the San Luis valley, and marked out by a survey made by Albinus Z. Sheldon in November, 1863, is not mineral and is vacant.

G. N. Chilcott,

"Register Land Office, Colo. Dist.

"C. B. Clements,

"Receiver Land Office, Colo. Ty."

To this letter the Land Office replied on January 16, 1864 stating—

"The evidence furnished by you is not sufficient, in the opinion of this office, to prove that the selection No 4 does not cover valuable mineral deposits. Your certificate is not based upon actual knowledge of the facts, but upon

320] the *information and conclusions deduced from reasoning. This kind of proof is not deemed sufficient when large public interests may be involved, and the character of the location is made still more doubtful by the statement of ex Governor Gilpin officially communicated to this office by Surveyor General Case, that there are mineral lands in that locality.

"The statement of the register and receiver required in our instructions is also wanting.

"The approval of the selection will stand suspended until some satisfactory proof is obtained upon the points indicated."

On February 12, 1864, the Land Office again wrote to the surveyor general the following letter:

"John Pierce, Esq., Surveyor General, Denver City, Colo.

"Sir: I have considered your report of the 14th December last, respecting the survey made in November, 1863, by Deputy Surveyor Albinus Z. Sheldon, of what is known as the Luis Maria Baca float, in San Luis Park, in Colorado, and containing 92,293 acres.

"You transmit your certificate 'that the lands are not mineral and are vacant,' and state under specific heads 'the grounds on which' you 'have signed the certificate' and which are satisfactory to you. You report further that 'the survey as made by Mr. Sheldon is probably as near perfect as can be made, as the mountains at the northeast corner of the grant are inaccessible at any time of the year.'

"The act of Congress approved 21st June, 1860, U. S. Statutes at Large, vol. 12, page 71, chap. 167, confers authority for the location of the said Baca float in the then territory of New Mexico, but now a part of Colorado territory.

"The said statute makes it the 'duty of the surveyor general of New Mexico,' now in your jurisdiction, 'to make survey and location of the lands so selected by the heirs of Baca when thereunto required by them,' with a proviso making a three years' limitation to the statute.

"You further report that you have refunded to Mr Gilpin the money placed in your 'hands and he has paid for the survey as a private 321] survey, though he has permitted' *you 'to make an abstract of the field notes which' you 'have placed on file in' the surveyor general's office.

"This part of the proceedings is irregular. Under statutory requirements it is obligatory upon private claimants to pay for the survey of confirmed private claims, but the work must be done under the usual obligations and responsibilities both of deputies and surveyor general.

"The difficulty, however, may be avoided by pursuing the following course: The original field notes, duly verified and authenticated, must be filed in the surveyor general's office of Colorado upon bringing these to the usual satisfactory tests, and finding the same all regular and correct you are authorized in virtue of the aforesaid sixth section of the said act of 21st June, 1860, to approve the said survey, but in your certificate of approval you will add the special reservation stipulated by the statute, but not to embrace mineral land nor to interfere with any other vested rights, if such exist.

"The statute does not order the issue of a patent. The aforesaid law of 21st June, 1860, with your plat approved in the manner indicated, will therefore constitute the evidence of title.

"You will take care so to arrange the matter that hereafter when in the gradual progress of the lines of the public surveys they shall reach the Baca location they shall be properly connected therewith and so appear on the township plats."

And again, on February 26, 1864, the Land Office sent the following to the surveyor general:

"Sir: At the request of William Gilpin, Esq., I herewith transmit the following papers, to wit:

"First, Mr. Gilpin's application for the survey of Grant No. 4 of the heirs of Baca, dated October 3, 1863.

"Second. Surveyor general's estimate of the cost of said survey, dated October 5, 1863

"Third. Surveyor general's receipt for $600, deposited by Mr. Gilpin to pay for the above survey, October 6, 1863.

"Fourth. Certificate of the register and receiver at Golden City, Colorado, that the lands covered by the said Grant No. 4 are not mineral and are vacant, December 5, 1863.

*"Fifth. The field notes of the bounda [322 ry lines of the above grant, together with plat thereof.

"These papers were deposited in this office by Mr. Gilpin and are transmitted to you for such action as you shall deem proper in the premises in accordance with the views expressed in our communication to you, dated the 12th instant."

Thereupon the field notes of the survey with the certificate of the surveyor and his assistants were duly filed in the surveyor general's office and approved by him, his certificate of approval being in these words:

"The foregoing field notes of the survey of Grant No. 4, heirs of Luis Maria Baca, executed by Albinus Z. Sheldon, under his contract of the 7th day of October, 1863, having been critically examined, the necessary corrections and explanations made, the said field notes and the survey they describe are hereby approved."

In the general description accompanying the field notes is this statement by the deputy surveyor:

"This grant contains every grade of land from the most productive to the most sterile. La 'Trois Tetons' and the Chatillon creeks have each rich bottom lands, from one half of a mile to a mile in width, extending nearly to the mountains. About six miles from the mountains the bottoms rapidly widen until along the west boundary they become almost an unbroken savannah, thickly covered with grass, red top and other varieties, some of which is five feet in height.

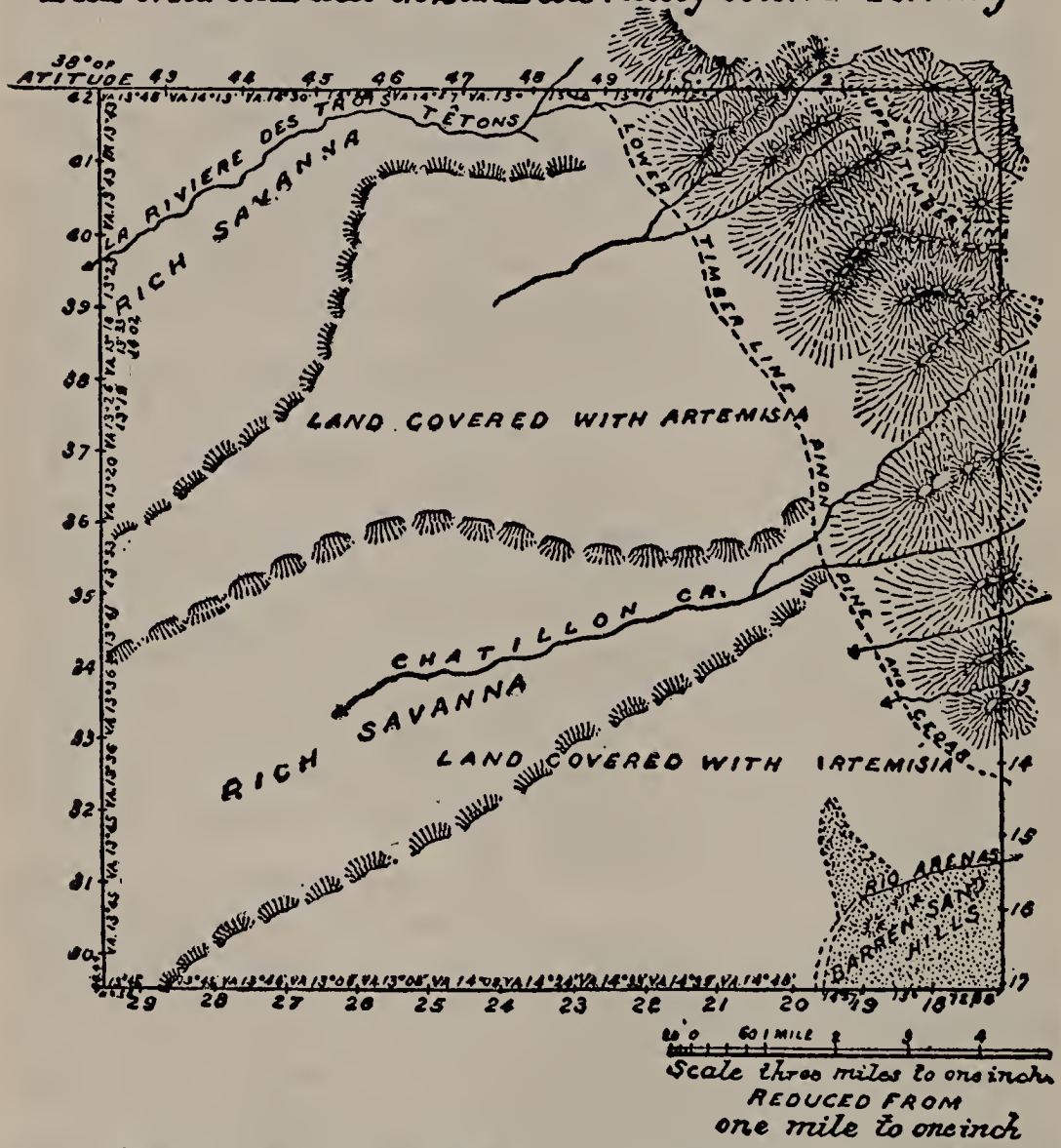
"The grant contains about forty thousand (40,000) acres which may be classed as first rate. The balance, excepting the sand hills in the southeast corner (about six square miles) and the extreme mountain portion (say ten square miles) is good grazing land; and between the Chatillon and Arenas creeks affords a rich growth of gramma grass.

"The Chatillon leaves the mountains at a point nearly equidistant between the north and south boundary lines, and runs in a due westerly direction until it is lost in the savannah above mentioned. These creeks are timbered

about five miles. There is considerable good pine near the base of the mountains and firs 323]* higher up. Along the streams are cottonwoods (sweet cottonwoods) of considerable size. There is no stone except in the vicinity of the mountains. These are composed mainly of a dense and fine grained granite varying to syenite and gneiss. Near this base is found a very compact conglomerate, parti colored, and presenting more than the beauties of the mosaic 324]* art. Saw fragments of limestone (jurassic) but none in position. Saw no indications of the precious metals or minerals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle set forth in the notes."

The map of the survey was also filed and approved by the surveyor general. The following is a copy of the map, with his certificate of approval:

MAP OF THE SURVEY OF GRANT N°4 OF THE HEIRS OF Luis Maria Baca in San Luis Valley Colorado Territory



The above map of the boundary lines of Grant No. 4 of the heirs of Luis Maria Baca in San Luis Valley Colorado Territory, as surveyed by Albinus Z. Sheldon under his contract bearing date the 7th day of October 1863, is strictly conformable to the field notes on file in this office, which have been examined and approved, subject to the conditions and provisions of Sec. 6 of the act of Congress approved June 21st 1860.

Surveyor Generals Office JOHN PIERCE
Denver March 18th 1864 Surv. Genl. Colo. & Utah

On March 29, 1864, the surveyor general forwarded to the Land Office a transcript of the field notes and plat of the survey with his approval entered thereon, the receipt whereof was acknowledged by the Land Office in a letter of date May 4, 1864, which letter is as follows:

"John Pierce, Esq., Surveyor General, Denver City, C. T.

"Sir: Your letter of March 29 last, transmitting transcript and field notes of the survey of Grant No. 4, of the heirs of Luis Maria Baca, has been received at this office."

These were all the proceedings had at the time in reference to the location, survey, and transfer of title of this grant.

Subsequently, and on January 14, 1868, application was made for a patent, and declined by the Land Office in these words:

"Sir: Referring to your application of 12th inst. for the issuing of patent for the tract of land in Colorado known as 'Baca Tract No. 4,' I have to state that the selection authorized by the sixth section of the act of 21st June, 1860 (Stat. at L. vol. 12, p. 72, chap. 167), has been made, and the survey executed and reported to this office, but as no provision is made in the statute for the issuing of patent, the survey and statute are the only authorized evidences of title, this office having no authority to issue patents unless the statute expressly orders the same, which is not done in the *Baca Case*, but 'that a grant may be made by a law as well as a patent pursuant to a law is undoubted ([*Fletcher* v. *Peck*] 10 U. S. 6 Cranch, 128 [3: 175]); a confirmation by a law is as fully 325] *to all intents and purposes a grant, as if it contained in terms a grant *de novo*.'"

Again, in March, 1879, a further application was made through the surveyor general of Colorado for a patent. This application was denied, and the Commissioner of the General Land Office, in his letter declining to issue a patent, after reciting the history of the grant, stated:

"After the selection, but previous to the location, the Commissioner of the General Land Office instructed the surveyor general of Colorado that, as the statute did not authorize the issuing of a patent, the act of June 21, 1860, and the plat approved by the surveyor general would constitute the evidence of title.

"There is no doubt that the government may convey and vest the legal title without issuing a patent as effectually as may be done by patent. *Larriviere* v. *Madegan*, 1 Dill. 455; *Grignon* v. *Astor*, 43 U. S. 2 How. 319 [11: 283]; 3 Ops. Atty. Gen. 350.

"The surveyor general was authorized by the act to locate only vacant nonmineral land. Unless the contrary appeared, it would be presumed from the act of locating that the surveyor general determined the land was not mineral. But before locating, the surveyor general had expressly found and certified that this land was not mineral.

"It is now alleged that the land is mineral; that the surveyor general approved the plat of survey 'subject to the conditions and provisions of section six of the act of Congress approved June 21, 1860,' and that, therefore, the grantees cannot hold the land under that act.

"The conditions and provisions of the act of June 21, 1860, were, as respects this question, that the selection and location should be on land determined at the time of such location, when the title passed, to be nonmineral land.

"The act did not intend that if at any subsequent time, in the remote future, mineral should be discovered, the title should be unsettled, or that the title should be the subject of controversy through all time, as often as anyone might choose to allege its mineral character.

*"The surveyor general did not un- [326 dertake, and had no power, to impose conditions not in the act.

"If after fifteen years the question as to the mineral character of the land may be reopened, why may it not be raised again after the lapse of any number of years? If the question may be reopened as to the land granted under the provisions of the act of June 21, 1860, why may it not as to land acquired under the homestead, pre-emption, and other acts of Congress? Would such titles ever be considered secure?

"The question as to the mineral or nonmineral character of this land has been passed upon by competent authority; the title has passed from the government and vested in private individuals; this office has no authority to reopen the question; the land cannot longer be regarded as a part of the public domain.

"Mr. Gilpin, who claims this tract of land as the assignee of the Baca heirs, makes personal application for a patent. It is not claimed that the granting act authorized a patent to issue, but that it is authorized by section two of the act approved March 3, 1869 (15 Stat. at L. 342, chap. 152), and by section 2447, Rev. Stat. U. S. But those provisions authorize patent to issue only when claims to land have been confirmed by law; that is, where an act of Congress recognizes a claim to specific land, and does not apply to cases where the acts of Congress only authorize a claim to be made thereafter to land without regard to any specific tract or parcel of land. This office can issue patents only where it is authorized by some act of Congress. The application of Mr. Gilpin for a patent must therefore be refused."

Subsequently, and on June 28, 1884, in response to inquiries as to whether prospectors would be allowed to hold any mineral discoveries made on said location, the Land Office replied as follows:

"In the case of location No. 4, in question, the surveyor general having first ascertained and determined that the land selected was vacant and nonmineral, surveyed and located it, and approved the plat of the location, March 18, 1864, and this approved plat, in the absence of any provision of law for *the [327 issuing of patent, became the evidence of title in the owner of the land so located.

"On a subsequent application by Governor Gilpin for a patent, it was contended, before this office, that mineral existed in some part of the location, and therefore the grantee could not hold the land under the act. The matter was fully considered and the following conclusions reached:

"The conditions and provisions of the act of June 21, 1860, were, as respects this question, that the selection and location should be on land determined, at the time of such locations when title passed, and to be nonmineral.

"The act did not intend that if at any subsequent time, in the remote future, mineral should be discovered, the title should be unsettled, or that the title should be the subject of controversy through all time, as often as one might choose to allege its mineral character.

"The surveyor general did not undertake, and had no power to impose conditions not in the act.

"The question as to the mineral or nonmineral character of the land has been passed upon by competent authority; the title has passed from the government and vested in private individuals, and this office has no authority to reopen the question; the land can no longer be regarded as a part of the public domain.

"You will see by the foregoing that the land in question was determined, in 1864, by the surveyor general, whose province and duty it was, to be nonmineral; the location was then perfected and the title passed. Whether prospectors will be allowed to hold any mineral discoveries thereon, prior to or since 1880, must probably rest between them and the holders of the location No. 4."

And again, on June 8, 1889, in response to a similar application, the acting commissioner replied as follows:

"In determining the various questions involved in the case, this office on March 21, 1879, decided that the character of the land involved had already been determined, and the matter, therefore, was *res judicata*.

"The question as to the mineral or nonmineral character *of this land has been passed upon by competent authority; the title has passed from the government and vested in private individuals; this office has no authority to reopen the question. The land can no longer be regarded as a part of the public domain, etc.

"The case has therefore become final so far as this office is concerned."

In the annual report of the surveyor general of Colorado of the proceedings of his office, dated October 1, 1864, which was transmitted to Congress in the report of the Secretary of the Interior for 1864, it is stated:

"During the month of November, 1863, Deputy Surveyor A. Z. Sheldon made a survey of Grant No. 4 of the heirs of Luis Maria Baca, as located by William Gilpin, attorney for said heirs, under the act of June 21, 1860. The survey was made under the usual guaranty of its accuracy, and the field notes returned to this office for approval. Under instructions from the General Land Office dated February 12, 1864, that survey and location were approved, subject to the conditions and restrictions above referred to."

And in the report of the Commissioner of the General Land Office of the same year, and included in the same report to Congress, it is also stated:

"In Colorado territory the returns of surveys for the last fiscal year consists of correction, parallel, township, and sectional lines, with fifty miles of private grant embracing over 431,000 acres of public lands. Also 92,292 acres in the fourth location of the Las Vegas grant, as confirmed by the act of 21st June, 1860, to the heirs of Luis Maria Baca, the premises formerly falling within the limits of New Mexico, but now of Colorado."

In the same volume is found a map accompanying the report of the Secretary of the Interior, which shows Baca Grant No. 4 segregated from the public domain, and it was admitted by counsel that all government maps issued from that time to this make a similar showing of the segregation of this tract.

The plaintiff and those under whom he claims have been in continuous and actual possession of this Baca Grant No. 4 since at least *1869; in 1881 a fence was built entirely [329 around the tract except for a little distance in the northeast corner, where the precipitous character of the mountains created a natural fence, and from that date onward to the present time it has remained under inclosure; and the plaintiff and his grantors have paid the annual taxes levied thereon by the state of Colorado, amounting, since the year 1877, to $66,000.

In 1876 François Herard and two associates discovered a mineral vein, which they named the "Eastern Star," and on June 16 of that year filed a certificate of location in the proper office; but in 1877, upon ascertaining that this mineral location was within the limits of the Baca grant, they abandoned the mine. In 1879 the owners of the grant leased this mine to one William Young, but he immediately thereafter threw up the lease. In 1883 the mine was again leased to the Gold Legion Mining & Milling Company, but this company soon abandoned the lease. In 1887 the defendant took a verbal lease from the manager of the grant for three months, at the expiration of which time he sought a renewal of the lease, but was refused. Subsequently to this refusal he took possession of the property and has remained in such possession ever since. And it is this mine, with the adjacent ground, the possession of which was sought to be recovered by this action.

Messrs. **Edward O. Wolcott** and **Joel F. Vaile** for plaintiff in error.

Mr. **John R. Smith** for defendant in error.

Messrs. John K. Richards, Solicitor General, and *L. F. Parker* submitted a brief for the United States.

Mr. Justice **Brewer** delivered the opinion of the court:

In 1860, in settlement of a claim under a Mexican grant to land in the vicinity of Las Vegas, Congress passed an act giving to the claimants an equal amount of land, to be by them selected elsewhere in the territory of New Mexico, stipulating that the land should be vacant and nonmineral and should be located within three years in square bodies not exceeding five *in number. Within the three [330 years they selected and located the tract in question as one fifth of the land to which they were thus entitled. They applied to the proper officers of the United States to take such steps as would perfect their title. More than thirty four years ago the Land Department took its final action. Since then it has continuously treated the tract as private land, and refused to recognize it in any way as part of the public domain; within the same year, 1864, in which it took its final action, it reported the fact thereof to Congress,

and that body has never in any way questioned the rightfulness of the action taken. And now at the end of this lapse of time the title is challenged, and challenged upon propositions which, if sustained, establish that the owners have never had, and do not now have, any certain title to a single foot of the land, and this although they have been in undisturbed possession all these years, and have paid taxes to the state authorities amounting to $66,000 at least and probably more.

The party who challenges the title of the plaintiff to the particular portion of the tract in controversy in this suit entered at first into possession of it as a tenant, and when at the the termination of his lease he was refused a continuance thereof, took steps to maintain a possession and assert a right adverse to his former landlord. It is undoubtedly true that settled rules of law cannot be ignored because in any particular case their application works apparent harshness. At the same time the result to which the contentions of the defendant lead may well compel a careful examination of them.

These contentions are that Congress granted only nonmineral lands; that this particular tract is mineral land, and therefore by the terms of the act is not within the grant; that no patent has ever been issued, and therefore the legal title has never passed from the government; that the Land Department never adjudicated that this was nonmineral land, but on the contrary simply approved the location, subject to the conditions and provisions of the act of Congress, thereby leaving the question of title to rest in perpetual abeyance upon possible future discoveries of minerals within the tract.

In examining these contentions it is well to 331] consider first *the act of Congress of June 21, 1860, and the circumstances under which it was passed. For as said in *Winona & St. P. Railway Company* v. *Barney*, 113 U. S. 618, 625 [28: 1109, 1112], in reference to legislative grants, "they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used, if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together." This act was a final disposition by Congress of certain claims under Mexican grants for lands situate in the territory of New Mexico. The circumstances and character of these claims had been reported to Congress by the surveyor general of the territory. Some of them were confirmed as reported and *in toto*, and, as stated in *Tameling* v. *United States Freehold & Emigration Company*, 93 U. S. 644 [23: 998]; *Maxwell Land-Grant Case* [*United States* v. *Maxwell Land-Grant Co.*], 121 U. S. 325 [30: 949], and other cases, such confirmation operated as a grant *de novo*, and took effect at once as a relinquishment by Congress of all rights of the United States to the premises. Others were confirmed in part and for only fractions of the areas claimed, and as to them, by § 2, it was made "the duty of the surveyor general of New Mexico immediately to proceed to make the surveys and locations authorized and required by the terms of this section." Another claim was not confirmed, but leave was given to the claimant to bring suit, with a proviso that if the suit should not be instituted within two years the claim should be presumed to have been abandoned; and in respect to the claim before us the right of location was to continue in force for three years, and no longer. Obviously, the thought was that these claims should not only be finally but speedily disposed of. It was not contemplated that the title should remain unsettled, a mere float for an indefinite time in the future.

As the amount of the Las Vegas claim was large, and as the claimants were required to make their locations "in square bodies, not exceeding five in number," each location would necessarily be of a tract of considerable size; in fact, each one *was nearly 100,000 acres. [332 The tract thus located was as a whole to be nonmineral. No provision was made for indemity lands in case mineral should be found in any section or quarter section. So that when the location was perfected the title passed to all the lands or to none.

It will also be perceived that Congress did not permit this location to be made anywhere in the public domain, but only within the limits of the territory of New Mexico. It was not like a military land warrant, subject to location upon any public lands, but only a grant which could be made operative within certain prescribed and comparatively narrow limits—limits not even so broad as those of the territory ceded by Mexico. There were then but few persons living in New Mexico; it contained large areas of arid lands; its surface was broken by a few mountain chains, and crossed by a few streams. It was within the limits of this territory, whose condition and natural resources were but slightly known, that Congress authorized this location. The grant was made in lieu of certain specific lands claimed by the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say "lands then known to contain mineral," for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries. This is in accord with the general rule as to the transfer of title to the public lands of the United States. In cases of homestead, pre emption, or townsite entries, *the law excludes mineral lands, but it [333 was never doubted that the title once passed was free from all conditions of subsequent dis-

coveries of mineral. As was said in *Deffeback* v. *Hawke*, 115 U. S. 392, 404 [29: 423, 427], where this matter was considered:

"We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler, and patented by the government under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued." See also *Colorado Coal & I. Company* v. *United States*, 123 U. S. 307 [31: 182].

How was the character of the land to be determined, and by whom? The surveyor general of New Mexico was directed to make survey and location of the lands selected. Upon that particular officer was cast the specific duty of seeing that the lands selected were such as the Baca heirs were entitled to select. It is not strange that he was the one named, for, in the original act of 1854, which made provision for the examination of these various claims, the duty of such examination was cast upon the same officer, and he was there required "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summon witnesses, administer oaths, and do and perform all other necessary acts in the premises," and it was upon his report that Congress acted. Further, he was the officer who, by virtue of his duties, was most competent to examine and pass upon the question of the character of the lands selected. We do not mean that Congress thereby created an independent tribunal outside of and apart **334**] from the *General Land Department of the government. On the contrary, the act of 1854 provided that he should act under instructions from the Secretary of the Interior, and so undoubtedly in proceeding to make survey and location as required by § 6 of the act of 1860, he was still subject to the control and direction of the Land Department; but while he was not authorized by this section to act in defiance of or independently of the Land Department, he was the particular officer charged with the duty of making survey and location, and it was for him to say, in the first instance, at least, whether the lands so selected, and by him surveyed and located, were lands vacant and nonmineral. This is in accord with the views of the Land Department, as appears from the official letter of June 28, 1884, written in response to an application for the right to make mineral locations within the tract, in which the commissioner, after stating what had taken place, added: "You will see by the foregoing that the land in question was determined, in 1864, by the surveyor general, whose province and duty it was, to be nonmineral; the location was then perfected and the title passed."

It is also worthy of note that Congress did not consider that there was any great probability of the discovery of mineral wealth in New Mexico. By the act of 1860 it confirmed various claims, amounting to millions of acres; confirmed them absolutely and without any reservation of mines then known or to be thereafter discovered within their limits. And this, although under Spanish, if not under Mexican, law, all minerals were perpetually reserved from such grants. 1 Rockwell, Spanish & Mexican Law, p. 49, §§ 1, 2, 3, pp. 112, 113, 114. It made no appropriation for the exploration of the claims to be thereafter located, and although it required the completion of this location within three years, it made but meager appropriation for surveys, the appropriation in 1860 for surveying both the public lands and private land claims in New Mexico being only $10,000. 12 Stat. at L. 108, chap. 211.

It will also be perceived that the surveyor general, as well as the register and receiver of the Land Office, each certified *that the [**335** land was nonmineral. These certificates were their decision to that effect. They were made in accordance with the original instructions sent out by the Land Department in July, 1860, and in this respect they were all that was required by those instructions, which were "in either case [that is, whether the selection is either within or outside the existing surveys] the final condition of the certificate to this office must be accompanied by a statement from yourself and the register and receiver that the land is vacant and not mineral." Thus the proper officer decided that the land was nonmineral, and accompanied the report of the survey and location with all the certificates and statements required by the original instructions from the Land Department.

But it is said that, the attention of the Land Department having been called to the fact that this location was made upon lands supposed to contain minerals, it was not satisfied with the requirements it had originally made; was not content with the certificates demanded of the surveyor general and the register and receiver, and expressly disapproved the evidence in fact furnished thereby, and, also, that while it finally authorized an approval of the survey and location, it directed that the certificate of approval should contain the special reservations named in the statute; that is, that the location should not embrace mineral lands. It is undoubtedly true that the suspicions of the Land Department were aroused by the report that was made as to the supposed character of the land embraced within this location, and that by its letter of January 16, 1864, it held that the evidence furnished as to the character of the land was not sufficient. This letter criticises the certificate of the surveyor general on the ground that, as appeared from an accompanying letter, it was based not solely upon his personal knowledge, but upon "information and conclusions deduced from reasoning." It also notes the fact that the certificate of the register and receiver required by the instructions was wanting. There is a seeming conflict between the statements in this letter and

the records of the surveyor general's office. The latter indicate that the certificate of the register and receiver was forwarded with the 336]*certificate of the surveyor general, while the letter of the Commissioner says that the former was lacking. This apparent contradiction may arise from the fact that the certificate of the register and receiver was sent in a different inclosure, or perhaps it was overlooked by the Commissioner of the Land Office. At any rate, it was about that time, at least, sent to the Land Department, for, as appears from the letter of February 26, it was returned by that department to the surveyor general. Obviously the Land Department, after sending the letter of January 16, reconsidered its action. It had received the certificate of the register and receiver, and had before it all the certificates required by the original letter of instructions, and instead of continuing the suspension of an approval for further proof, as indicated by the letter of January 16, it wrote, on February 12, to close the matter up, pointing out how all the difficulties which stood in the way could be removed. This letter notes the fact that by the statute it is made the duty of the surveyor general to make the survey and location. It contains no disapproval of the certificates or evidence furnished; authorizes him to approve the survey, although it directs that to his certificate of approval he "add the special reservation stipulated by the statute, but not to embrace mineral lands." It further notifies him that the statute does not provide for a patent, and that the law with the plat approved by him in the manner indicated will constitute the evidence of title. Thereupon the surveyor general proceeded to approve the survey, his certificate of approval being absolute and unconditional. He also approved the plat, though his certificate of approval to that was made as required by the letter of February 12, "subject to the conditions and provisions of § 6 of the act of Congress approved June 21, 1860." He also forwarded to the Land Department the field notes, the survey, and the plat with his certificates of approval attached, and they were received and filed by the department without objection. But one conclusion can be deduced from these proceedings, and that is that the Land Department, perceiving that its original instructions had been strictly complied with; that no money had been 337] appropriated *by Congress for actual exploration of the lands; that no way was open for securing further evidence as to their character; that the time within which any other location could be made had passed; that it was the right of the locators to have the question settled and the title confirmed or rejected,—ordered the closing of the matter, the passage of the title, and sought to protect the interests of the government and guard against any criticism of its action by directing an entry in the certificate of approval that it was made subject to the conditions and provisions of the act of Congress.

In this three things are to be noticed: First, that the surveyor general, the officer specially designated to make the survey and location, the one primarily charged with the duty of determining its character, decided that the land was nonmineral. His certificate to that effect is unqualified. His certificate of approval to the field notes and the survey is the same. So far, therefore, as his action is concerned, there was an adjudication that the land was nonmineral. Second, the Land Department directed that the matter be closed, specified how it should be closed, and received and filed without question the report of the surveyor general's action. Third, the only qualification or limitation is found in the direction of the Land Department, followed by the action of the surveyor general in adding to his certificate of approval of the plat the proviso that it is "subject to the conditions and provisions of § 6 of the act of Congress of June 21, 1860." There was no reservation of the matter for further consideration in the Land Department or by the surveyor general. There was a finality so far as they were concerned.

What is the significance of, and what effect can be given to, the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of Congress? We are of opinion that the insertion of any such stipulation and limitation was beyond the power of the Land Department. Its duty was to decide, and not to decline to decide; to execute, and not to refuse to execute, the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. *It was agent, and not principal. Con- [338 gress had made a grant, authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action, and its action at the time. The general statutes of Congress in respect to homestead, pre-emption, and town-site locations provide that they shall be made upon lands that are nonmineral, and in approving any such entry and issuing a patent therefor could it be tolerated for a moment that the Land Department might limit the grant and qualify the title by a stipulation that if thereafter mineral should be discovered the title should fail? It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land, or else denying it altogether. As said in *Deffeback* v. *Hawke*, *supra*, 406 [29: 427]:

"The position that the patent to the plaintiff should have contained a reservation excluding from its operation all buildings and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of Congress. The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals show-

ing a compliance with the law and the conditions which it prescribed."

Further, it must be noticed that the Land Department has since 1864 again and again decided that the action then taken was final, that the land has been segregated from the public domain and become private property. Thus, so far as the judgment of the executive 339] branch of the government is *concerned, the finality of the action taken in passing the title has been settled. But we may go further. As appears by the report of the surveyor general and of the Land Department, transmitted to Congress in 1864, the fact that this land had been finally appropriated to the claim of the Bacca heirs was disclosed. Mention of that fact was also made in subsequent reports to that body, and yet from that time to the present Congress has taken no action in the matter, and has thus by its silence confirmed the proceedings of the Land Department.

Defendant relies largely on the decision of this court in *Barden* v. *Northern Pacific Railroad Co.* 154 U. S. 288 [38: 992], in which it was held that lands identified by the filing of the map of definite location as within the scope of the grant made by Congress to that Company, although at the time of the filing of such map not known to contain any mineral, did not pass under the grant if before the issue of the patent mineral was discovered. But that case properly considered sustains rather the contentions of the plaintiff. It is true there was a division of opinion, but that division was only as to the time at which and the means by which the nonmineral character of the land was settled. The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original act of 1864 making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be "construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States," held that the question of mineral or nonmineral was open to consideration up to the time of issuing a patent. But there was no division of opinion as to the question that when the legal title did pass—and it passed unquestionably by the patent—it passed free from the contingency of future discovery of minerals.

Referring to the contention that if the question of mineral was open for consideration until the issue of a patent there would be great uncertainty in titles, the court said (pp. 326, 327 [38: 1001]):

"We do not think that any apprehension of disturbance in titles from the views we assert 340] need arise. The law places *under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims to them under the legislation of Congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized."

It quoted these words from the opinion in *St. Louis Smelting & Ref. Company* v. *Kemp*, 104 U. S. 636, 640 [26: 875, 876]:

"The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law."

And added (329, 330 [38: 1002]):

"There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural, as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time of their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive. . . . *It is true that the patent has [341 been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the Land Department."

But, it is said, no patent was issued in this case, and therefore the holding in the *Barden Case*, that the issue of a patent puts an end to all question, does not apply here. But the significance of a patent is that it is evidence of the transfer of the legal title. There is no magic in the word "patent" or in the instrument which the word defines. By it the legal title passes, and when, by whatsoever instrument, and in whatsoever manner, that is accomplished, the same result follows as though a formal patent were issued. *Rutherford* v. *Greene's Heirs*, 15 U. S. 2 Wheat. 196, 206 [4: 218, 221]; *Bryan* v. *Forsyth*, 60 U. S. 19 How. 334 [15: 674]; *Langdeau* v. *Hanes*, 88 U. S. 21 Wall. 521, 530 [22: 606, 609], in which this court said: "If the claim be to quantity, and not to a specific tract capable of identifi-

cation, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated." The land passes out of the jurisdiction of the Land Department. The grant has then become complete, and the only remedy for any wrong in the transfer of such title is through the courts, and not in the Land Department. *Michigan Land & Lumber Company* v. *Rust*, 168 U. S. 589, 592 [*ante*, 591, 592] and cases cited in the opinion. In this case the Land Department refused to issue a patent; decided that it had no power to do so, and that the title was complete without one. It would seem strange to hold that the lack of a patent left the question of mineral an open one when there was no authority for the issue of a patent, when it was in **342**] fact refused, and when the *title passed the same as though a patent had issued. There was not at the time of these transactions, and has not since been, any statute specifically authorizing a patent for this land. Section 2447, Rev. Stat. (taken from the acts of 1854, 10 Stat. at L. 599, chap. 10), applies only to the case of a claim to land "which has heretofore been confirmed by law." And the same may be said as to the special act of March 3, 1869 (15 Stat. at L. 342, chap. 152). Here there had been no claim confirmed to any tract of land, but only the grant of a right to locate. In that respect it was like a land warrant, subject to location anywhere within the specified territory. As to land warrants, however, there is a specific provision for the issue of patents. Rev. Stat. § 2423. The Land Department was therefore technically right when it said that the statute did not order the issue of a patent, and that the case was one in which the granting act with the approved survey and location made a full transfer of title. Very likely if a patent had been issued the courts would not have declared it void, but have sustained it as the customary instrument used by government to make a transfer of the legal title. *Carter* v. *Ruddy*, 166 U. S. 493 [41: 1090]. But as there was no statute in terms authorizing a patent, it was not within the power of the locators to compel the issue of one. No court would by mandamus order such issue in the absence of a specific and direct statute requiring it. So when the department refused to issue one the locators had no alternative but to accept that which the statute had provided as the means of acquiring and the evidence of title, and that must be treated as having all the efficacy of a patent.

Summing up the whole matter it results in this: Congress in 1860 made a grant of a certain number of acres, authorized the grantees to select the land within three years anywhere in the territory of New Mexico, directed the surveyor general of that territory to make survey and location of the land selected, thus casting upon that officer the primary duty of deciding whether the land selected was such as the grantees might select. They selected this tract. Obeying the statutes and instructions issued by the Land Department, that officer approved the selection and made the survey and **343**] location. *The Land Department, at first suspending action, finally directed him to close up the matter, to approve the field notes, survey, and plat, and notified the parties through him that such field notes, survey, and plat, together with the act of Congress, should constitute the evidence of title. All was done as directed. Congress made no provision for a patent and the Land Department refused to issue one. All having been done that was prescribed by the statute, the title passed. The Land Department has repeatedly ruled that the action then taken was a finality. It has noted on all maps and in its reports that this tract had been segregated from the public domain and become private property. It made report of this to Congress, and that body has never questioned the validity of its action. The grantees entered into actual possession and fenced the entire tract. They have paid the taxes levied by the state upon it as private property, amounting to at least $66,000. While the approval entered upon the plat by the surveyor general under the direction of the Land Department was in terms "subject to the conditions and provisions of § 6 of the act of Congress approved June 21, 1860," such limitation was beyond the power of executive officers to impose.

We are of opinion that at this late day the title of the locators and their grantees is not subject to challenge, and that it is a full, absolute, and unconditional title. *The judgment of the Circuit Court will therefore be reversed*, and the case remanded for a new trial.

LARS THOMPSON, *Plff in Err.*,
v.
STATE OF UTAH.

(See S. C. Reporter's ed. 343-355.)

Trial by jury—criminal prosecution—number of jurors—law of Utah—jury of eight persons—consent of accused—ex post facto law.

NOTE.—*As to jurisdiction of state and United States courts, as to territory and offense*, see note to United States v. Bevans, 4: 404.

As to jury, of what number; practice in regard to; illness or insanity of one; thirteen or eleven jurors; wrong person serving as juror by mistake,—see note to Silsby v. Foote, 14: 394.

As to constitutionality of ex post facto laws, see notes to Calder v. Bull, 1: 648; and Sturges v. Crowninshield, 4: 529.

Constitutional right of trial by jury; to what cases it applies; cases to which it does not apply.

The Amendment to the Constitution of the United States by which the trial by jury was secured may be construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. Parsons v. Bedford, 3 Pet. 433 (7: 732).

The right of trial by jury is preserved to every one accused of crime who is not attached to the army or navy or militia in actual service. *Ex parte* Milligan, 4 Wall. 2 (18: 281).

The constitutional provision that, in suits at common law where the value exceeds $20, the right of trial by jury shall be preserved, does not apply to equity courts. Shields v. Thomas, 18 How. 253 (15: 368); Barton v. Barbour, 104 U. S. 126 (26: 672).

1. The provisions in the national Constitution relating to trials by jury for crimes and to criminal prosecution apply to the territories of the United States.

2. The jury referred to in the Federal Constitution and in the 6th Amendment thereto is a jury constituted, as it was at common law, of twelve persons, neither more nor less.

3. The state of Utah did not acquire, upon its admission into the Union, the power to provide in respect of felonies committed within its limits while it was a territory, that they should be tried otherwise than by such a jury as is provided by the Federal Constitution.

4. A substitution of a jury of eight persons in place of a common-law jury, in case of a crime committed before the change in the law, constitutes an *ex post facto* law.

5. It is not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt, instead of the constitutional jury of twelve.

6. The provision in the Constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the territory became a state.

[No. 553.]

Argued March 4, 7, 1898. Decided April 25, 1898.

IN ERROR to the Supreme Court of the State of Utah to review a judgment of that court affirming the judgment of the lower court of that state convicting Lars Thompson

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The confirming act of March 28, 1787, of Pennsylvania, was unconstitutional under the then existing Constitution of Pennsylvania, because it took a person's property at a valuation assessed by a board appointed solely by the state, and not by a jury; also because it provided that compensation should be made in other lands, and not in money. Vanhorne v. Dorrance, 2 Dall. 304 (1: 391).

The law of Ohio, which directs the court, in a suit at law, to appoint commissioners to value the improvements of occupying claimants, is repugnant to the 7th Amendment to the Constitution of the United States. The compensation for improvements, to be determined in a suit at common law, must be submitted to a jury. Bank of Hamilton v. Dudley, 2 Pet. 492 (7: 496).

A court cannot, in an action at law, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and itself determine the remainder, without a waiver by the defendants of a verdict by the jury. Hodges v. Easton, 106 U. S. 408 (27: 169).

So much of the act of March 3, 1863, as invests the court of claims with power to render judgment in favor of the United States against a claimant, is not in violation of the 7th Amendment of the national Constitution, which provides for the right of trial by jury. McElrath v. United States, 102 U. S. 426 (26: 189).

The first clause of the 7th Amendment to the United States Constitution, in regard to the right of trial by jury, relates only to courts of the United States. The states are left to regulate trials in their courts. Walker v. Sauvinet, 92 U. S. 90 (23: 678); Edwards v. Elliott, 21 Wall. 532 (22: 487); Pearson v. Yewdall, 95 U. S. 294 (24: 436).

The second clause of the 7th Amendment of the Constitution, prohibiting courts of the United States to re-examine any fact tried by a jury otherwise than according to the common law, applies to the facts tried by a jury in a cause in a state court. The Justices v. Murray, 9 Wall. 274 (19: 658).

The 14th Amendment does not forbid abridging the right of trial by jury in suits at common law in the state courts. Walker v. Sauvinet, 92 U. S. 90 (23: 678).

A party may waive his right to trial by jury, by giving a note payable at a bank the charter of which authorizes collection by summary process. Bank of Columbia v. Okely, 4 Wheat. 235 (4: 559).

The constitutional guaranty that the right of trial by jury shall remain inviolate is not infringed by a statute providing for a struck jury. Fowler v. State, 58 N. J. L. 423.

A statute authorizing special findings of fact by the jury, and providing for judgment upon them if they are inconsistent with the general verdict, does not violate the right of trial by jury. Walker v. New Mexico & S. P. P. Co. 165 U. S. 593 (41: 837).

The guaranty of a jury trial by N. Y. Const. 1846 art. 1, § 2, in all cases in which it has been "heretofore" used, was not infringed, so far as concerns actions to enforce such liens in the city of New York, by the New York mechanic's lien law (N. Y. Laws 1885, chap. 342), providing that the manner and form of instituting and prosecuting actions thereunder shall be the same as in actions to foreclose real-estate mortgages. Schillinger Fire Proof C. & A. Co. v. Arnott, 152 N. Y. 584.

A petitioner for revocation of decrees of adoption has no constitutional right to a jury trial in Massachusetts. McKay v. Kean, 167 Mass. 524.

The guaranty that the right of trial by jury shall remain inviolate, by Washington Declaration of Rights, art. 1, § 21, does not extend to *quo warranto* proceedings. State v. Doherty, 16 Wash. 382.

A summary proceeding for a restraining order against carrying on a business declared by the legislature to be a common nuisance is not a case within the scope of the constitutional guaranty of the right of trial by jury. *Ex parte* Keeler, 45 S. C. 537, 31 L. R. A. 678.

Interposition of equitable defense as defeating right to trial by jury. Colville v. Chubb, 38 N. Y. S. R. 698; Thatcher v. Stickney, 88 Iowa, 454; Lindley v. Sullivan, 133 Ind. 588, 594; Peden v. Cavins, 134 Ind. 494; Hill v. Atoka & Min. Co. 124 Mo. 153; McLaurin v. Hodges, 43 S. C. 187; Brown v. Cohn, 88 Wis. 627; Routt v. Milner, 57 Mo. App. 50.

Right to trial by jury as known to the common law at the adoption of the United States Constitution was secured by U. S. Const. 7th Amend., providing that in suits at common law where the value in controversy exceeds $20 the "right of trial by jury" shall be preserved. United States, Brightwood R. Co., v. O'Neal, 10 App. D. C. 205.

The requirement of U. S. Const. Amend. 6, that in all criminal prosecutions the accused shall enjoy the right to a public trial by an impartial jury of the state and district wherein the crime shall have been committed, is confined to prosecutions in the United States courts, and does not apply to those in the state courts. State v. Bates, 14 Utah, 293.

The constitutional right of trial by jury is not infringed by a statute making the mere possession of prohibited articles, even without knowing what they were, an offense. Ford v. State, 85 Md. 465.

Provision in city charter that violations of the city ordinances shall be tried by the police justice without a jury, except in cases where the punishment is imprisonment exceeding ten days, is void under S. D. Const. art. 6, § 6, providing that the right to trial by jury shall extend to all "cases at law without regard to the amount in controversy," or § 7, giving the right to trial by jury in all criminal prosecutions. Belatti v. Pierce, 8 S. D. 456.

Trial before a magistrate is not infringement of

of the crime of grand larceny. *Reversed*, and cause remanded for further proceedings.

The facts are stated in the opinion.

Mr. **J. W. N. Whitecotton** for plaintiff in error.

Messrs. **L. T. Michener**, *A. C. Bishop*, Attorney General of Utah, *Benner X. Smith*, and *W. W. Dudley* for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

By an indictment returned in the district court of the second judicial district of the territory of Utah, at its May term, 1895,—that being a court of general jurisdiction,—the plaintiff in error and one Jack Moore were charged with the crime of grand larceny alleged to have been committed March 2, 1895, in Wayne county of that territory, by unlawfully and feloniously stealing, taking, and driving away one calf, the property of Heber Wilson.

The case was first tried when Utah was a territory, and by a jury composed of twelve persons. Both of the defendants were found guilty as charged, and were recommended to the mercy of the court. A new trial having been granted, the case was removed for trial to another county. But it was not again tried until after the admission of Utah into the Union as a state.

At the second trial the defendant was found guilty. He moved for a new trial upon the ground, among others, that the jury that tried him was composed of only eight jurors; whereas by the law in force at the time of the

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constitutional right to jury trial. Hunt v. Jacksonville, 34 Fla. 504; Liberman v. State, 26 Neb. 464.

Guaranty of a jury trial by New York Constitution is violated by N. Y. Laws 1896, chap. 383, which forfeits, as part of the penalty for violation of the statute prohibiting interference with oysters or other shell fish belonging to another, any boat or vessel used in the act, upon a finding of that fact by a justice of the peace without a jury. Colon v. Lisk, 153 N. Y. 188, Affirming 13 App. Div. 195.

The right of trial by jury guaranteed by Ind. Const. is not violated by a statute empowering a police judge, in case he shall deem the punishment he is authorized to assess to be inadequate for the offense, to hold the prisoner to bail for appearance before the proper court. Stevens v. Anderson, 145 Ind. 304.

A statute providing for a struck jury on demand of either party does not conflict with the constitutional right of trial by jury. Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 33 L. R. A. 437.

A Chinese person accused of being unlawfully in the United States is not entitled to a jury trial before his deportation is ordered, where no punishment in the way of imprisonment is inflicted. Re Tsu Tse Mee, 81 Fed. Rep. 562.

The trial by jury preserved by U. S. Const. 7th Amend. in cases at common law involving more than $20 is a trial by jury according to the course of the common law, and therefore the jury trial provided for by the act of Congress of March 1, 1823, extending the jurisdiction of justices of the peace, is not such a jury trial as the amendment contemplates. Kengla v. Booth, 24 Wash. L. Rep. 715.

The right of trial by jury "preserved by U. S. Const. 7th Amend. in suits at common law involving over $20 is that known to the common law of England when the amendment was adopted, *viz.*, a trial or an issue of fact by twelve men in a court of common-law jurisdiction under the direction of the court. Capital Traction Co. v. Hof, 24 Wash. L. Rep. 646.

The right to a jury trial under the North Carolina Constitution in all controversies at law respecting property does not extend to findings of fact, not relating to the issues raised by the pleadings, of a referee to whom a compulsory reference has been directed. Keystone Driller Co. v. Worth, 117 N. C. 515.

The South Carolina acts of 1887 and 1888, for the summary trial of offenses against the ordinances of the city of Anderson, are not unconstitutional as interfering with the constitutional right of trial by jury. Anderson v. Fowler, 43 S. C. 8.

A court has jurisdiction without a jury to find one guilty of a misdemeanor. Austin v. People, 63 Ill. App. 298.

The right of trial by jury given by the Illinois Constitution does not make invalid a statute authorizing the appellate court to reverse without remanding, where its findings of fact on conflicting evidence differ from the findings of the jury. Borg v. Chicago, R. I. & P. R. Co. 162 Ill. 348.

Dismissing a suit on a demurrer to evidence which, with all legitimate inferences therefrom, makes out no cause of action, is not a violation of the constitutional guaranty of the right to trial by jury. Hopkins v. Nashville, C. & St. L. R. Co. 96 Tenn. 409, 32 L. R. A. 354.

The Illinois statute placing the primary duty of supporting a pauper upon his relatives when able is not unconstitutional because it gives a remedy for the enforcement of such liability without making a provision for a jury trial. People, Peoria County, v. Hill, 163 Ill. 186, 36 L. R. A. 634.

The constitutional right of trial by jury is not infringed by a statute providing for an action to determine adverse claims to real estate in which "the court shall hear the several claims and determine the rights of the parties," as the term "court" means the tribunal, and not merely the judge as distinguished from the jury. Miles v. Strong, 68 Conn. 273.

The provisions of Conn. Gen. Stat. § 1356, for the trial of summary process by a jury of six, do not violate the constitutional guaranty of the right of trial by jury. Miller v. Lampson, 66 Conn. 432.

A complaint alleging that third persons have been allowed to get possession of the property of a bank in consequence of the neglect of defendant to properly perform his duties as a director thereof, for the damages resulting from which judgment is asked, states a cause of action at law in which defendants are entitled to a trial by jury. Higgins v. Tefft, 4 App. Div. 62.

The constitutional guaranty of right of trial by jury does not apply to the question whether certain real estate vested in an assignee for creditors, raised by the special summary proceeding for the sale of real estate provided by the Illinois assignment act. Holnback v. Wilson, 159 Ill. 148.

An eloigner against whom a personal judgment is sought in an action under Wash. Laws, 1893, p. 428, to enforce a logger's lien, is entitled upon demand to a trial by jury, under the Washington Constitution. McCoy v. Cook, 13 Wash. 158.

A garnishee is not entitled as of right to a trial by jury in Wisconsin. Delaney v. Hartwig, 91 Wis. 412.

The fact that a suit to determine title to land by one out of possession would have been cognizable at law when the United States Constitution was adopted brings it within the guaranty of a right to trial by jury. Gordan v. Jackson, 72 Fed. Rep. 86.

The denial of a right to a jury trial in a state court, although by erroneous construction of the laws of the state, does not deny a right protected

commission of the alleged offense a lawful jury in his case could not be composed of less than twelve jurors. The application for a new trial having been overruled, and the accused having been called for sentence, he renewed his objection to the composition of the jury, and moved by counsel that the verdict be set aside and another trial ordered.

This objection was overruled, the accused duly excepting to the action of the court. He was then sentenced to the state prison for the term of three years. The judgment of conviction was affirmed by the supreme court of 345] Utah, the court *holding that the trial of the accused by a jury composed of eight persons was consistent with the Constitution of the United States.

By the statutes of the territory of Utah in force at the time of the commission of the alleged offense it was provided that a trial jury in a district court should consist of twelve, and in a justice's court of six, persons, unless the parties to the action or proceeding, in other than criminal cases, agreed upon a less number; that a felony was a crime punishable with death or by imprisonment in the penitentiary, every other crime being a misdemeanor; that the stealing of a calf was grand larceny and punishable by confinement in the penitentiary for not less than one nor more than ten years; that no person should be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon judgment against him upon a demurrer, or upon the judgment of a court, a jury having been waived in a criminal

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by the Constitution of the United States. Iowa C. R. Co. v. Iowa, 160 U. S. 389 (40: 467).

A justice of the New York city district court may require a second trial to be by jury, although the first trial was had without a jury, under N. Y. city consolidation act, § 1372, as amended, authorizing him in his discretion to direct a trial by jury at any stage of the action. New York Small Stock Co. v. Third Ave. R. Co. 16 Misc. 64.

An injunction to restrain a contemplated crime is not a deprivation of the constitutional right of trial by jury, as such right does not arise until the party is accused of having already committed the crime. Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212.

A provision for a jury trial on appeal from a conviction of a criminal offense under a municipal ordinance sufficiently preserves the constitutional right of trial by jury, although there is no jury in the court in which the conviction is had; and Kan. Gen. Stat. 1889, § 1010, requiring a recognizance conditioned to pay the fines and costs and payment of all costs of the lower court as a condition of appeal, is void as inconsistent with such right. *Re* Jahn, 55 Kan. 694.

The provision of the Indiana Constitution, that in all civil cases the right of trial by jury shall remain inviolate, refers only to what were deemed civil actions at common law. Wright v. Fults, 138 Ind. 594.

A trial by jury of the issues of fact involved in a mandamus proceeding is a matter of right in Oklahoma. Territory, Galbraith, v. Chicago, R. I. & P. R. Co. 2 Okla. 108.

The right of trial by jury secured to a suitor in a Federal court by U. S. Const. 7th Amend. cannot be taken away by a state statute or state decisions giving courts of equity jurisdiction of a case otherwise triable at law. Frey v. Willoughley, 27 U. S. App. 417, 63 Fed. Rep. 865, 11 C. C. A. 463.

A suit against a receiver removed from a state to a Federal court is triable by jury, where it would have been so triable as matter of right, in the state court. Vany v. Toledo, St. L. & K. C. R. Co. 67 Fed. Rep. 379.

A suit to enforce the allowance of a claim by an assignee in insolvency is not triable by jury. Root v. Meader, 2 Ohio Dec. 547.

The constitutional right of a trial by jury is denied by a statute attempting to authorize a court without a jury to declare a turnpike road abandoned and its franchise forfeited because the road had been out of repair for six months. Salt Creek Valley Turnp. Co. v. Parks, 50 Ohio St. 568, 28 L. R. A. 769.

A defendant in an action which is in substance, though not in form, one of ejectment, is entitled as of right to a jury trial; and he is not deprived of such right by the fact that plaintiff seeks to set aside certain conveyances in order to establish his legal title. Boyd v. Boyd, 12 Misc. 119.

There is no right to a jury trial on a summary application, under Minn. Laws 1893, chap. 118, to redeem from a tax sale an interest in land. Wade v. Drexel, 60 Minn. 164.

A *scire facias* on a forfeited recognizance is not an "action" for the recovery of money only, triable by jury, under Mo. Rev. Stat. § 2131, nor is it within Mo. Const. art. 2, § 28, providing that "the right of trial by jury as heretofore enjoyed shall remain inviolate." State v. Hoeffner, 124 Mo. 483, 492; State v. Murmann, 124 Mo. 502; State v. Caldwell, 124 Mo. 509.

A petitioner for the revocation of the probate of a will is entitled to a trial by a jury upon a written demand, under Cal. Code Civ. Proc. § 1330. *Re* Robinson, 106 Cal. 493.

Failure of defendant on demanding a jury trial, in an action in the New York city district court, to deposit the jury fees at the time of his demand as required by N. Y. Laws 1882, chap. 410, § 1377, does not prevent the justice from granting a jury trial under § 1372, authorizing him in his discretion, without a demand by the parties, to direct that the trial be had before a jury. Equitable Gaslight Co. v. French, 10 Misc. 749.

One charged with violation of the laws relative to the observance of Sunday before a police justice authorized to try all criminal cases that may by law be tried by a justice of the peace, only "as a court of special sessions," is entitled to a jury trial where he so elects. *Re* Erbe, 13 Misc. 404; People v. Daufkirch, 13 Misc. 408.

One charged with violation of the California act to regulate the practice of medicine, approved April 3, 1876, is entitled to a jury trial under the California constitutional guaranty, and is not deprived thereof by Doering's Pol. Code, pp. 716, 717. *Ex parte* Wong Yon Ting, 106 Cal. 296.

The violators of a city ordinance may be sentenced to pay a fine without a trial by jury. Opelousas Police Bd. v. Giron, 46 La. Ann. 1364.

A party charged with violation of a village ordinance is not entitled to a jury trial, but the magistrate before whom he is brought must proceed forthwith to hear and determine the charge, under N. Y. Laws 1875, chap. 385, § 1; People v. Van Houten, 13 Misc. 603.

A municipal ordinance creating an offense against the city triable without a jury does not contravene the Florida constitutional provision that the right of trial by jury shall remain inviolate. Hunt v. Jacksonville, 34 Fla. 504.

The constitutional right to a trial by jury does not extend to a proceeding to punish a person for contempt in violating an injunction. *Re* Debs, 158 U. S. 564 (39: 1092).

action not amounting to a felony; and that issues of fact should be tried by jury, unless a trial in that mode was waived in criminal cases not amounting to a felony by the consent of both parties expressed in open court and entered in its minutes. 2 Compiled Laws, Utah, 1888, §§ 3065, 4380, 4643, 4644, 4790, 4997.

By the Constitution of the state of Utah it is provided: "In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous." Art. 1, § 10. Also: "All criminal prosecutions and penal actions which may have arisen, or which may arise before the change from a territorial to a state government, and which shall then be pending, shall be prosecuted to judgment and execution in the name of the state, and in the court having jurisdiction thereof. All offenses committed against the laws of the territory of Utah, before the change from a territorial to a state government, and which shall not have been prosecuted before such change, may be prosecuted in the name and by the authority of the state [346] *of Utah with like effect as though such change had not taken place, and all penalties incurred shall remain the same as if this Constitution had not been adopted." Art. 24, § 6.

As the offense of which the plaintiff in error was convicted was a felony, and as by the law in force when the crime was committed he could not have been tried by a jury of less number than twelve jurors, the question is presented whether the provision in the Constitution of Utah, providing for a jury of eight persons in courts of general jurisdiction, except in capital cases, can be made applicable to a felony committed within the limits of the state while it was a territory, without bringing that provision into conflict with the clause of the Constitution of the United States prohibiting the passage by any state of an *ex post facto* law.

The Constitution of the United States provides: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." Art. 3, § 2. And by the 6th Amendment of the Constitution it is declared: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

That the provisions of the Constitution of the United States relating to the right of trial by jury in suits at common law apply to the territories of the United States is no longer an open question. *Webster* v. *Reid*, 52 U. S. 11 How. 437, 460 [13: 761, 770] *American Publishing Co.* v. *Fisher*, 166 U. S. 464, 468 [41: 1079, 1081]; *Springville* v. *Thomas*, 166 U. S. 707 [41: 1172]. In the last-named case it was claimed that the territorial legislature of Utah was empowered by the organic act of the territory of September 9, 1850 (9 Stat. at L. 458, chap. 51, § 6), to provide that *unanimity [347] of action on the part of jurors in civil cases was not necessary to a valid verdict. This court said: "In our opinion the 7th Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so."

It is equally beyond question that the provisions of the national Constitution relating to trials by jury for crimes and to criminal prosecutions apply to the territories of the United States.

The judgment of this court in *Reynolds* v. *United States*, 98 U. S. 145, 154 [25: 244, 246], —which was a criminal prosecution in the territory of Utah,—assumed that the 6th Amendment applied to criminal prosecutions in that territory.

In *Callan* v. *Wilson*, 127 U. S. 540, 548, 551 [32: 223, 226, 227], which was a criminal prosecution by information in the police court of the District of Columbia, the accused claimed that the right of trial by jury was secured to him by the third article of the Constitution as well as by the 5th and 6th Amendments. The contention of the government was that the Constitution did not secure the right of trial by jury to the people of the District of Columbia; that the original provision, that when a crime was not committed within any state "the trial shall be at such place or places as the Congress may by law have directed," had, probably, reference only to offenses committed on the high seas; that, in adopting the 6th Amendment, the people of the states were solicitous about trial by jury in the states and nowhere else, leaving it entirely to Congress to declare in what way persons should be tried who might be accused of crime on the high seas and in the District of Columbia and in places to be thereafter ceded for the purposes respectively of a seat of government, forts, magazines, arsenals, and dockyards; and, consequently, that that Amendment should be deemed to have superseded so much of the third article of the Constitution as related to the trial of crimes by jury. That contention was overruled, this court saying: "As the guaranty of a trial by jury, in the third article, implied *a trial [348] in that mode and according to the settled rules of the common law, the enumeration, in the 6th Amendment, of the rights of the accused in criminal prosecutions is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the states to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well those permanently or

temporarily residing in the District of Columbia as those residing or being in the several states. There is nothing in the history of the Constitution or of the original Amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty, and property—especially of the privilege of trial by jury in criminal cases. . . . We cannot think," the court further said, "that the people of this District have, in that regard, less rights than those accorded to the people of the territories of the United States."

In *Church of Jesus Christ of L. D. S.* v. *United States*, 136 U. S. 1, 44 [34: 481, 491], one of the questions considered was the extent of the authority which the United States might exercise over the territories and their inhabitants. In the opinion of Mr. Justice Bradley reference was made to previous decisions of this court, in one of which—*First National Bank* v. *County of Yankton*, 101 U. S. 129, 133 [25: 1046, 1047]—it was said that Congress, in virtue of the sovereignty of the United States, could not only abrogate the laws of the territorial legislatures, but may itself legislate directly for the local government; that it could make a void act of the territorial legislature valid, and a valid act void; that it had full and complete legislative authority over the people of the territories and all the departments of the territorial governments; that it "may do for the territories what the people, under the Constitution of the United States, may do for the states." Reference was also made to *Murphy* v. *Ramsey*, 114 U. S. 15, 44 [29: 47, 57], in which it was said: "The people **349**] of the United States, *as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms." The opinion of the court in *Church of Jesus Christ of L. D. S.* v. *United States* then proceeded: "Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its Amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions. The supreme power of Congress over the territories and over the acts of the territorial legislatures established therein, is generally expressly reserved in the organic acts establishing governments in said territories. This is true of the territory of Utah. In the 6th section of the act establishing a territorial government in Utah, approved September 9, 1850, it is declared 'that the legislative powers of said territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act. . . . All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect.' 9 Stat. at L. 454, chap. 51."

Assuming, then, that the provisions of the Constitution relating to trials for crimes and to criminal prosecutions apply to the territories of the United States, the next inquiry is whether the jury referred to in the original Constitution and in the 6th Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. 2 Hale, P. C. 161, 1 Chitty, Crim. L. 505. This question must be answered in the affirmative. When Magna Charta declared that no freeman should be deprived of life, etc., "but by the judgment of his peers or by the law of the land," it referred to a trial by twelve jurors. Those who emigrated to this *country from [**350** England brought with them this great privilege "as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power." 2 Story, Const. § 1779. In Bacons' Abridgment, tit. *Juries*, it is said: "The trial *per pais*, or by a jury of one's country, is justly esteemed one of the principal excellencies of our Constitution; for what greater security can any person have in his life, liberty, or estate, than to be sure of not being devested of, or injured in, any of these, without the sense and verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta." So, in 1 Hale's P. C. 33: "The law of England hath afforded the best method of trial that is possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witneses *viva voce* in the presence of the judge and jury, and by the inspection and direction of the judge." It must consequently be taken that the word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offense of grand larceny in the territory of Utah—which was under the complete jurisdiction of the United States for all purposes of government and legislation—the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons. And such was the requirement of the statutes of Utah while it was a territory.

Was it then competent for the state of Utah, upon its admission into the Union, to do in respect of Thompson's crime what the United States could not have done while Utah was a territory, namely, to provide for his trial by a jury of eight persons?

We are of opinion that the state did not acquire upon its admission into the Union the power to provide, in respect of felonies committed within its limits while it was a territory, *that they should be tried otherwise than [**351** by a jury such as is provided by the Constitution of the United States. When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the

court and the unanimous verdict of a jury of twelve persons. To hold that a state could deprive him of his liberty by the concurrent action of a court and eight jurors, would recognize the power of the state, not only to do what the United States in respect of Thompson's crime could not, at any time, have done by legislation, but to take from the accused a substantial right belonging to him when the offense was committed.

It is not necessary to review the numerous cases in which the courts have determined whether particular statutes come within the constitutional prohibition of *ex post facto* laws. It is sufficient now to say that a statute belongs to that class which by its necessary operation and "in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage." *United States* v. *Hall*, 2 Wash. C. C. 366; *Kring* v. *Missouri*, 107 U. S. 221, 228 [27: 506, 509]; *Medley, Petitioner*, 134 U. S. 160, 171 [33: 835, 840]. Of course, a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offense was committed. And therefore it is well settled that the accused is not entitled of right to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offense charged against him. Cooley in his Treatise on Constitutional Limitations, after referring to some of the adjudged cases relating to *ex post facto* laws, says: "But so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, 352] and heard only by the courts in *existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." Chap. 9, *272. And this view was substantially approved by this court in *Kring* v. *Missouri*, above cited. So, in *Hopt* v. *Utah*, 110 U. S. 574, 590 [28: 262, 269], it was said that no one had a vested right in mere modes of procedure, and that it was for the state, upon grounds of public policy, to regulate procedure at its pleasure. This court, in *Duncan* v. *Missouri*, 152 U. S. 378, 382 [38: 485, 487], said that statutes regulating procedure if they leave untouched all the substantial protections with which existing law surrounds the person accused of crime, are not within the constitutional inhibition of *ex post facto* laws. But it was held in *Hopt* v. *Utah*, above cited, that a statute that takes from the accused a substantial right given to him by the law in force at the time to which his guilt relates would be *ex post facto* in its nature and operation, and that legislation of that kind cannot be sustained simply because, in a general sense, it may be said to regulate procedure. The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure, as in determining whether particular statutes by their operation take from an accused any right that was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the offense charged against him.

Now, Thompson's crime, when committed, was punishable by the territory of Utah proceeding in all its legislation under the sanction of, and in subordination to the authority of, the United States. The court below substituted, as a basis of judgment and sentence to imprisonment in the penitentiary, the unanimous verdict of eight jurors in place of a unanimous verdict of twelve. It cannot therefore be said that the Constitution of Utah, when applied to Thompson's case, did not deprive him of a substantial right involved in his liberty, and *did not materially alter the [353 situation to his disadvantage. If, in respect to felonies committed in Utah while it was a territory, it was competent for the state to prescribe a jury of eight persons, it could just as well have prescribed a jury of four or two, and, perhaps, have dispensed altogether with a jury, and provided for a trial before a single judge.

The supreme court of Utah held that this case came within the principles announced by it in *State* v. *Bates*, 14 Utah, 293, 301. In the latter case no reference was made to the *ex post facto* clause of the Constitution of the United States. But it was held that the requirement of eight jurors in courts of general jurisdiction, except in capital cases, was not in conflict with the 6th Amendment of the Constitution of the United States—the court saying that "if a jury of eight men is as likely to ascertain the truth as twelve, that number secures the end," and "that there can be no magic in the number twelve, though hallowed by time." But the wise men who framed the Constitution of the United States and the people who approved it were of opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors. It was not for the state, in respect of a crime committed within its limits while it was a territory, to dispense with that guaranty simply because its people had reached the conclusion that the truth could be as well ascertained, and the liberty of an accused be as well guarded, by eight as by twelve jurors in a criminal case.

It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons.

In the case of *Hopt* v. *Utah*, above cited, the **354**] question arose whether *the right of an accused, charged with felony, to be present before triers of challenges to jurors was waived by his failure to object to their retirement from the court room, or to the trial of the several challenges in his absence. The court said: "We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life and liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

If one under trial for a felony, the punishment of which is confinement in a penitentiary, could not legally consent that the trial proceed in his absence, still less could he assent to be **355**] *deprived of his liberty by a tribunal not authorized by law to determine his guilt.

In our opinion the provision in the Constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the territory became a state, because, in respect of such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion. *Reversed.*

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissented.

VIRGINIA & ALABAMA COAL COMPANY, Suing on Its Own Behalf and for the Use of the Sloss Iron & Steel Company, *Appt.*,

v.

CENTRAL RAILROAD & BANKING COMPANY of Georgia *et al.*

(See S. C. Reporter's ed. 355-372.)

Preference of claim for coal over mortgage on railroad—charge upon the income.

1. A claim for coal purchased for and used in operating a railroad when the parties expected payment thereof out of the current earnings is not excluded from preference over a mortgage on the road in case of a subsequent receivership, because of the fact that the purchase was not made by the owner of the road, but by another party who was in control and operation thereof under a lease, without protest or interference by the bondholders.
2. A provision for the sequestration by foreclosure of the income of a railroad for the benefit of the bondholders will not prevent the income from being charged with the prior equity of unpaid supply claimants until strict foreclosure or a sale of the road.

[No 100.]

Argued December 14, 15, 1897. Decided May 9, 1898.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree of that court reversing a decree of the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia, and remanding the cause to the latter court with instructions to enter decree in favor of the interveners, the Virginia & Alabama Coal Company, and the Sloss Iron & Steel Company, for amounts due them for coal delivered to the lines under the control and forming a part of the system of the Central Railroad & Banking Company of Georgia, etc. *Affirmed.*

See same case below, 30 U. S. App. 263.

Statement by Mr. Justice **White:**

On December 19, 1888, the Georgia Pacific Railroad Company leased its line of railroad extending from Atlanta to Birmingham, Alabama, to the Richmond & Danville Railroad Company, a corporation organized under the laws of Virginia and which owned or controlled by lease a line of railroad from Atlanta to Washington, in the District of Columbia; and thereafter the Georgia Pacific road was operated by the Richmond & Danville Company. On June 1, 1891, the Central Railroad & Banking Company of Georgia, a corporation under the laws of Georgia owning and operating a line of railroad from Atlanta to Savannah, Georgia, and which owned or controlled various other railroads or lines of steamships and a large amount of other property, executed a lease for ninety-nine years of said railroad

NOTE.—*As to powers and duties of receivers*, see note to Davis v. Gray, 21: 447.

As to priority between judgment for damages and railroad mortgage, see note to Green v. Coast Line R. Co. (Ga.) 33 L. R. A. 806.

and various lines and property controlled by it to the Georgia Pacific Company. The lease was signed on behalf of the Georgia Pacific Company by its president, pursuant to the direction of the board of directors of the company, but it was subsequently asserted that this was done without previous authorization or ratification of the stockholders. The Georgia Pacific Company did not take possession of the property of the Central Company or assume or exercise any control over the same, except that on the date of the lease it requested the Richmond & Danville Company to assume the control of the leased property, with which request there was an immediate compliance.

357] *In March, 1892, a suit was instituted in the circuit court of the United States for the eastern division of the southern district of Georgia by Rowena M. Clarke, a stockholder of the Central Company, to obtain a cancelation of the lease of the property of that company and other specific relief. A temporary receiver was appointed on March 4, 1892. The Danville Company, as also the Georgia Pacific Company, appeared and disclaimed any rights under the lease, and, on March 28, 1892, the preliminary receiver, and other persons constituting the then board of directors of the Central Company, were appointed joint receivers to take charge of the railroad property and assets of the Central Company until there could be a reorganization of such board in pursuance of its charter.

As ancillary to Mrs. Clarke's bill, the Central Company on July 4, 1892, filed a bill against the Farmers' Loan & Trust Company of New York, trustee, and other creditors, averring its inability to meet many matured obligations, and that it had defaulted on July 1, 1892, on the semiannual interest due on $5,000,000 mortgage bonds dated October 1, 1872, for which the Farmers' Loan & Trust Company was trustee, and that for these reasons the directors were unable to assume the management of the property, and requesting the court by proper process to call upon its creditors to come into court, and that the court would administer the property for the benefit of all interested. The Farmers' Loan & Trust Company assented to the continuance of the receivership; and, on July 15, 1892, under the depending bill, all the receivers, with the exception of one H. M. Comer, were discharged, and Mr. Comer was continued as receiver.

Subsequently, in May, 1893, under bills filed to foreclose a mortgage executed by the Savannah & Western Railroad Company, Comer and one Lowry were appointed receivers, and directed to continue to operate the road as part of the system of the Central Company.

On January 23, 1893, the Farmers' Loan & Trust Company of New York, trustee for the mortgage bondholders of the Central Railroad & Banking Company of Georgia, filed its dependent bill in said court for the foreclosure of

358] the five *million dollar mortgage on the main stem of the Central Railroad from Atlanta to Savannah because of default in the payment of the interest due July 1, 1892, and the receivership was extended to that bill.

In an agreed statement of facts contained in the record, it was stipulated as follows:

"It is a fact that since the receivership the receivers of the Central Railroad & Banking Company of Georgia have expended for betterments in its railroad lines from the income of the roads during the receivership a sum much larger than the entire claim of the Interveners."

On June 30, 1893, a final decree was entered dismissing, for want of equity, the bill filed on behalf of Mrs. Clarke, it being, however, recited that the validity of the lease by the Central Company was not passed upon.

On May 26, 1892, the Virginia & Alabama Coal Company was allowed to become a party complainant in the Clarke suit and to file an intervening petition therein. The Central Company and its receivers and the Danville Company were made parties defendant to the intervention. It was averred in the petition that the Danville Company, while operating the Central Company, purchased from the intervener, for the use and benefit of the Central, in its several divisions, coal, which purchase was made in pursuance of a contract of Danville dated July 13, 1891. For coal furnished under said contract and actually delivered to the Central Company (against which latter company in the course of said business the bills were originally made out), and used by said Central Company in the running of its machinery, $26,607.44, as shown by a statement of account annexed to the petition.

The contract referred to in the petition reads as follows:

Richmond & Danville Railroad Company.
Office general purchasing agent; Joseph P. Minetree, general purchasing agent, Atlanta, Ga.
The Virginia and Alabama Coal Company;
Mr. J. R. Ryan, V. P. and G. M., Birmingham, Ala.

Dear Sir: We beg to accept your verbal offer of to-day *to furnish the C. R. & B. Co. of [359 Ga. with, say 275,000 tons of best quality engine steam coal for the next twelve months, commencing July 1, 1891, and ending July 1, 1892, at 90 cents per ton of 2,000 pounds, to be delivered on cars at mines, and to be shipped at times and in quantities to suit. Settlements for the coal delivered in any one month to be made on or about the first of the succeeding month, and the C. R. & B. Co. of Ga. reserves the right to increase or decrease the monthly deliveries upon reasonable notice at any time. The division superintendents of the divisions for which the coal will be required will communicate with you as to the monthly deliveries, and all bills for coal furnished under this contract to be sent direct to the division superintendents. Kindly confirm this at once, and oblige, yours truly,

(Signed) Joseph P. Minetree,
July 13, 1891. General Purchasing Agent.

Besides asking a decree against all the defendants jointly for the amount claimed with interest, the petition prayed for general relief. The petition was subsequently amended by averring that the Danville Company was liable under the contract or purchase, and that the Central Company was liable because the coal was bought and actually used for the benefit of the Central Company of Georgia.

An amendment was subsequently filed to the

petition, setting up that the coal delivered by the Virginia Company had been furnished to the Central Company under the contract recited in the petition, and that said coal was furnished to the Central Company for the purpose of being used by it in the running of its machinery and the prosecution of its business; that a great portion of said coal remained on hand in the bins and storage places of the Central Company at the time of the appointment of the temporary receiver, and a large portion was still on hand when the board of receivers was appointed, and went into the possession of said receivers, and had since that time been actually used by the receivers in the running of the machinery of and the operation **360**] of the business of the *Central Company, and it was asked that an account might be taken as to the portions so used, and that it should be decreed to be a part of the operating expenses of the railroad company in the hands of the receivers, to be paid as a part of the expenses of the receivership.

On December 3, 1892, the Virginia & Alabama Coal Company, suing for the use of the Sloss Iron & Steel Company, a corporation under the laws of the state of Alabama, filed a further intervening petition, asking payment of an account aggregating $14,359.38, for coal furnished for use on the Central lines by the Sloss Company, under the contract between the Danville Company and the Virginia Company. Grounds of recovery were stated similar to those relied upon in the prior intervention, it being also insisted that if recovery was allowed against the receiver only for the coal used by him, it should be paid for at its value at the place where used, *viz.*, $2.50 per ton.

To these interventions the Central Company and the receivers thereof separately demurred, while the Danville Company filed motions asking that it be dismissed as a party defendant thereto. The motions were overruled, while decisions upon the demurrers were deferred until the hearing of the interventions.

The issues raised by the respective interventions were referred to a master for report and decision. At different dates the master reported, recommending judgments in favor of the Virginia & Alabama Company, on its behalf and as suing for the use of the Sloss Company, against the Danville and Central Companies and the receiver of the Central, jointly and severally, for the full amounts claimed with interest, and that upon the payment of the amount of the decree by the Central Company or its receiver, a judgment should be entered in its or his favor against the Richmond & Danville Company for whatever sum might be paid for coal delivered prior to March 4, 1892, and actually used before the appointment of a receiver. By a supplemental report the master reduced the judgment against the receiver for the benefit of the Virginia Company solely, by the sum of $5,543.10, with **361**] interest, and *the judgment for the use of the Sloss Company for the sum of $2,682.80, owing to the fact that a specified quantity of the coal which had been sold and delivered under the contract had not been used on the lines of the Central Company, but by lines held to be independent roads. Exceptions were filed to the master's report, both as to his findings of fact and conclusions of law, on behalf of all parties to the intervention. The reports of the master and the exceptions filed thereto came on for hearing before the court; and, on December 29, 1893, an order was entered sustaining the exceptions in part and overruling them in part. A final decree was entered on January 1, 1894, and amended on March 31, 1894, setting aside the reports and adjudging that the Virginia & Alabama Coal Company recover from the Central Company $6,171.98 for the "amount of unpaid for coal" in cars consigned to the officers of the Richmond & Danville Railroad Company, and which was unloaded after March 4, 1892, and appropriated by the receivers of the company, being 6,857.75 tons, at 90 cents per ton; and the Virginia & Alabama Coal Company, suing for the use of the Sloss Iron & Steel Company, was adjudged to recover of the Central Company $735.16, or 816.85 tons of coal at 90 cents per ton, being the amount of unpaid for coal unloaded after March 4, 1892, and appropriated by the receivers. The receivers of the Central Company were directed to pay the sums so found due out of the current earnings of the Central Railroad & Banking Company in their hands.

An appeal was prosecuted from the final decree to the circuit court of appeals for the fifth circuit, which court, on February 25, 1895, reversed the decree of the circuit court (30 U. S. App. 263), and remanded the cause to that court "with instructions to enter a decree in favor of the interveners [the Virginia & Alabama Coal Company and the Sloss Iron & Steel Company] for the amount respectively due them for coal delivered to the lines under the control, and forming a part of the system, of the Central Railroad & Banking Company of Georgia, as shown by the evidence in this case, including the coal furnished before the appointment *of receivers, and that found in [**362** the bin at the time of such appointment, and of which the receivers took possession, as well as the coal delivered to the receivers after their appointment, the amount due being determined by the contract price; and an order that they recover from the Central Railroad & Banking Company of Georgia and the receivers of the same such sums thus found to be due. No decree will be entered in favor of the interveners for the payment of that portion of the coal which was used by the Charlotte, Columbia, & Augusta Railroad Company "

An application for a rehearing being denied, a writ of certiorari was allowed by this court.

Messrs. **Walter B. Hill** and **Nathaniel E. Harris** for appellants.

Messrs. **Alexander Rudolph Lawton** and **Thomas Mayhew Cunningham, *Jr.***, for appellees.

Mr. Justice **White** delivered the opinion of the court:

In each of the intervening petitions a liability of the Central Company was asserted to arise from the fact that the coal was sold to and purchased by the Danville Company for use in operating the lines of railway of the Central Company, and in the lower courts, as in this court, it was contended that under the prayer

for general relief the petitioners were entitled to have their demands allowed as a preferential claim against any surplus income which might arise from the operation of the Central road under the receiver, after payment of the ordinary expenses of operation, or out of the *corpus* of the estate or the proceeds of sale thereof, in the event that the income had been diverted by the receivers in expenditures for betterments.

Had the Central Company, through its own officers, operated its line of railway during the [363] period when the coal in question *was furnished, it cannot be doubted, in the light of the decision in *Burnham* v. *Bowen*, 111 U. S. 776 [28: 596], that in the event that the company failed to make payment for such coal while a going concern, the indebtedness created, upon the appointment of a receiver, might have been properly allowed as a charge upon the surplus income arising during the receivership. In the case referred to, an Iowa state court in the early part of 1875, and subsequently, by removal, a circuit court of the United States sitting in equity, took possession of, and operated through a receiver, a line of railway owned by the Chicago, Dubuque, & Minnesota Railroad Company. When the receiver took control the company was indebted to the Northern Illinois Coal & Iron Company for coal furnished "during 1874," and used in running locomotives. During the receivership there was paid from the earnings which came into the hands of the receiver the amount of a judgment indebtedness for lands purchased by the company for its depot and offices, and also several judgments rendered against the company for its right of way. The sum of these payments by the receiver exceeded the amount of the indebtedness owing for the coal furnished as above stated. In October, 1876, a decree of strict foreclosure was entered, in which, however, a reservation was made, for future decision, of all matters in controversy between the plaintiffs and all and any of the defendants and interveners and claimants. Among the persons who had intervened in the foreclosure proceedings was one Bowen, who had acquired acceptances which had been given to the coal company for the indebtedness referred to. He petitioned for a judgment against the railroad company for the amount of such indebtedness, "and that such judgments be declared a lien on the property and road of said company in the hands of said trustees and their grantees." A decree was entered on October 30, 1880, finding due to Bowen on his claim a specified sum, and declaring that the mortgaged property in the hands of the trustees under the decree of foreclosure was equitably bound for the payment thereof, "said property having passed to said trustees subject to the rights and equities of said Bowen, inter-[364] vener, *and said trustees, and all parties holding under them, taking said property subject to such rights and equities on the part of said Bowen, intervener." Provision was then made for a sale of the property if the claim was not paid. An appeal having been taken by the trustees, this court held that, at time of the appointment of the receiver, the indebtedness in question was one of the current debts for operating expenses made in the ordinary course of a continuing business, to be paid out of current earnings. In the course of the opinion, speaking through Mr. Justice Waite, the court reiterated the doctrine enunciated in *Fosdick* v. *Schall*, 99 U. S. 252 [25: 342], where it was declared that "the income [of a railroad company] out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim on the income."

And it was further said (pp. 781, 782 [28: 598]):

"So far as anything appears on the record, the failure of the company to pay the debt to Bowen was due alone to the fact that the expenses of running the road and preserving the security of the bondholders were greater than the receipts from the business. Under these circumstances, we think the debt was a charge in equity on the continuing income, as well that which came into the hands of the court after the receiver was appointed as that before. When, therefore, the court took the earnings of the receivership and applied them to the payment of the fixed charges on the railroad structures, thus increasing the security of the bondholders at the expense of the labor and supply creditors, there was such a diversion of what is denominated in *Fosdick* v. *Schall*, the 'current debt fund,' as to make it proper to require the mortgagees to pay it back. So far as current expense creditors are concerned, the court should use the income of the receivership in the way the company would have been bound in equity and good conscience *to use it if no change in the possession [365 had been made. This rule is in strict accordance with the decision in *Fosdick* v. *Schall*, which we see no reason to modify in any particular."

It was thus settled that where coal is purchased by a railroad company for use in operating lines of railway owned and controlled by it, in order that they may be continued as a going concern, and where it was the expectation of the parties that the coal was to be paid for out of current earnings, the indebtedness, as between the party furnishing the materials and supplies and the holders of bonds secured by a mortgage upon the property is a charge in equity on the continuing income, as well that which may come into the hands of a court after a receiver has been appointed as that before. It is immaterial in such case, in determining the right to be compensated out of the surplus earnings of the receivership, whether or not during the operation of the railroad by the company there had been a diversion of income for the benefit of the mortgage bondholders, either in payment of interest on mortgage bonds or expenditures for permanent improvements upon the property. Nor is the equity of a current supply claimant in subsequent income arising from the operation of a railroad under the direction of the

court affected by the fact that while the company is operating its road its income is misappropriated and diverted to purposes which do not inure to the benefit of the mortgage bondholders and are foreign to the beneficial maintenance, preservation, and improvement of the property. This principle finds support in *Miltenberger* v. *Logansport, C. & S. W. Railway Company*, 106 U. S. 286, 311, 312 [27: 117, 127], the decision in which case was approvingly referred to in *Union Trust Co.* v. *Illinois Midland R. Company*, 117 U. S. 434 [29: 963], and in the recent case of *Thomas* v. *Western Car Company*, 149 U. S. 95, 110 [37: 663, 669]. In the *Trust Company Case*, the court said p. 456 [29: 971]:

"The principle laid down in *Wallace* v. *Loomis*, 97 U. S. 146 [24: 895], was applied in *Miltenberger* v. *Logansport, C. & S. W. Railway Co.* 106 U. S. 286, 311, 312 [27: 117, 127]. In that case a bill was filed by a second mortgagee against the mortgagor and a first mortgagee and judgment creditors of the mortgagor, to foreclose a 366] mortgage on *a railroad. On the day the bill was filed, and without notice to the first mortgagee, a receiver was appointed, and power given him to operate and manage the road, 'receive its revenues, pay its operating expenses, make repairs, and manage its entire business, and to pay the arrears due for operating expenses for a period in the past not exceeding ninety days, and to pay into the court all revenue over operating expenses.' After that and without notice to the first mortgagee, who had not appeared, though notified of the order appointing the receiver, and of the pendency of the suit, the court authorized the receiver to purchase engines and to adjust liens on cars owned by the mortgagor, and to pay indebtedness not exceeding $10,000 to other connecting lines of road in settlement of ticket and freight accounts and balances, and for materials and repairs, which had accrued in part more than ninety days before the order appointing the receiver was made, and to construct five miles of new road, and a bridge. The petition for the order stated the necessity for the rolling stock and for the adjustment of the liens; that the payment of the connecting lines was indispensable to the business of the road, and it would suffer great detriment unless that was provided for; and that the new road and the bridge would come under the mortgages, and their construction would be to the advantage of the bondholders. After the first mortgagee had appeared and answered, an order was made, but not on prior notice to it, authorizing the receiver to issue certificates to pay for rolling stock he had bought under orders of the court, and to pay debts incurred for building the five miles of road and the bridge, under those orders, and to pay debts incurred for taxes and rights of way and back pay, and supplies in operating the road, the certificates to be payable out of income, and, if not so paid, to be provided for by the court in its final order. Claims thus arising were afterwards allowed, to be paid out of the proceeds of sale before the mortgage bonds. This court upheld such priority, as to the debts for the purchase of rolling stock, and for the adjustment of liens, and for the construction of the five miles of road and the bridge, and for the amount due connecting lines, *some of which was incurred [367 more than ninety days before the receiver was appointed. On the latter branch of the subject it said: 'It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the *corpus* of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, prima facie, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, the outcome of indispensable business relations, where stoppage of the continuance of such business relations would be a probable result, in case of nonpayment, the general consequence involving largely, also, the interests and accommodation of travel and traffic,—may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the goodwill and integrity of the enterprise, and entitle them to be made a first lien. This view of the public interest in such a highway for public use as a railroad is, as bearing on the maintenance and use of its franchises and property in the hands of a receiver, with a view to public convenience, was the subject of approval by this court, speaking by Mr. Justice Woods, in *Barton* v. *Barbour*, 104 U. S. 126 [26: 672].'"

Is there any good reason why the equitable doctrine applied in the cases to which we have referred should not be applied *under a [368 state of facts such as shown at bar, where the immediate management of a road was confined by its owners, without protest or interference by the bondholders, to third parties? It would seem not. The dominant feature of the doctrine, as applied in *Burnham* v. *Bowen*, is that where expenditures have been made which were essentially necessary to enable the road to be operated as a continuing business, and it was the expectation of the creditors that the indebtedness created would be paid out of the current earnings of the company, a superior equity arises in favor of the materialman as against the mortgage bonds in the income arising both before and after the appointment of a receiver from the operation of the property.

The equity thus held to arise when a purchase of necessary current supplies is made by the owning company, is not in any wise influenced by the fact that the company itself is the purchaser of the supplies, but is solely dependent upon the fact that the supplies are sold and

purchased for use, and that they are used in the operation of the road, that they are essential for such operation, and that the sale was not made simply upon personal credit, but upon the tacit or express understanding that the current earnings would be appropriated for the payment of the debt. Clearly, if the owning company had entered into an agreement with some individual to commit to his uncontrolled management as their agent the operation of the company's lines, the bondholders could not be heard to say that thereby no equities could arise in favor of labor or supply claimants in the income of the property preserved or kept in operation by their efforts. This would be the category in which the Danville Company would stand if the lease of the Central lines was not valid. On the other hand, if the lease was lawful, upon the insolvency for any cause of the Danville Company while the lease continued in force, its relation towards its leased line in the adjustment and settlement as against the leased road of equities arising between those who had furnished supplies to the road and the bondholders would be precisely that of an owner of the leased lines, and if such possession is terminated by the court through [369] *the agency of a receiver equities in the income of the property continue to survive.

Upon the evidence contained in the record, we hold that the contract upon which both interveners relied—the deliveries of coal by the Sloss Company being under the contract which had been made with the Virginia Company—was made with the Danville Company, but we conclude from the terms of the contract that the intention of the parties was that the coal was to be used in the operation of the lines of the Central Company, and that the mining companies did not rely simply upon the responsibility of the Danville Company, but on the contrary that the coal companies looked to the earnings of the Central system as the source from which the funds to pay for the coal to be furnished was to be derived.

While it was established that during the time the Danville Company was in control of the Central property a semiannual instalment of interest—which exceeded the amount of the claims of the interveners—was paid to the holders of bonds of the Central Company, we cannot say that there was a diversion of income from the Central lines for such purpose. At the best it could only be conjectured that such payment was probably made from that income. Whether, however, there was a diversion of income before the receivership, inuring to the benefit of the bondholders, the equity in favor of the coal company for payment out of subsequent income, as we have seen, survived and attached to the property when it was taken possession of by the receiver; and if a surplus of income was created by the operations of the road under the receiver, sufficient to satisfy the claims of the interveners, the right to demand that the surplus income be applied in satisfaction of the claims in question was undoubted. From the evidence we find that there was such surplus. It was stipulated in the record, as a fact "that since the receivership, the receivers of the Central Railroad & Banking Company of Georgia have expended for betterments on its railroad lines from the income of the roads during the receivership a sum much larger than the entire claim of the interveners." *Keeping in mind the manifest [370 purpose of this stipulation, which undoubtedly was to present the question of the right of the claimants to resort to the *corpus* of the estate for payment of their claims, we must give the term "betterments" a broad and not a restricted meaning. So construed, it must be held to have referred to expenditures for the improvement of the property as distinguished from mere payments for operating expenses and ordinary repairs which are usual and legitimate terms of outlay from current receipts. This was the sense in which the term was understood by this court in *Union Trust Company* v. *Illinois Midland R. Company*, 117 U. S. 434 [29: 963], where the validity of receivers' certificates was upheld which had been paid out of the proceeds of the sale of *corpus* of the property, because issued to replace earnings diverted from paying operating expenses and ordinary repairs to payment of betterments P. 462 [29: 973].

The circumstance that it is uncertain, from the terms of the stipulation, whether the expenditures for betterments were made by the receivers under the stockholders' bill, or under the bill filed by the Central Company or under the trustee's bill for foreclosure, is immaterial. Even though the mortgages securing the bonds provided for the sequestration by foreclosure of the income of the road for the benefit of the bondholders, for reasons already stated, that income until strict foreclosure or a sale of the road was charged with the prior equity of unpaid supply claimants such as those now before the court.

In concluding that the claims of the interveners were entitled to priority out of the surplus earnings which arose during the control of the road by the court, we must not be understood as in any wise detracting from the force of the intimations contained in the recent utterances of this court in *The Kneeland*, 136 U. S. 89 [34: 379], and *Thomas* v. *Western Car Co.* 149 U. S. 95 [37: 663], cases as to the necessity of a court of equity confining itself within very restricted limits in the application of the doctrine that in certain cases a court having a road or fund under its control may be justified in awarding priority over the claims of mortgage bondholders to unsecured claims originating prior *to a receiver- [371 ship. In the *Kneeland Case*, however, the claim refused priority was based upon an alleged instrument of lease, and was for four months' rental of cars operated on a line of railroad by a receiver appointed at the suit of a judgment creditor, such receiver being succeeded in office by a receiver appointed in the foreclosure proceedings instituted by the trustees of the mortgage bondholders. It was held that the alleged contracts of lease were in substance and effect "antecedent contracts of sale;" that in those contracts ample provision had been made by the vendor for his security, by stipulations authorizing a retaking of the property upon failure to make payment promptly of the instalments of purchase money as they became due, and that the claim against the fund was in reality for a

portion of the purchase price of the cars. Under these circumstances, the debt was held not to be embraced "in the few specified and limited cases" in which this court "has declared that unsecured claims were entitled to priority over mortgage debts;" and particular attention was called, among other things, to the fact that the receivership at the suit of the judgment creditor was not for the benefit of the mortgage bondholders, so that it could not be asserted that the expenditures of such receivership were payable in any event out of the income or *corpus* of the property; and the fact was also noticed that from the time of the purchase of the rolling stock in question in the suit to the time of the final disposition of the mortgage foreclosure the receipts did not equal the operating expenses, and there had been no diversion of the current earnings, either to the payment of interest or the permanent improvement of the property. In the *Thomas Case* claims for rental of cars, which rental had accrued prior to the receivership, were denied priority over the mortgage bonds, but the facts in that case were such as to justify the conclusion that the car company contracted "upon the responsibility of the railroad company, and not in reliance upon the interposition of a court of equity." In neither the *Kneeland* nor the *Thomas Case* was there any intention to question the prior decision of the court, which allowed priority to claims based upon the **372**] *furnishing of essential and necessary current supplies, not sold upon mere personal credit, against the surplus income arising during the operation of a road under the direction of a court of equity.

In view of the conclusion which we have reached, none of the other matters urged in argument need be noticed. *The decree of the Circuit Court of Appeals being in consonance with the views we have expressed, the decree of that court is affirmed.*

Mr. Justice **Peckham** and Mr. Justice **McKenna**, not having heard the argument, take no part in this decision.

FREDERICK W. SMITH *et al., Plffs. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 372-383.)

Receiver of public moneys—liability on his bond —removal from office—liability remains.

1. Money paid to a receiver of public moneys, in payment for public lands, under the regulations of the general land office, authorized by U. S. Rev. Stat. § 161, "that proofs without payment must in no case be accepted," is public money within the meaning of the law and the bond given by the receiver, although it is to be repaid if the proofs are not finally accepted.

NOTE.—*As to powers and duties of receivers*, see note to Davis v. Gray, 21: 447.

As to bonds, official and other, and for debts; liability of sureties on,—see notes to United States v. Giles, 3: 708; and Postmaster General v. Early, 5: 577.

2. The custom of the land office not to have such money appear in the accounts of the receiver with the government until after the proofs have been passed upon by both register and receiver and a final receipt given does not affect the character of the money so paid.
3. The removal of the receiver from office before he has fully accounted for moneys received by him on applications for entry of land does not alter the liability on his bond.
4. Although there was no breach of the bond of the receiver at the time of his removal from office, his liability to account remained, and the bond continued in force until he had fully accounted and had fulfilled all its conditions.

[No. 212.]

Submitted April 20, 1898. Decided May 9, 1898.

IN ERROR to the Supreme Court of the Territory of Arizona to review a judgment of that court affirming the judgment of the District Court of the First Judicial District of that Territory in favor of the United States, plaintiff, against Frederick W Smith, and the sureties on his official bond as receiver of the public moneys in Tucson Land District in said Territory, for the amount of moneys found to be due from said Smith as receiver aforesaid. *Affirmed.*

See same case below, 45 Pac. 341.

Statement by Mr. Justice **Peckham:**

This action is brought against Frederick W. Smith and the sureties on his official bond as receiver of public moneys in the Tucson land district in the territory of Arizona. The bond was dated March 7, 1888, and the condition therein was that "if the said Frederick W. Smith shall, at all times during his holding and remaining in said office, carefully discharge the duties thereof, and faithfully disburse all public moneys, and honestly account, without fraud or delay, for *the same and for all [**373** public funds and property which shall or may come into his hands, then the above obligation to be void and of no effect; otherwise, to remain in full force and virtue."

Smith was appointed receiver on the 28th of February, 1887, and remained such receiver until the latter part of November, 1889, when he was removed and Charles R. Drake was appointed his successor, who assumed the duties of the office and took charge of the books and papers on December 3, 1889. The government claimed that the condition of the bond had been violated by the failure of Smith to faithfully disburse all public moneys and to honestly account for the same, and that he was indebted to the government by reason thereof in various sums, amounting to over $19,000. During the time of Smith's incumbency there was either no register of the land office in the Tucson district, or the person occupying that position was in such ill health as to be unable to attend to the duties of the office. Smith was himself also in ill health during 1889. Owing to these facts the business of the office ran largely behind, and there were so many persons presenting their proofs and making their payments to receiver Smith, before he was ready to pass upon the sufficiency of such proofs and before the register had acted upon

any of them, that a large sum of money thereby accumulated in the hands of the receiver, amounting at the time he was removed from office to about the sum of $40,000. Prior to the time when the receiver was removed from office in November, 1889, no final action had been taken by him or the register in regard to any of the applications involved in this record.

Before his removal it had been the custom of the Land Department not to permit the giving of any receipt by a receiver, for money paid him by an applicant for entry, until such application had been finally acted upon by the receiver and the register, and then if favorably decided, the custom was for the receiver to charge himself in his account with the government with the amount of the money which had already been paid him by the applicant. If the application was not favorably acted upon it 374] was then the custom of a receiver to *return the money to the applicant. This was authorized by the government.

An agent of the government came to Tucson after the receiver's removal and on examining his books stated that the receiver did not owe the government anything. One of the sureties on the receiver's bond had heard of the receipt of these moneys by Smith, and had obtained from him $25,000, being part of the moneys which Smith had received as above mentioned. While in possession of this money the surety saw the agent of the government and inquired if there were any charges against the receiver, his principal, and that he wanted to know so that he might use the money Smith had paid him to repay the government any amount that might be found due on an accounting, and he was told by the agent that Smith's accounts were all right, and that he did not owe the government a dollar. It is claimed that thereafter the $25,000 were refunded to the entrymen who had made payments to Smith, until the amount was exhausted.

In April, 1890, there was still a very large accumulation of cases in the Tucson office where proofs had been made and filed with Smith, and moneys had been paid to him, while receiver, as the purchase price of the lands desired and no final receipts had been given by him or his successor. In this condition of affairs the Commissioner of the General Land Office wrote the following letter:

Letter M.
Department of the Interior,
General Land Office,
Washington, D. C., April 30, 1890.
Register and Receiver, Tucson, Arizona.

Sir: I inclose herewith a statement as taken from the records of your office, showing the final proofs now in your office awaiting examination on which the money in payment for the same was paid to Fred. W. Smith, the late receiver, and was by him appropriated to his own use and never accounted for to the United States. You are instructed to examine all the final proofs now in your office, as shown by the 375] accompanying *list, and, if the same is found sufficient, you will request the parties in interest to furnish an affidavit, properly attested, showing that they did pay the money to Fred. W. Smith, and whether the same was paid by draft or check. If the parties can furnish certified copies of these drafts or checks from the cashier of the bank showing the same, you will obtain these copies and allow the entries as of date when proof and payment were made. You will refer on the entry papers and upon your records to this letter by initial and date as your authority therefor. The receiver will enter upon the books of his office, under the account of Fred. W. Smith, late receiver, the amount of purchase money received for each class of entry. You will give to said entries a half number corresponding to the time when said proof was accepted and prepare supplemental abstracts of the same, noting thereon "Allowed by letter 'M' of April 30," and purchase money is to be charged to Fred. W. Smith, the late receiver. You will then prepare an account current, Form 4–105, thereof and certify therein that the transaction reported appears from the records of your office. The receiver will send a duplicate receipt to the entrymen in accordance with the instructions herein contained, noting on the receipt, as his authority, this letter by initial and date, and after you have carefully examined all of these papers as instructed in this letter, you will forward them to this office for future consideration.

The decision of this office heretofore has been against the allowance of an entry where the money be payable to the receiver of public moneys if the moneys were not properly accounted for or deposited to the credit of the Treasurer of the United States; but, as a matter of equity, in view of the general circular of this office, which provides that proof without payment must in no case be accepted or received by register and receiver, and in view of the fact that entrymen had made their payments in accord with this circular issued by this office, it is the opinion of this office that the entries should be allowed. I am aware that the views herein expressed are in conflict with the practice above referred to, but my understanding of the law and convictions of equity are so strong and *clear that, reluctant [376 as I am to change the former practices, I feel myself compelled to do so in this case. I therefore hold that the moneys paid by entrymen to Fredrick W. Smith, receiver, and received by him in his official capacity as such, were public moneys within the meaning and intent of the law, and the payment to him was a payment to the government. The recourse of the United States is under the official bond of Mr. Smith, and, as suit has already been instituted for the recovery of the amount received by him, the entries should be allowed without further delay.

Very respectfully,
William Stone,
Assistant Commissioner.

Pursuant to the directions contained in the above letter, the receiver, Mr. Drake, issued, in all cases where the proofs were satisfactory, final receipts to the various entrymen who had made applications for entry and paid their money to Smith while he was receiver, and the payments to Smith in such cases were recognized as payments to the government.

Upon the trial of the action in the Arizona

court judgment for nearly $6,000 was given for the United States for the amount found to be due by the jury in cases where payments had been made to Smith and the final proofs had been favorably decided upon by his successor. That judgment was affirmed by the supreme court of the territory, and the defendants brought the case here for review.

Messrs. **W. H. Barnes** and **L. E. Payson** for plaintiffs in error.

Messrs. **John K. Richards,** Solicitor General, and **Felix Brannigan** for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

The question to be determined in this case is whether, under the circumstances above set forth, the moneys received by receiver Smith, **377**] and to recover which the action herein* was commenced, were public moneys within the meaning of the law and the bond given by the receiver.

The moneys paid to the receiver were paid upon the making of proofs by the entrymen under various statutes of the United States providing for the sale of the public lands, such as the statute relating to pre emptions (chap. 4, p. 414, Rev. Stat. U. S.); the statute relating to homesteads (chap. 5, *Ibid.* p. 419); the statute relating to the sale of desert lands (19 Stat. at L. 377, chap. 107; also 1 Supp. Rev. Stat. 2d ed. p. 137) etc. In the course of the proceedings under these acts and in the examination of the proofs submitted, various questions of fact arise and are to be decided by the register and receiver, who are to be satisfied of the existence of the necessary facts mentioned in the statute, and of the regularity and sufficiency of the proofs. When so satisfied the register issues his certificate to that effect, and the receiver gives what is known as a "final receipt," and upon the two papers the patent finally issues. There must be the favorable action of both register and receiver before the final papers issue, but such action need not be simultaneous. The receiver may act at one time and the register at another, but both must act before the case is concluded and the papers signed upon which the patent is subsequently issued. *Lytle* v. *Arkansas*, 50 U. S. 9 How. 314 [13:153]; *Potter* v. *United States*, 107 U. S. 126 [27:330].

The statutes are somewhat general in their provisions as to the time of payment of the purchase price of the lands, merely providing that the entries desired may be made upon satisfactory proof being made to the register and receiver and "upon paying to the United States the minimum price of such land."

The statutes do not provide that the entryman shall not pay the money before the final decision is made determining the sufficiency of his proofs, but they simply provide that when the register and receiver are so satisfied, and upon payment of the money, entry may be made. The matter of the time of payment, so long as it is made before the entry, is thus left for regulation by the department having the matter in charge. Such regulations are made under § 161, Rev. Stat., permitting each head of a department to prescribe regulations, not inconsistent* with law, for the government [**378** of his department and the conduct of its officers and clerks, etc.

Acting under the authority of § 161, the General Land Office provided by its general circular with regard to the time when payment for public lands sold should be made, and directed "that proofs without payment must in no case be accepted." This regulation did not refer to "final" acceptance of proof, resulting in a favorable decision upon the application. The statutes already provided that it was only *upon payment* that the entry might be made. The regulation referred to the taking of the proofs at all. It could only mean that no proof proffered by an entryman should be received without payment of the purchase price of the land which he desired to purchase. The probable purpose of the rule was to prevent the unnecessary examination of proofs in cases where they might be found to be satisfactory and yet the purchase price should not then be forthcoming. Whatever the reason, the direction was plain and unambiguous, and it absolutely forbade the reception of the proofs of the entryman unless at the same time he paid the purchase price to the receiver for the lands which he proposed to buy. Thus the entryman could not make his proofs and leave them with the receiver for him and the register subsequently to act upon them, unless the entryman at the time of making his proofs and leaving them for future examination and decision paid the purchase price for the lands. This regulation is not inconsistent with or in violation of the statutes in regard to payment. As we have observed, the payment must by statute be made before entry is allowed, but the particular time is not stated. The regulation above mentioned then comes in, the effect of which is to prevent the acceptance of proof without payment, and the payment must therefore be made when the proof is offered, and it may be some time before it is favorably acted upon by both register and receiver. Thus, under provision of law and pursuant to valid requirements of the land office, the entryman is compelled to pay his money at the time he proffers his proofs and before final action upon them is taken by the two public officers designated in the statutes. When the entryman* goes to the public land office [**379** for the purpose of obtaining the land he desires, and is told that his proofs cannot be filed or accepted unless and until he pays the purchase price of the land, which he thereupon does, he makes such payment to the receiver as a public officer, acting in the line of his duty, and it is safe to say that the entryman is without any thought or intention of paying the money to such receiver as his own private agent, to be kept by that agent in trust until the proofs are satisfactory, and to be then paid by him to the government; nor are the circumstances of that nature which would lead to the belief that in making such payment the entryman is in fact trusting to the good faith and integrity of the receiver as his agent and that he does not regard himself as dealing with a public officer of the government. The law accords with the fact. How can it be said that the money which he pays does not become public money

upon such payment, when he pays it pursuant to law as the purchase price of land which he desires to buy and the money is exacted from him by the government before any final action is taken upon his application? What difference does it make that the government comes under an obligation to repay the money to the man in case the proofs are not finally accepted? The money is none the less public money when paid to this public official pursuant to law and under the direction and by reason of the regulations of the land office. See *King* v. *United States*, 99 U. S. 229 [25: 373].

As the party taking the money is a public officer, and as he exacts the payment, and such exaction is in pursuance of a regulation of the General Land Office, and is consistent with and authorized by law, it seems to us that the money thus paid is received by the receiver as public money and in his official capacity, and he is neither in law nor in fact the agent of the entryman. If the proofs are unsatisfactory and the money is returned, it is returned by the receiver as a public officer and as the agent of the government, and the money is returned by the government through its agent.

The custom of the Land Office at the time in question not to have such money appear in the [380] accounts of the receiver *with the government until after the proofs had been passed upon by both register and receiver and a final receipt given, does not affect the character of the money so paid. The receiver receives the money as a public officer pursuant to the provisions of law. While in the hands of the receiver it remains public money, received by him by virtue of his office, and the money belongs to the government as between it and the receiver, although it may be under obligations to return the same to the entryman in case his proofs were rejected. When the government authorized the return of the money by the receiver, in making such return he acted as its agent and not as the agent of the entryman, and the payment was not by the receiver in his personal capacity.

It is true that on some occasions prior to the execution of this bond it had been decided by the Commissioner of the General Land Office that under the law the money paid to a receiver by an entryman before the final determination of his application and a certificate given by the register was not public money, but was paid by the entryman to the receiver as his own agent, and that until the proofs were favorably passed upon and a final receipt given, the money in the hands of the receiver was at the risk of the entryman; it was received by the receiver in his personal capacity as a private individual, and if not properly paid over recourse for the money must be had against the receiver personally by the parties aggrieved. Such was the case of *Matthiessen* v. *Ward*, 6 U. S. Land Dec. 713. This rule was upheld by the Secretary of the Interior.

The decision does not refer to the regulation made by the department that no proof shall be accepted from the entrymen without payment of the money. This regulation is a most vital part of the whole proceeding, and instead of the moneys not being payable to the receiver until an entry had been allowed by the register and a certificate given, the regulation of the department distinctly provided that payment of the purchase price was to be insisted upon as a condition precedent to the acceptance of proofs at all. The decision of the department was not in any sense a regulation under § 161 of *the Revised Statutes, but [381] was the opinion of the secretary upon the law and regulations as they existed. Such opinion is entitled to, and it receives, great respect and consideration by this court, but it is not binding upon us as a valid regulation of the department, and cannot be so regarded.

We are unable, for the reasons already stated, to concur with the opinion of the commissioner.

These distinctions between the acts of the receiver as an alleged agent of the entryman in receiving the money prior to the decision upon the sufficiency of the proofs, and the same receiver as agent of the government in the keeping of public moneys, ought not to be created by any refined reasoning. Fair protection of the entryman in his dealings with the government ought to be given when possible. There can be no doubt of the fact that the entryman has no idea of any such distinction, nor can there be any doubt of the fact that when he pays the money to the receiver he supposes he is paying it to the government through its public officer, and by reason of provisions of law and the regulations of the department.

Public money in the sense of the law, and as used in this bond, is money which legally comes to the receiver by virtue of his office and as a public officer and while carrying out the duties of his office, and he cannot be permitted to say that it was not public money when so received. Being public money, he is bound to account.

Is there any alteration of this liability caused by his removal from office before he has finally accounted for the moneys he received on these various applications? We think not. The applications are to be acted upon by the register and receiver; that is, by those persons who at the time of such action hold these offices. It is not a matter personal to the individual who receives the money, and therefore when the person receiving the money is removed from office before the proofs are finally acted upon by the register and receiver, and action is subsequently had by the receiver's successor in office, and the proofs are finally accepted by such successor and by the register, the government is as much bound by such acceptance as if it had been acknowledged by the receiver *who received the money, [382] and his obligation to account for the money which he received still remains in full force and is not altered in the slightest degree by the fact of his removal from office. As the agent of the government he received it, and upon the acceptance of the proofs and final receipt it becomes the duty of the government to issue the patent, and the fact that its agent had not paid the money over to it would constitute no defense to its obligation to issue the patent when the proofs were found satisfactory.

There may have been no breach of the bond at the time of his removal from office, but the liability of the receiver to account remained.

and the bond continued in force until he had fully accounted and thus had fulfilled all the conditions of his bond. His repayment to the entryman, after his removal, in case the proof were rejected, would be an accounting *pro tanto* to the government, the repayment being authorized and recognized by it as the fulfilment to that extent of the duty of the government to make such repayment.

In this view the liability of the defendant and his sureties does not depend at all upon the letter written by the commissioner and set forth in the above statement of facts. The letter simply officially recognized the duty of the receiver who then occupied the office to issue the final receipt when the officials were satisfied with the proofs and the money had been theretofore paid to Smith. Although before the writing of the letter the Land Office had not recognized its obligation to issue patents under the circumstances developed in this case, and had refused to issue them unless it were again paid the money, that practice, as we have said, did not alter the law and did not take away or affect the obligation and liability of the government to issue the patent when the proofs were found satisfactory.

Setting the letter aside, the liability of the government remains the same, the character of the money received by the receiver remains the same, and the liability of himself and his sureties is of the same nature and of the same degree without the letter as with it. This, therefore, is no case of an alteration of the law or of
383] the obligations of the bond *made subsequently to the time of its execution, and we are not called upon to discuss the question as to how far alterations of the regulations or of the law may affect the continued obligation of the obligors in a bond like this.

Substantially the same question that we have been discussing arose in the case of *Meads* v. *United States*, decided in the circuit court of appeals, sixth circuit, in July, 1897, and reported in 54 U. S. App. 150; also in 81 Fed. Rep. 684. The case was heard before Circuit Judges Taft and Lurton, and District Judge Clark, and the conclusion arrived at in that case is in accord with that which we have come to herein.

There is no question of estoppel in the case. The surety had possession of some $25,000 of the moneys collected by the receiver, and when the agent of the government said that the receiver did not owe it a dollar, the surety repaid to the various entrymen the amounts that they had paid, as far as the money went. In doing so, he lessened by that amount the liability of the sureties on the bond, and there is no proof that any portion of the indebtedness for which this judgment was recovered was represented in those payments.

We think this case was correctly decided; and the judgment is therefore affirmed.

WILLIAM DUGALD STUART, *Plff. in Err.*,
v.
CITY OF EASTON and the County of Northampton.

(See S. C. Reporter's ed. 383-402.)

Construction of patent for lands—local law of state—estoppel—land for use of county—when the estate is not limited.

1. Evidence to aid in the construction of a patent for lands is incompetent, as the construction and legal effect of such a written instrument is a matter for the court.
2. In the construction of a grant of lands, this court will be guided by the local law of the state in which the lands are situated.
3. A county is not estopped from contending that the fee was conveyed to it by a certain patent for lands, by reason of its accepting a later deed for a reversion.
4. Where a state law authorizes trustees to purchase and acquire the title to land for the use of the inhabitants of a county, the trustees take the legal estate in fee, and the inhabitants of the county acquire the beneficial use or equitable estate.
5. Where a conveyance in fee is made to public trustees in trust for the erection of a county court-house thereon, for public use, in pursuance of a statute authorizing the purchase for that purpose, the duration of the estate in fee therein is not limited in Pennsylvania to the period while the land is used for a court-house, where there are no technical terms creating a limitation, and the habendum clause is to the trustees by name and "their heirs and assigns forever."

[No. 197.]

Argued April 12, 13, 1898. Decided May 9, 1898.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Third Circuit to review a judgment of that court affirming the judgment of the United States Circuit Court for the Eastern District of Pennsylvania in favor of the defendants, the city of Easton and the county of Northampton, in an action of ejectment in which William Dugald Stuart was substituted as plaintiff in the place of William Stuart, the lands being situated in the town of Easton in the county of Northampton. *Affirmed.*

See same case, 156 U. S. 46 [39: 341], and the same case below, 39 U. S. App. 238.

Statement by Mr. Justice **White:**

By an act of the general assembly of the province of Pennsylvania, passed on March 11, 1752, the county of Northampton was erected out of a portion of the county of Bucks. In

NOTE.—*That patents for land may be set aside for fraud*, see note to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands; how construed,—see note to Watts v. Lindsey, 5: 423.

As to deeds, restriction of use of property by, see note to Newbold v. Peabody Heights Co. (Md.) 3 L. R. A. 579.

Of land for public parks, see note to Clarke v. Providence (R. I.) 1 L. R. A. 725.

the sixth and seventh clauses of the act it was provided as follows:

"VI. And be it further enacted by the authority aforesaid, That it shall and may be lawful to and for Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong, and James Martin, or any three of them, to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the said town (of Easton) in trust and for the use of the inhabitants of the said county, and thereon to erect and build a court-house and prison, sufficient to accommodate the public service of the said county, and for the ease and convenience of the inhabitants.

"VII. And be it further enacted by the authority aforesaid, That for the defraying the charges of purchasing the land, building and erecting the court-house and prison aforesaid, it shall and may be lawful to and for the commis **385**] sioners and *assessors of the said county, or a majority of them, to assess and levy, and they are hereby required to assess and levy, so much money as the said trustees, or any three of them, shall judge necessary for purchasing the land and finishing the said court house and prison. Provided, always, the sum of money so to be raised does not exceed three hundred pounds, current money of the province."

On March 4, 1753, an act was passed in which it was recited that the amount specified in the act of March 11, 1752, had been expended in building a prison, and authority was given to assess and levy a further sum not exceeding a stated amount, as the persons named in the act, or any three of them, should judge necessary for building a court-house and finishing the prison already erected.

On July 9, 1762, the following warrant of survey was issued:

Pennsylvania, *ss.*

By the Proprietaries.

Whereas in and by an act of general assembly of this province entitled "An Act of Erecting the Northwest Part of Bucks into a Separate County," which in and by the said act is called Northampton, and Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong, and James Martin, or any three of them, were appointed Trustees to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the Town of Easton in the said County; and thereon to erect and build a Court House and Prison sufficient to accommodate the public service of the said County, and for the ease and convenience of the inhabitants, as in and by the said act appears. And whereas on application and request of said Trustees, and out of our regard to encourage and promote the Improvement of the said Town and general good and convenience of the inhabitants of the said County, we have condescended and agreed to grant to the said trustees a lot or piece of ground Eighty Feet square to be laid out in the center of the great square in the middle of the said Town of Easton for a Court House for the use and the accommodation of the inhabitants of the said town and County forever. **386**] These are *therefore to require you to survey and lay out, or cause to be surveyed and laid out, a lot or piece of ground in the center of the great Square in the said Town of Easton of the said dimensions of Eighty feet square for the public use of a Court House for the inhabitants of the said town and county, and make return thereof into our Secretary's Office in order for confirmation to the said Trustees and their heirs for the use aforesaid, and for your so doing this shall be your sufficient Warrant.

Given under my hand and the seal of the Land Office, by virtue of certain powers from the said Proprietaries at Philadelphia, the ninth day of July, 1762.

To John Lukens, Surveyor General.

James Hamilton.

A survey was made and returned, in which it was recited:

"In pursuance of a Warrant dated the 9th day of July, 1762. Surveyed the 8th day of October, 1763, to Thomas Craig and others, the above described Lot of Ground Situate in the Public Square of the Town of Easton in the County of Northampton. Containing in length North & South eighty feet and in breadth East & West eighty feet."

Forming part of the certificate was a plat exhibiting a large open space, 320 feet square, intersected from north to south and east to west by two 80 feet wide streets (Northampton and Pomfret). In the center of the open space referred to, facing the streets mentioned, was a square plot of ground, marked as being 80 feet on each side.

On September 8, 1764, a patent was executed as follows:

"Thomas Penn & Richard Penn Esquires True and Absolute Proprietaries and Governors in Chief of the Province of Pennsylvania & Counties of Newcastle Kent and Sussex upon Delaware To all unto whom these Presents shall come Greeting Whereas in and by an Act of General Assembly of the said Province passed in the twenty fifth year of the Reign of our late Sovereign Lord the Second Intituled 'An Act for Erecting the North West part of Bucks into a *separate County' [**387** which in and by the said Act is called Northampton and John Jones Thomas Armstrong James Martin John Rinker and Henry Allshouse or any of them are appointed Trustees to purchase and take Assurance to them and their Heirs of a Piece of Land Situate in some convenient Place in the Town of Easton in the said County and thereon to erect and build a Court House & Prison sufficient to accommodate the public Service of the said County as by the said Act appears And whereas in Pursuance of a Warrant dated the ninth of July 1762 under the Seal of our Land Office we have at the special Instance & Request of the said Trustees caused a Lot of Ground situate in the Center of the said Town of Easton to be laid out for a Court House for the Public Use and Service of the said County (another Lot of Ground in the said Town having been heretofore laid out for a Prison or Common Goal erected thereon) which said lot in the Center Square contains in Length North and South eighty feet and in Breadth East and West eighty feet As by the said Warrant and Survey of the said Lot remaining in the Surveyor

Generals Office and from thence Certified into our Secretarys Office more fully appears Now know ye that for the further Encouragement and better promoting the Public Benefit and Service of the said Town and County And for and in Consideration of the yearly Quitrent hereinafter reserved | and of the Sum of Five Shillings to us in Hand paid by the said Trustees (The Receipt whereof is hereby acknowledged) We have given granted released confirmed & by these Presents do give grant release and confirm unto the said Trustees John Jones Thomas Armstrong James Martin John Rinker and Henry Allshouse and their Heirs the said Lot of Ground situate in the Center of the Great Square in the said Town of Easton containing Eighty feet in Length North & South and eighty feet in breadth East and West Together with all Ways Waters Watercourses Liberties Easements Privileges Profits Commodities Advantages and Appurtenances thereto belonging And the Reversions and Remainders thereof To have and to hold the said herein before described Lot of Ground [388] with the Appurtenances unto *the said John Jones Thomas Armstrong James Martin John Rinker and Henry Allshouse their Heirs and Assigns for ever In Trust nevertheless to and for the Erecting thereon a Court House for the public Use and Service of the said County and to and for no other Use Intent or Purpose whatsoever to be holden of us our Heirs and Successors Proprietaries of Pennsylvania as of our Manor of Fermor in the County of Northampton aforesaid in free and common Soccage by Fealty only in Lieu of all other Services Yielding & Paying therefor yearly unto us, our Heirs and Successors, at the Town of Easton aforesaid at or upon the first day of March in every Year from the first day of March next one Red Rose for the same or value thereof in Coin Current according as the Exchance shall then be between our said Province and the City of London to such Person or Persons as shall from Time to Time be appointed to receive the same And in Case of Nonpayment thereof within ninety days next after the same shall have become due That then it shall and may be lawful for us our Heirs and Successors our and | their Receiver or Receivers into and upon the hereby granted Lot or Piece of Ground and Premises to Reenter and the same to hold and Possess until the said Quitrent and all arrears thereof Together with the Charges accruing by Means of such Nonpayment and Reentry be fully paid and discharged

"Witness John Penn Esquire Lieutenant Governor of the said Province who by virtue of certain Powers and Authorities to him for this Purpose *inter alia* granted by the said Proprietaries hath hereunto set his Hand and caused the Great Seal of the said Province to be hereunto affixed at Philadelphia this twenty eighth day of September, in the Year of our Lord one thousand seven hundred and sixty four The Fourth year of the Reign of George the Third the King over Great Brittain &c And Forty seventh Year of the said Proprietaries Government."

A court-house was built upon the property between the years 1763 and 1766 and remained thereon until the year 1862, when it was removed. No buildings have since been placed upon the ground, but it was asserted in argument that a public fountain had been erected thereon.

*By an act of the general assembly of [389] Pennsylvania of date April 15, 1834, the title of the trustees was vested in the county of Northampton.

On July 25, 1888, William Stuart, as sole heir of the original grantors, by his duly authorized attorney, made entry upon the lot in question for a breach of an alleged condition as to its use, claimed to have been incorporated in the patent of 1764, and which, it was asserted, revested the land in the claimant as succeeding to the rights of the original grantors. Being ousted by the representatives of the county of Northampton and the citizens of Easton, Stuart soon after instituted an action of ejectment in the United States circuit court for the eastern district of Pennsylvania to recover possession of the land. At the trial a verdict was directed for the defendant, and the case subsequently came into this court for review, when the judgment was reversed because of an omission of the plaintiff to properly plead his alienage. 156 U. S. 46 [39:341]. Thereafter, William Stuart having died, his son, the present plaintiff in error, was substituted as plaintiff, and, the pleadings having been amended, a new trial of the action was had in April, 1895. During the course of the trial counsel for the plaintiff separately offered in evidence:

1. A certified copy of the deed referred to in the acts of 1752 and 1753, acquiring land on which to erect a prison, stating that he proposed to follow this by the offer of a subsequent grant to the county by the heirs of Penn of the reversion of the prison lands. The purpose of the offer was declared to be to throw light on the terms of the grant of land for the court-house, and thereby to demonstrate that the county was estopped from claiming that the grant of such land by the patent of 1764 was not upon a condition.

2. A deed by Granville, John Penn and Richard Penn to the county of Northampton, dated in 1852, for the reversion in the prison lot, which was offered for two purposes; first, for the former purpose of establishing an estoppel upon the county; and, second, to show grants by Penn of land in the township of Easton subsequent to the devesting act; to be followed by other deeds made by Penn subsequent to the devesting act.

*The devesting act referred to was an [390] act passed November 27, 1779 (1 Smith's Laws, 479), vesting the title to the province of Pennsylvania in the commonwealth.

3. A deed by John Penn to Peter Schuyler *et al.*, for a lot in the county of Easton, subsequent to the devesting act.

4. A certified copy from the books of the land office, showing that the records of the department of internal affairs of Pennsylvania contain a number of warrants issued for lots in the town of Easton, Pennsylvania, and surveys made in pursuance thereof, and lots granted by the proprietaries of the province of Pennsylvania.

5. That no evidence can be found to indicate

that any warrants were issued, and surveys made or patents granted by the commonwealth of Pennsylvania for any lots in the town of Easton, Pennsylvania.

Offers Nos. 3, 4, and 5, it is claimed in argument, were made to establish that the property in question was part of the private estate of the Penns, preserved to them by § 8 of the devesting act.

Upon objection that the evidence was irrelevant to the issue, it was excluded, and exceptions to such rulings were reserved.

At the close of the testimony for the plaintiff, counsel for defendant moved the court to direct a verdict for the defendant. This motion was granted, the court instructing the jury that the deed on its face was a conveyance to trustees for the use and benefit of the people of Northampton county in the erection and use of public buildings, and that the land had not reverted to the grantors by a diversion of the use. Judgment having been entered in favor of the defendants, the cause was taken by writ of error to the United States circuit court of appeals for the third circuit, which affirmed the judgment. 39 U. S. App. 238. A writ of certiorari was subsequently allowed by this court.

Messrs. **Carter Berkeley Taylor, A. T. Freedley,** and *W. Brooke Rawle* for plaintiff in error.

Messrs. **Aaron Goldsmith** and **Edward J. Fox** for defendants in error.

391] *Mr. Justice **White** delivered the opinion of the court:

The errors assigned are misdirection in instructing the jury to render a verdict for the defendant and wrongful exclusion of the offered evidence. We at once dismiss the latter assignments from consideration. The evidence offered to aid in the construction of the patent was clearly incompetent, as, the patent being a written instrument, its construction and legal effect were a matter for the court, and, even if an estoppel had been pleaded, the excluded evidence could not have estopped the county from asserting that the patent of 1764 had the meaning contended for. As regards the evidence offered to establish that the rights of the proprietaries, if any, in the property in question had not been cut off by the devesting act, the evidence, if not cumulative, was clearly not material, if by the terms of the patent, as we hold to be the case, no interest in the land granted thereby remained in the grantors.

Did the trial court improperly direct a verdict for the defendant?

This question requires an interpretation of the grant contained in the patent of 1764; and, as the question arising on such construction relates to the title to real property, we must, in reaching a conclusion, be guided by the local law of Pennsylvania, the state in which the land is situated.

We premise our examination of the terms of the patent with the following extract from the opinion delivered by Kennedy, J., in *Ingersoll* v. *Sergeant*, 1 Whart. 337, 348:

"King Charles the 2d, in granting the province of Pennsylvania to William Penn and his heirs, gave it to be held in free and common socage, and by fealty only, for all services. . . . And by the seventeenth section thereof, William Penn, his heirs and assigns, had full and absolute power given to them, at all times thereafter, and forever, to assign, alien, grant, demise, or enfeoff such parts and parcels thereof to such persons as might be willing to purchase the same, their heirs and assigns, in fee simple, fee tail, for term of life, lives, or years, *to be held of [392 the said William Penn, his heirs and assigns, as of the seigniory of Windsor by such services, customs, and rents as should seem fit, to the said William Penn, his heirs and assigns, and not immediately of the said King Charles, his heirs, or successors. And, again, by the eighteenth section, it was further provided, that the purchasers from William Penn, his heirs or assigns, should hold such estates as might be granted to them, either in fee simple, fee tail, or otherwise, as to the said William Penn, his heirs or assigns, should deem expedient, the statute of *quia emptores terrarum* in any wise notwithstanding."

The proper construction of the patent in question is free from difficulty when construed in connection with the act of the assembly to which the patent refers. The act of 1752 constituted the authority of the trustees for acquiring the land in question, and that authority was to the individuals named in the act "to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the said town of Easton, in trust, and for the use of the inhabitants of the said county." The inhabitants of the county of Northampton, not being a corporation, were unable to take a direct conveyance of the land, but the clear intention of the statute was that while the legal estate in fee in the land should be acquired by the trustees, the beneficial use or equitable estate was to be in the inhabitants of the county. The provision following the authorization to acquire the land, "and thereon to erect and build a court-house and prison," was no more than a direction to the trustees as to the mode of use to be made of the land after it had been purchased.

The authority to the trustees being to "purchase," adds force to the clear implication that it was the intention of the assembly that a title in fee simple should be acquired. When, therefore, we find a recital in the patent that it is conveyed upon a named consideration, and the patent expressly refers to the act of the assembly as the authority from which the patentees derived the power to take and hold the property, we naturally infer an intention of the parties on the one hand to convey, and on the other to receive, just such an estate in the *land as the act contemplated. It is true [393 that the consideration is apparently nominal, but, at common law, in a deed like the one in question, a pecuniary consideration, however small, was sufficient to devest the title. *Queen* v. *Porter*, 1 Coke, 24, 26; *Van der Volgen* v. *Yates*, 9 N. Y. 226.

The patent expressly purports to convey the fee, the reservation of an annual quitrent of a red rose being merely a feudal acknowledgment of tenure (*Marshall* v. *Conrad*, 5 Call. (Va.) 364, 398), which was in effect annulled

by the Revolution and acts of the assembly of Pennsylvania subsequently passed, declaring all lands within the commonwealth to be held by a title purely allodial. In the premises the grant is to the trustees by name "and their heirs," while the habendum is to the individuals theretofore referred to as the trustees, "their heirs and assigns forever. In trust, nevertheless, to and for the erecting thereon a court-house for the public use and service of the county, and to and for no other use, intent, or purpose whatsoever." This last clause, it is claimed, qualifies the prior grant of an estate in fee, and limits the duration of the estate in the land to the period while the land was used as the site of a court-house. But it will be remembered that the act of 1752 authorized the acquisition of a lot upon which the trustees were directed to build a court-house *and prison*, and the act of 1753 recited that the amount authorized by the act of 1752 to be expended for a court-house and prison had already been expended for building a prison, and authority was given to assess and levy a further sum for the erection of a court-house. The patent of 1764 recited the fact that another lot of ground had been laid out for a prison site, and it may be well in reason considered that had the act of 1752 authorized solely the erection of a court-house instead of a court-house and prison, that the clause to which we have referred would have simply recited that the patentees were to hold the land for the uses and purposes mentioned in the act of the assembly. In the condition in which matters stood, however, the recital that the land was to be held in trust for the object stated may well be treated as having been inserted with the intent of showing that the grant **394**] related alone to one *of the purposes covered by the law, the court-house, and not to both therein expressed; that is, the prison and the court-house. Be it as it may, however, under the facts disclosed by the record, the decisions of the courts of Pennsylvania leave no doubt that the clause in question cannot be construed as anything more than a recognition of the trust previously created by the act of the general assembly, and that it amounted simply to conforming the grant to the legislative authority previously given, and that it cannot be deemed to have imported a limitation of the fee. Thus in *Slegel* v. *Lauer*, 148 Pa. 244, whilst it was held that the grant there considered, though absolute in terms, merely conveyed a fee on limitation, because the purpose expressed in the grant was not one for which counties usually acquired a fee simple in lands, the court reviewed the cases of *Kerlin* v. *Campbell*, 15 Pa. 500; *Griffitts* v. *Cope*, 17 Pa. 96; *Brendle* v. *German Reformed Congregation*, 33 Pa. 415, and *Seebold* v. *Shitler*, 34 Pa. 133, and declared the doctrine established by those cases to be that where a conveyance purporting to be in fee is made to public trustees or commissioners, religious societies, etc., for the particular purpose for which the grantees could lawfully hold real estate, such declaration could not be construed as qualifying a prior grant of the fee. The court said (p. 241):

"Of course, the mere expression of a purpose will not of and by itself debase a fee. Thus, a grant in fee simple to county commissioners of land 'for the use of the inhabitants of Delaware county to accommodate the public service of the county,' was held not to create a base fee (*Kerlin* v. *Campbell*, 15 Pa. 500); as also a grant to county commissioners and their successors in office of a tract of land with a brick court-house thereon erected, 'in trust for the use of said county, in fee simple,' the statute under which the purchase was made authorizing the acquisition of the property for the purpose of a court-house, jail, and offices for the safekeeping of the records (*Seebold* v. *Shitler*, 34 Pa. 133). Similarly a devise of land to a religious body in fee 'there to build a meeting-house upon,' etc., was held to pass an *unqualified estate (*Griffitts* v. *Cope*, 17 [**395** Pa 96); as was also a grant to a congregation 'for the benefit, use, and behoof of the poor of said . . . congregation, . . . forever, and for a place to erect a house of religious worship, for the use and service of said congregation, and if occasion shall require a place to bury their dead' (*Brendle* v. *German Reformed Congregation*, 33 Pa. 415). . . . It is apparent in all the cases cited, that the purposes for which the grants were made were really all the purposes for which the grantees could lawfully hold real estate. Unless, therefore, the absurd position be assumed that a corporation can in no event take a fee simple absolute, because its power to hold land is limited to the uses for which it is authorized to acquire and employ it, a declaration in the grant that it is conveyed for those uses cannot be deemed to import a limitation of the fee. *Expressio eorum quae tacite insunt nihil operatur.* Such a declaration can amount to no more than an explicit assertion of the intended legality of the grant."

The case at bar is precisely analogous in its main features to the facts which were under consideration in *Kerlin* v. *Campbell*, *supra*, the only difference being that, in the case just cited, instead of the purpose for which the land was to be held being specified in the grant, a declaration of trust was made in a separate instrument. The facts in the *Kerlin Case* were as follows: Certain public buildings had been erected on land and the land with the erections was sold to a private individual. Subsequently, five named individuals, or any three of them, were authorized by statute "to take conveyances and assurances to them, and their heirs, of the said old court-house, and of the prison and workhouse, in the said borough of Chester, with the lots of ground thereunto belonging, in trust, and for the use of the inhabitants of the said county of Delaware, to accommodate the public service of the said county." A deed was made in pursuance of this act to the individuals named "and to their heirs and assigns" for an expressed consideration, "to have and to hold the same to them, their heirs and assigns, forever." A declaration of trust was made contemporaneously with the deed, reciting *that the latter instrument had been [**396** made or was intended to be "In trust, and for the use of the inhabitants of the said county of Delaware, to accommodate the public service of the said county, according to the intent and true meaning of the said recited act of assembly;" and also declaring that the interest

held in the land and buildings was "only to and for the use and services hereinbefore mentioned, expressed, and declared, and to and for no other use, interest, or purpose whatsoever." A part of the lot and the workhouse building thereon having been subsequently sold to a private individual under authority of an act of assembly, the heirs of the original grantor brought ejectment to recover possession, upon the ground that the property was granted for a grossly inadequate consideration, if the unrestricted fee was conveyed, and that the deed to the individuals named in the original act and the declaration of trust by them executed was but a single transaction and constituted a conveyance to the parties named, in trust to and for the use of the inhabitants of the county of Delaware, to accommodate the public service of the said county, according to the true intent and meaning of the act of assembly, and to no other use, intent, or purpose whatsoever, and that the estate which the trustees took was a base or determinable fee; in other words, an interest which might continue forever, but was liable to be determined, without the aid of a conveyance, by some act or event circumscribing its continuance or extent. On the part of the defendants in error it was contended that the transaction was a purchase, and not a trust. The court said (p. 506):

"The doctrine of charitable uses is inapplicable to a question like the present. Had the ancestor of the plaintiffs conveyed the property as a gratuity to be used in a particular way, they might have had a plausible case on the cessation of the user; but he conveyed it for its value, by an absolute deed, to persons who executed a declaration of trust, not for his benefit, but to vest the equitable ownership in the county. After that, it is impossible to conceive of a dormant interest in him. The two deeds, though executed at the same time, were as diverse as if the latter were a conveyance of [397] the legal title to a stranger, *with whom the grantor in the first could not be in privity. There could be no resulting trust, for every part and particle of the grantor's estate, legal or equitable, present or prospective, had passed from him and was paid for. Nor was the estate granted a base fee. It was unclogged with conditions or limitations. The ancestor received a full consideration for it; and the plaintiffs cannot rescind the bargain."

We think the two cases are not distinguishable in principle. The purposes of the grant by the patent of 1764 of the lot in the center of the public square at Easton, in conformity to the clear intent of the act of 1752, was undoubtedly to vest an equitable estate in the land in the inhabitants of the county, the trust in their favor being executed so soon as the county became capable of holding the title. While the proprietaries may have been mainly influenced in making the grant by a desire to advance the interests of the town, or were actuated by motives of charity, yet the transaction was not a mere gift, but was upon a valuable consideration, and it was the evident intention of the grantors to convey all their estate or interest in the land for the benefit of the county. The declaration in the patent of the purposes for which the land was to be held, enjoined as it was with a reference to the act of the assembly wherein the trust was created, could not have the effect of qualifying the grant of the fee simple, any more than if the declaration of the purposes for which the land was to be held had been omitted and a declaration of the trust made in an independent instrument.

If the grant be viewed as one merely to trustees to hold "for the uses and purposes mentioned in the act of the assembly," it is clear that the fee was not upon a condition subsequent nor one upon limitation. There are no apt, technical words (such as *so that; provided; if it shall happen;* etc.,—4 Kent, Com. note b, p. 132; 2 Washb. Real Prop. p. 3) contained in the grant, nor is the declaration of the use coupled with any clause of re entry or a provision that the estate conveyed should cease or be void on any contingency. *Ibid.* So, also, we fail to find in the patent the usual and apt word to create a limitation (such as *while; so long as; *until;* [398 *during;* etc., 4 Kent, *Ibid.*) or words of similar import. And for the reason already stated, if we disregard the absence of technical terms or provisions importing a condition or limitation, and examine the deed with a view of eliciting the clear intention of the parties, we are driven to the conclusion that it was the intention of the grantors to convey their entire estate in the land.

The cases mainly relied upon as supporting the claim of the plaintiff in error that by the patent an estate was conveyed which was "to be commensurate in duration with the purpose to be answered by it," clearly present no analogy in their facts to the case at bar. Thus, in *Kirk* v. *King*, 3 Pa. St. 436, the material parts of the conveyance read as follows:

"Know all men by these presents, that I, Thomas McElroy, of Plum township, in the county of Allegheny, for and in consideration of the sum of 50 cents to me in hand paid, the receipt of which is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, to the employers of the school at Plum creek meeting house, that lot of land, beginning, etc. [describing it], to have and to hold said lot for an English schoolhouse and no other purpose, for me, my heirs, and assigns, to them who are now, or may hereafter be, the employers of said school, to have and to hold the same forever for said purpose.

"Witness my hand and seal," etc.

It will be noticed that the deed did not contain words of inheritance or expressly purport to convey a fee simple; and in *Wright* v. *Linn*, 9 Pa. 440, the decision in *Kirk* v. *King* was construed to hold that "the legal title remained in the original owner, the 'school company' having but an equity, which was thought to be dependent on the agreement to use the ground 'for an English schoolhouse and for no other purpose.'" In other words, the deed was construed as making the substantial consideration of the grant the erection of the schoolhouse, and as though the land was conveyed, in terms, to the grantees, to have and to hold the same *so long* as they used it for an English schoolhouse. And the court, in the *Wright Case*, while questioning the correctness of the holding *in the *Kirk Case*, that the [399

deed there considered did not establish a trust for a charitable use, not liable to be defeated by nonuser, said (p. 438):

"It has long been held that money given to build or repair a church is given to a charitable use; and surely it must be agreed that land given as the site of a public schoolhouse, prima facie, stands in the same category. It may be otherwise, where the object in the contemplation of the party is ephemeral, and the subject sought to be promoted is intended to be of temporary duration. This is the point upon which *Kirk* v. *King* was made to turn; and, where such is the case, perhaps the grant may be taken as on an implied condition of reverter as soon as the temporary object is accomplished. But such a condition should either expressly appear or be unerringly indicated by the circumstances attendant on the gift."

The object to be attained by the grant in the case at bar was, however, not ephemeral in its character, the assurance being expressly to the trustees and their heirs and assigns forever; while the attendant circumstances we have heretofore alluded to rebut any inference of an implied reverter.

Scheetz v. *Fitzwater*, 5 Pa. 126, also relied on, was the case of a conveyance of "a certain mill dam or pond of water, and mill race or stream of water, issuing and proceeding from the said mill dam or pond of water, as the same is now situate, and being in and upon a certain tract or parcel of land situate in the manor of Springfield, together also with the site and soil of the said mill pond or dam and race of water, and also one perch of land on each and every side of the said pond, or dam and race of water, to and for the use and service of a certain mill, with the land thereto belonging, and for no other use whatsoever." The deed did not contain words of inheritance or expressly grant a fee simple. The grant was of the mill dam, etc., and, in the same sentence, the qualification was attached that it was for a particular use only, that is, "for the use and service of a certain mill, with the land thereto belonging."

The mill pond having been drained and con-
400] verted into a *meadow, the claim was made that there had been a diversion from the purposes of the grant, and an action was commenced for the taking of grass from the site of the mill pond. The trial judge held that a fee simple estate in the land had not been conveyed, but that it was the intention of the grantor to only convey a qualified interest in the land or limited fee, and to retain a reversionary interest, and that the estate in the grantee determined on the abandonment of the use and service for which the conveyance had been made as stated in the deed. The appellate court held this construction to be correct.

First Methodist E. Church v. *Old Columbia Public Ground Co.* 103 Pa. 608, is relied upon as sustaining the proposition that where a deed refers to a certain mode of user of the land conveyed, coupled with words such as "and for no other use," a conditional estate is granted. The decision, however, does not justify this broad statement. The action was ejectment. One Wright had covenanted under seal to convey certain property to named parties, their heirs or assigns, in fee simple, clear of all encumbrances, in trust for the sole use of a company which might thereafter be formed for the purpose of bringing a supply of water into the borough of Columbia, the grantees covenanting to give, grant, and assure unto Wright, his heirs and assigns, when a reservoir should be erected, "the privilege of erecting a hydrant at said reservoir at his own expense and for his own use and shall have a supply of water therefrom sufficient to water his cattle or stock or for the use of a family at all times when the same is in repair or water sufficient therein." A deed was subsequently made to the water company, and that corporation constructed a reservoir on the land, but subsequently abandoned the same, filled up the reservoir and sold the land, and the purchaser erected a chapel thereon. Ejectment was brought by the grantees of the heirs of Wright to recover possession of the land. The trial judge held that under the agreement first referred to the grantees took a base of qualified fee only, and when they and their vendees ceased to use the land for a reservoir it reverted to Wright or his heirs.

*The appellate court, however, held [**401** that a conditional estate had not been created by the deed, and discussed the effect of the grant solely as to whether an estate upon condition subsequent was created. After reviewing various authorities holding that a mere recital in a deed that it was made upon a certain consideration, while it might create a covenant, would not raise a condition, the court said (p. 614):

"Whatever words are relied on as creating a condition must not only be such as of themselves would create a condition, but must be so connected with the grant as to qualify or restrain it. *Laberee* v. *Carleton*, 53 Me. 211. It was said by Mr. Chief Justice Bigelow in *Packard* v. *Ames*, 16 Gray, 327: 'We know of no authority by which a grant declared to be for a special purpose, without other words, can be held to be a condition. On the contrary, it has always been held that such a grant does not convey a conditional estate unless coupled with a clause for the payment of money or the doing of some act by the grantee, on which the grant is clearly made to depend.' To make the estate conditional the words must clearly show such intent. *Cook* v. *Trimble*, 9 Watts, 15. Turning to the writing executed by Wright, we see that he absolutely and unconditionally covenanted to convey the premises in fee simple clear of all encumbrances, to the vendees, their heirs or assigns, whenever requested by them. No restraint was imposed on an alienation of the land. No construction of a reservoir, nor any work on the ground, was required to precede the right to demand a deed. No clause provided for a forfeiture or termination of the estate, in case the land ceased to be used as a reservoir. No right of re-entry was reserved by the grantor on any contingency. No technical word to create a condition was used. No other words were used, equivalent thereto or proper to create a condition. The authorities show that the recital of the consideration and a statement of the purpose for which the land is to be used are wholly insufficient to create a conditional estate."

At page 613 of the opinion, it is true, the

cases of *Kirk* v. *King* and *Scheetz* v. *Fitzwater* are 402] referred to as though the *grants considered in those cases were of estates upon condition subsequent, and as illustrating the proposition that words clearly equivalent to the technical words usually employed to create a condition would be sufficient. Weight was attached to the circumstance that the grants in those cases were expressed to be for a particular named use, "and no other purpose;" but it is manifest that importance was attached not alone to the emphatic statement of the particular use expressed, but to that language coupled with the other provisions of the grant.

But, manifestly, under the authorities referred to in the *Slegel Case* [148 Pa. 244], which we have above cited, the declaration of the purposes contained in the patent under consideration had not the effect of qualifying or limiting the estate in fee expressly granted to the trustees for the benefit of the inhabitants of the county, and which has since become vested by act of the legislature, in the county of Northampton. Without, however, positively determining whether the estate in the county is held charged with a trust for a charitable use, or is an unrestricted fee simple on the theory that the trustees were merely the link for passing the title authorized by the act of 1752 (*Brendle* v. *German Reformed Congregation*, 33 Pa. 415, 425), we hold that the trial court did not err in directing a verdict for the defendant and *the judgment of the Circuit Court of Appeals must therefore be affirmed.*

Mr. Justice **Brown** concurs in the result.

EVERETT JOLLY, *Plff. in Err.*,
v.
UNITED STATES.

Stealing postage stamps—made a crime by the United States Revised Statutes.

(See S. C. Reporter's ed. 402-408.)

1. The crime of feloniously taking and carrying away personal property of the United States is, by U. S. Rev. Stat. § 5456, made a distinct and separate offense from that of robbery mentioned in the same section.

2. Postage stamps which have not been issued or sold, and are in the possession of the government, are personal property belonging to the United States, within the meaning of U. S. Rev. Stat. § 5456, making it a crime to feloniously take and carry away such property.

[No. 238.]

Submitted April 28, 1898. Decided May 9, 1898.

IN ERROR to the District Court of the United States for the District of Kentucky to review a judgment convicting Everett Jolly of the crime of stealing postage stamps, the property of the United States, upon which conviction he was sentenced to be imprisoned for the term of two years. *Affirmed.*

The facts are stated in the opinion.

Mr. **Robert S. Todd** for plaintiff in error.

Mr. **James E. Boyd,** Assistant Attorney General, for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

The plaintiff in error seeks to reverse his conviction of the crime of stealing certain postage stamps on the 25th day of April, 1894, being the property of the United States, upon which conviction he was sentenced to be imprisoned for the term of two years. The indictment against him was found in the district court of the United States for the district of Kentucky, Owensborough division, in the June term, 1895, and contained five counts. It was drawn under § 5456 of the Revised Statutes. The first count alleged, in substance, that on the 25th day of April, 1894, at Hardinsburg, in the district mentioned, the defendant did feloniously steal, take, and carry away from a building then and there used as a postoffice building of the United States, certain postage stamps of the United States, of various denominations mentioned in the indictment, and of the value named ($163.12), and which stamps were then and there the personal property of the United States of America.

The second count was the same, except that it alleged the stealing to have been from the possession of Thomas McClure, the postmaster, etc.

The third and fourth counts alleged the stamps to have been the property of the Post Office Department, and the fifth count alleged that he had the stamps in his possession with intent to convert to his own use, the same having *theretofore been stolen from the [404 United States by some other person, which the defendant well knew.

Upon being arraigned, the defendant filed a demurrer to each count of the indictment, which was sustained as to the third and fourth counts and overruled as to the others.

His counsel upon the trial again raised the question as to the validity of the first and second counts, duly excepting to the decision of the court in holding that he might be convicted upon either of them.

The judge charged the jury that the defendant could not be convicted under the first, second and fifth counts together; that if convicted upon either the first or second count, or both, he could not be convicted under the fifth.

He was found guilty as charged in the first and second counts, but the jury said nothing in their verdict as to the fifth count.

The same objections to the conviction that were taken below are now urged upon us by counsel for the plaintiff in error as grounds for the reversal of the judgment.

Section 5456 of the Revised Statutes, under which the indictment was drawn, reads as follows:

"Every person who robs another of any kind or description of personal property belonging to the United States, or feloniously takes and carries away the same, shall be punished

NOTE.—*As to larceny; defined; theft in secret; theft of own property,*—see note to State v. Powell (N. C.) 4 L. R. A. 291.

As to what law defines larceny under a statute against bringing stolen property into the state; particular statutes,—see note to State v. Kief (Mont.) 15 L. R. A. 722.

by a fine of not more than five thousand dollars, or by imprisonment at hard labor not less than one nor more than ten years, or by both such fine and imprisonment."

The contention on the part of the plaintiff in error is, that in order to sustain an indictment under this statute (1) there must be a felonious and forcible taking of personal property; and (2) the property must be the subject of larceny, which postage stamps belonging to the government are not.

(1) There are two distinct offenses mentioned in the statute.

One is the offense of robbery, the legal and technical meaning of which is well known. It is a forcible taking, or a taking by putting the individual robbed in fear.

There is also set forth in the statute the crime of feloniously taking and carrying away any **405**] kind or description of personal *property belonging to the United States. This is a distinct and separate offense from that of robbery. If the statute required the taking to be forcible in all cases, the language providing against the felonious taking and carrying away of the personal property of the United States would be surplusage, the forcible taking being already implied and included in the use of the word "rob." But in addition to robbery, the offense of feloniously (not forcibly) taking the personal property of the United States is created. The indictment herein comes under the latter head.

(2) The objection that the postage stamps are not the subject of larceny while in the possession and being the property of the United States we think is also untenable.

The language used in the statute is much broader and covers more ground than the common-law definition of larceny, and it is also more comprehensive than the statute of 1790 (1 Stat. at L. 112 116, chap. 9). "Any kind or description of personal property" is an exceedingly broad designation. It is difficult to imagine language which would be plainer in its meaning or which would more certainly embrace property such as is the subject of this indictment.

Postage stamps while in the hands of the government, ready to be sold and used, are most surely its personal property. Although § 5413 provides that the words "obligation or other security of the United States" shall be held to mean, among other things, "stamps and other representatives of value, of whatever denomination, which have been or may [be] issued under any act of Congress," yet that language does not preclude the stamps from being the personal property of the United States before they are issued and sold by it. The section in question (5413) precedes those sections relating to the forgery or counterfeiting of United States obligations or securities, national bank notes, letters patent, certificates of entry, public records, and the like, and it includes stamps or any obligation of the United States that may be the subject of forgery or counterfeiting, but it does not thereby exclude postage stamps before they are issued and while in the possession of the government, from the **406**] *general designation of personal property belonging to the United States.

There is, while the stamps are in the possession of the government, some intrinsic value in the stamps themselves as representatives of a certain amount of cost of material and labor, both of which have entered into the article in the process of manufacture entirely aside from any prospective value as stamps. They are incapable of being distinguished the one from the other. All postage stamps of the same denomination are alike, and the moment they are taken from the possession of the government they are valuable in proportion to their denomination, and are subject to use, the same as if they had been purchased, because it is wholly impossible for the government to detect or identify any particular stamp as having been stolen or otherwise fraudulently put in use. Once out of the possession of the government they may be used for their full value to obtain carriage by mail of the article to which they are affixed. There is every reason, therefore, why such stamps should be regarded as personal property even while in the possession of the government. They become valuable to the amount of their denomination the very instant they get into the possession of another. They are not mere obligations, but a species of valuable property in and of themselves the moment they are out of the possession of the government.

The case of *United States* v. *Davis*, 5 Mason, 356, 365, was an indictment for stealing bank bills, a promissory note, etc., and it was founded upon a different statute in which very different language was used. The act under which that indictment was found was chapter 9 of the laws of 1790 (1 Stat. at L. 112, 116), and § 16 thereof provided "that if any person . . . shall take and carry away, with an intent to steal or purloin, the personal goods of another, etc." It was held by Mr. Justice Story that the meaning of the words "personal goods of another" was to be determined by a resort to the common law as furnishing the proper rule of interpretation, and he held that in the strict sense of the common law "personal goods" are goods which are movable, belong to, or *are the property of, some person, and [**407** which have an intrinsic value; that bonds, bills, and notes, which are choses in action, are not esteemed by the common law goods whereof larceny may be committed, being of no intrinsic value, and not importing any property in the possession of the person from whom they are stolen, but only evidence of property. Therefore, strictly construing the statute as a penal one, the court held that the analogy of the common law in respect to larceny might well furnish the proper rule for decision, and that personal goods in the sense of the act under consideration did not embrace choses in action. Since that statute was passed the common-law definition of larceny has been largely extended by statute in almost every state in the Union.

The statute from which § 5456, Revised Statutes, was taken was passed March 2, 1867, (14 Stat. at L. 557, chap. 193), and the same all embracing language is found therein. "Any kind or description of personal property" is the phrase used. It was no doubt passed to enlarge the common law in relation to the subjects of larceny. Although at common law written instruments of any descrip

tion were not the subject of larceny, as not being persoual goods; that is, movables having an intrinsic value, yet although such instruments could not in strictness be stolen, the paper or parchment on which they were written might be, and prosecutions for petty thefts of this description frequently took place in England. *People* v. *Loomis*, 4 Denio, 380; 3 Chitty, Crim. L. 932; 2 Russell, Crimes, 74–80; *Clark's Case* [*Rex* v. *Clark*], Russ. & R. C. C. 181; *Vyse's Case* [*Rex* v. *Vyse*], Moody, C. C. 218; *Reg.* v. *Morris*, 9 Car. & P. 347; *Reg.* v. *Rodway*, 9 Car. & P. 784; *Rex* v. *Bingley*, 5 Car. & P. 602; *Rex* v. *Mead*, 4 Car. & P. 535. To make stamps, while unissued and in the hands of the government, the subject of larceny is not, therefore, any very great departure from the general doctrine of the common law.

Counsel for plaintiff in error claims that the offense, as shown by the evidence in this case, assuming it to be true on the part of the United States, is brought within § 5453 of the Revised Statutes in relation to secreting, embezzling, taking or carrying away any property, etc., stamped in whole or in part, and intended to **408**] be issued in behalf of the United *States, and he also argues that the indictment is wholly defective under that section.

Whether the facts might or might not warrant an indictment under such section, it is not now necessary to decide, for the reason that we hold the indictment good under § 5456, because we regard postage stamps belongiug to the United States as being included in the section in question as personal property, and therefore the subject of larceny.

The action of the jury in returning a verdict of guilty upon the first and second counts and being silent as to the fifth was equivalent to a verdict of not guilty as to that count. See cases cited by Mr. Justice White in *Selvester* v. *United States*, 170 U S. 262 [*ante*, 1029].

For the reasons already given, *we think the judgment is right, and that it should be affirmed.*

HENRY J. HAVNOR, *Plff. in Err.*,
v.
PEOPLE OF THE STATE OF NEW YORK.

(See S. C. Reporter's ed. 408-411.)

Allowance of writ of error.

A writ of error allowed and a citation signed by an associate judge of the New York court of appeals, who does not purport to act as chief judge or chief judge *pro tem.*, is not sufficient, under U. S. Rev. Stat. § 999, to give jurisdiction to the Supreme Court of the United States, although there is an affidavit by counsel that the chief judge of the court is abroad in Europe, and will be for some space of time to come.

[No. 227.]

Argued April 21, 1898. Decided May 9, 1898.

IN ERROR to the Supreme Court of the State of New York to review a judgment of that court which was affirmed by the Court of Appeals of that State, holding valid a judgment of the Court of Special Sessions for the city and county of New York, sentencing Henry J. Havnor upon a conviction for violating a statute of that state prohibiting any person from carrying on the business of "barbering" on the first day of the week. *Dismissed.*

See same case below, 149 N. Y. 195 [31 L. R. A. 689.]

The facts are stated in the opinion.

Mr. **Albert I. Sire** for plaintiff in error.

Mr. **Asa Bird Gardner** for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

Plaintiff in error seeks the reversal of a judgment of the *court of appeals of the state [**409** of New York which affirmed a judgment of an appellate division of the supreme court of that state, holding valid a judgment entered in the court of special sessions for the city and county of New York, sentencing the plaintiff in error upon a conviction for violation of a statute of the state of New York prohibiting any person from carrying on or engaging in the business of "barbering" on the first day of the week. The record having been remitted by the court of appeals to the supreme court of the state, the writ of error was directed to the latter tribunal.

The correctness of the ruling of the court of appeals, upholding the validity of the statute referred to, was vigorously attacked in argument, emphasis being laid on the fact that three judges dissented from the opinion of the court, two of whom (Judges Gray and Bartlett) delivered opinions.

We are unable, however, to pass upon the question pressed upon our notice as to whether the statute referred to is repugnant to the Constitution of the United States, for the reason that the court of appeals of the state of New York is composed of a chief judge and several associate judges, and the writ of error in this case was allowed and the citation signed by an associate judge, who did not purport to act as chief judge or chief judge *pro tem.* of the court. The signature to the allowance of the writ was as follows: "Edward T. Bartlett, Asso. Judge, N. Y. Court of Appeals;" while following the signature to the citation was the designation: "Asso. Judge, Court of Appeals, State of New York." There is nothing contained in the record warranting an inference that the associate judge was at the time acting as chief judge *pro tem.* of the court. True it is, that there is contained in the record, at the end thereof, an affidavit verified by counsel for plaintiff in error on July 29, 1896, stating that the deponent was informed and believed that the chief judge of the court of appeals was then abroad in Europe and would be for some space of time to come, while the writ of error was allowed and the citation signed on

NOTE.—*As to review by United States Supreme Court of territorial decisions; extent and manner of; distinction between an appeal and a writ of error,*—see note to Miner's Bank v. Iowa, 13: 867.

As to what questions the United States Supreme Court will review on writ of error; bill of exceptions,—see note to Parks v. Turner, 13:883.

the 6th of August following. The affidavit purports to have been filed with the papers in the 410] case in the supreme court of New *York on September 2, 1896. It manifestly, however, in no particular justifies the inference that the associate justice who allowed the writ was, at the time of such allowance, the chief judge *pro tem.* of the court of appeals. It was essential, in order to confer jurisdiction on this court, that the chief judge of the court of appeals of New York or his lawful substitute or a justice of this court should have allowed the writ and signed the citation.

Thus, it is provided in the Revised Statutes as follows:

"Sec. 999. When it [the writ of error] is issued by the Supreme Court to a state court, the citation shall be signed by the chief justice or judge or chancellor of such court rendering the judgment or passing the decree complained of, or by a justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice."

The provision referred to was contained in the 25th section of the judiciary act (1 Stat. at L. 86, chap. 20) and § 2 of the act of February 5, 1867 (14 Stat. at L. 387, chap. 28). It was construed in *Bartmeyer* v. *Iowa*, 81 U. S. 14 Wall. 26 [20: 792], where the court, taking notice *sua sponte* of the fact that there had been no proper allowance of a writ of error, said (p. 27 [20: 792]):

"Writs of error to the state court can only issue when one of the questions mentioned in the twenty-fifth section of that act was decided by the court to which the writ is directed, and in order that there may be some security that such a question was decided in the case, the statute requires that the citation must be signed by the chief justice or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States. It has been the settled doctrine of this court that a writ of error to a state court must be allowed by one of the judges above mentioned, or it will be dismissed for want of jurisdiction, and the case before us raises the question whether the writ has been allowed by the judge authorized to do so. The supreme court of Iowa, which rendered the judgment complained of, is composed of a chief justice and 411] three *associate justices, and this writ is allowed by one of the associate justices. We are of opinion that the act of Congress requires that, when there is a court so composed, the writ can only be allowed by the chief justice of that court, or by a justice of the Supreme Court of the United States. In case of a writ to a court composed of a single judge or chancellor, the writ may be allowed by that judge or chancellor, or by a justice of the Supreme Court of the United States. The result of this construction of the statute is that the associate justice of the supreme court of Iowa who allowed the present writ had no authority to do so, and it is accordingly dismissed."

The *Bartemeyer Case* was approvingly referred to in *Butler* v. *Gage*, 138 U. S. 55 [34: 871], where the court, speaking through Mr. Chief Justice Fuller, said:

"Section 999 of the Revised Statutes provides that the citation shall be signed by the chief justice, judge, or chancellor of the court rendering the judgment or passing the decree complained of, or by a justice of this court; and it was held in *Bartemeyer* v. *Iowa*, 81 U. S. 14 Wall. 26 [20: 792], that when the supreme court of a state is composed of a chief justice and several associates, and the judgment complained of was rendered by such court, the writ could only be allowed by the chief justice of that court or by a justice of this court."

In *Butler* v. *Gage*, however, the judge allowing the writ described himself as "Presiding Judge of the Supreme Court of the State of Colorado." As the Constitution of Colorado provided that when the chief justice was absent, the judge having the next shortest term should preside in his stead, and as the record showed that the chief justice was absent at the time the writ was allowed, and counsel conceded that the judge who allowed the writ had the next shortest term to serve, it was held that the writ was properly allowed.

Upon the facts appearing in the case at bar, however, it is manifest that *the writ of error was not properly allowed, and it must be dismissed.*

T H. RHODES, *Plff. in Err.*, [412
v.
STATE OF IOWA.

(See S. C. Reporter's ed. 412–433.)

Act of August 8, 1890—interstate transportation of intoxicating liquors—statute of Iowa.

1. The act of Congress of August 8, 1890, that intoxicating liquors transported into a state shall

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NOTE.—*As to power of Congress to regulate commerce*, see notes to Gibbons v. Ogden, 6: 23, and Brown v. Maryland, 6: 678.

As to interstate commerce; regulation of; power of Congress, how far exclusive,—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

As to constitutionality of laws regulating sale of liquors, see note to Foster v. Kansas, Johnston, 28: 696.

As to what liquors are within statutory restrictions as to the sale of "spirituous, vinous, fermented, and other intoxicating liquors;" alcohol; spirituous liquors; spirituous as distinguished from fermented liquors; vinous as distinguished from fermented liquors; mixed drinks; bitters; wine, ale, beer, and other fermented liquors; cider; presumptions; judicial notice; as to lager beer; other liquors; questions for jury; miscellaneous matters,—see note to Lemly v. State (Miss.) 20 L. R. A. 645.

As to right of state to prohibit manufacture and sale of spirituous liquors; imported liquors; statutes against selling; special licenses; pharmacists; remedies against illegal sale; action for damages; transportation prohibited,—see note to State v. Creeden (Iowa) 7 L. R. A. 295.

As to liquor laws of Pennsylvania construed, see note to Veon v. Creaton (Pa.) 9 L. R. A. 814.

As to police power of state as to intoxicating liquors; license laws constitutional; local laws; local option laws; special taxation of traffic,—see note to Tragesser v. Gray (Md.) 9 L. R. A. 780.

As to inspection of liquor records, see note to *Re* Caswell (R. I.) 27 L. R. A. 82, 85.

upon arrival therein be subject to the police laws of the state, does not cause them to be subject to such state laws upon their arrival at the state line in the course of interstate transportation, but only after their coming into the state and the consummation of their shipment.

3. Moving intoxicating liquors from the station platform to the freight warehouse of a railroad depot, on their arrival at their destination in Iowa, is a part of the interstate commerce transportation, when they were shipped from another state, and is not a violation of the Iowa statute making the transportation of such liquors from one place to another an offense.

3. Such statute of Iowa cannot be held to apply to intoxicating liquors while in transit from their point of shipment, Dallas, Illinois, to their delivery to the consignee at the point in Iowa, to which they were consigned.

(No. 21.)

Submitted January 12, 1897. Ordered for Oral Argument March 15, 1897. Argued February 23, 1898. Decided May 9, 1898.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment of that

Intoxicating liquors, interstate sales of; laws prohibiting, when valid or not; laws regulating sales; when valid and when invalid.

A statute prohibiting the sale of intoxicating liquors by any private individual, and vesting in the state the exclusive right to manufacture and sell such liquors, violates the provisions of S. C Const. art. 1, §§ 1, 14, guaranteeing all men the rights of "acquiring, possessing, and protecting property," and providing that no person shall be "despoiled or dispossessed of his property, immunities, or privileges . . . or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land." McCullough v. Brown, 41 S. C. 220, 23 L. R. A. 410.

N. C. Acts 1891, chap. 42, prohibiting the manufacture and sale of liquor, the use of profane language, discharging firearms, and other acts upon the lands of certain cottonmills, is not unconstitutional as an interference with the freedom of speech. State v. Warren, 113 N. C. 683.

Ohio act May 4, 1891, prohibiting the sale, exchange, or giving away of intoxicating liquors in brothels, is not unconstitutional as violating the natural rights of a citizen in making criminal an act not *malum in se*, and making no exception as to acts done ignorantly or with the best of motives. Schmeltz v. State, 8 Ohio C. C. 82.

The provision of S. C. act December 24, 1892, § 25, subd. 2, that any servant, agent, or employee of a railroad or express company or other carrier, who shall remove any intoxicating liquors from any railroad car, vessel, or other vehicle of transportation, at any place other than the usual and established stations or places of business of such carriers within an incorporated city or town where there is a dispensary, shall be punished,—is not a valid exercise of the police power of the state. *Re* Langford, 57 Fed. Rep. 570, 4 Inters. Com. Rep. 437.

The South Carolina dispensary act, § 33, declaring guilty of a misdemeanor any person bringing into the state or transporting from place to place within the state any liquor or liquids containing alcohol, except as provided in the act, is, as applied to liquors brought into the state by a vessel at a stipulated freight for carriage, unconstitutional as a regulation of interstate commerce. *Ex parte* Jervey, 66 Fed. Rep. 957; Scott v. Donald, 165 U. S. 58, 107 (41: 632, 648); Vance v. W. A. Vandercook Co. 170 U. S. 438 (*post*, 1100).

A state statute providing for the forfeiture of any conveyance transporting liquor at night is invalid as an interference with interstate commerce, as applied to a vessel bringing liquors from another state and entering at night a port of such state. Jervey v. The Carolina, 66 Fed. Rep. 1013.

The provision of the South Carolina dispensary law, forbidding a citizen to purchase in other states and import into the state alcoholic liquors, products of other states, for his own use and consumption, makes an unlawful discrimination against the products of such other states; and the provision permitting the chief dispenser to purchase liquors in other states and import them into the state for use and consumption unlawfully discriminates against all other citizens of the state, and cannot be sustained as an exercise of the police power. Donald v. Scott, 67 Fed. Rep. 854; Scott v. Donald, 165 U. S. 58 (41: 632).

The sale, as well as the condition upon which intoxicating liquor shall be transported after entering the territorial limits of a state, is left to state legislation by the act of Congress of 1890, known as the Wilson act. State, George, v. Aiken, 42 S. C. 222, 26 L. R. A. 345.

Sales of intoxicating liquors shipped to another state in the original packages before the passage of the Wilson bill are not subject to the laws of that state allowing the recovery back of money paid on unlawful sales of intoxicating liquors. Wind v. Iler, 93 Iowa, 316, 27 L. R. A. 219.

A statute providing, among other things, that on consent of a city council, to which the consent of a majority of the electors is a condition precedent, certain penalties of a prohibitory liquor law may be suspended, is not unconstitutional as a delegation of legislative power to the people. State, Witter, v. Forkner, 94 Iowa, 1, 28 L. R. A. 206.

The right of the state to assume control of the sales of intoxicating liquors under its police power is not affected by either the 4th, 5th, or 14th Amendment to the United States Constitution. State, George, v. Aiken, 42 S. C. 222, 26 L. R. A. 345.

A statute prohibiting a druggist to sell intoxicating liquors in quantities less than a quart even for medicinal purposes, without a physician's prescription, is not an unconstitutional restraint upon lawful business, but is a valid exercise of the police power. Com. v. Fowler, 96 Ky. 166, 33 L. R. A. 839.

A state statute requiring a druggist's license from county commissioners in order to permit a pharmacist to use intoxicating liquors in compounding prescriptions, although he is already licensed as a pharmacist, does not trespass in any way upon any constitutional rights. Gray v. Connecticut, 159 U. S. 74 (40: 80).

The right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States. Giozza v. Tiernan, 148 U. S. 657 (37: 599).

A statute prohibiting the sale of intoxicating liquors within the state except under certain rules is not unconstitutional as the taking of property without due process of law, or taking for public use without compensation, where it operates on all alike and is an exercise of the police power of the state. Cantini v. Tillman, 54 Fed. Rep. 969.

Ohio Rev. Stat. § 4364, providing for subjecting premises upon which unlawful sales of liquor are made to a judgment against the seller for damages arising from such sale, is not in conflict with U. S. Const. 14th Amend. or with Ohio Const. art. 1, § 16, as depriving the lessor of his property without due process of law, or of his remedy by due course of law. Mullen v. Peck, 49 Ohio St. 447.

The regulation of the manufacture, sale, and keeping for sale of spirituous or intoxicating liquors, is within the police power of the state and

court affirming the judgment of the District Court of that State, which affirmed the judgment of a justice of the peace convicting T. H. Rhodes of the unlawful transportation of intoxicating liquors conveyed from Burlington to Brighton, Iowa. *Reversed.*

See same case below, 90 Iowa, 496, 24 L. R. A. 245.

The facts are stated in the opinion.

Messrs. **J. W. Blythe** and **Thomas Hedge** for plaintiff in error on submission of case.

Mr. **Milton Remley,** Attorney General of Iowa, for defendant in error on submission of case.

Messrs. **Thomas Hedge** and **Robert Mather** for plaintiff in error on oral argument of case.

Mr. **Milton Remley,** Attorney General of Iowa, for defendant in error on oral argument.

Mr. Justice **White** delivered the opinion of the court:

The Chicago, Burlington, & Quincy Railroad Company was, in 1891, a common carrier, incorporated under the law of *Illinois, and[413

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extends to the power of absolute prohibition. Cantini v. Tillman, 54 Fed. Rep. 969.

An act making a licensed liquor seller responsible for an assault by one intoxicated by liquor purchased of him does not exceed the constitutional police power of the legislature. Howes v. Maxwell, 157 Mass. 333.

The power of the legislature to prohibit the manufacture and sale of intoxicating liquors within a specified distance of an orphans' home is not limited by the fact that a person is engaged in such manufacture within such distance and no compensation is provided for his outlay or loss. State v. Barringer, 110 N. C. 525.

The act of Congress known as the Wilson bill, making intoxicating liquors imported in original packages subject to the laws of any state into which they are carried, is not an unconstitutional delegation of power, as it simply declares when such property shall become subject to state laws, and does not give any power to the states to legislate upon that subject. *Re* Van Vliet, 43 Fed. Rep. 761, 10 L. R. A. 451; *Re* Spickler, 43 Fed. Rep. 653, 10 L.R. A. 446; *Re* Pahrer, 140 U. S. 545 (35: 572).

A state's denial to persons not citizens of the United States of the right to obtain licenses to sell spirituous liquors within its borders is not a discrimination against them, or an abridgement of their rights within the prohibition of the 14th Amendment of the Constitution of the United States. Trageser v. Gray, 73 Md. 250, 9 L. R. A. 780.

Restricting the right to obtain licenses for the sale of intoxicating liquors to the male inhabitants of the state does not render a law obnoxious to U. S. Const. art. 4, § 2, which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states. Welsh v. State, 126 Ind. 71, 9 L. R. A. 664.

A municipal regulation that cider shall not be sold in less quantities than one gallon, and shall not be drunk at the place of sale, violates no private right, and does not unreasonably or improperly restrain trade, although it is not limited to the sale of cider which is intoxicating. Monroe v. Lawrence, 44 Kan. 607, 10 L. R. A. 520.

Closing of markets for alcoholic liquors in South Carolina to producers in other states, by the dispensary law as amended, renders it unconstitutional although they are likewise closed to the producers in the state, as the use of liquors as a beverage and their importation for personal use are not forbidden, but they are treated as the subject of foreign and interstate commerce in behalf of the state. W. A. Vandercook Co. v. Vance, 80 Fed. Rep. 786.

A dealer who is a citizen of a state other than South Carolina may import liquors, wines, and beer in original packages for purposes of sale so long as the state recognizes intoxicating liquor as an article of commerce, as the right to import and sell includes the right to have a place for receipt and exposure for sale of the original packages imported. Moore v. Bahr, 82 Fed. Rep. 19.

The fact that intoxicating liquor which is subject of sale made in violation of terms of the Vermont statute was brought into the state in original packages does not exempt the sale from the operation of the statute, in view of the act of Congress of August 8, 1890, which provides that all intoxicating liquors transported into any state shall, on arrival therein, be subject to the operation and effect of the laws of such state. Starace v. Rossi, 69 Vt. 303.

Liquor imported from another state into South Carolina for the personal use of the importer will be protected from seizure under the South Carolina dispensary act, so long as such personal use continues, although it is kept at a bona fide club of which the importer is a member, in a locked receptacle of which he has the key. Donald v. Scott, 76 Fed. Rep. 554.

A city ordinance requiring every person selling vinous liquors in quantities of one gallon or more to obtain a license, as applied to one selling wines for houses or manufacturers in other states, is not an exercise of the police power of the state, but an attempted regulation of a product of interstate commerce, not in the interest of public health, or morality, and is invalid. *Re* Lebolt, 77 Fed. Rep. 587.

The prohibition by Wash. Const. art. 1, § 12, of the passage of any law granting to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all the citizens, is not violated by Wash. act March, 19, 1895, making it an offense to employ a female in any place where intoxicating liquor is sold. State v. Considine, 16 Wash. 358.

Regulations as to intoxicating liquors not denial of equal protection and privileges. Kohn v. Melcher, 29 Fed. Rep. 433; Trageser v. Gray, 73 Md. 250, 9 L. R. A. 780; Welsh v. State, 126 Ind. 71, 9 L. R. A. 644; *Ex parte* Swann, 96 Mo. 44; *Ex parte* Hayes, 98 Cal. 555, 20 L. R. A. 701; Giozza v. Tiernan, 148 U. S. 657 (37: 599); Cantini v. Tillman, 54 Fed. Rep. 969; State v. Hodgson, 66 Vt. 134; Hunzinger v. State, 39 Neb. 653.

A statute limiting the number of licensed places to one for each 1,000 of the population is a reasonable exercise of the police power, and does not conflict with U. S. Const. 14th Amend. Decie v. Brown, 167 Mass. 290.

The legislature of a state, in the absence of any restrictions in the state Constitution, has the power to regulate the mode and manner and the circumstances under which the liquor traffic may be conducted, and to surround the right to pursue it with such conditions, restrictions and limitations as the legislature may deem proper. Giozza v. Tiernan, 148 U. S. 657 (37: 599).

When a state statute affects all persons in the state engaged in the sale of liquors in exactly the same manner and degree, it is not in violation of the United States Constitution. *Id.*

Ga. act August 11, 1891, prohibiting the sale of intoxicating liquors within 3 miles of any church or schoolhouse, is not unconstitutional. Butler v. State, 89 Ga. 821.

operated among others a line of railway from Dallas, Illinois, to Burlington, Iowa, and beyond said point. The Burlington & Western Railway Company was, at the same date, a common carrier, incorporated under the law of Iowa, and operated a line of railway from Burlington, Iowa, to Oskaloosa in that state, with stations at intervening points, one of which was Brighton, in Washington county. Both of these corporations had a depot at Burlington which they jointly used. The two carriers had, at the time stated and for years previous thereto, between themselves, joint freight tariffs, by which transportation under a single through waybill was given to merchandise from any station on either of the lines to any station on the line of the other.

In August, 1891, the Dallas Transportation Company delivered to the Chicago, Burlington, & Quincy Railroad at Dallas, Illinois, a wooden box stated to contain groceries consigned to William Horn, Brighton, Iowa. It had been the habit of the agent of the Dallas company before this date to ship intoxicating liquors over the Chicago, Burlington, & Quincy. The box in question was receipted for as through freight and was billed through in accordance with the custom above stated,

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Statutory provisions as to the liquor licenses are an exercise of the police power of the state, and are not within U. S. Const. 14th Amend. assuring the equal protection of the laws. Hoffman v. Bowman, 1 Pa. Dist. R. 562.

That a statute prohibiting the sale of intoxicating liquors is unconstitutional as to sales of liquor imported into the state and sold in original packages does not make it void as to other sales. State v. Kibling, 63 Vt. 636.

A statute prohibiting the sale or giving away of intoxicating liquors within a prescribed distance of a specified soldier's home is void as in contravention of Ohio Const. art. 2, § 26, requiring all laws of a general nature to have a uniform operation throughout the state. Rollins v. State, 28 Ohio L. J. 66.

The dramshop ordinance of 1888 of Kansas City, being inconsistent with the freeholders' charter, as to the prerequisites of the granting of a dramshop license, is in so far repealed by said charter. *Ex parte* Joffee, 46 Mo. App. 360.

The ordinance of the city of Chicago, that no person shall sell in such city spirituous liquors in quantities of one gallon or more at a time without having first obtained a license therefor from such city, is valid. Miller v. Ammon, 145 U. S. 421 (36:759).

The legislature may prohibit or restrict the sale of spirituous liquors in any manner which its discretion may dictate. No one can claim as a right any power whatever to sell such liquors; if he sells at all it must be on such terms as the legislature sees fit to impose. Trageser v. Gray, 73 Md. 250, 9 L. R. A. 780.

There is no inherit right in a citizen to sell intoxicating liquors by retail. It is not a privilege of a citizen of the state, or of a citizen of the United States. It may be entirely prohibited by state legislation, or be permitted under such conditions as will limit its evils. Crowley v. Christensen, 137 U. S. 86 (34: 620).

An ordinance of the city and county of San Francisco, which provides that any person selling without a license shall be guilty of a misdemeanor, does not deny the equal protection of the laws, or abridge the privileges and immunities of a citizen, contrary to U. S. Const. Amend. 14. *Id.*

Village trustees in Nebraska have authority to enact an ordinance to prohibit the sale of intoxicating liquors within the corporate limits, and to impose a fine not to exceed $100 as a penalty for its violation, and imprisonment in default of payment of the fine and costs. Bailey v. State, 30 Neb. 855.

A city ordinance providing for the closing of liquor saloons between the hours of 11 P. M. and 5 A. M. the following day, during which hours screens shall be raised and obstructions removed so as to give an unobstructed view of the interior, is valid under Ind. Rev. Stat. 1881, § 3106, cl. 13, § 3154. Decker v. Sargeant, 125 Ind. 404.

A penal ordinance prohibiting the sale of intoxicating liquors is authorized by a charter giving power to make ordinances for the preservation of good order, decency, and decorum, where such sales are unlawful in the county in which the town is situated. Fortner v. Duncan, 91 Ky. 171, 11 L. R. A. 183.

Power conferred on city by its charter to prohibit and suppress tippling shops is not in conflict with the prohibitory liquor law of North Dakota, and is not repealed by such law. Yankton v. Douglass, 8 S. D. 440.

That the South Carolina dispensary law in general operation throughout the state forbids the sale of spirituous liquors anywhere within the limits of the state, except by specified officers or agents, and prescribes penalties for a violation thereof, does not prevent a municipal corporation, if authorized by its charter, from also forbidding such sale within the city limits under penalties to be imposed by the proper city authorities. Florence v. Brown, 49 S. C. 332.

The adoption of the Missouri local option law by the qualified voters of a given city does not repeal the general statutes in relation to dramshops, but merely suspends their operative force in such city while the local option law is in force. State v. Patrick, 65 Mo. App. 653.

An ordinance requiring a majority of the legal voters of a district to sign a petition for a dramshop license as a condition of granting it is not an unlawful delegation to them of the power to grant licenses. Swift v. People, Ferris Wheel Co. 162 Ill. 534, 33 L. R. A. 470.

The prohibition in N. Y. Laws 1896, chap. 112, § 24, against the traffic in liquor in any building which shall be on the same street and within 200 feet of a building occupied exclusively as a church or a schoolhouse, applies where the building in which the saloon is located is on the corner of the street on which the church is located and another street, and the entrance is on the latter street. *Re* Zinzow, 18 Misc. 653.

That an ordinance passed by a board of supervisors imposed a heavier license tax upon saloonkeepers outside of incorporated cities and towns than upon those within the same does not render it void for unlawful discrimination. *Ex parte* Stephen, 114 Cal. 278.

The legislature has power to pass local prohibitory acts. State v. Snow, 117 N. C. 774.

A state statute exacting the payment of a sum called a tax, and also the giving of a bond as conditions precedent to the right to engage in the sale of intoxicating liquors, is an exercise of the police power, rather than a tax law in the proper sense. People, Einsfeld, v. Murray, 149 N. Y. 367, 32 L. R. A. 344.

A general state excise law, although it graduates excise taxes in cities according to their population, is not a general or special city law, so as to bring it within the provisions of N. Y. Const. art. 12, § 2, respecting the classification of cities. *Id.*

An ordinance of a city of the third class in Kansas, prohibiting the sale of malt, hop tea tonic, ginger ale, cider, or any other drink of like nature in less quantities than one gallon, and forbidding the drinking of the same at the place of sale, is a valid police regulation. *Re* Jahn, 55 Kan. 694.

was taken to Burlington, Iowa, there delivered to the Burlington & Western Company, by whom it was carried to Brighton. On its arrival there, the package was placed by the trainmen on the station platform, and shortly afterwards the plaintiff in error, who was the station agent of the Burlington & Western, in the discharge of his duties opened the door of the freight house and moved the box into a freight warehouse, which was about 6 feet from the platform. In about an hour thereafter the box was seized by a constable under a search warrant, on the ground that it contained intoxicating liquors, which proved to be the truth, and subsequently the liquor was condemned and ordered to be destroyed, and the order was executed. At the time of the seizure the freight charge due to the railways was unpaid. It was admitted that there was nothing on the package to notify the receiving railway of its contents, unless such knowledge can be imputed from the nature of the previous 414] dealings of the Dallas *company with the railway. There was, however, testimony showing that the railroad agent who moved the box from the freight platform to the warehouse had reason to know or suspect that it contained liquor since it was proved that, before the arrival of the box at Brighton, a mail carrier called at the station and asked for a package consigned to William Horn, stating that one was expected from Dallas, and that it would contain intoxicating liquor.

The plaintiff in error was proceeded against by information before a justice of the peace, charging him with the unlawful transportation of intoxicating liquors conveyed from Burlington to Brighton, Iowa. This prosecution was under the provisions of the statutes of the state of Iowa, to which we shall hereafter refer. He was convicted and sentenced to pay a fine of $100. An appeal from this sentence was taken to the district court, where it was affirmed, in which court, among other defenses, it was alleged that the package in question was not subject to the jurisdiction of the state of Iowa, because at the time of its removal from the platform to the freight warehouse it was in course of interstate commerce transportation. The district court having affirmed the conviction, an appeal was taken to the supreme court of the state of Iowa, where the judgment below was also affirmed. *State* v. *Rhodes*, 90 Iowa, 496 [24 L. R. A. 245]. To this judgment of affirmance this writ of error is prosecuted.

The sole question presented for consideration is whether the statute of the state of Iowa can be held to apply to the box in question whilst it was in transit from its point of shipment, Dallas, Illinois, to its delivery to the consignee at the point to which it was consigned. That is to say, whether the law of the state of Iowa can be made to apply to a shipment from the state of Illinois, before the arrival and delivery of the merchandise, without causing the Iowa law to be repugnant to the Constitution of the United States.

In *Bowman* v. *Chicago & N. W. Railway Co.* (1888) 125 U. S. 465 [31: 700, 1 Inters. Com. Rep. 823], this court was called upon to determine the validity of a statute of the state of Iowa, which it was asserted was repugnant to the third clause of § 8 of article 1 of the *Constitution of the United States, be- [415 cause its provisions amounted to a regulation of interstate commerce. The facts upon which the controversy then presented arose were briefly as follows: Kegs of beer were offered in the state of Illinois to a common carrier operating a line of railway in the states of Illinois and Iowa. The beer was consigned to a point in Iowa, and the carrier refused to receive it, on the ground that the statute of Iowa made it unlawful to bring intoxicating liquors within the limits of that state, except when accompanied with a specified certificate, which the Iowa law provided should be granted under particular and exceptional conditions. The one by whom the beer was tendered to the carrier in the state of Illinois thereupon sued the railroad company for the damages claimed to have arisen from its refusal to receive and carry the merchandise. The railway company defended on the ground that it was justified in its refusal because of the provision of the Iowa statute. This, on the other hand, was asserted not to be an adequate defense, because it was claimed that the Iowa statute was wholly void, as it constituted a regulation of interstate commerce. The sole issue arising therefrom was whether the Iowa law protected the refusing carrier, and thus involved determining whether the statute of the state was repugnant to the Constitution of the United States. After great consideration, it was held that the law of the state of Iowa, in so far as it affected interstate commerce, was repugnant to the interstate commerce clause of the Constitution and was void. It was decided that the transportation of merchandise from one state into and across another was interstate commerce, and was protected from the operation of state laws from the moment of shipment whilst in transit and up to the ending of the journey by the delivery of the goods to the consignee at the place to which they were consigned. The court in the course of its opinion adverted to the question whether goods so shipped continued to be protected by the interstate commerce clause after their delivery to the consignee and up to and including their sale in the original package by the one to whom they had been delivered, but did not decide the question, as it was *not essential to do [416 so. Referring to the subject, however, the court said (pp 499, 500 [31: 712]):

"It might be very convenient and useful in the execution of the policy of prohibition within the state to extend the powers of the state beyond its territorial limits. But such extraterritorial powers cannot be assumed upon such an implication. On the contrary, the nature of the case contradicts their existence. For if they belong to one state, they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the Constitution by its delegation of national power to prevent. It is easier to think that the right of importation from abroad, and of transportation from one state to another, includes by necessary implication the right of the importer to sell in unbroken packages at the place where the transit terminates, for the very purpose and motive of

that branch of commerce which consists in transportation, is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported. Such, indeed, was the point decided in the case of *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419 [6: 678], as to foreign commerce, with the express statement, in the opinion of Chief Justice Marshall, that the conclusion would be the same in a case of commerce among the states. But it is not necessary now to express any opinion upon the point, because that question does not arise in the present case. The precise line which divides the transaction, so far as it belongs to foreign or interstate commerce, from the internal and domestic commerce of the state, we are not now called upon to delineate. It is enough to say that the power to regulate or forbid the sale of a commodity, after it has been brought into the state, does not carry with it the right and power to prevent its introduction by transportation from another state."

Subsequently in *Leisy* v. *Hardin* (1890) 135 U. S. 100 [34: 128, 3 Inters. Com. Rep. 36], the question which was thus reserved in the *Bowman Case* arose from the adjudication, and it was held that the right to sell the imported merchandise in the original package free from [417]*interference of state laws was protected by the Constitution of the United States, as up to such sale the goods brought into the state were not commingled with the mass of property in the state. Summing up its conclusions the court said (p. 124 [34: 138]):

"The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer, which they sell in original packages, as described. Under our decision in *Bowman* v. *Chicago & W. Railway Co. supra*, they had the right to import this beer into the state, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time, we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or nonresident importer."

The statutes of the state of Iowa, under which the prosecution now before us was instituted, is as follows:

"If any express company, railway company, or any agent or person in the employ of any express company, or of any common carrier, or any person in the employ of any common carrier, or if any other person shall transport or convey between points, or from one place to another within this state, for any other person or persons or corporation, any intoxicating liquors, without first having been furnished with a certificate from and under the seal of the county auditor of the county to which said liquor is to be transported or is consigned for transportation, or within which it is to be conveyed from place to place, certifying that the consignee or person to whom said liquor is to be transported, conveyed, or delivered, is authorized to sell such intoxicating liquors in such county, such company, corporation, or person so offending, and each of them, and any agent of such company, corporation, or person so offending, shall, upon conviction thereof, be fined in the sum of $100 for each offense, and pay costs of prosecution, and the cost shall include a reasonable attorney fee to be assessed by the court, which shall be paid into the county fund, and stand committed to the county jail *until such fine and [418 costs of prosecution are paid. The offense herein defined shall be held to be complete, and shall be held to have been committed in any county of the state, through or to which said intoxicating liquors are transported, or in which the same is unloaded for transportation, or in which said liquors are conveyed from place to place or delivered. It shall be the duty of the several county auditors of this state to issue the certificate herein contemplated, to any person having such permit, and the certificate so issued shall be truly dated when issued, and shall specify the date at which the permit expires as shown by the county records. Provided, however, that the defendant may show as a defense hereunder by preponderance of evidence that the character and circumstances of the shipment and its contents were unknown to him." Iowa Code, § 1553, ¶ 2410, McClain's Annotated Code of Iowa.

This statute is identical with the one which was held to be unconstitutional in the *Bowman Case*, except that the latter contained the words "knowingly bring within the state," these words having been stricken out by an amendment adopted after the decision in the *Bowman Case*. In other words, the statute which was under review in the *Bowman Case* provided: "If any express company, railway company, or any agent or person in the employ of any express company, or of any common carrier, or if any other person, shall knowingly bring within this state, or transport or convey between points or from one place to another within the state," whilst the statute now before us provides exactly the same thing, except that the words "knowingly bring within this state" are omitted. It is hence manifest that the present statute, as interpreted by the supreme court of Iowa, has exactly the significance it would have did it contain the words found in the act reviewed in the *Bowman Case*. It follows that the law before us now, as interpreted below, is the exact equivalent of the statute which has once before been declared by this court to be repugnant to the Constitution. This result in reason is inevitable, since the court below held that the words, as found in the present law, were not confined to transportation *of [419 commodities originating within the state, but related to shipments made from another state. This ruling hence subjects shipments made from another state to the control of the statute at once on the arrival of the merchandise within the territorial limits of the state, and before the completion of the interstate shipment, as completely as if the words "bring within this state" were yet in the statute. As it was held in the *Bowman Case* that the power to ship from one state into another embraced of necessity the right to have the goods carried to the place of destination, and be delivered at that point to the consignee, it follows that an interpretation of the present law which gives the

state the right to stop the goods shipped into the state at the state line, and before their arrival at destination, is directly within the rule announced in the *Bowman Case*.

The fundamental right which the decision in the *Bowman Case* held to be protected from the operation of state laws by the Constitution of the United States was the continuity of shipment of goods coming from one state into another from the point of transmission to the point of consignment, and the accomplishment there of the delivery covered by the contract. This protection of the Constitution of the United States is plainly denied by the statute now under review, as its provisions are interpreted by the court below. The power which it was held in the *Bowman Case* the state did not possess was that of stopping interstate shipments at the state line by breaking their continuity and intercepting their course from the point of origin to the point of consummation. The right of a state to exert these very powers is plainly upheld by the decision rendered below. It follows that if the ruling in the *Bowman Case* is applicable to the question here presented, it is decisive of this controversy, and must lead to a reversal of the judgment below rendered. The claim is, however, and it was upon this ground that the court below rested its judgment, that under and by virtue of the provisions of the act of Congress of August 8, 1890 (26 Stat. at L. 313, chap. 728), the ruling in the *Bowman Case* is no longer apposite, as the effect of the act of Congress in question was to confer upon the state of Iowa the [420] *power to subject to its statutory regulations merchandise shipped from another state the moment it reached the line of the state of Iowa, and before the consummation of the contract of shipment by arrival at its destination, and delivery there to the consignee. And it is to this question that the discussion at bar has mainly related, and upon which a decision of the cause really depends.

It is not gainsaid that the effect of the act of Congress was to deprive the receiver of goods shipped from another state of all power to sell the same in the state of Iowa in violation of its laws, but whilst it is thus conceded that the act of Congress has allowed the Iowa law to attach to the property when brought into the state before sale, when it otherwise would not have done so until after sale, on the other hand, it is contended that the act of Congress in no way provides that the laws of Iowa should apply before the consummation by delivery of the interstate commerce transaction. To otherwise construe the act of Congress, it is claimed, would cause it to give to the statutes of Iowa extraterritorial operation, and would render the act of Congress repugnant to the Constitution of the United States. It has been settled that the effect of the act of Congress is to allow the statutes of the several states to operate upon packages of imported liquor before sale. *Re Rahrer* [*Wilkerson* v. *Rahrer*], 140 U. S. 545 [35: 572].

Did the act of Congress referred to operate to attach the legislation of the state of Iowa to the goods in question the moment they reached the state line, and before the completion of the act of transportation, by arriving at the point of consignment and the delivery there to the consignee, is, then, the pivotal question. The act of Congress is as follows:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt *therefrom by reason of being introduced [421] therein in original packages or otherwise."

The words "shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory," in one sense might be held to mean arrival at the state line. But to so interpret them would necessitate isolating these words from the entire context of the act, and would compel a construction destructive of other provisions contained therein. But this would violate the fundamental rule requiring that a law be construed as a whole, and not by distorting or magnifying a particular word found in it. It is clearly contemplated that the word "arrival" signified that the goods should actually come into the state, since it is provided that "all fermented, distilled, or other intoxicating liquors or liquids transported into a state or territory," and this is further accentuated by the other, provision, "or remaining therein for use, consumption, sale, or storage therein."

This language makes it impossible in reason to hold that the law intended that the word "arrival" should mean at the state line, since it presupposes the coming of the goods into the state for "use, consumption, sale, or storage." The fair inference from the enumeration of these conditions, which are all embracing, is that the time when they could arise was made the test by which to determine the period when the operation of the state law should attach to goods brought into the state. But to uphold the meaning of the word "arrival," which is necessary to support the state law, as construed below, forces the conclusion that the act of Congress in question authorized state laws to forbid the bringing into the state at all. This follows from the fact that if arrival means crossing the line, then the act of crossing into the state would be a violation of the state law, and hence necessarily the operation of the law is to forbid crossing the line and to compel remaining beyond the same. Thus, if the construction of the word "arrival" be that which is claimed for it, it must be held that the state statute attached and operated beyond the state line confessedly before the time when it was intended by the act of Congress it should take effect.

*But the subtle signification of words [422] and the niceties of verbal distinction furnish no safe guide for construing the act of Congress. On the contrary, it should be interpreted and enforced by the light of the fundamental rule of carrying out its purpose and object, of affording the remedy which it was intended to create, and of defeating the wrong which it was its purpose to frustrate. Undoubtedly the purpose of the act was to enable the laws of the

several states to control the character of merchandise therein enumerated at an earlier date than would have been otherwise the case, but it is equally unquestionable that the act of Congress manifests no purpose to confer upon the states the power to give their statutes an extraterritorial operation so as to subject persons and property beyond their borders to the restraints of their laws. If the act of Congress be construed as reaching the contract for interstate shipment made in another state, the necessary effect must be to give to the laws of the several states extraterritorial operation, for, as held in the *Bowman Case*, the inevitable consequence of allowing a state law to forbid interstate shipments of merchandise would be to destroy the right to contract beyond the limits of the state for such shipments. If the construction claimed be upheld, it would be in the power of each state to compel every interstate commerce train to stop before crossing its borders, and discharge its freight, lest by crossing the line it might carry within the state merchandise of the character named covered by the inhibitions of a state statute. The force of this view is well illustrated by the conclusion of the court below, where it is said [90 Iowa, 496, 24 L. R. A. 245]:

"Was the defendant, in the removal of the liquor, engaged in transporting or conveying it, within the meaning of our statute? The language of the statute is broad enough to cover the act of defendant in removing the liquor from the platform to the freight room of the depot. He was one of the instruments necessary to complete the act of transporation. If this be not so, then, clearly, he is within the terms of the act, as he conveyed the liquor from one point to another within this state. His guilt is not to be determined by the distance **423**] *he conveyed the package, but his conveying it any distance was a violation of the law. With the propriety of legislation making such an act a crime and with the severity of the punishment attached to doing the act, we having nothing to do."

If it had been the intention of the act of Congress to provide for the stoppage at the state line of every interstate commerce contract relating to the merchandise named in the act, such purpose would have been easy of expression. The fact that such power was not conveyed, and that, on the contrary, the language of the statute relates to the receipt of the goods "into any state or territory for use, consumption, sale, or storage therein," negatives the correctness of the interpretation holding that the receipt into any state or territory for the purposes named could never take place. Light is thrown upon the purpose and spirit of the act by another consideration. The *Bowman Case* was decided in 1888, the opinion in *Leisy* v. *Hardin* was announced in April, 1890, the act under consideration was approved August 8, 1890. Considering these dates, it is reasonable to infer that the provisions of the act were intended by Congress to cause the legislative authority of the respective states to attach to intoxicating liquors coming into the states by an interstate shipment only after the consummation of the shipment, but before the sale of the merchandise, that is, that the one receiving merchandise of the character named, whilst retaining the full right to use the same, should no longer enjoy the right to sell free from the restrictions as to sale created by state legislation, a right which the decision in *Leisy* v. *Hardin* had just previously declared to exist.

This view gives meaning and effect to the language of the act providing that such merchandise "shall not be exempt therefrom" (legislative power of the state) by reason of being introduced therein in "original packages or otherwise." These words have no place or meaning in the act if its purpose was to attach the power of the state to the goods before the termination of the interstate commerce shipment. The words "original packages" had, at the time of the passage of the act by the decisions of this court, acquired with reference to *the construction of the Constitution [**424** a technical meaning, signifying that the merchandise in such packages was entitled to be sold within a state by the receiver thereof, although state laws might forbid the sale of merchandise of like character not in such packages.

Whilst it is true that the right to sell free from state interference interstate commerce merchandise was held in *Leisy* v. *Hardin* to be an essential incident to interstate commerce, it was yet but an incident, as the contract of sale within a state in its nature was usually subject to the control of the legislative authority of the state. On the other hand, the right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states, since it embraced a contract which must come under the laws of more than one state. The purpose of Congress to submit the incidental power to sell to the dominion of state authority should not without the clearest implication be held to imply the purpose of subjecting to state laws a contract which in its very object and nature was not suseeptible of such regulation even if the constitutional right to do so existed, as to which no opinion is expressed. And this view is cogently illustrated by the opinion in the *Bowman Case*, where it was said (pp. 486, 487 [81: 707, 708]):

"Has the law of Iowa any extraterritorial force which does not belong to the law of the state of Illinois? If the law of Iowa forbids the delivery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter? In view of this necessary operation of the law of Iowa, if it be valid, the language of this court in the case of *Hall* v. *De Cuir*, 95 U. S. 485, 488 [24: 547, 548], is exactly in point. It was there said: 'But we think it may safely be said that state legislation, which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the *business through the local instruments [**425** to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within.

While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up within and put down without. A passenger in the cabin set apart for the use of whites without the state must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced. It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers, while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more; it could prescribe rules by which the carrier must be governed within the state, in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which 'is untrammeled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be.' "

And it was doubtless this construction which caused the court to observe in the opinion in *In Rahrer* [*Wilkerson* v. *Rahrer*] 140 U. S. 562 [35: 577] that the act of Congress "divests them [objects of interstate commerce shipment] of that character at an earlier period of time than would otherwise be the case." We think that interpreting the statute by the light of all its provisions, it was not intended to and did not cause the power of the state to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee, and of course this conclusion renders it entirely unnecessary to consider whether if the act of Congress had submitted the right to make interstate commerce shipments to state control it would be repugnant to the Constitution.

It follows from this conclusion that as the act for which the plaintiff in error was convicted, and which consisted in moving the goods from the platform to the freight warehouse, was a part of the interstate commerce transportation, and was done before the law of Iowa could constitutionally attach to the goods, the conviction was erroneous, and *the judgment below is therefore reversed.*

Mr. Justice **Gray**, with whom concurred Mr. Justice **Harlan** and Mr. Justice **Brown**, dissenting:

Mr. Justice Harlan, Mr. Justice Brown, and myself are constrained to dissent from this judgment, which appears to us to deny due effect to the police power, reserved to each state by the Constitution of the United States, and recognized by Congress in the act of August 8, 1890, chap. 728, commonly known as the Wilson act. 26 Stat. at L. 313.

The purpose and effect of this act may be best understood by recalling the history of the law upon the subject.

In order to keep this opinion within reasonable compass, we shall, in referring to the [427 previous decisions of this court, confine ourselves, as far as possible, to those decisions which directly relate to the traffic in intoxicating liquors.

The regulation of the manufacture, sale, and use of intoxicating liquors has always been recognized as a subject peculiarly appertaining to the police power of the several states respectively. *License Cases*, 46 U. S. 5 How. 504 [12: 256]; *Bartemeyer* v. *Iowa*, 85 U. S. 18 Wall. 129 [21: 929]; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25 [24: 989]; *Foster* v. *Kansas* [*Johnston*], 112 U. S. 201 [28: 629]; *Mugler* v. *Kansas*, 123 U. S. 623 [31: 205]; *Kidd* v. *Pearson*, 128 U. S. 1 [32: 346, 2 Inters. Com. Rep. 232]; *Rolenbecher* v. *Plymouth County Dist. Ct.* 134 U. S. 31 [33: 801].

Upon the question how far the police power reserved to each state over this subject is affected by the grant to Congress of the power to regulate commerce among the several states, there have been conflicting opinions, and even varying decisions, at different periods.

The earliest cases which came before this court, concerning the extent of the police power of each state over intoxicating liquors within its borders, were *Thurlow* v. *Massachusetts*, *Fletcher* v. *Rhode Island*, and *Peirce* v. *New Hampshire*, decided in 1847, and reported under the name of *The License Cases*, 46 U. S. 5 How. 504 [12: 256].

In *Peirce* v. *New Hampshire*, a statute of New Hampshire, prohibiting sales of intoxicating liquors by any person without a license from municipal authorities, and authorizing licenses to be granted only to persons residing within the state, was held by all the justices to be constitutional and valid, as applied to a barrel of intoxicating liquors, brought into New Hampshire from another state, and sold in New Hampshire by the importer, in the same barrel, unbroken and in the same condition in which it had been brought in—there having been no legislation of Congress upon the subject.

That decision was afterwards repeatedly cited with approval. *Gilman* v. *Philadelphia*, 70 U. S. 3 Wall. 713, 730 [18: 96, 101]; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 33 [24: 929, 992]; *Mobile County* v. *Kimball*, 102 U. S. 691, 701 [26: 238, 241]; *Mugler* v. *Kansas* 123 U.

S. 623, 657, 658 [31: 205, 209]. And in several cases the validity of statutes of a state, taxing the sale of intoxicating liquors brought from
428]another state, was *treated as depending upon the question whether the statutes made any discrimination in favor of liquors manufactured within the state. *Hinson* v. *Lott*, 75 U. S. 8 Wall. 148 [19: 387]; *Tiernan* v. *Rinker*, 102 U. S. 123 [26: 103]; *Walling* v. *Michigan*, 116 U. S. 446, 460 [29: 691, 696].

The question whether the power of Congress to regulate commerce with foreign nations and among the several states is exclusive, or only paramount, was a subject of much diversity of opinion from an early period until 1851, when this court, speaking by Mr. Justice Curtis, in *Cooley* v. *Philadelphia Port Wardens*, 53 U. S. 12 How. 299 [13: 996], laid down this principle: When the nature of the particular subject in question is such as to demand a single uniform rule, operating equally throughout the United States, the power of Congress is exclusive, but when the subject is of such a nature as to require different systems of regulation, drawn from local knowledge or experience, and conformed to local wants, it may be the subject of state legislation so long as Congress has not legislated. 53 U. S. 12 How. 319, 320 [13: 1004, 1005]. The principle there laid down has become fully recognized and established in our jurisprudence. *Parkersburg & O. R. Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 704 [27: 584, 589]; *Crandall* v. *Nevada*, 73 U. S. 6 Wall. 35, 42 [18: 745, 747]; *Mobile County* v. *Kimball* 102 U. S. 691, 701 [26: 238, 241].

Wherever, from the nature of the subject, the power of Congress to regulate commerce is exclusive, the several states, of course, cannot legislate, even if there has been no legislation by Congress; or, as the proposition has been stated in another form, "where the power of Congress to regulate is exclusive the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, . . . is repugnant to such freedom." *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 493 [30: 694, 696].

The theory that the bringing of intoxicating liquors from one state into another, and the selling of them there in the packages in which they had been introduced, are subjects requiring to be regulated by a national and uniform rule, and therefore within the exclusive
429]power of Congress, and wholly *free from state legislation, was not broached by any member of the court before the cases of *Bowman* v. *Chicago & Northwestern Railway Co.* 125 U. S. 465 [31: 700, 1 Inters. Com. Rep. 823], and *Leisy* v. *Hardin*, 135 U. S. 100 [34: 128, 3 Inters. Com. Rep. 36].

In *Bowman's Case*, Chief Justice Waite and two other justices dissented, and in *Leisy's Case* three justices dissented; and the reasons for and against the decisions were stated at length in the opinions delivered in those cases. It will be sufficient for our present purpose to state the points there decided.

Each of those cases arose under the statutes of the state of Iowa, regulating the manufacture, the sale, and the transportation of intoxicating liquors within the state.

Bowman v. *Chicago & Northwestern Railway Co.*, decided by this court March 19, 1888, involved the validity of a provision of those statutes (substantially similar to the provision now before us, as construed by the highest court of the state), imposing a penalty upon any railroad company or other common carrier, or any agent of either, or any other person, that should knowingly bring within the state, or knowingly transport or convey between points or from one place to another within the state, for any other person or corporation, any intoxicating liquors, without first having obtained a certificate from the auditor of the county to which it was consigned, or within which it was to be conveyed from place to place, certifying that the consignee was authorized by the laws of Iowa to sell such liquors. The majority of this court, upon a consideration of the whole statute, frankly recognized that "the provision in question has been adopted by the state of Iowa, not expressly for the purpose of regulating commerce between its citizens and those of other states, but as subservient to the general design of protecting the health and morals of its people, and the peace and good order of the state, against the physical and moral evils resulting from the unrestricted manufacture and sale within the state of intoxicating liquors." 125 U. S. 475, 476 [31: 703, 704, 1 Inters. Com. Rep. 823]. Nevertheless, the provision was held to be unconstitutional and void, as applied to a railroad company transporting intoxicating liquors into the state from another *state, upon the ground that the[430
state "cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other states of the Union in order to effect its end, however desirable such a regulation might be." 125 U. S. 493 [31: 709, 1 Inters. Com. Rep. 823]. The court took pains to distinguish the case from *Peirce* v. *New Hampshire*, above cited, and distinctly reserved the expression of any opinion upon the question whether the state had the right to regulate or prohibit the sale of the liquor by the importer in unbroken packages after it had been brought within the state. 125 U. S. 479, 499, 500 [31: 705, 712, 1 Inters. Com. Rep. 823].

But in *Leisy* v. *Hardin*, two years later, that question was distinctly presented for decision; and it was decided that the provision of the statutes of Iowa, prohibiting the sale of any intoxicating liquors, otherwise than for pharmaceutical, medicinal, chemical, or sacramental purposes, and under a druggist's license from a county court of the state, was, as applied to a sale by the importer, and in the original packages, unbroken and unopened, for such liquors manufactured in and brought from another state, unconstitutional and void, as repugnant to the grant by the Constitution to Congress of the power to regulate interstate commerce. The majority of the court, in its opinion, delivered by the present Chief Justice, April 23, 1890, treated *Peirce* v. *New Hampshire* as overruled, and stated its own conclusions as follows: "The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit,

but import into Iowa beer, which they sell in original packages, as described. Under our decision in *Bowman* v. *Chicago & Northwestern Railway Co.* they had the right to import this beer into that state, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the state. Up to that point of time, we hold that, in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or nonresident importer." And it was said in that opinion that "the responsibility is upon Congress, so far as the regulation **431**]*of interstate commerce is concerned, to remove the restriction upon the state in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action." 135 U. S. 123, 124 [34: 137, 138, 3 Inters. Com. Rep. 36].

Thereupon Congress immediately interposed, and by explicit legislation unequivocally manifested its purpose that no silence on its part should give rise to the presumption that it intended that either the transportation of intoxicating liquors from one state into another, or their sale in the latter state, even in the packages in which they had been brought, should be free, and beyond the reach of the police power of the state.

On May 14, 1890, Mr. Wilson, of Iowa, reported to the Senate, from the committee on the judiciary, a bill, which, as amended upon his motion on May 29, was passed August 8, 1890, enacting that "all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaiuing therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Congressional Record, 51st Congress, 1st sess. pt. 5, p. 4642; pt. 6, p. 5430; Act of August 8, 1890, chap. 728 (26 Stat. at L. 313).

Soon after the passage of this act of Congress, the question of its constitutionality and effect was brought before this court in *Rahrer's Case* [*Wilkerson* v. *Rahrer*], 140 U. S. 545 [35: 572]. Intoxicating liquors, which had been sent, before the passage of this act, by their owners in Missouri to Rahrer in Kansas to be sold by him on their account, were, after the passage of the act, sold by him in Kansas as the agent of the consignors and in original packages. This court unanimously held that Rahrer was liable to be prosecuted for such a sale under statutes of the state of Kansas, passed in 1889, which made no distinction between imported and domestic liquors.

432] *The chief justice, in delivering the opinion of the majority of the court, said: "Congress has now spoken and declared that imported liquors or liquids shall, upon arrival in a state, fall within the category of domestic articles of similar nature." 140 U. S. 560 [35: 576]. The grant by the Constitution to Congress of the power to regulate interstate commerce, said the Chief Justice, "furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In so doing, Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the state, or to adopt state laws. . . No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which devests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so." 140 U. S. 561, 562 [35: 576, 577]. "Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction. . . . This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the state to pass, but which could not operate upon articles occupying a certain situation until the passage of the act of Congress. That act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a re enactment of the state law was required before it could have the effect upon imported which it had always had upon domestic property. Jurisdiction attached, not in virtue of the law of Congress, but because the effect of the latter was to place the property where jurisdiction could attach." 140 U. S. 564, 565 [35: 578].

*The necessary effect of that decision[**433** is that the police power of each state includes the regulation of the transportation, as well as the sale, of all intoxicating liquors within its territory, except so far as affected by the grant by the Constitution to Congress of the power over interstate and foreign commerce; and that, so far as Congress manifests its intention that the interests of such commerce do not require its exemption from the exercise of the police power of the state, this power is unrestricted.

The opinions heretofore delivered in this court upon the effect of the act of Congress of 1890, although they do not decide, clearly imply, that the "arrival in such state," contemplated and intended by the act, is an arrival within the territorial limits and jurisdiction of the state. In *Rahrer's Case*, the Chief Justice, in the passage already quoted, said that Congress by this act has declared that "imported liquors or liquids shall, upon arrival in a state, fall within the category of domestic articles of a similar nature," and has allowed "imported property to fall at once upon arrival within

the local jurisdiction." 140 U. S. 560, 564 [35: 576, 578]. The natural meaning of these expressions is that imported liquors, upon arrival within the jurisdiction of the state, become at once subject to its jurisdiction. And in *Scott* v. *Donald* (No. 1), 165 U. S. 58 [41: 632], the phrase used in the opinion of the majority of the court was "upon arrival in a state," and in the dissenting opinion, "upon their arrival within the state," without a suggestion in either opinion that the two phrases were not exactly synonymous, or that any "arrival within the state" was not an "arrival in the state." 165 U. S. 99, 102 [41: 645, 646].

The case at bar directly presents the question of the meaning of the words "upon arrival in such state," as used by Congress in this act.

Chief Justice Marshall, when discussing the general meaning of the words "arrival," and "to arrive," said: "'To arrive' is a neuter verb, which, when applied to an object moving from place to place, designates the fact of 'coming to' or 'reaching' one place from another, or of coming to or reaching a place by traveling, or moving towards it. If the place he **434**]*designated, then the object which reaches that place has arrived at it. A person who is coming to Richmond has arrived when he enters the city. But it is not necessary to the correctness of this term, that the place at which the traveler arrives should be his ultimate destination, or the end of his journey. A person going from Richmond to Norfolk, by water, arrives within Hampton Roads when he reaches that place; or, if he diverges from the direct course, he arrives in Petersburg, when he enters that town. This is, I believe, the universal understanding of the term." *The Patriot*, 1 Brock. 407, 411, 412.

If, as Chief Justice Marshall declared, it is the universal understanding of the term that it designates the fact of "coming to" or "reaching" a place, by traveling or moving towards it, and does not require that the place at which the traveler arrives should be his ultimate destination, and consequently that a traveler arrives in a city or town when he enters that city or town, it would seem to follow that "arrival in the state" is complete when the person or merchandise in question enters the state.

That such is the meaning of the word "arrival," as used in the act of Congress now in question, appears to us to be confirmed by the whole scope and by the obvious purpose of the act.

The act declares and enacts that all intoxicating liquors "transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory," be subject to the effect and operation of its laws enacted in the exercise of its police powers, to the same extent and in the same manner as though they had been produced in it, "and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The act, in terms, includes all intoxicating liquors "transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein." If it be assumed that the words, "for use, consumption, sale, or storage therein," are not restricted to the next preceding clause, "or remaining therein," but also extend back to the earlier clause, *"transported into any state or territory,"[**435** still the effect of the words is to cover all intoxicating liquors, transported into or remaining in the state for any possible purpose, except that of being transported through the state to another state or country. All such liquors are "upon arrival in such state" to be subject to the operation and effect of the laws enacted by the state "in the exercise of its police powers," to the same extent and in the same manner as if the liquors had been produced within its limits. And it is expressly provided that intoxicating liquors shall not be exempt from the exercise of the police powers of the state, "by reason of being introduced therein in original packages or otherwise." The phrases "transported into any state," "upon arrival in such state," and "introduced therein," would seem to have been used as substantially equivalent.

The act makes no mention of arrival at a specific destination or place in the state. Its whole object, as appears upon its face, as well as from the circumstances which led to its enactment, is not to define when a particular voyage or transit shall be considered at an end; but to assure to the state, throughout its territorial jurisdiction, the full exercise of its police powers over the subject of intoxicating liquors. And we find nothing in the act to indicate an intention on the part of Congress that the mere fact that intoxicating liquors, brought by a common carrier into the state, have not reached their ultimate destination in the state, or been delivered to the consignee, shall exempt them, after coming within the territorial limits of the state, from the exercise of its police powers.

By the statute of the state of Iowa, under which Rhodes was prosecuted, "if any express company, railway company, or any agent or person in the employ of any express company, or of any common carrier, or any person in the employ of any common carrier, or if any other person shall transport or convey between points, or from one place to another within this state, for any other person or persons or corporation, any intoxicating liquors, without first having been furnished with a certificate from and under the seal of the county auditor of *the county to which said liquor is to be [**436** transported or is consigned for transportation, or within which it is to be conveyed from place to place; certifying that the consignee or person to whom said liquor is to be transported, conveyed, or delivered is authorized to sell such intoxicating liquors in such county," the company, agent, or person so offending shall, upon conviction, be fined in the sum of $100 for each offense; and "the offense herein defined shall be held to be complete, and shall be held to have been committed in any county of the state, through or to which said intoxicating liquors are transported, or in which the same is unloaded for transportation, or in which said liquors are conveyed from place to place or delivered." But it is provided that "the defendant may show as a defense hereunder

by preponderance of evidence that the character and circumstances of the shipment and its contents were unknown to him." McClain's Code of Iowa, § 2410. And it was held by the supreme court of the state that, in order to support the conviction of Rhodes, it must appear that, when doing the act complained of, he knew that the box in question contained intoxicating liquor.

The material facts, as appearing by the record, and stated in the opinion of the supreme court of Iowa, reported 90 Iowa, 496 [24 L. R. A. 245], were as follows:

The intoxicating liquor, which Rhodes has been adjudged guilty of transporting or conveying from one place to another within the state of Iowa, in violation of the statute of the state, was a jug of whisky, contained and hidden in a wooden box about a cubic foot in size, marked "W. H.," represented to contain groceries, delivered at Dallas in the state of Illinois, by a company doing business at that place, to the Chicago, Burlington, & Quincy Railway Company, and consigned to one William Horn at Brighton, in the state of Iowa; and was carried, under a through waybill, by that railway company over its road to Burlington in the state of Iowa, and was there transferred to the Burlington & Western Railway Company, whose road was wholly within the state of Iowa, and was carried by this company to Brighton. Upon its arrival at Brighton, it was delivered by the trainmen upon
437] *the platform of this company's depot; and immediately afterwards Rhodes, the company's station agent at Brighton, complying with the directions of his employer, carried the box from the platform into the freight room of the depot building, where, on the same day, it was seized by a constable on a search warrant, being then held by the company for payment of the unpaid freight and for delivery to the consignee. Neither Rhodes nor the company held a permit for the transportation or sale of intoxicating liquors, or a certificate from the county auditor that the consignee was authorized to sell such liquors.

Rhodes testified that before the arrival of the box a mail carrier told him he was looking for a box from Dallas for William Hown, and said it was likely to be marked "W. H.," and would contain alcohol or whisky; that he told the mail carrier he had not received a box of that description; that the box arrived the next day; and that he supposed, perhaps, this was the box the mail carrier told him would come. The supreme court of Iowa was of opinion that this testimony clearly showed that Rhodes knew that the box contained intoxicating liquors; and its conclusion upon this question of fact is not reviewable by this court. *Doncer* v. *Richards*, 151 U. S. 658 [38: 305]; *Egan* v. *Hart*, 165 U. S. 188 [41: 680]; *Turner* v. *New York*, 168 U. S. 90, 95 [42: 392, 394].

Nor does the conclusion of that court, that Rhodes, by moving the box from the depot platform to the freight house, only a few feet off, transported or conveyed the box from one place to another within the state, within the meaning of the statute of Iowa, present any question of law which this court is authorized to review, except so far as the statute, thus construed, may deprive him of a right under the Constitution and laws of the United States.

The intoxicating liquor in question was brought by rail under a through waybill from Dallas in the state of Illinois to Burlington and Brighton in the state of Iowa. It was carried by the Chicago, Burlington, & Quincy Railway Company (whose road ran from Illinois into Iowa) to Burlington, and was there delivered to the Burlington & Western *Railway (whose road was wholly in the[438 state of Iowa) and was carried by this company to Brighton, and was there delivered by its servants upon the platform of its freight station. Taking into consideration that so much of the transportation as was performed by an interstate railroad company had been accomplished, and that the remainder of the transportation was by an Iowa corporation and wholly within the state of Iowa, and had been so far completed as to land the intoxicating liquor upon the soil of Iowa, we are of opinion that there had been an "arrival in such state," so as to subject the liquor to the exercise of the police powers of the state of Iowa, within the letter and the spirit of the act of Congress.

S. W. VANCE *et al.*, *Appts.*,
v.
W. A. VANDERCOOK COMPANY (No. 1).

(See S. C. Reporter's ed. 438-468.)

Act of August 8, 1890—state law, when valid—police power—sale of intoxicating liquor—exclusive right of state officers—right to ship liquor into another state—unconstitutional provisions — discrimination — unconstitutional regulations—state control—inspection law—requirement of sample.

1. Under the act of August 8, 1890, the restrictions and regulations of state laws become operative on the original package of intoxicating liquors

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NOTE. *As to interstate commerce; regulation of; power of Congress; how far exclusive,*—see note to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

As to power of Congress to regulate Commerce, see notes to Gibbons v. Ogden, 6: 23; and Brown v. Maryland, 6: 678.

As to what liquors are within statutory restrictions as to the sale of "spirituous, vinous, fermented, and other intoxicating liquors;" alcohol; spirituous liquors; spirituous as distinguished from fermented liquors; mixed drinks; bitters; wine; ale, beer, and other fermented liquors; cider; presumptions; judicial notice; as to lager beer; other liquors; questions for jury; mixed incons matters,—see note to Lemly v. State (Miss.) 20 L. R. A. 645.

As to right of state to prohibit manufacture and sale of spirituous liquors; imported liquors; statutes against selling; special licenses; pharmacists; remedies against illegal sale; action for damages; transportation prohibited,—see note to State v. Creeden (Iowa) 7 L. R. A. 235.

As to liquor laws of Pennsylvania construed, see note to Venn v. Creaton (Pa.) 9 L. R. A. 814.

As to police power of states as to intoxicating liquors; license laws constitutional, local laws; local option laws; special taxation of traffic,—see note to Traqueser v. Gray (Md.) 9 L. R. A. 780.

As to inspection of liquor records, see note to *Re* Caswell (R. I.) 27 L. R. A. 82, 85.

imported into a state before the sale thereof, and therefore such packages cannot be sold if the state law forbids the sale, or can be only so sold in the manner and form prescribed by the state regulations.

2. A state law cannot be void because in excess of state authority, when it is but the execution of a power lawfully vested in the legislature of the state to forbid the sale of liquors in the original packages.

3. From the fact that a state law permits the sale of liquor subject to particular restrictions and only upon enumerated conditions, it does not follow that the law is not a manifestation of the police power of the state.

4. The act of Congress of August 8, 1890, subjects the sale of original packages of intoxicating liquors to state laws which restrict or regulate such sales, as well as to laws which forbid them.

5. The right of persons in one state to ship liquor into another state to a resident for his own use is derived from the Constitution of the United States and does not rest on the grant of the state law.

6. Giving to state officers the exclusive right to purchase all the intoxicating liquors to be sold in the state does not make a state law regulating such sales inherently discriminatory and therefore unconstitutional, on the ground that the officers have an arbitrary discretion in determining where and from whom they will purchase liquors.

7. The fact that the provisions omitted from a new law had been before its enactment declared to be unconstitutional affords a conclusive demonstration of their inconsistency with the new law.

8. Authorizing the use by a resident of wine or liquor made by him for such purpose does not make an unconstitutional discrimination.

9. The provisions of the South Carolina act of March 5, 1897, compelling a resident of the state who desires to order intoxicating liquors from another state for his own use, first to communicate his purpose to a state chemist, and depriving any non-resident of the right to ship into the state any intoxicating liquors unless previous authority is obtained from state officers,—are unconstitutional.

10. The right of a citizen to carry on interstate commerce is conferred by the Constitution of the United States, and its exercise depends solely upon the will of the person engaged therein, and cannot be in advance controlled or limited by the state in any department of its government.

11. An inspection law must not substantially hamper or burden the constitutional right, on the one hand, to make, and, on the other hand, to receive, an interstate shipment.

12. A requirement that a sample shall be sent in advance for inspection before intoxicating liquors are brought into the state cannot be supported as an inspection law; but such a law must, at least, provide for some inspection of the article imported.

[No. 514.]

Argued March 9, 10, 1898. Decided May 9, 1898.

APPEAL from a decree of the Circuit Court of the United States for the District of South Carolina in a suit in equity in which the W. A. Vandercook Company was plaintiff and S. W. Vance *et al.* defendants, restraining defendants from interfering with plaintiff in the shipment of its liquors and wines to residents of the state of South Carolina, on their orders, and from interfering with plaintiff in shipping its products from California into South Carolina to its agents there for the purpose of selling the same in original packages. *Affirmed* as to that part of the decree restraining defendant from seizing such property shipped from California to South Carolina on the orders of residents of the latter state, *and reversed* so far as it restrains the state officers from levying upon such property shipped into the state to agents for the purpose of being sold in original packages, etc.

See same case below, 80 Fed. Rep. 791

Statement by Mr. Justice **White:**

The bill below was filed by the appellee, a corporation created by the laws of California and a citizen of that state. It alleged, in substance, that the corporation was the owner of large vineyards in California, from which it produced well-known qualities of pure wines and brandies and other liquors; that through its traveling agent, a citizen of the state of Virginia, it took orders from certain residents of the state of South Carolina residing in the city of Charleston, to deliver to each of them in Charleston certain original packages of wines and brandies, the products of the vineyards of the complainant; that in consequence of said orders seventy-three original packages for the customers aforesaid were shipped *in [**440** one car, by a contract for continuous interstate carriage from San Francisco to Charleston; that under a law of South Carolina, known as the dispensary law, certain officers of the state of South Carolina had seized the packages of liquor above described and prevented the delivery thereof, and openly avowed their intention to continue to levy upon any packages of liquor shipped into the state of South Carolina in violation of the law of the state. The bill moreover alleged another shipment of the same character and a like seizure. The bill then averred as follows:

"And your orator further shows that your orator intends in the course of its said business, as aforesaid, further and in addition to said shipments so ordered by its said customers in advance, as aforesaid, to ship also from San Francisco, California, to its agent in the state of South Carolina, and to store and warehouse in the state of South Carolina, and to sell in the state of South Carolina, in the original unbroken packages as imported, as aforesaid, to the residents and citizens of the state of South Carolina, its wines and other liquors, products of its vineyards, as aforesaid, for the lawful use and consumption of the said residents and citizens of the state of South Carolina in the due and lawful exercise of your orator's right of importation of such wines, etc., products of its vineyards, into the state of South Carolina in lawful intercourse, trade, and commerce with the citizens and residents of the state of South Carolina, under the Constitution and laws of the United States, all of which shipments, as aforesaid, the defendants and other persons claiming to act as state constables and officials threaten to seize, take, and carry away, detain, convert, and sell, to the manifest wrong, damage, and injury of your orator and its trade and business, as aforesaid.

"And your orator further shows that by and under the terms, principle, policy, and opera-

tion of the said dispensary law of the state of South Carolina, as aforesaid, approved March 6, 1896, and amended March 5, 1897, all wines, beers, ales, alcoholic, spirituous, and other intoxicating liquors are subjects of lawful manufacture, barter, sale, export, and import in the state of South Carolina, and have been, are be-
441] ing, *and will continue to be, lawfully used and consumed as a beverage by the citizens and residents of the state of South Carolina."

Averring the avowed purpose of the state officers to continue to seize all liquors thereafter shipped by the complainant into the state to residents therein or for sale in original packages, the bill proceeded to charge that the state law upon which the officers relied was void, because repugnant to the Constitution of the United States. That to prevent the continuing wrong which would necessarily arise from the conduct of the state officers and to avoid a multiplicity of suits, a writ of injunction was necessary restraining the state officers from interfering with complainant in its shipment of its products to residents of the state on their orders, and also enjoining the state officers from interfering with the complainant in shipping its products from the state of California into the state of South Carolina to its agents there for the purpose of selling the same in original packages, the provisions of the South Carolina law to the contrary notwithstanding. This mere outline of the averments of the bill suffices to convey an understanding of the controversy which the record presents. A restraining order was granted as prayed for against the designated state officers, and after due pleadings and proceedings this restraining order was perpetuated, and a final decree was entered in favor of the complainant in accordance with the prayer of the bill.

Mr. **William A. Barber,** Attorney General of South Carolina, for appellants.

Mr. **J. P. Kennedy Bryan** for appellee.

Mr. Justice **White** delivered the opinion of the court:

In the two cases of *Scott* v. *Donald*, 165 U. S. 58, 107 [41:632, 647], the court was called upon to determine whether a law of the state of South Carolina, controlling the sale of intoxicating liquors within that state, was re-
442]pugnant to the Constitution of *the United States. In one of the cases it was held that the court below had jurisdiction to entertain a bill filed by the complainants to enjoin the execution of the law, as to liquors by them owned; while in both cases it was decided that, in so far as the law then in question forbade the sending from one state into South Carolina of intoxicating liquors for the use of the person to whom it was shipped, the statute was repugnant to the third clause of § 8 of the first article of the Constitution of the United States, commonly spoken of as the interstate commerce clause of the Constitution. It was besides decided that the law in question, which created state officers or agents with authority to buy liquor to be sold in the state, and which forbade the sale of any liquor except that so bought and offered for sale by the state officers or agents, was also in violation of the Constitution of the United States, because amounting to an unjust discrimination against liquors, the products of other states. The conclusion reached on this latter subject was predicated, not on the general theory which the statute put in practice, but on particular provisions of the law by which the discrimination was brought about. Whether a state could, without violating the Constitution of the United States, confer upon certain officers or agents the sole power to buy all liquors which were to be sold in the state, allowing no other liquor to be sold except that offered for sale by the designated officers or agents, was not decided. On the contrary, this question was reserved, for as the state law was found to violate the Constitution because of express discriminatory provisions which it contained, it became unnecessary to determine whether a law of that general character would be inherently repugnant to the Constitution of the United States. Referring to this last question, the court said, page 101 [41:646]:

"It was pressed on us, in the argument, that it is not competent for a state, in the exercise of its police power, to monopolize the traffic in intoxicating liquors, and thus put itself in competition with the citizens of other states. This phase of the subject is novel and interesting, but we do not think it necessary for us now to consider it. It is sufficient for the present cases to hold, as we do, that when a state recognizes the *manufacture, sale, and use [443 of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from, other states; that such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting state as against similar products of the other states."

The controversy which this record presents arises from a law of South Carolina, similar in its general scope to the one which was under review in *Scott* v. *Donald*. The statute before us, however, was enacted after the decision in *Scott* v. *Donald*, and changes in many important particulars the law which was passed on in that case. The statute, as changed, retains the general provisions conferring on the state officers or agents the exclusive right to buy all liquor which is to be sold in the state and to sell the same, but does not contain those clauses in the previous statute which were held to operate a discrimination. It, however, modifies the previous statute to the extent that it allows shipments of intoxicating liquors to be made from other states into the state of South Carolina to residents therein for their own use, but subjects the exercise of this right to designated regulations and restrictions. Despite these differences, it is asserted that the present law is repugnant to the Constitution of the United States for the following reasons: First, because, although the features in the prior act which were held to be discriminatory have been eliminated from this act, nevertheless there are, it is asserted, other provisions in the present act which on their face amount to a discrimination, and therefore render the act void. Second, because, as the act as at present drawn created state officers and confers upon them the power to buy all the liquor which is to be sold in the state, and forbids the sale

of any other liquor by any other person, it is therefore in violation of the Constitution of the United States to the extent that it seeks to control or forbid the sale in original packages of all liquor shipped into South Carolina from other states. And this controversy presents for consideration the question which was reserved in *Scott* v. *Donald*. Third, because, although the amended statute recognizes
444] the right of residents *of other states to ship intoxicating liquors to the residents of South Carolina, and their right to receive the same for their own use, it, in reality, it is asserted, denies such right, since its exercise is subjected to conditions which hamper and frustrate the same to such a degree that they are equivalent to a denial of the right itself. The first two contentions go to the whole statute, and therefore, if well taken, render it void as an entirety. The third is narrower in its purport, since it only assails as unconstitutional the particular restrictions which the statute imposes upon the right of the residents of another state to ship into South Carolina, and of the residents of that state to receive, liquor for their own use. We therefore, at the outset, dispose of the first two contentions before approaching the third.

In the inception it is necessary to bear in mind a few elementary propositions which are so entirely concluded by the previous adjudications of this court that they need only to be briefly recapitulated.

(*a*) Beyond dispute the respective states have plenary power to regulate the sale of intoxicating liquors within their borders, and the scope and extent of such regulations depend solely on the judgment of the law-making power of the states, provided always, they do not transcend the limits of state authority by invading rights which are secured by the Constitution of the United States, and provided further, that the regulations as adopted do not operate a discrimination against the rights of residents or citizens of other states of the Union.

(*b*) Equally well established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and hence, that a state law which denies such a right, or substantially interferes or hampers the same, is in conflict with the Constitution of the United States.

(*c*) It is also certain that the settled doctrine is that the power to ship merchandise from one
445] state into another *carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any state regulation to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the Constitution, until by a sale in the original package they have been commingled with the general mass of property in the state.

This last proposition, however, whilst generically true, is no longer applicable to intoxicating liquors, since Congress, in the exercise of its lawful authority, has recognized the power of the several states to control the incidental right of sale in the original packages, of intoxicating liquor shipped into one state from another, so as to enable the states to prevent the exercise by the receiver of the accessory right of selling intoxicating liquors in the original packages except in conformity to lawful state regulations. In other words, by virtue of the act of Congress the receiver of intoxicating liquors in one state, sent from another, can no longer assert a right to sell in defiance of the state law in the original packages, because Congress has recognized to the contrary. The act of Congress referred to was approved August 8, 1890, and is entitled "An Act to Limit the Effect of the Regulations of Commerce between the Several States and with Foreign Countries in Certain Cases." It read as follows:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." 26 Stat. at L. 313, chap. 728.

The scope and effect of this act of Congress have been settled. *Re Rahrer* [*Wilkerson* v. *Rahrer*], 140 U. S. 545 [35:572]; *Rhodes* v. *The State of Iowa*, 170 U. S. 412 [*ante*, 1088].

In the first of these cases the constitutional power of Congress to pass the enactment in question was upheld, and the *purpose of [446
Congress in adopting it was declared to have been to allow state laws to operate on liquor shipped into one state from another, so as to prevent the sale in the original package in violation of state laws. In the second case the same view was taken of the statute, and although it was decided that the power of the state did not attach to the intoxicating liquor when in course of transit and until receipt and delivery, it was yet reiterated that the obvious and plain meaning of the act of Congress was to allow the state laws to attach to intoxicating liquors received by interstate commerce shipments before sale in the original package, and therefore at such a time as to prevent such sale if made unlawful by the state law.

The claim that the state statute is unconstitutional because it deprives of the right to sell imported liquor in the original packages rests therefore on the assumption that the state law is a regulation of interstate commerce, because it forbids the doing of an act which, in consequence of the permissive grant resulting from the act of Congress, the state had undoubtedly the lawful power to do. Indeed, the entire argument by which it is endeavored to maintain the contention arises from excluding from view the change as to the sale of intoxicating liquor arising from the act of Congress; that is, it rests on the fallacious assumption that the state is without power to forbid the sale of intoxicating liquors in original packages despite the act of Congress, while in fact, as a result of that act, the restrictions and regulations of state laws become operative on the original package

before the sale thereof, and therefore such packages cannot be sold if the state law forbids the sale, or can be only so sold in the manner and form prescribed by the state regulations. In view of the self-evident misconception upon which the argument proceeds, it becomes unnecessary to review the many decisions of this court cited in support of the proposition relied upon. Their authority is unquestioned, but their irrelevancy is equally obvious. They all relate to and illustrate various aspects of the principle that the right to send merchandise from one state to another carries with it as an in-
447] cident the power of *the one by whom they are received to sell them in the original package, even although so doing may be contrary to a state law. None of them have the remotest hearing on the exception to this general rule springing from the act of Congress. The right of the state to forbid the sale of liquors in the original packages being clear, it results that a state law cannot be void because in excess of state authority, when it is but the execution of a power lawfully vested in the legislature of the state. This reasoning would dispose of the case, but for the contention that the act of Congress in question has no hearing on the controversy, and indeed that in this case the power of the state to control the sale of intoxicants in the original package must he determined just as if the act of Congress had never been passed.

Congress, it is argued, hy the act in question has submitted merchandise in original packages only to the control of state laws "enacted in the exercise of its police powers." As the state law here in question does not forbid, but, on the contrary, authorizes, the sale of intoxicants within the state, hence it is not a police law, therefore not enacted in the exercise of the police power of the state, and consequently does not operate upon the sale of original packages within the state. But the premise upon which these arguments rest is purely arbitrary and imaginary. From the fact that the state law permits the sale of liquor subject to particular restrictions and only upon enumerated conditions, it does not follow that the law is not a manifestation of the police power of the state. The plain purpose of the act of Congress having been to allow state regulations to operate upon the sale of original packages of intoxicants coming from other states, it would destroy its obvious meaning to construe it as permitting the state laws to attach to and control the sale only in case the states absolutely forbade sales of liquor, and not to apply in case the states determined to restrict or regulate the same.

The confusion of thought which is involved in the proposition to which we have just referred is embodied in the principle upon which the court below [80 Fed. Rep. 791] mainly rested its conclusion. That is, "if all alcoholic
448] liquors, by whomsoever held, *are declared contraband, they cease to belong to commerce, and are within the jurisdiction of the police power. But so long as their manufacture, purchase, or sale, or their use as a beverage in any form or by any person, are recognized, they belong to commerce, and are without the domain of the police power." But this restricts the police power to the mere right to forbid, and denies any and all authority to regulate or restrict. The manifest purpose of the act of Congress was to subject original packages to the regulations and restraints imposed by the state law. If the purpose of the act had been to allow the state law to govern the sale of the original package only where the sales of all liquor were forbidden, this object could have found ready expression, whilst, on the contrary, the entire context of the act manifests the purpose of Congress to give to the respective states full legislative authority, both for the purpose of prohibition as well as for that of regulation and restriction with reference to the sale in original packages of intoxicating liquors brought in from other states.

Nor is the claim well founded that it was decided in *Scott* v. *Donald* that the provisions of the act of Congress of 1890 do not apply in any state by whose laws the sale of liquor is not absolutely forbidden, that is to say, that the right exists to sell original packages in violation of the state laws wherever they do not prohibit liquor from being sold under any circumstances. The language in *Scott* v. *Donald*, which it is asserted establishes this doctrine, is as follows (p. 100 [41: 645]):

"It [the South Carolina law then considered] is not a law purporting to forbid the importation, manufacture, sale, and use of intoxicating liquors as articles detrimental to the welfare of the state and to the health of the inhabitants, and hence it is not within the scope and operation of the act of Congress of August, 1890."

Separated from its context these words might have the significance sought to be attached to them, but when elucidated by a reference to what immediately preceded them, and that which immediately followed, it is obvious that they refer to the matter which was being considered, that is, a state law which did not forbid the sale, hut, on the contrary, allowed it, *under conditions of ex [449
press discrimination against the products of other states. Immediately following the passage cited is this language:

"That law [the act of Congress] was not intended to confer upon any state the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce. When that law provided that 'all fermented, distilled, or intoxicating liquors transported into any state or territory, remaining therein for use, consumption, sale, or storage therein, should, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and should not be exempt therefrom by reason of being introduced therein in original packages or otherwise,' evidently equality or uniformity of treatment under state laws was intended. The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the

manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the state cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."

Having found that the law under consideration expressly discriminated against the products of other states, the question which arose for decision was whether the act of Congress allowed such a law to operate on the original package and it became therefore not necessary to decide what would be the rule where discrimination did not exist. The conclusion expressed on that branch of the case was this and nothing more, that although the act of Congress authorizes a state law to attach to an original package so as to prevent its sale, it did not contemplate and sanction the operation of a **450**] state law which *injuriously discriminated against the products of other states, and which, in consequence of such discrimination, was not a police law in the correct sense of those words. It would lead to an impossible conclusion to treat the sentences in *Scott* v. *Donald*, upon which reliance is placed, as having the significance attributed to them in argument, since, as we have already stated, the court expressly reserved the question of whether a state law which undertook to confer on its officers power to buy all liquor which was to be sold in the state would be constitutional if no express discriminatory provisions were found in it. It is obvious from even a casual reading of the opinion that the court did not pass on the very question which it expressly declared it abstained from deciding.

A more plausible but equally unsound proposition is involved in the contention that the state law in question is inherently discriminatory. The argument by which this is supported is as follows: The law gives to the state officers exclusive right to purchase all the liquor to be sold in the state. The authority to purchase includes the right on the part of buyer to determine from whom and where the purchase may be made. This gives the officers the opportunity, by exercising their right of purchase, to buy in one state to the detriment and exclusion of the products of every other state. As no other product, then, but that which the officers buy, can be sold in the state, it follows that although intoxicants will be freely offered for sale in the state, only liquors coming from the state in which the officer has purchased will be so sold, and the products of all other states will be excluded from sale and be thereby discriminated against. And whether these consequences will arise will depend solely upon the arbitrary discretion of the state officers in determining where and from whom the liquor that they propose to offer for sale will be by them purchased. This, it is argued, demonstrates the inherent discrimination arising from legislation which makes state officers the sole persons authorized to buy and sell liquor—a discrimination whose unjust consequences can only be avoided by recognizing the right of the residents of all other states to ship their products into the state and sell them in the original *packages. In the first place, to maintain[**451** this proposition, the presumption must be indulged in that the state officer, in purchasing as provided by the state statute, instead of buying fairly and in the best markets, affording an equal chance to all sellers and to every locality, will, on the contrary, so act as to discriminate against the products of one or more states in favor of those of others.

Such a presumption would be equally justified in case the state law authorized only residents to be licensed to sell liquor and restricted the number of such licenses. The persons so licensed, whether one or one hundred, would buy where they pleased the liquor they proposed to sell, and it would therefore be fully as cogent to argue that they might elect to buy in one place instead of another, and thus discriminate against the persons or places from where or from whom they did not buy. The argument will not be strengthened, even if it be conceded that there is a difference between licensing a number of persons to buy or sell and concentrating the power, to buy all the liquor to be sold, in the hands of state officers, and by further conceding that whether the statute discriminates against producers of other states is to be determined solely by the power to bring about the discrimination which might arise from its execution, and not by whether the power has been so carried out as to cause an actual discrimination. Under these concessions there would doubtless be force in the position taken, if the authority of the state officers to buy the liquor to be by them sold excluded the right of the residents of every other state to ship to the residents of South Carolina liquor for their own use, for in that event the products of the state for which no liquor was bought by the state officers would be wholly excluded from the state, although by the state law liquor could be sold therein by the state agents. But the weight of the contention is overcome when it is considered that the interstate commerce clause of the Constitution guarantees the right to ship merchandise from one state into another, and protects it until the termination of the shipment by delivery at the place of consignment, and this right is wholly unaffected by the act of Congress which allows state authority *to attach to the original package before[**452** sale but only after delivery. *Scott* v. *Donald*, and *Rhodes* v. *The State of Iowa*, *supra*. It follows that under the Constitution of the United States every resident of South Carolina is free to receive for his own use liquor from other states and that the inhibitions of a state statute do not operate to prevent liquors from other states from being shipped into such state, on the order of a resident for his use. This demonstrates the unsoundness of the contention that if state agents are the only ones authorized to buy liquor for sale in a state, and they select the liquor to be sold from particular states, the product of other states will be excluded. They cannot be excluded if they are free to come in for the use of any resident of South Carolina who may elect to order them for his use. The products of other states will be, of course, excluded from sale in the original packages in the state, but as the right of the state to prevent the sale in original pack-

ages of intoxicants coming from other states, in consequence of the state law forbidding the sale of any but certain liquor, attaches to the original packages from other states by virtue of the act of Congress, the inability to make such sales arises from a lawful state enactment. To hold the law unconstitutional because it prevents such sale in the original package would be to decide that the state law was unconstitutional because it exerted a power which the state had a lawful right to exercise. Indeed, the law of the state here under review does not purport to forbid the shipment into the state from other states of intoxicating liquors for the use of a resident, and if it did so, it would upon principle and under the ruling in *Scott* v. *Donald*, to that extent be in conflict with the Constitution of the United States. It is argued that the foregoing considerations are inapplicable since the state law now before us, whilst it recognizes the right of residents of other states to ship liquor into South Carolina for the use of residents therein, attaches to the exercise of that right such restrictions as virtually destroy it.

But the right of persons in one state to ship liquor into another state to a resident for his own use is derived from the Constitution of the United States, and does not rest on the 453]*grant of the state law. Either the conditions attached by the state law unlawfully restrain the right or they do not. If they do—and we shall hereafter examine this contention—then they are void. If they do not, then there is no lawful ground of complaint on the subject.

We are thus brought to examine whether the regulations imposed by the state law on the right of the residents of other states to ship into the state of South Carolina alcoholic liquor to the residents of that state when ordered by them for their use, are so onerous and hurdensome in their nature as to substantially impair the right; that is, whether they so hamper and restrict the exercise of the right as to materially interfere with or, in effect, prevent its enjoyment.

Before, however, approaching this question, we briefly dispose of two other contentions. It is said that the law now before us is expressly discriminatory, since it really contains the provisions found in the previous statute, and which were held in *Scott* v. *Donald* to be repugnant to the Constitution of the United States. This argument is predicated on the following proposition: The law now before us was passed subsequent to the decision in *Scott* v. *Donald*, holding that the discriminatory clauses in the previous act were void, and it entirely omits them. Its repealing clause, however, only repeals laws inconsistent therewith, and the argument is, that as the provisions found in the previous law, and which were declared unconstitutional by this court, are not inconsistent with the present law, therefore they continue to exist, and the present law must be interpreted as if they were written in it. The error of the argument is so self evident as to require only a passing notice. The very fact that the omitted provisions had been, before the enactment of the new law, declared to be unconstitutional, affords a conclusive demonstration of their inconsistency with the present law. In addition, the fact that the present law has omitted the provisions which had been declared unconstitutional excludes the supposition that it was the intention of the new law, by silence on the subject, to perpetuate and re enact the void provisions. It is, moreover, contended that there is an express discrimination found in the present statute, which was not referred to in *Scott* v. *Donald*, 454[* the provision in question being one which authorizes the use by a resident of South Carolina of wine or liquor made by him for such purpose. The context of the entire statute conclusively demonstrates that the right thus given in an exceptional and limited case in no way relieves alcoholic liquors made by a citizen of South Carolina for his own use from the restrictions imposed by the statute as to the sale of all other liquors, and this, therefore, leaves liquor made by a resident for his own use under the control of the general regulations which the statute creates, and this completely answers the contention.

The right recognized by the state in residents of another state to ship into South Carolina to a resident of that state liquor for his own use is regulated by the statute as follows:

"Any person resident in this state intending to import for personal use and consumption any spirituous, malt, vinous, fermented, brewed, or other liquor, containing alcohol, from any other state or foreign country, shall first certify to the chemist of South Carolina College the quantity and kind of liquor proposed to be imported, together with the name and place of business of the person, firm, or corporation from whom it is desired to purchase, accompanying such certificate with the statement that the proposed consignor has been requested to forward a sample of such liquor to the said chemist at Columbia, South Carolina. Upon the receipt of said sample, the said chemist shall immediately proceed to test the same, and if it he found to be pure and free from any poisonous, hurtful, or deleterious matters, he shall issue a certificate to that effect, stating therein the name of the proposed consignor and consignee, and the quantity and kind of liquor proposed to be imported thereunder, which certificate shall be dated and forwarded by said chemist, post paid, to the proposed consignor at his place of business. The said consignor shall cause such certificate to he attached to the package containing the liquor when it is shipped in this state, and no package bearing such certificate shall be liable to seizure or confiscation; *hut any package[455 of spirituous, malt, vinous, fermented, brewed, or other liquid or liquor containing alcohol imported into this state without such certificate, or any package containing liquor other than described in the certificate therein attached, or any package shipped by or to any person or persons not named in such certificate, shall be seized and confiscated as provided in this act. Any certificate obtained from the chemist as herein provided shall be used within sixty days after the date of its issue, and shall be invalid thereafter. It shall be unlawful to use said certificates for more than one importation."

The regulation, then, compels the resident of the state who desires to order for his own use, to first communicate his purpose to a state chemist. It moreover deprives any nonresi-

dent of the right to ship by means of interstate commerce any liquor into South Carolina unless previous authority is obtained from the officers of the state of South Carolina. On the face of these regulations, it is clear that they subject the constitutional right of the nonresident to ship into the state and of the resident in the state to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The right of the citizen of another state to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the state of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the Constitution of the United States; it exists wholly independent of the will of either the lawmaking or the executive power of the state; it takes its origin outside of the state of South Carolina, and finds its support in the Constitution of the United States. Whether or not it may be exercised depends solely upon the will of the person making the shipment, and cannot be in advance controlled or limited by the action of the state in any department of its government. As the law directs that a sample of the liquor proposed to be shipped shall be sent to the state officer in advance of the shipment, and as a prerequisite for obtaining permission to make a **456**]*subsequent shipment, it is claimed in argument that this law is an inspection law passed for the purpose of guaranteeing the purity of the product to be shipped into the state for the use of a resident therein, and therefore it is but a valid manifestation of the police power of the state exerted for the purposes of inspection only. But it is obvious that this argument is unsound, as the inspection of a sample sent in advance is not in the slightest degree an inspection of the goods subsequently shipped into the state. The sample may be one thing and the merchandise which thereafter comes in another. It is hence beyond reason to say that the law provides for an inspection of the goods shipped into the state from other states, when in fact it exacts no inspection whatever. Conceding, without deciding, the power of the state where it has placed the control of the sale of all liquor within the state in charge of its own officers to provide for an inspection of liquors shipped into a state by residents of other states for use by residents within the state, it is clear that such a law, to be valid, must not substantially hamper or burden the constitutional right on the one hand to make and on the other to receive such shipment. A law of this nature must at least provide for some inspection of the article to justify its being an inspection law. The power of the state to inspect an article protected by the guaranties of the Constitution, because intended only for use and which cannot be sold, is in the nature of things restrained by limitations arising from the constitutional provisions of a more restricted nature than would be the power to inspect articles intended for sale within the state. The greater harm and abuse which might arise in the latter case suggests a wider power than is incident to the other.

It follows from the foregoing that the decree below rendered was well founded in so far as it restrained the defendants from seizing the property shipped into the state of South Carolina from the state of California by the complainant for the residents of the state of South Carolina on the orders of such residents for their own use, because said shipments had not been made in compliance with the regulations *of the law of South Carolina. But it [**457** further follows that the decree below was wrong in so far as it restrained the state officers from levying upon the property of the complainant shipped into the state to agents of complainant for the purpose of being stored and sold therein in original packages, and from interfering with such sales. *These conclusions require that the judgment below be affirmed in part and reversed in part.* This renders it necessary to remand the case to the court below with instructions to enter a decree setting aside the injunction and dismissing the bill to the extent above indicated, and perpetuating the injunction only in so far as is above pointed out, the whole in accordance with the views herein above expressed.

And it is so ordered.

Mr. Justice **Shiras** dissenting in part, with whom the Chief Justice and Mr. Justice **McKenna** concur:

In the opinion and judgment of the court, in so far as they affirm the decree of the circuit court restraining the state officers from seizing property shipped into the state of South Carolina from the state of California by the complainant to residents of South Carolina on their order for their own use, I fully concur. But the reasons that lead me to so concur constrain me to withhold my assent from that portion of said opinion and judgment which reverses the decree below, in respect that it restrained such officers from levying upon and confiscating property of the complainant shipped into the state to agents for the purpose of being stored and sold therein in original packages.

In the few observations I shall submit it will be assumed as well settled that before the passage of the act of August 8, 1890, known as the Wilson act, it was not within the power of any state to forbid the importation of wines and liquors from foreign countries or other states, nor their sale in the original packages, nor to subject such sale to discriminatory taxes or regulations. *Walling* v. *Michigan*, 116 U. S. 446 [29: 691]; *Bowman* v. *Chicago & N. W. Railway Co.* 125 U. S. 507 [31: 715, 1 Inters. Com. Rep. 823]; *Leisy* v. *Hardin*, 135 U S. 100 [34: 128, 3 Inters. Com. Rep. 36]; *Lyng* v. *Michigan*, 135 U. S. 161 [32: 150, 3 Inters. Com. Rep. 143].

*The case before us, therefore, turns [**458** upon the proper construction and application of that statute.

Since its passage it has been considered by this court in two cases, and the conclusions therein reached will now be pointed out.

In the case of *Re Rahrer* [*Wilkerson* v. *Rahrer*], 140 U S. 545 [35: 572], the question for adjudication was the validity of a constitutional provision of the state of Kansas, which provided that "the manufacture and sale of

intoxicating liquors shall be forever prohibited in this state, except for medical, scientific, and mechanical purposes," and of certain statutes of that state which declared that "any person or persons who shall manufacture, sell, or barter any spirituous, malt, vinous, fermented, or other intoxicating liquors shall be guilty of a misdemeanor, and punished as hereinafter provided: Provided, however, That such liquor may be sold for medical, scientific, and mechanical purposes, as provided in this act;" and it was held that, in the case of a person arrested by the state authorities for selling imported liquor on the 9th day of August, 1890, contrary to the law of the state which forbade the sale, the act of Congress which had gone into effect on the 8th day of August, 1890, providing that imported liquors should be subject to the operation and effect of the state laws to the same extent and in the same manner as though the liquors had been produced in the state, justified the imposition of the penalties of the state law.

It will be perceived that this was a case in which the state laws wholly prohibited the manufacture and sale of intoxicating liquors as articles of ordinary consumption and merchandise; and this court said, referring to the Wilson bill, "Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition. . . . It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

459] *In *Scott* v. *Donald*, 165 U. S. 58 [41: 632], was presented the question of the validity of the act of the general assembly of South Carolina, approved January 2, 1895, generally known as the State Dispensary Law. That legislation did not forbid the use, manufacture, or sale of intoxicating liquors, but enacted an elaborate system of regulation, whereby no wines or liquors, except domestic wines, should be manufactured or sold except through the agency of a state board of control, a commissioner and certain county dispensers, and after an inspection by a state chemist.

Packages of wines and liquors made in other states and imported by a resident of the state for his own use, and in the possession of railroad companies which, as common carriers, had brought the packages within the state, were seized and confiscated as contraband by constables of the state.

This court, after considering certain provisions of the act which relieved the sale of domestic wines from restrictions imposed upon imported wines, and also those which created a system of inspection, said—

"It is not a law purporting to forbid the importation, manufacture, sale, and use of intoxicating liquors, as articles detrimental to the welfare of the state and to the health of the inhabitants, and hence it is not within the scope and operation of the act of Congress of August 8, 1890. That law was not intended to confer upon any state the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce. 'When that law provided that all fermented, distilled, or intoxicating liquors, transported into any state or territory, remaining therein for use, consumption, sale, or storage therein, should, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and should not be exempt therefrom by reason of being introduced therein in original packages or otherwise,' evidently equality or uniformity of treatment under state laws was intended. *The question whether a given state law [**460** is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the state cannot, under the congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful. . . . It is sufficient for the present cases to hold, as we do, that when a state recognizes the manufacture, sale and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other states; that such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting state as against similar products of the other states."

Accordingly the conclusion reached was that, as respected residents of the state of South Carolina desiring to import foreign wines and liquors for their own use, the act in question in that case was void.

In the present case, which arose under a later statute, this court follows *Scott* v. *Donald* in holding that the act is invalid as sought to be applied to the importation by residents of the state, for their own use, but holds that the residents of other states cannot import wines and liquors and sell them in the original packages, although such articles are recognized by the state as lawful subjects of manufacture, use, and sale.

The court concedes that it is not within the power of the state, even when re enforced by the act of Congress of August, 1890, to deprive a resident of one state of the right to ship liquor into another state to a resident for his own use, "because such right is derived from the Constitution of the United States, and does not rest on the grant of the state law," yet holds that the act of South Carolina can validly declare that all liquors imported from other states, for the purpose of sale in original packages, can be seized and confiscated, the common *carrier therein subjected to fine, and [**461** the consignee, if he removes the liquors from the depot or pays freight or express charges thereon, subjected to a fine of $500, and to an imprisonment of twelve months at hard labor in the state penitentiary.

Such legislation manifestly forbids interstate commerce in articles whose manufacture and sale within the state are permitted, and, in

view of the previous decisions of this court, can only be defended by invoking the provisions of the act of Congress. This seems to be the theory upon which the opinion of the majority proceeds, as shown by the following statement: "The claim that the state statute is unconstitutional because it deprives of the right to sell imported liquor in the original packages rests therefore on the assumption that the state law is a regulation of interstate commerce, because it forbids the doing of an act which, in consequence of the permissive grant resulting from the act of Congress, the state had undoubtedly the lawful power to do. Indeed the entire argument by which it is endeavored to maintain the contention arises from excluding from view the change as to the sale of intoxicating liquor arising from the act of Congress."

But, if the act of Congress can validly operate to authorize the state to forbid the sale in original packages of imported articles of the same kind with those whose manufacture and sale within the state are permitted and regulated, I am unable to see why it cannot also operate to authorize the state to forbid the importation for use. One concede that it is competent for Congress to abdicate its control over interstate commerce in articles whose manufacture, sale, and use are lawful within the state, and to confer upon the state the power to forbid importation of such articles for *sale*, it must follow that it would equally be competent for Congress to authorize the state to forbid the importation of such articles for *use*. And, conversely, if it be not competent for Congress to authorize a state to forbid the importation for use of articles whose use in domestic commerce is lawful, so it would not be competent for Congress to authorize a state to forbid the importation for sale of articles whose sale in domestic commerce is lawful.

462]*I am altogether unwilling to attribute to Congress an intention to abandon the protection of interstate commerce in articles of food or drink, whether for personal use or for sale, whether similar articles are treated by a state as lawful subjects of domestic commerce. If such were the intention of Congress in the act of August, 1890, I should be compelled to regard such legislation as invalid. The control and regulation of foreign and interstate commerce are among the most important powers possessed by the national legislature, and, as has often been said by this court, were among the most potent causes which led to the establishment of the Constitution. The conceded purpose of protecting commerce from hostile action between the states would be defeated if Congress could withdraw from the exercise of its powers in such matters, and turn them over to the legislatures of the states.

But there is no reason to suppose that Congress intended any such act of abdication in the present instance. Reasonable meaning and effect can be given to the act of August 8, 1890, without giving it such a construction as would raise the serious question of its constitutionality.

Its plain meaning is that if, in the bona fide exercise of its police power, the state finds it necessary to declare that all fermented, distilled, or other intoxicating liquor is of a detrimental character, and that its use and consumption are against the morals, good health, and safety of its inhabitants, it may legislate, on that assumption, with equal effect as to such liquor, whether imported or of domestic manufacture. Such legislation may take the form of total prohibition, and be valid, as we held in *Re Rahrer* [*Wilkerson* v. *Rahrer*], 140 U. S. 545 [35: 572], under a statute of the state of Kansas. The articles prohibited were thus taken out of the sphere of commerce, whether interstate or domestic, and no discriminations were thereby made or attempted adversely to the persons or property of other states.

Or the legislation may seek to regulate the sale of intoxicating liquors, and if the regulations are reasonable, in the fair exercise of the police power, applicable alike to articles imported and to those made in the state, their validity may well be sustained, without infringing upon the Federal control of interstate commerce.

*Thus if the state of South Carolina, in [**463** stead of prohibiting the sale of imported liquors in imported packages altogether and confiscating them to her own use, had seen fit to prescribe reasonable regulations of the sale—such, for instance, as forbade its taking place on Sunday, or in the night-time, or to be drunk on the premises, or to be made to minors, and if such regulations likewise applied to the sale of domestic liquors—then the case might be deemed to fall within the proper exercise of the police power.

Far different is the nature of the provisions of these acts of South Carolina. They do not pretend to forbid either the use, manufacture, or sale of intoxicating liquors. They do not provide a reasonable system of inspection, calculated to protect the public from imposition. They do not seek to subject the sale to reasonable regulations, but do contain provisions which, if carried into effect, would wholly prevent the makers and owners of wines and liquors made in foreign countries or in the other states from exercising the *right* of free commerce under the Constitution. At the most, it can only be said that such persons can be permitted to send their property into South Carolina for sale if the state authorities think fit to allow them that *privilege*.

Nor, even if allowed this restricted privilege of importation, are they permitted to sell their property for what it is worth in the market, because they can sell only through a county dispenser, who is compelled to give a bond in the penal sum of $3,000, conditioned that he will not sell intoxicating liquors at a price other than that fixed by the state board of control. This provision not merely hampers the citizens of the other states in their exercise of the right of trade and commerce, but deprives the residents of the state of the right to purchase articles of a commercial character at prices regulated by open competition.

It may be said that such a construction of the act of Congress would deprive it of actual operation—that the power and laws of the states would be left just as they were before its passage. But not infrequently courts have said that there are statutes that are merely declaratory of the law as it* previously existed. [**464** And such declaratory statutes are not without

value when they serve to elucidate existing law, or to remove uncertainty when decisions or prior enactments are supposed to conflict. The act in question may well be regarded as a legislative attempt to define the boundaries between Federal and state powers in respect to interstate commerce in intoxicating liquors; and this court, in the cases of *Re Rahrer* [*Wilkerson* v. *Rahrer*] and of *Scott* v. *Donald*, and in the recent case of *Rhodes* v. *Iowa*, 170 U. S. 412 [*ante*, 1088], has so treated it. But it cannot, as I think, be either interpreted or sustained as an effort to transfer the regulative control in matters of interstate commeree from the nation to the states.

The opinion of the majority, as I read it, fails to recognize frequent and well considered decisions of this court, and seems to justify a brief reference to them.

In *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419 [6: 678], an act of the state of Maryland imposing penalties on all importers of foreign articles or commodities, including wines and spirituous liquors, if they should sell the same without having first procured a license from the state authorities, was held repugnant to the provision of the Constitution of the United States which declares that "no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may he absolutely necessary for executing its inspection laws," and to that which declares that Congress shall have power "to regulate commerce with foreign nations, among the several states, and with the Indian tribes." In the course of his reasoning Chief Justice Marshall said: "The object [of the Constitution] would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country; the one would be a necessary consequence of the other. No goods would be imported, if none could be sold."

And again: "If this power [to regulate commerce] reaches the interior of a state, and may [466] be there exercised, it must *be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse—one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. . . . The power claimed by the state is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence."

Walling v. *Michigan*, 116 U. S. 446 [29: 691], was a case wherein was brought into question the validity of the statute of the state of Michigan, which imposed a tax or duty on persons who, not having their principal place of business within the state, engaged in the business of selling liquors, to be shipped into the state; and it was held that a discriminating tax imposed by a state, operating to the disadvantage of products of other states when introduced into the first-mentioned state, is, in effect, a regulation of commeree between the states, and as such a usurpation of the power conferred by the Constitution upon Congress. Replying to the contention on behalf of the statute, that it was passed in the exercise of the police power of the state, Mr. Justice Bradley said: "This would be a perfect justification of the act if it did not discriminate against the citizens and products of other states in a matter of commerce between the states, and thus usurp one of the prerogatives of the national legislature. The police power cannot be set up to control the inhibitions of the Federal *Constitution, or the powers of the [466] United States government created thereby."

In *Robbins* v. *Shelby County Taxing District*, 130 U. S. 489 [30: 694], it was held that interstate commerce cannot be taxed at all by a state, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state.

A law of the state of Iowa forbidding any common carrier from bringing within that state, for any person or corporation, any intoxicating liquors from any other state or territory, without a permit from the state authorities, was held void in the case of *Bowman* v. *Chicago & Northwestern R. R. Co.* 125 U. S. 465 [31: 700, 1 Inters. Com. Rep. 831], and the court, through Mr. Justice Matthews, said: "Here is the limit between the sovereign power of the state and the Federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States. . . . The same process of legislation and reasoning adopted by the state and its courts could bring within the police power any article of consumption that a state might wish to exclude, whether it belonged to that which was drunk, or to food and clothing."

By an act passed in 1871, the legislative assembly of the District of Columbia subjected persons selling imported goods without a license to penalties, and this act was held invalid in *Stoutenburg* v. *Hennick*, 129 U. S. 141 [32: 637], and in disposing of the contention that Congress must be regarded as having authorized or adopted this legislation, Mr. Chief Justice Fuller said: "In our judgment Congress, for the reasons given, could not have delegated the power to enact the third clause of the twenty-first section of the act of assembly, construed to include business agents such as Hennick, and there is nothing in this record to justify the assumption that it endeavored to do so, for the powers granted to the District were municipal merely, and although by several

acts Congress repealed or modified parts of this particular by-law, these parts were separably operative and such as were within the scope of municipal action, so that this congres-
467] sional legislation cannot *be resorted to as ratifying the objectionable clause, irrespective of the inability to ratify that which could not have been originally authorized."

In *Minnesota* v. *Barber*, 136 U. S. 313 (34: 455, 3 Inters. Com. Rep. 190], this court held invalid a statute of the state of Minnesota, which made it a matter of fine and imprisonment for anyone to sell any fresh beef, mutton, lamb, or pork which had not been inspected in a manner prescribed in the act. Referring to the contention, in behalf of the state, that there was no discrimination against the products and business of other states for the reason that the statute requiring an inspection of animals on the hoof, as a condition for the privilege of selling in the state, was applicable alike to all owners of such animals, whether citizens of Minnesota or citizens of other states, this court, through Mr. Justice Harlan, said: "To this we answer that a statute may, upon its face, apply equally to the people of all the states, and yet be a regulation of interstate commerce which a state may not establish. A burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute. . . . The people of Minnesota have as much right to protection against the enactments of that state, interfering with the freedom of commerce among the states, as have the people of other states. Although this statute is not avowedly, or in terms, directed against the bringing into Minnesota of the products of other states, its necessary effect is to burden or obstruct commerce with other states, as involved in the transportation into that state, for the purpose of sale there, of all fresh beef, veal, mutton, lamb, or pork, however free from disease may have been the animals from which it was taken."

We did not find it necessary in *Scott* v. *Donald* to pass upon the validity of a scheme whereby a state should seek to establish itself as a trader in articles of commerce, and to punish as criminals all persons who should attempt to deal in such articles. Nor has the court seen fit to discuss that question in the present case. It may be that, if confined to ar-
568] ticles of *state production, such a scheme might not be open to objections on Federal grounds. But where a state proposes to create a monopoly in articles which its own legislation recognizes as proper subjects of manufacture, sale, and use, and where those articles are a part of international and interstate commerce, it is, I submit, too plain to call for argument that such an attempt does not comport with that freedom of trade and commerce, to preserve which is one of the most important purposes of our Federal system.

If these views are sound, then the acts of South Carolina in question, in so far as they seek to prevent citizens of that state from importing for their own use wines and liquors, and to arbitrarily forbid, and not by reasonable regulations control, sales of such articles when imported, are void as an unconstitutional interference with interstate commerce.

I think the decree of the circuit court should be affirmed.

I am authorized to state that the Chief Justice and Mr. Justice McKenna concur in the views of this opinion.

S. W. VANCE *et al.*, *Plffs. in Err.*,
v.
W. A. VANDERCOOK COMPANY (No. 2).

(See S. C. Reporter's ed. 468-481.)

Jurisdictional amount—damages for detention of property—damages recoverable.

1. In determining from the face of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that such jurisdiction cannot attach if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, although the damages be laid in the declaration at a larger sum.
2. Damages for the detention of property, recoverable in an action of claim and delivery, in South Carolina, must have respect to the property and to a direct injury arising from the detention, and cannot include destruction of business.
3. An allegation of damage in the sum of $10,000 is not sufficient to give jurisdiction to a Federal court in an action for claim and delivery of property alleged to be of the value of $1,000, when the damages recoverable are only for the actual damage caused by the detention, which is confined to interest on the value of the property.

[No. 515.]

Argued March 9, 10, 1898. Decided May 9, 1898.

IN ERROR to the Circuit Court of the United States for the District of South Carolina to review a judgment for the recovery of the possession of certain packages of wines and brandies, the property of the plaintiff, or the sum of $1,000 the value of said property, and for the further sum of $1,000 damages in an action brought by the W. A. Vandercook Company, plaintiff, against S. W. Vance *et al.*, for the wrongful seizure at a railroad depot in the city of Charleston, South Carolina, of packages of wines and brandies, the property of the plaintiff. *Reversed*, and cause remanded with directions to dismiss the case for want of jurisdiction.

Statement by Mr. Justice White:

*The appellee, a corporation of the state[469 of California, began this action against the present plaintiffs in error, citizens of the state of South Carolina, averring the alleged wrongful seizure by the defendants Bahr and Scott, at a

NOTE.—*Jurisdiction of United States Supreme Court dependent on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy,*—see note to Gordon v. Ogden, 7: 592.

railroad depot in the city of Charleston, South Carolina, of packages of wines and brandies, the property of the plaintiff. It was averred that at the time of the seizure the liquors were in the custody of a common carrier, under a shipment from San Francisco to the agent of the plaintiff at Charleston, who was to make delivery of each package to a particular individual, who, prior to the shipment, had given an order for the same. Averring that the defendant Vance had, subsequently to the seizure, and with knowledge of its wrongful nature, received said packages into his custody, it was further alleged that demand had been made for the return of the property seized, that it was still detained, and that plaintiff was entitled to the immediate possession thereof. Judgment was prayed against the defendants for the recovery of possession of the packages or their value, alleged to be $1,000, in case delivery could not be had, and for damages in the sum of $10,000. There was an allegation of special damage, to wit: "That by said malicious trespass of said defendants and their continuation in the wrongful detention of said sixty-eight packages of wine the plaintiff has been greatly injured in its lawful trade and business with the citizens and residents of the state of South Carolina to its great hurt and damage in the breaking up of such trade and commerce." Itemized lists of the packages were attached as exhibits to the complaint.

It was also alleged that the defendants claimed that the acts by them done were performed under the authority of a law of South Carolina designated as the dispensary law, and it was charged that the statute was void, because in conflict with the Constitution of the United States. It was moreover averred that the forcible seizure and carrying away of the packages and the detention thereof were done "knowingly, wrongfully, wilfully, and maliciously, with intent to oppress and humiliate and intimidate this plaintiff, and make it afraid [**470**] *to rely upon the Constitution and laws of the United States, and the judicial power thereof, for its protection in those rights, privileges, and immunities secured to the plaintiff by the Constitution and laws of the United States." It was also alleged that the defendants, by "the said malicious trespass and wrongful detainer," intended to deter and intimidate plaintiff and others from asserting their rights under the Constitution of the United States.

S. W. Vance filed a separate answer, while Bahr and Scott jointly answered. The respective answers set up that the court had no jurisdiction of the action; that the complaint did not state facts sufficient to constitute a cause of action; that by the provisions of the dispensary law of South Carolina, approved March 6, 1896, the action could not be maintained against the defendants, for the reason that the acts complained of were by them performed in the discharge of duties imposed upon the defendants by the said law; and, if the action was maintainable, that there was a misjoinder of causes of action, in that the plaintiff sued for the recovery of the possession of personal property, and also for exemplary damages for the commission of a trespass in taking the same. It was denied that the seizures and detentions complained of were made with the intent to injure or oppress the complainant, and it was also denied that the property was of the value alleged in the complaint, or that the plaintiff had been damaged in the sum claimed. It was further specially averred that the packages were seized and detained because the liquors contained therein had not been inspected as required by the provision of an amendment to the dispensary law, adopted in 1897, and because of a failure to have attached to each package a certificate of inspection as required by the statute.

By a stipulation in writing it was agreed that the issues of fact should be tried by the court without a jury. At the trial, as appears by a bill of exceptions allowed by the presiding judge, the court, on request of counsel for the defendant, passed upon the matters of law heretofore referred to and also upon several propositions of law relied on by the defendants, that is, that the dispensary law was not in conflict with the *Constitution of the [**471** United States and was a valid exercise of the police power of the state, particularly by reason of the provisions of the act of Congress of 1890, known as the Wilson act. Each of these propositions of law was decided adversely to the defendants, and an exception was noted.

The facts found by the court were: "That the property described in the complaint is the property of the plaintiff, and that the value thereof is the sum of one thousand dollars, and that the damages to the plaintiff from the detention of the said property by the defendants is the sum of one thousand dollars." And, as matter of law, the court found "that the plaintiff is entitled to judgment against the defendants for the recovery of the possession of the said property described in the complaint, or the sum of one thousand dollars—value of said property—in case delivery thereof cannot be had, and for the further sum of one thousand dollars damages." Judgment was entered in conformity with the findings. A writ of error having been allowed, the cause was brought to this court for review.

Mr. **William A. Barber,** Attorney General of South Carolina, for plaintiffs in error.

Mr. **J. P. Kennedy Bryan** for defendant in error.

Mr. Justice **White** delivered the opinion of the court:

Counsel for plaintiffs in error discuss in their brief the contentions that the circuit court erred in holding that it had jurisdiction of the action and that there was not a misjoinder of causes of action, and also assert that the court erred in refusing to hold that the dispensary law of South Carolina was a valid enactment.

We shall dispose of the case upon the jurisdictional question, as it is manifest that the amount of recovery to which the plaintiff was entitled, upon the construction put upon the complaint by its counsel and acted upon by the trial court, could not equal the sum of $2,000.

*In his brief, counsel for defendant [**472** in error says:

"It is clear that the complaint is a case for recovery of personal property and for damages for its detention. The allegations in the com-

plaint as to the wrongful taking of the property are not by way of stating a cause of action for malicious trespass, but, under the law of the state of South Carolina, are necessary as allegations of wrongful seizure, wrongful taking, and support an action for recovery of personal property and damages for detention, without a previous demand before the suit, and the court, by its judgment, so construed the complaint and gave judgment in conformity to the Code. . . . The circuit judge has treated the complaint as an ordinary action for recovery of personal property and for damages for its detention, and has found the title of the property in the plaintiff, and has found the *damages for detention*. He has found no other damages, he has found no damages for malicious taking, he has found no damages for malicious trespass, he has found only '*damages for detention*.' And those damages, as matter of fact, were testified to as being at least twelve hundred dollars. The circuit judge has found them to be one thousand dollars, and they are conclusive as matters of fact, and are the usual damages accompanying the successful plaintiff who recovers judgment against the defendants for recovery of possession of personal property and damages incident to wrongful detention. The defendants, therefore, have no possible cause of complaint."

In determining from the face of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even though the damages be laid in the declaration at a larger sum. *Barry* v. *Edmunds*, 116 U. S. 550, 560 [29:729, 732]. *Wilson* v. *Daniel*, 3 U. S. 3 Dall. 401, 407 [1: 655, 657].

As by § 914 of the Revised Statutes of the United States the practice, pleadings, and forms [473] and modes of proceedings *in actions at common law in a circuit court of the United States are required to conform, as near as may be, to those prevailing in the state court, and as by § 721 the laws of the several states are made rules of decision in trials at common law in the courts of the United States, in cases where they apply (*Bauserman* v. *Blunt*, 147 U. S. 648 [37:317]), we will examine the laws of South Carolina and the decisions of its courts, in order to ascertain the nature of the state statutory action to recover possession of personal property, and the rights of the parties thereunder.

The action of claim and delivery of personal property, under the Code of South Carolina, is one of the class of statutes referred to by Judge Cooley, in his treatise on Torts (note 2, p. 442), which permits the plaintiff in an action of replevin to proceed in it as in trover, and recover the value of the property in case the officer fails to find it to return to the plaintiff on the writ. The proceeding was introduced into the legislation of South Carolina by the Code of Procedure adopted in 1870 (14 S. C. Stat. at L. 423), which provided in § 269, p. 480, that, upon the making of an affidavit containing certain requisites and the giving of a bond, the plaintiff might obtain an immediate delivery of the property. By § 285, p. 484, it is provided that "in an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or if it have, and the defendant by the answer claim a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof; and may, at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property." In § 301, p. 488, it is provided: "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or the value thereof, in case a delivery cannot be had, and of damages for the detention." By § 300 it is provided that, "whenever damages are *recover- [474] able, the plaintiff may claim and recover, if he show himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action."

Prior to the Code, by a statute passed December 19, 1827, entitled "An Act to Alter the Law in Relation to the Action of Trover and for Other Purposes" (6 S. C. Stat. at L. 337), it was provided that upon the giving of a bond and the making of an affidavit by a plaintiff who intended to commence an action of trover for the conversion of any specific chattel, that the chattel belonged to the plaintiff and had been converted by the defendant, an order might issue requiring the defendant to enter into a bond with sufficient surety for the production of the chattel to satisfy the plaintiff's judgment in case he should recover against the defendant or defendants, and it was declared that such specific chattel should be liable to satisfy the plaintiff's judgment to the exclusion of other creditors. Under this act the surety might take the body of the defendant and keep him in custody until he gave the required security. *Poole* v. *Vernon*, 2 Hill, L. 667.

The measure of damages in South Carolina in an action of trover was early settled in that state. Thus, in 1792, in the case of *Buford* v. *Tanner*, 1 Bay, 273 [1 Am. Dec. 615], an action of trover to recover the value of several negroes and a horse, after proving the value of the horse, the plaintiff offered evidence of consequential damages sustained by the loss of his crop. The trial judge having refused to receive the evidence, the case came before the superior court on a motion for a new trial. Chief Justice Rutledge was of opinion that this kind of testimony might be allowed in some cases, and was for granting a new trial, but the court ruled otherwise, the following opinions being delivered (p. 273):

Waites, J.: "It is of great importance to keep different issues distinct, that the parties in one form of action may not be surprised by evidence which belongs to another. The evidence which the plaintiff wished to produce would have been admissible in trespass, but was, I think, properly rejected in this action. Where there has been an unlawful taking, either trespass or trover will lie; but if the party proceeds in trover *he waives the tort, ex- [475]

cept as it is evidence of a conversion, and can only have damages for the value of the property converted, and the use of it while in the defendant's possession. The real value of the property is not always the sole measure of damages; if the conversion of it is (or may reasonably be supposed to be) productive of any benefit to the defendant, the jury may give additional damages for it; as, where trover is brought for money in a bag, interest ought to be allowed, by way of damages for the detention; so, in this case, if the negroes had not been delivered, damages could be given for the labor of the negroes; for the use of money or negroes is a certain benefit to the party who converts them, and he ought to pay for it. But where he acquires no gain to himself by the conversion, it does not appear to me that he is answerable for any damages above the real value of the thing converted; if he was, he would be answering for a mere *delictum*, for which he is not liable in trover. By waiving the trespass in this action, which the plaintiff must do, he waives, I conceive, every kind of personal wrong which is unattended with any gain to the trespasser; he releases him from everything which death would release him from. If, for instance, the defendant had been dead at the time of bringing this suit, what could the plaintiff in any form of action have recovered from his executors? The same amount which he has now recovered, and no more; that is, the value of the horse taken, or damages for the use of the negroes while they were in the defendant's possession; but nothing for the loss of crop, which proceeded *ex delicto*, and produced no benefit to the defendant. For the same reason as this action is founded in property only, and no damages can be allowed for the mere *delictum*, I think the evidence offered was not admissible, and that the judge was right in refusing it. Bay, J., thought that as in an action of trover the tort was waived, all its consequences were relinquished with it. The very nature of the action supposed that the defendant came lawfully into possession; and, if so, no damage could or ought to be given till the true owner made his demand; from which time only damages **476**] ought to be calculated. And *where no specific demand was proved, then from the time of the commencement of the action: and relied on the case of *Cooper et al.* v. *Chitty et al.* 1 Burr. 31, where the nature of this action is particularly defined; also [*Fisher* v. *Prince*] 3 Burr. 1364, 1365; 2 Esp. 353."

In 1818, in the case of *Banks* v. *Hatton*, 1 Nott & M'C. 221, an action of trover to recover the value of three negroes, a verdict having been rendered for the plaintiff, a new trail was asked for, among other grounds, because the damages were excessive. In the course of the opinion of the appellate court granting the motion, Mr. Justice Colcock said on this branch of the case (p. 222):

"It is stated that the presiding judge instructed the jury that they were at liberty to give 'smart money' in estimating the damages. In the action of trover, the correct measure of damages is the value of the property and interest thereon; or if the action be for the conversion of negroes, the value of their *labor*, in addition to the value of the negroes. It is impossible to determine by what rule the jury have been governed, but from the amount of the verdict it is highly probable that they were influenced by the charge of the presiding judge, and I therefore think the defendant entitled to a new trial on this ground."

On a subsequent appeal from a new trial granted in the case, Mr. Justice Nott, with whom four justices concurred, said (Id. p. 223):

"Damages for the detention may be given, according to the nature of the thing converted or detained; as, for instance, for the use of money, the interest may be made the measure of damages, or the value of their labor, in the case of negroes. *Buford* v. *Fannen*, 1 Bay, 273 [1 Am. Dec. 615]. Sometimes the increased value may be added, as was decided in the case of *Kid and Mitchell*, in this court, *post* [1 Nott & M'C. 324, 9 Am. Dec. 702]. The defendant is not to be benefited by his own wrong, neither can the rights of the plaintiff be affected by the death or destruction of the property, after demand and refusal."

In *M'Dowell* ads. *Murdock*, 1 Nott & M'C. 237 [9 Am. Dec. 684], an action of trover for the value of two negroes, Mr. Justice Nott, in delivering *the opinion of the court, held [**477** that the defendant was entitled to a new trial because, among other grounds, of an erroneous instruction to the jury as to the rule of damages, and said (p. 240):

"It has lately been determined by this court, in several cases, that a jury cannot give *vindictive* damages in an action of *trover*. The *value* of the property, with such damages as must *necessarily* be supposed to flow from the *conversion*, is the only true measure. Such, for instance, as the *work* and *labor* of negroes; interest on the value of dead property, etc."

In 1853, in *Harley* v. *Platts*, 6 Rich. L. 310, an action of trover brought to recover the valve of four slaves, a new trial asked for on the ground of excessive damages was refused, it being held that the verdict was warranted by the evidence, under the rule allowing the jury to give the highest value up to the time of trial, with interest, or hire. Glover, J., delivering the opinion of the court, said (p. 318):

"In trover, the jury is not limited to find the mere value of the property at the time of conversion, but may find, as damages, the value at a subsequent time, at their discretion. 3 Steph. N. P. 2711. The jury may give the highest value up to the time of trial. *Kid* v. *Mitchell*, 1 Nott & M'C. 334 [9 Am. Dec. 702]. In *Burney* v. *Pledger*, 8 Rich. L. 191, Judge O'Neall says: 'That the plaintiff is entitled to recover for the value of the property at the time of the trial, with interest; or for the value of the property at the time of the trial, with hire from the conversion, as may be most beneficial.' And in *Rogers* v. *Randall*, 2 Speers, L. 38, it was held that the jury have a discretion between the highest and lowest estimates. Governed by these rules, so long and so repeatedly established, the evidence appears to have authorized the conclusion attained by the jury in this case."

That the decisions referred to are applicable under the Code was recognized in the case of *Sullivan* v. *Sullivan* (1883) 20 S. C. 509, an action of claim and delivery to recover the possession of certain notes with damages for their

detention, where it was held by the appellate court that, in addition to a recovery of the notes, the plaintiff was entitled to recover the
478] *amount they had diminished in value while in the hands of defendant. After quoting § 298 (formerly § 300) of the Code, which we have heretofore referred to, the court said (p. 512):

"The Code has made no material changes in the primary rights of parties, or in the causes of actions, nor has it given any new redress for wrongs perpetrated. It has only changed the mode by which such redress is reached and applied. The rights and remedies (using the term 'remedy' in the sense of 'redress' are still the same. . . . The action below was an action for the recovery of personal property and damages for its detention. It was an action in the nature of the old action of trover.' It will not be denied that in actions of that kind, under the former practice (as a general rule) damages for detention beyond the property itself could be and were uniformly recovered, such damages being measured by different rules, according to the character of the property and the circumstances of each case. See case of *M'Dowell* v. *Murdock*, 1 Nott & M'C. 237 [9 Am. Dec. 684], where the court said: 'It has lately been determined by this court, in several cases, that a jury cannot give vindictive damages in an action of trover. The value of the property, with such damages as must necessarily be supposed to flow from the conversion, is the true measure. Such, for instance, as the work and labor of negroes; interest on the value of dead property.' *Buford* v. *Fannen*, 1 Bay, 2d ed. 273 [1 Am. Dec. 615]; *Harley* v. *Platts*, 6 Rich L. 318; *Kid* v. *Mitchell*, 1 Nott & M'C. 338 [9 Am. Dec. 702]."

A recent decision construing the provisions of the action of claim and delivery of personal property is *Loeb* v. *Mann*, 39 S. C. 465, in which the defendant, a sheriff, was alleged to have wrongfully and unlawfully taken from the plaintiffs and to have unjustly detained from them certain liquors. Bond having been given, the goods were taken from the possession of the defendants and delivered to the plaintiffs. The appellate court, in the course of its opinion, held that the trial judge erred in permitting evidence of expenditures by the plaintiffs for hotel bills, railroad fare, and at-
479] torney's fees, and *declared that such damages were not recoverable for the *detention* of the property. The court said (p. 469):

"It is urged that this action of 'claim and delivery' is peculiar in this, that the law expressly gives to the prevailing party damages in addition to costs and disbursements. It is true that § 283 of the Code provides as follows: 'In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or if it have, and the defendant by his answer claims a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof; and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property,' etc. What damages? Why, surely such damages as 'may have been sustained by reason of the seizure and detention of the property itself; that is to say, by direct and proximate injury of the property in question, or in reducing its value; and not for the purpose of allowing a party to reimburse himself as to consequential losses alleged to have been sustained in the prosecution of the case, in respect to the speculative value of time lost, and the payment of the bills of railroads and hotels, lawyers' fees,' etc."

After reviewing authorities in support of the proposition that counsel fees were not allowable as damages for the detention of property, for the reason that they could not be said to be the *necessary* result of the act done by the defendant, the court said (p. 471):

"It is true that the decided cases do not seem to be as full and clear in reference to the other items of expenditures claimed here as damages; but we confess that in respect to damages we are unable to draw a distinction in principle between expenses incurred in paying lawyers' fees and in making a charge for the speculative loss of time and paying railroad and hotel bills, etc."

Under the decisions to which we have referred, it is evident *that, in the case at [480 bar, the measure of damages for the detention was interest on the value of the property from the time of the wrong complained of. This rule of damages has been held by this court to be the proper measure even in an action of trespass for a seizure of personal property where the facts connected with the seizure did not entitle the plaintiff to a recovery of exemplary damages. An action of this character was the case of *Conrad* v. *Pacific Insurance Co.* 31 U. S. 6 Pet. 262 [8: 392]. In the course of the opinion there delivered by Mr. Justice Story, the court held that the trial judge did not err in giving to the jury the following instruction:

"The general rule of damage is the value of the property taken, with interest from the time of the taking down to the trial. This is generally considered as the extent of the damages sustained, and this is deemed legal compensation with reference solely to the injury done to the property taken, and not to any collateral or consequential damages, resulting to the owner, by the trespass."

Indeed the same rule was in effect reiterated in *Watson* v. *Sutherland* (72 U. S. 5 Wall. 79 [18: 582]), where it was substantially held that "loss of trade, destruction of credit, and failure of business prospects" could not be recovered in an action at law where malice or bad faith was not an ingredient, because such damages were collateral or consequential as regards a seizure of personal property, and could only be recovered at law where the issue of bad faith was involved. In other words, that however at law such damages might be considered when the suit was based upon a malicious trespass they were not a proximate result of an injury to property caused by an illegal seizure thereof.

The courts of South Carolina, as we have seen, have held that in an action of trover *consequential* damages are not recoverable, and have also held that in the action of claim and delivery damages for the detention must have respect to the property and to a direct injury

arising from the detention. Destruction of business not being of the latter character, it follows that the special damages averred in the complaint were not recoverable.

481] *It results that the plaintiff's action was solely one for claim and delivery of property alleged to have been unlawfully detained and for damages for the detention thereof, that the amount of recovery depended first upon the alleged value of the property, which in the present case was $1,000, and such damages as it was by operation of law allowed to recover in the action in question. As, however, by way of damages in an action of this character, recovery was only allowable for the actual damage caused by the detention, and could not embrace a cause of damage which was not in legal contemplation the proximate result of the wrongful detention, and such recovery was confined, as we have seen, to interest on the value of the property, it results that there was nothing in the damages alleged in the petition and properly recoverable adequate, when added to the value of the property, to have conferred upon the court jurisdiction to have entertained a consideration of the suit. Upon the face of the complaint, therefore, the circuit court was without jurisdiction over the action, and it erred in deciding to the contrary.

The judgment of the Circuit Court of the United States for the District of South Carolina is reversed with costs, and the cause is remanded to that court with directions to dismiss the case for want of jurisdiction.

JOHN ANDERSEN, *Plff. in Err.*,
v.
UNITED STATES.

See S. C. Reporter's ed. 481-511.)

Indictment for murder on the high seas—when not demurrable—charge of shooting and drowning—quashing venire—striking out testimony—conduct of captain—evidence of provocation—general reputation—charge.

1. In an indictment for murder committed on the high seas an allegation that it was committed "on the high seas and within the jurisdiction of this court, and within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular state of the said United States, in and on board of a certain American vessel," is sufficient to show the locality of the offense.
2. An indictment for murder on the high seas is not demurrable for duplicity, uncertainty, or repugnance, because it charges the homicide to have been caused by shooting and drowning, on the ground that such means are inconsistent in themselves and not of the same species.
3. The charge of shooting and drowning a person need not be made in the alternative in separate counts of an indictment which charges that he was shot on a vessel and his body immediately thrown overboard.
4. Refusal to quash a venire because the jurors were not summoned for the trial of a particular case is not ground of error, where there does not appear to have been any irregularity in summoning and impaneling the jury, and no exception was taken to it as impaneled.
5. On a motion to strike out all testimony as to the condition of a vessel at the time of a casualty, after a witness who was not on board at that time, but who built and for some years sailed the vessel, has testified as to what could be seen from the wheel house under certain conditions, it is proper for the court to say that he has not testified to the condition of the vessel at the time of the casualty but that anything bearing that construction will be excluded from the jury, and that it is proper to give the general character and situation of the vessel.
6. Proof of the conduct of the captain of a vessel on previous occasions is not admissible on the trial of a person charged with killing the mate, when not so connected with the killing as to form part of the *res gestæ*, or having any legitimate tendency to justify, excuse, or mitigate the crime, although he killed the captain and mate both on the same day.
7. Evidence of provocation or injuries received on previous occasions by the accused from the person whom he killed is inadmissible, when the crime was committed without any circumstances tending to make out self-defense or reduce the grade of the crime.
8. Evidence of the general reputation of the captain of a vessel is not admissible on a trial for murdering the mate shortly after the accused had killed the captain.
9. A charge to the jury that, if the defendant has committed a felonious homicide, of which they are the only judges, there is nothing before them that reduces it below the grade of murder, is proper in the absence of evidence to justify any verdict for any degree of the crime less than murder.

[No. 583.]

Argued April 11, 1898. Decided May 9, 1898.

IN ERROR to the Circuit Court of the United States for the Eastern District of Virginia to review a judgment of that court convicting John Andersen of the murder of William Wallace Saunders on an American vessel on the high seas, of which vessel Saunders was the mate and Andersen the cook. *Affirmed.*

Statement by Mr. Chief Justice **Fuller:**

Andersen was indicted in the circuit court of the United States for the eastern district of Virginia, for the murder of William Wallace Saunders, on an American vessel, on the high seas, of which vessel Saunders was the mate and Andersen the cook.

The indictment charged that Andersen—

"On the sixth day of August, in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, on the high seas and within the jurisdiction of this court and *within the admiralty and maritime juris [**483** diction of the said United States of America, and out of the jurisdiction of any particular state of the said United States of America, in and on board of a certain American vessel, the same being then and there a schooner called and named 'Olive Decker,' then and there belonging to a citizen or citizens of the said United States of America whose name or names is or are to the grand jurors aforesaid unknown, in and upon one William Wallace Saunders, sometimes called William Saunders, then and there being on board said vessel, did piratically, wilfully,

feloniously, and of his malice aforethought, make an assault, and that the said John Andersen, alias John Anderson, a certain pistol then and there charged with gunpowder and leaden bullets, which said pistol he, the said John Andersen, alias John Anderson, in his hand (but which hand is to the said jurors unknown) then and there had and held, then and there piratically, feloniously, wilfully, and of his malice aforethought did discharge and shoot off to, against, and upon the said William Wallace Saunders, sometimes called William Saunders, with intent him, the said William Wallace Saunders, sometimes called William Saunders, then and there to kill and murder, and that the said John Andersen, alias John Anderson, with the leaden bullets aforesaid out of the pistol by the said John Andersen, alias John Anderson, discharged and shot off as aforesaid, then, to wit: On the said sixth day of August, in the year of our Lord one thousand eight hundred and ninety-seven, and there, to wit: On the high seas as aforesaid, in and on board of the said American vessel, and within the admiralty and maritime juisdiction of the said United States of America and within the jurisdiction of this court, and out of the jurisdiction of any particular state of the United States of America, piratically, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound the said William Wallace Saunders, sometimes called William Saunders, in and upon the head of him, the said William Wallace Saunders, sometimes called William Saunders (and in and upon other parts of the body of him, the said William Wallace Saunders, some [484] times called William Saunders, *to the said jurors unknown), giving to him, the said William Wallace Saunders, sometimes called William Saunders, then and there, with the leaden bullets aforesaid, so as aforesaid discharged and shot off out of the pistol aforesaid by the said John Andersen, alias John Anderson, with the intent aforesaid, in and upon the head of him, the said William Wallace Saunders, sometimes called William Saunders (and in and upon other parts of the body of him, the said William Wallace Saunders, sometimes called William Saunders, to the said jurors unknown), several grievous, dangerous, and mortal wounds, and the said John Andersen, alias John Anderson, did then and there, to wit: At the time and place last above mentioned, him, the said William Wallace Saunders, sometimes called William Saunders, piratically, feloniously, wilfully, and of his malice aforethought cast and throw from and out of the said vessel into the sea, and plunge, sink, and drown him, the said William Wallace Saunders, sometimes called William Saunders, in the sea aforesaid, of which said mortal wounds, casting, throwing, plunging, sinking, and drowning, the said William Wallace Saunders sometimes called William Saunders, in and upon the high seas aforesaid, out of the jurisdiction of any particular state of the United States of America, then and there instantly died.

"And the grand jurors aforesaid, upon their oath aforesaid, do say that by reason of the casting and throwing of the said William Wallace Saunders, sometimes called William Saunders, in the sea as aforesaid, they cannot describe the said mortal wounds with greater particularity."

The case coming on before Goff, circuit judge, and Hughes, district judge, defendant "demurred to the said indictment on the ground that it does not specify the locality on the high seas where the alleged offense occurred, and for other reasons not assigned. Thereupon the United States joined in said demurrer as to the said cause so assigned and objected to the said demurrer being in any wise considered, for reasons not assigned. Whereupon, after argument, the court overruled the said demurrer for the cause assigned as aforesaid and admonished the accused that he must state any *other grounds of demurrer on [485 which he relied, as the court could not otherwise consider them. No other grounds being alleged by the accused, the said demurrer was overruled."

Defendant was duly and formally arraigned and pleaded not guilty; and then "moved to quash the writ of venire facias for the petit jury to be used in the trial of this particular case, on the ground that the said writ must show that said venire were summoned for the trial of this particular case, and not the general venire for offenses in general to be tried at this term of the circuit court of the United States for the eastern district of Virginia." This motion was overruled and defendant excepted.

A jury was thereupon duly impaneled and sworn and the trial proceeded with, and during its progress exceptions to the admission and exclusion of evidence and the giving and refusal of instructions were preserved by defendant. At the close of the government's case in chief, defendant's counsel moved the court to instruct the jury to bring in a verdict of "not guilty" on the ground that defendant was indicted for the murder of Saunders by drowning, whereas the evidence showed that he met his death by the discharge of a pistol. The court overruled the motion and defendant excepted. A verdict of guilty having been returned, defendant made successive motions for a new trial and in arrest of judgment, which were severally overruled, whereupon he was sentenced to be executed. This writ of error was then sued out, the cause docketed, and duly argued at the bar.

The bill of exceptions contained the following preliminary statement of uncontroverted facts:

"That the American three-masted schooner 'Olive Pecker' sailed from Boston, Massachusetts, on the 20th day of June, 1897, for Buenos Ayres, South America, with a cargo of lumber under and on deck. She had on board a captain, J. W. Whitman; a mate, William Wallace Saunders, sometimes called William Saunders; an engineer of a donkey engine, William Horsburgh; a cook, *viz.*, the defendant, John Andersen, and four seamen, *viz.*, Martin Barstad, a native of Norway; John Lind, a native of Sweden; Juan de Dios *Barrial, [486 a native of Spain; and Andrew March, a native of Newfoundland; that the said 'Olive Pecker' was an American vessel, belonging to citizens of the United States; that the said vessel proceeded from Boston on her course

to her port of destination until the morning of August 6, 1897, when, on the high seas and about 100 or 150 miles off the Brazilian coast, between nine and ten o'clock on that morning, the captain, Whitman, was shot in his cabin, and shortly thereafter the mate was shot on the left hand side of the forecastle head and his body immediately thrown into the sea. The body of the captain was also thrown into the sea. Several hours thereafter the said vessel 'Olive Pecker' was burned, and the cook, engineer, and four seamen took to the sea in an open boat. Twenty-eight or thirty hours thereafter they reached the Brazilian coast, where, having spent the night on shore, they separated the next morning, the accused and John Lind going in a northerly direction and the other four going in a southerly direction. That the accused and Lind, within a few days, reached Bahia, in Brazil. Both shipped, the accused on a vessel called the 'Bernadotte,' bound for Pensacola, in the United States, and Lind on a Brazilian barkentine, bound for some point in Spain. The other four men, having the Spaniard as their spokesman, he being familiar with the language of the country, and not finding an American consul, made known to the Brazilian authorities what had transpired on the 'Olive Pecker,' with the request that telegrams be sent along the coast for the arrest of the accused, John Andersen. These four men, having secured passes on a vessel to Bahia, arrived there several days after the arrest of the accused, and were placed in charge of the American consul at that port. The accused handed to the American consul a statement in his own handwriting, purporting to be an account of the voyage of the 'Olive Pecker,' and also made to the American consul a sworn statement, as did also the other five men, which said statements were duly transmitted to the Department of State at Washington, and upon the call of defendant's counsel were produced for his use at the trial, but were not produced in evidence.

487] *"At the direction of the government at Washington, the American consul at Bahia kept the accused and the five men in custody at Bahia until the arrival at that port sometime in the month of September, 1897, of the United States man-of-war 'Lancaster,' when they were put on board of that vessel and brought into Hampton Roads, Virginia, in the eastern district of Virginia, that being the first district into which the accused was brought after the commission of the alleged offense; and the said accused, together with the five men, was turned over by the officers of the 'Lancaster' to the United States marshal on the 7th day of November, 1897, and were duly placed in confinement in the city jail at Norfolk, Virginia."

The evidence introduced on the trial was given in full, and included the testimony of the four seamen, Barstad, Lind, Barrial, and March, and the engineer Horsburgh, on behalf of the government, and that of the defendant on his own behalf. A considerable portion is set forth in the margin †

Mr. **George McIntosh** for plaintiff in error.

Messrs. **John K. Richards,** Solicitor General, and **William H. White** for defendant in error.

*Mr. Chief Justice **Fuller** delivered [**489** the opinion of the court:

1. The cause assigned in support of the demurrer to the indictment was that it did "not specify the locality on the *high seas [**490** where the alleged offense occurred." The objection was without merit. The indictment alleged the murder to have been committed "on the high seas and within the jurisdiction of this court, and within the admiralty and maritime *jurisdiction of the said United States of [**491** America, and out of the jurisdiction of any particular state of the said United States of America, in and on board of a certain American vessel." Nothing more was required to*show[**492** the locality of the offense. *St. Clair* v. *United States*, 154 U. S. 134, 144 [38: 936, 940]. But the point is now made that the indictment was demurrable because it charged the homicide to have been caused by shooting and drowning, which are means *contended to be incon- [**493** sistent in themselves and not of the same species. This ground of demurrer was not brought forward in the circuit court, although defendant was admonished that he must state all the grounds on which he relied. But, treating it *as open to consideration, we think the [**494** indictment was clearly sufficient as ruled in effect in *St. Clair's Case.*

In that case, defendant was charged with the murder of Fitzgerald on board the bark Hesper on the high seas, *by striking and beat- [**495** ing him with a weapon unknown, and thereby giving him "several grievous, dangerous, and mortal wounds," and then and there casting and throwing him from the vessel into the sea, and drowning him, "of which said *mortal [**496** wounds, casting, throwing, plunging, sinking, and drowning," Fitzgerald "then and there instantly died." The language used was much the same as that employed in *United States* v. *Holmes*, 18 U. S. 5 Wheat. 412 [5: 122]. The indictment was sustained *though the par- [**497** ticular objection under consideration was not commented on. The indictment in this case was evidently drawn from that, and charged that Andersen assaulted Saunders with a pistol with intent to kill him, by the *discharge of [**498** which he inflicted on him "several grievous, dangerous, and mortal wounds," and that he did "cast and throw from and out of the said vessel into the sea and plunge, sink, and drown him, the said William Wallace Saunders, sometimes called William Saunders, in the sea aforesaid, of which said mortal wounds, casting, throwing, plunging, sinking, *and[**499** drowning," Saunders "then and there instantly died." And it was further said, as in the indictment against St. Clair, that by reason of the casting and throwing of Saunders into the sea as aforesaid, the grand jurors "could not describe the said mortal wounds with greater particularity."

†Barstad, who was at the wheel when the mate was shot, testified:

"I last saw William Saunders, the mate of the said vessel, alive on the morning of August the 6th, 1897, on the left side of the forecastle head of that vessel. It was between nine and ten o'clock of that morning. He was shot at that time and place by John Andersen, the cook of the vessel and the

In *Commonwealth* v. *Webster*, 5 Cush. 295 [52 Am. Dec. 711], the first count charged an assault and a mortal wound by stabbing with a knife; the second by a blow on the head with a hammer; and the third, by striking, kicking, beating, and throwing on the ground. The fourth count charged that the defendant feloniously, wilfully, and of his malice aforethought, deprived the deceased of life "in some way and manner, and by some means, instruments, and weapons to the jurors unknown." The supreme judicial court of Massachusetts was unanimously of opinion that the latter was a good count. The court, speaking through Chief Justice Shaw, said: 'From the necessity of the case, we think it must be so, because cases may be imagined where the death is proved, and even where remains of the deceased are

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prisoner here. I saw him shoot him. I was at the wheel of the vessel in the wheelhouse, just aft of the after cabin.

"I heard a report of a shot in the captain's cabin, which was connected with the wheelhouse by the after companionway. Immediately after I saw John Andersen, the accused, come running up the after companionway and through the wheelhouse, with a pistol in each hand and one in his hip pocket. He ran up to John Lind, who was standing amidships by the rigging of the middle mast. He said something to Lind, but I did not hear what it was, I heard him sing out to the mate, Saunders, who was up on the cross-tree of the foremast, at work in the rigging, and say, 'Come down, Mr. Saunders.' The mate said, 'What do you want, steward?' In a little while the mate finished the job and started down the rigging. When about midway down, and when the cook Andersen was standing on top of the forward house, the mate started down and said, 'What you got in your hands, cook?' 'I got guns,' he says. 'Where you get them?' says the mate. 'Down in the cabin,' he says. The mate came down and stepped on the forecastle head, not on the forecastle house. Then Andersen fired a shot. The mate reeled and faced him, and said, 'For God's sake, don't shoot me, cook.' The cook fired another shot, and the mate kept on reeling; and the cook fired another one, and a third one when the mate fell, and he shot him once after he had fallen. Then the cook sung out to the men, who were in the forecastle, 'I am in charge of this vessel; I am next to the mate.' He sung out again, 'Won't you fellows come out?' They came out and I saw them throw the mate's body overboard. I was at the wheel all the time. Then he marched the whole gang aft and went down in the cabin and brought the captain up and threw him overboard. He then said, 'If any man like he can put me in irons.' He had two or three pistols, one in his hands then. He had said he was in charge of the vessel and had ordered the men to throw the mate and captain overboard. I was at the wheel all the time. Then he says, 'Boys, come down and have a drink.' He went down in the captain's cabin and handed a bottle of whisky, about two parts full. He gave each a drink and took one himself. Then he marched the whole gang up on deck, just outside the door of the wheelhouse, and said, 'You know all you men is guilty for helping me throw the bodies over the side.'

"The Spaniard told him to keep the vessel off, to clew up the gaff topsails and jibs, the outer jib, and make for port. The cook said, 'Damn; you want me to get hung.' We said, 'No, steward, we don't want you to get hung.' All the time he was armed. After a little he said to the Spaniard, 'You the only sensible man amongst the crowd; I want to speak to you.' Then he called John Lind afterwards and spoke to him. I don't know what he said. He ordered the men to do so and so. I left the wheel and went to the forecastle. The rest of the men came forward to get their clothes. He ordered us to get our best clothes, and no more; he said take no discharges, bank books, nothing. He ordered the men down in the booby hatch to get up a barrel addressed to the American consul at Buenos Ayres. Then he told me to go down in the galley to tap some paraffine oil. I said, 'No.' He says, 'You go,' and handed his pistol in my face. 'All right,' I says, 'steward.' I filled three buckets and passed them up, and Andrew March took it and threw it on the deck-load. He was standing there armed all the time. Then he, the cook, ordered me to take the wheel. I went. The first fire commenced at the booby hatch; the next was forward. The boat was lowered and provisions put in it. . . . It was twelve or one o'clock when we left the 'Olive Pecker.' No vessels were in sight which could have picked up the bodies of the mate and captain."

He then gave the particulars of the sail to the shore; the arrest; etc.

This witness further said that when Andersen called to Saunders to come down—

"The mate asked him, 'What do you want, steward?' He finished his job and hung the marlin spike around his neck and came down the rigging. The marlin spike had a half hitch on the point, which put the point upwards. That is the way sailors do it to keep the point from striking them as they go up and down the rigging.

"There was nothing to keep me from seeing the mate in the rigging and when he came down, and all along the vessel on her port side to where the shooting occurred. The sails were all swinging to starboard. The lumber was so piled on the deck that a man running along on it would run right on top of the forward house. John Andersen was standing on the top of the forward house when he shot the mate, and the mate was standing on the forecastle deck. The forecastle deck is about 3 feet lower than the top of the house where the cook was standing. The body of the mate was lying, when picked up, on the forecastle head, on the left side of the vessel."

On cross-examination he said: "I mean to tell the jury that five of us were intimidated by that one man, the cook—the cook with the pistols. He intimidated us so that when he ordered us to burn the ship we obeyed. He was following us up all the time. He ordered one to go there and another to go there, and another one there. We had to follow the man at the point of the pistol or else get killed We did what we were told to do through his pistol . . . When the mate came down out of the rigging, he asked the cook, 'What have you got in your hands, steward?' The steward said, 'I got guns.' The mate came down, stepped on the forecastle head, and John Andersen fired a shot. The marlin spike was not in the mate's hand, but was hanging around his neck with the point up. I am sure of that, though I was 150 feet away. I did not have a glass. The mate was standing with his hands at his side, with the marlin spike around his neck. He did not make any hostile demonstration towards the cook. He did not come at him to strike him. I am positive of that. I do not know the mate had threatened the cook's life."

Lind testified:

"I last saw mate William Saunders on the 6th of August of this year; he was killed that morning by John Andersen on the forecastle head, on the left or port side thereof. I saw Andersen just before the shooting of the mate that morning, coming up from the cabin through the after companion way and through the wheelhouse; I was standing amidships; he came up with a revolver in each hand; he came right up to me and asked me where the mate was, and said, 'I have killed the captain, and now the mate goes too.' The mate was then aloft, in the rigging of the foremast. I went then down on the lee or starboard side of the vessel to the forecastle house; I went and called the watch below in the forecastle house. I said, 'You better look out because the cook is on deck with revolvers.' As I was calling through the window I could not see on the left of the vessel. While I was calling to the men I heard a shot on the port side, on the forecastle head. I heard three or four shots, I don't know exactly know how many. I heard the steward call to the men to come out, for all of them to come up there. He was calling the men in the forecastle house. He said he wanted us to throw the body overboard. When I came up, all hands were there except the man at the wheel, Martin Barstad. The mate was lying on the forecastle head with his face downward. He had a marlin spike tied around his neck. A marlin spike is used for splicing ropes, an instrument that all sailors carry aloft when they go up to splice a rope; it is carried around the neck by a long lanyard and a half hitch on the point to keep it from sticking in his legs. We threw the body overboard. Then the cook told us to come aft and get the captain's body overboard. We went in the after cabin and found the captain sitting in his chair; sitting like this, sir, with his hands folded in his lap. He looked as if he was alive. I saw blood on the side of his head, on the left side. We were

discovered and identified, and yet they may afford no certain evidence of the form in which the death was occasioned; and then we think it is proper for the jury to say that it is by means to them unknown. . . . The rules of law require the grand jury to state their charge with as much certainty as the circumstances of the case will permit; and, if the circumstances will not permit a fuller and more precise statement of the mode in which the death is occasioned, this rule [illegible] forms to the rules of law." In [illegible] the indictment and the setting out of several modes of death, the chief justice also said: "Take the instance of a murder at sea; a man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide by the

told to take him up by Andersen; he helped. He was taken up and thrown overboard. Andersen was armed all this time. Before throwing the captain's body overboard, Andersen took hold of the captain's arm and felt his pulse. When the body was thrown overboard Andersen cursed it. The captain's body was sitting in a chair in the after cabin, near the sofa on the starboard side of the cabin. He was facing forward. I had only been in the cabin once before, when we were in Boston. On American vessels seamen do not go in the captain's cabin unless they are sent or called there. There are doors opening from the forward cabin into the after cabin and from the mate's room into these cabins.

"After the captain's body was thrown overboard, Andersen told us to go down and he would give us a drink. We went down in the cabin, in the forward cabin where the dining-room table was, and got a drink. I don't recollect whether Andersen drank with us or not. There was not much liquor in the bottle, a little over half a bottle I think, not enough to make anyone drunk. I didn't see anyone drunk. After taking a drink, we went up on deck and talked about making the small sails fast. The Spaniard and myself suggested that the small sails be made fast and to make for land. This was not done. Andersen said, 'No, keep her up to her course,'—she was off a little. 'Keep her up to her course,' he said; 'you want me to be hanged?' He then said to the Spaniard, 'You are about the sensiblest man; I want to speak to you.' I did not hear what he said to him. He then called me. I went to the lee side of the wheelhouse and he asked me what I thought was best to do with the vessel. I said, 'The only thing we can do now is to try to make for some land.' He said, 'No, nothing is going to be done but to destroy the vessel.' He did not say anything more to me after that. If he spoke to any of the rest, I didn't see or hear it. He then ordered everything to make ready for to leave the ship. The old boat sail was all torn up and I started to patch that. I was engaged about it about an hour I should think. He then gave orders to lower the boat. Me and the Spaniard lowered the boat. It was the big boat you see hanging at the stern in the picture. Me and the Spaniard did lower the boat and Andrew March went down and unhooked the tackle, and we hauled the boat up alongside the vessel and got some provisions down there. Then the cook called Andrew and he went up. After I was through with that I went up on the house again and I saw flames coming out of the after hatch. She was afire then. Then they all went down in the boat and all hands cut the boat adrift, rigged up the mast and started to sail. The cook helped us to rig up the mast and sail. He was armed all that time with pistols. I do not think any other members of the crew had pistols. I did not see any of them have pistols. . . . There were no vessels sighted after the bodies of the captain and mate were thrown overboard which could possibly have picked up the bodies."

On cross-examination this witness gave an account of a difficulty between the cook and the captain that morning about the captain's dog. About eight o'clock the captain's dog was down by the galley door and the cook threw some water on him. The dog ran up on the deck load "hollering." The captain came up and said to the cook, "Did you throw hot water on that dog?" Andersen replied that he did not throw hot water on him; that it was cold. The captain felt the dog's back and then called the cook a liar, cursed him and struck him. Lind did not see the captain strike the cook but heard the noise in the galley. Shortly after this the cook appealed to the mate: "Won't you protect me until we get to port?" To this the mate replied, "Get to port! You will get killed anyhow," or something like that. "'Go to hell—you will get killed anyhow,' or something like that."

March testified:

"After the shooting the cook came and called us out of the forecastle. He says, 'Come out here, boys, lower the boat and put me ashore. The captain and mate is dead and I am in charge of this ship.' I got out of the bed and put on my shoes in a hurry, and the cook came back a second time and says, 'Come out here, won't you? Come out here, Manuel,' and he says, 'Yes.' We went out and went to the topgallant forecastle, and he ordered us to throw the mate overboard. The mate was lying on the forecastle head, on the left-hand side. The sails of the vessel were swinging at that time to the starboard, which left the left-hand side of the vessel clear back to the wheelhouse. The cook was armed when he ordered the mate's body to be thrown overboard, and he claimed then to be in charge of the vessel. I do not remember whether he caught hold of the mate's body and helped to throw it overboard or not. The mate had a marlin spike tied around his neck when the body was thrown overboard. A marlin spike is a big awl used to stick through the rope in splicing it. When it is used by a man going up and down the rigging a half hitch is taken over the point so it won't stick in his legs or get between the rigging going down. When it is around the man's neck it is tied with a string and with a half hitch on the point. He can't use it without taking the hitch off so as to hurt anybody with it. The top of the forecastle house, where the cook was standing when he shot the mate, is about 3 feet higher than the forecastle deck, where the mate was standing when he was shot. To get to where Andersen was when he was shot, the mate would have had to step up those 3 feet on top of the forecastle house. . . . I couldn't say whether the half hitch was around the point or not.

"After the mate's body was thrown overboard we were ordered to the cabin to take the captain up and throw him overboard. The cook was armed at that time. When the mate's body was thrown overboard Andersen swore oaths at it. When he swore oaths at the body the Spaniard asked him not to curse the body that way. We all obeyed the cook and went aft and found the captain's body in the after cabin. (Here the witness identified the diagram, showing the inside of the after cabin, and marked number two.) The captain's body was found sitting in his chair, dead, with both arms folded in his lap. He looked as if he was alive, with his head back on one side and a wound in the left part of his head, about an inch above the left ear. The captain was sitting in his chair near the sofa, on the starboard side of the vessel, the point marked on the diagram 'A.' John Andersen ordered the captain's body to be taken up and thrown overboard. Andersen was at that time armed. He assisted in throwing the body overboard. He swore at it when the body was thrown into the sea, calling it 'a mean bastard.' After the body of the captain was thrown overboard the steward ordered us to get ready the boat. He then invited us down into the cabin to get a drink of whisky. There was about two thirds of a bottle of whisky. He drank with us. After that was done the boat was got ready. Kerosene oil was thrown over the deck load and the ship was set on fire. Then we made for land in the sail boat. It was about two hours, I think, after the bodies were thrown overboard before we left the 'Olive Decker.' At the time these bodies were thrown overboard there was no vessel in sight which could possibly have picked them up."

. . . . . .

"That morning before the captain was shot and before the mate was shot I heard a difficulty between the cook and the captain about the captain's dog. As I was going forward from taking my dishes back from my breakfast, I heard the dog holler. I was standing on the forecastle house. I saw the dog come out and run aft. The captain came out and went to the galley and asked the cook if he had been throwing water on the dog,

blow, or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts, charging a death by a blow, and a death by drowning, and perhaps a third alleging a death by the joint result of both causes combined."

Commonwealth v. *Desmarteau*, 16 Gray, 1, 500] was an indictment *for murder, containing three counts. The first charged that the murder was committed by casting, throwing, and pushing the deceased into the Connecticut river, and so choking, suffocating, and drowning her; the second, that the death was caused by the blows of some weapon or instrument to the jurors unknown; the third, that the death was caused by the blows and drowning both. It was held that all the counts were in proper legal form and related to a single offense, and

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and he said no. The captain went back and felt for the dog. Then I saw the captain go in the gulley, but I did not know what he did there. This was about fifteen or twenty minutes, I think, before the captain was shot. I had been at the wheel of the 'Olive Pecker' many times. While standing at the wheel, in the wheelhouse, looking forward, with the sails swinging to the right or starboard side of the vessel, you can see all the way along the left-hand side of the ship, on top the forecastle house, or a man standing on top the forecastle house. The deck load did not interfere with seeing that."

On cross examination: "I say this man intimidated us all at the pistol's point. He ordered us to throw the mate overboard. I obeyed his orders, because I wanted my life a little longer. After the captain was thrown overboard, we all went into the cabin and took a drink. I can't say that we took a drink at the pistol's point, but he made us throw the mate's body overboard. He did not tell me he would kill me if I did not, but I knew enough to know he would do it. There were four of us altogether. I did not have a knife. I do not know whether I went ahead or who went ahead when we went into the cabin to take a drink. We had to throw the body of the captain overboard because the cook ordered us to do it. I took orders from the cook because he gave me to understand he was in charge of the ship. At the time I knew he was, because he had all the guns. It makes a big difference when he had all the arms."

Barstad testified:

"I last saw mate Saunders alive on board that vessel on the morning of the 6th of August, 1897, when the vessel was about 100 or 150 miles off the Brazilian coast. On that morning I left the wheel of the vessel about 8 o'clock, being relieved by Martin Barstad, and went after my breakfast; then went to the forecastle and to my cabin. While I was lying down,—after that,—I do not know how long,—I heard the captain's dog holler. Andrew March came in the forecastle and says, 'The captain is having a racket with the cook,' and I says, 'What can we do? Let him rack on,' says I, and it was a little while before John Lund came and knocked at the window where I was sleeping. When he finished talking to me I heard the report of four shots. I went in the forecastle, a narrow place between the engine room and my bunk. I went in there because I thought the cook wanted to kill us too. The engineer jumped on my bunk and got out, too. I heard the cook sing out in the door, 'Come out here, boys! Come out here quick!' 'Yes, sir,' says I, 'let me finish dressing.' He says, 'Come out here. I am in charge of the vessel.' I went out and the first thing I saw was the mate lying on the top of the forecastle deck on the left-hand side, with his face downwards. The cook says, 'Throw him overboard,' and then I says, 'Don't, cook; don't throw him overboard, he's alive.' He says, 'Throw him overboard; he's dead enough.' We threw him overboard, and after we threw him overboard the cook says, 'Now go aft and pick the captain up.' When he threw the body overboard he cursed at the body. Then he ordered the men aft to throw the captain overboard. All the while he was armed with pistols. We went under his orders and into the captain's cabin. When we got into the cabin we saw the captain sitting in his chair with both hands in his lap, and his head leaning slightly to one side and on his breast. I thought he was alive. I saw he had a bullet to go through near the left side of his head. His body was taken up and thrown overboard. When his body was thrown overboard, the cook cursed it also. After it was thrown over he said, 'Come on boys, I will give you a drink.' We took a drink, and after we took a drink all came on deck and I said, 'We will make the stay sails and the top sails fast and if a squall strikes her we can manage the other sails, and we go right into Rio de Janeiro or Bahia.' I sung out to Martin Barstad at the wheel, 'Keep her off,' and the cook says, 'No, I don't want to go to the land.' He was standing close to the rail. And he said, 'Do you want me to be hung? There is nothing to be done but destroy the vessel,' he said. Then he called me and said to me, 'You are the sensibiest man on board this vessel, and I want to speak to you.' 'All right, cook,' I says. He took me on top the galley and says, 'I am a murderer, and I killed these people to save my life and your lives. Now, you fellows,' he says, 'you are guilty of helping me throw the bodies overboard, and before you leave the vessel you will be as guilty as I am. You ain't got nothing to fear.' Says he, 'Many a vessel leaves port and they don't know where they go, and there's nobody to look after us for a long, long time, and we will have time to run away.' I told him I had nothing to fear with the vessel in port. I says, 'Look here, cook, destroy the vessel, it's a terrible thing, it's worse than what you have done already. Call all hands here and tell us what you want to do and where you want us to sail ashore, and we will help you as much as we can, and let us go into port.' 'No, no,' he says, 'that won't do; the vessel must be burned.' He ordered a small boat to be made ready, and everything was made ready and then he took us down into the cabin and he says, 'I didn't kill these people to rob the vessel. I grant you all fellows clothes out of this large chest,' and we went in and everybody took some clothes, and the cook says, 'You fellows can put on your best clothes,' and he gave me a suit of clothes, and he says, 'You don't want to take anything;' so we went forward and put on our best suit of clothes, and the cook had us to pour oil on the deck. The cook called us to hurry up and spread the oil on the deck. I didn't want to do this. I went to the forecastle and the cook came and said, 'What are you doing there? Come and give your hand with this oil.' I says, 'Yes cook; let me finish shaving and I go. When I went on deck I could see that the oil was already. It had been spread over the deck. The cook then told us to lower a boat and it was lowered, and Andrew March unhooked the tackle and we took the boat alongside the vessel and I jumped in too. Provisions were then put in the boat and when everything was ready Andersen called to me, 'Come up and light the fire.' 'Well,' I says, 'let me keep the lookout on the boat; it might smash against the vessel.' So he called Andrew March, and the first time he called Andrew he did not come, so he called him again in wild words and March went up."

On cross examination: "Q. After the cook here had killed the mate, didn't he tell you you might put him in irons? A. Yes, sir; he came and he says, 'Now you fellows can put me in irons and carry me to port, if you want.' Q. And give me to the American consul? A. No, sir; the same words I told you, sir. 'Now you fellows,' he says, 'can put me in irons and take me in port if you want.' I says, 'No, no, cook, I no put you in irons,' because he looked right in my face; and I says, 'Why don't you throw your revolvers away?' Q. He offered to give himself up to you, holding out his hands, and said: 'Put me in irons?' A. He didn't throw his revolvers away. Q. He didn't? A. No, he didn't. Q. Did he hold out his hands to put him in irons? A. With his revolvers, yes; and I says, 'No, no, cook, I won't put you in irons; no, no.' Q. Do you mean to say that he had the revolvers in his hands when he offered you to put him in irons? A. Yes, sir."

Horsburgh was asleep in his berth in the after cabin when the captain was shot. What he supposed was the noise of the shooting of the captain awakened him, and then Andersen came to the companionway and asked him to come on deck, that he had killed the captain. He came on deck and went aft along the starboard side, where he told the crew that the cook had killed the captain. Directly after the shots, the cook came forward, shouting, "Come out, boys; I am in charge of the

that as a conviction on any one required the same judgment and the same sentence as a conviction on all, the jury were properly instructed that if they found the prisoner guilty of the murder as set forth in either, they might return a verdict of guilty, generally.

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vessel," and ordered the mate's body to be thrown overboard. The mate was lying with his face down on the port side of the forecastle head, with a marlin spike hanging about his neck. After the mate's body was thrown overboard, the cook ordered them to go aft and throw the captain's body overboard. "We went down in the cabin and found the captain in the chair, so we took him up on deck and threw him overboard. Then after that he told us to go down and he would give us a drink; so we went down in the cabin and had a drink." After that the cook ordered them to get the boat ready with provisions, etc. The cook was armed and the witness was frightened. The burning of the vessel and the escape in the open boat as told by this witness corresponded with that of the others. On the cross-examination the difficulty between the captain and the cook about the captain's dog was reiterated.

Defendant Andersen testified in his own behalf:

"It was just after breakfast, and the dog was standing at the galley door. He used to keep himself around there all the time. The captain didn't want him to stay at the galley door, and I took some water I had left in a bucket, some dirty water, to throw it onto the dog, as I always used to throw some water on him, and he used to run and holler. I took the bucket, and there was a little water left at the bottom of it. He was standing right at the door and I had been giving him his breakfast. As the dog turned the bucket slipped in my hand. I had the handle on the edge of it, and it hit him here in the leg, and he ran up on deck and made a noise. I was looking around there for some place to run into and hide, as the captain was coming down there into the galley, and I was standing in the middle of the floor of the galley, facing the galley dresser. He struck me in the side here, and that sent me right on top the red-hot stove, on top the pots and pans. He commenced to curse me and threaten me and everything, and I pleaded to him. I says, 'Captain, don't hurt me; don't hurt me, Captain.' He looked at the axe, and he looked up through the slide. There is a little slide in the galley. He saw John Lind standing on top there, and he looked at me: he says, 'You whore's son,' he says, 'I will have the heart out of you.' And there he left me standing. I had cut them two fingers into my knuckles. The mate came along and it was my last hope in that vessel to see maybe another day; I had been sleeping in the galley for a week; I didn't know whether I would live to see the next day or not, so I turned to the mate, with tears rolling down my cheeks, and I said to him, 'Mr. Saunders,' I says, 'won't you protect me until we get into port?' He turned around to me with scorn. He says, 'Go to hell,' he says, 'you will get killed anyhow.' Then I did not know what I was doing. My mind was in that condition I didn't know whether to run overboard or stay there and go and hide. I didn't know what to do. So I went up in the galley slide and looked around to see if I could see any vessel. Then I made up my mind if I should see any vessel I should take a board and jump overboard. So there I was. My basket of dishes was standing upon the dresser, all dirty, after breakfast, and I was washing them, and I saw at the time it was twenty-five minutes to ten then. I looked around, and I didn't know if I had washed my dishes at all. Of course I was completely out of my head, then, so I thought about the cabin. Now, I used to sweep that cabin every morning and dust it and everything before nine o'clock. I used to have my dishes done in the galley before this time, and I had my dinner to have ready before twelve o'clock. So I started into the cabin, thinking that the captain would be on deck, and I came down in the cabin. He was sitting inside of the door in a chair like this, although bigger, and he had a bottle on this here lounge which was alongside of the stool or the chair. He glared at me and he looked fairly black in the face with rage. He blurted out and cursed me when I came into the cabin. Well, I didn't know what to do. If I should run on deck, I would have to run overboard; that was the only way I have to see out of it. I commenced sweeping the cabin and started into the mate's room first. I saw the mate's gun lying on the shelf, and I took that down, thinking if worst came to worst, I will have to defend myself. So I finished the cabin and started into the captain's room. I passed by him in that direction [indicating by gesture], and he took up that bottle like this. He says, 'You whore's soul!' Then he took it up like this as if to split my head open, when I pulled my gun out and fired. The bullet struck him in the left temple. He fell into the chair, and I ran into the captain's room. Then I thought about the mate. I ran into the captain's room then and got his two guns. He used to keep one gun in under the pillow and one on the shelf. I ran up on deck and I didn't know where the mate was then. I came up to John Lind and he was at the main rigging. I says, 'Where is the mate?' He says, 'He is aloft.' I looked up there, and I think I said something of calling him down, but I don't think I did do that. The mate came down, and before he came down to the ———, piece next to the rail, he says, 'Where in the h—ll did you get them guns?' He says, 'And where is the captain?' I never made no answer to him, but I stayed on top of that house there as the mate came down, and he had this marlin spike around his neck. I will just show you how he had it, if you please. He had this hitch on this marlin spike as represented to you before. He came down like this and walked up like this [indicating by appropriate gestures] (walking towards the bowsprit) and turned in this direction (to the right) and came towards me in that direction (on the starboard side). He took the half hitch out of the marlin spike like this, and the marlin spike was hanging down when he came towards me. I was standing there and had the guns then. I had three of them and I held them in my hands all the time. I had an apron around my waist, and I had no pockets here in the pants. He got this hitch off the marlin spike and came around to me like this [indicating by proper gesture] to take the marlin spike off his neck and shove the marlin spike into me. I pulled the gun and shot him. The first shot struck here somewhere (in the side). He was still coming towards me, and I shot twice or three times together, when the man fell dead. In the meantime John Lind has been running into the lee side of the house. Now, he stated here yesterday to you gentlemen that I came up to him and says, 'Now the mate will go, too.' But that belongs on the lee side of the house, to that man. When he came there he told them, 'Now the mate will go, too.'

"Q. You mean by that that you didn't say it at all?

"A. No, sir. That belongs to John Lind and into the lee side of the forecastle; that is where that belongs. So I stood there and John Lind—he was the man that came up first, and there was nobody else came up—so I says, 'Men,' I says, 'ain't you coming up?' I says. In the condition I felt, I felt actually frightened of the men the way I was, because I was completely gone. We throwed the mate overboard. I helped them also, so far as I can remember. And we took the captain out of the cabin and threw him overboard. And now, when this was done, I told them, I says, 'Now men,' I says, 'you can do as you like with me,' I says; 'you can put me in irons and take me into port and give me up. You see I had to defend my own life.' 'Yes,' they says, 'we all know that.' There I was, broke down completely, like a child, and here they are, coming up here yesterday to put everything onto me."

He also gave an account of the burning of the vessel and trip to the shore. On cross-examination he admitted that he was about 3 feet from the mate when he shot him; that he was standing on the forecastle house and the mate was down on the forecastle head; that the mate asked him not to shoot. As soon as he had killed the captain what came into his head then was the mate; that he got the captain's pistols; that he ran up on deck through the pilot house where Barstad was and to Lind, who stood amidships, and asked where the mate was; that Lind told him the mate was aloft; that he got on top of the forecastle house, and in the excitement may have called him down. He denied having asked the men to throw the mate's body overboard, but admitted that he asked them to throw the captain's body overboard. He denied asking the crew to take a drink, but admitted that he may have got the whisky. He denied ordering the vessel to be burned, and said that it was the engineer's suggestion. He admitted that he took the captain's watch and sold it and that the compass was thrown overboard before they reached the beach.

So an indictment which alleged that death was caused by a wounding, an exposure, and a starving, was held in *Commonwealth* v. *Macloon*, 101 Mass. 1 [100 Am. Dec. 89], not to be bad for duplicity, and it was ruled that it was sufficient to allege that the death resulted from all these means, and to prove that it resulted from all or any of them.

And see *Joy* v. *State*, 14 Ind. 139; *Woodford* v. *People*, 62 N. Y. 117 [20 Am. Rep. 464]; *State* v. *Fox*, 25 N. J. L. 566, 601; *State* v *Johnson*, 10 La. Ann. 456; *People* v. *Colt*, 3 Hill, 432; *Jones* v. *Georgia*, 65 Ga. 621; *Rodgers* v. *State*, 50 Ala. 102; *Gonzales* v. *State*, 5 Tex. App. 584.

In our opinion the indictment was not objectionable on the ground of duplicity or uncertainty.

Granting that death could not occur from shooting and drowning at the same identical instant, yet the charge that it ensued from both involved no repugnancy in the pleading. For the indictment charged the transaction as continuous, and that two lethal means were employed co-operatively by the accused to accomplish his murderous intent, and whether the vital spark had fled before the riddled body struck the water, or lingered until extinguished by the waves, was immaterial.

If the mate had been shot in the rigging and fallen thence into the sea, an indictment alleging death by shooting and drowning would have been sustainable.

The government was not required to make **501**]the charge in *the alternative in separate counts. The mate was shot and his body immediately thrown overboard, and there was no doubt that, if not then dead, the sea completed what the pistol had begun.

2. The venire for the jury in this case was issued after the term began, and it is insisted that it does not appear that it was authorized by any order of court. This was a point not made below, and it appeared on the argument at bar that an order of court directing the jury to be summoned had been duly entered, but omitted from the record because no question had been raised in that regard. A duly certified copy of that order being produced, counsel for plaintiff in error very properly waived the necessity of issuing a certiorari, on suggestion of diminution, to bring it up. This disposed of the objection as made.

On the trial plaintiff in error moved to quash the venire on the ground that it should have shown that the jurors were summoned for the trial of this particular case. The motion was overruled. The law did not require jurors necessarily to be summoned before the term began, nor the name of the particular person or persons to be tried to be inserted in the writ. This was the November term of the court, and the order was entered on the 2d day of December and the writ was issued on the 6th of that month, after the commencement of that term, and was in the usual form, directing the persons named to appear on a day named to serve as petit jurors at said term. So far as appears there was no irregularity in summoning and impaneling the jury, and no exception was taken to the jury as impaneled. The point was untenable.

3. One A. J. Hall testified for the government that he built the Olive Pecker and had sailed her for seven years. He described the vessel, and in connection with his testimony certain diagrams and an oil painting of the vessel were introduced without objection. He testified, among other things, that with a deck load of lumber of a certain height and the vessel on the port tack a man in the wheelhouse could command a view of the port side. After he had given his testimony *counsel for plaintiff[**502** in error "moved to strike out all testimony as to the condition of the vessel at the time of the casualty." Counsel for the government insisted that he had asked the witness nothing about that, and the circuit judge said: "The court does not understand that he has so testified. Anything that would bear that construction as a matter of course will be excluded from the jury. I think it is eminently proper that the jury should understand the character of this vessel. This man is familiar with it; he built it; he has commanded it. He is detailing to the jury nothing that took place at the time of the alleged offense. He is giving the general character and situation of the vessel, so that you may understand it, which I think is eminently proper. As he was not on the vessel at the time of this occurrence the court will not permit him to testify about anything that took place then." The ruling was correct. *Bram* v. *United States*, 168 U. S. 532, 568 [*ante*, 204, 217].

The witness was asked this question: "Is it customary in loading vessels with a deck load of lumber to leave passageways or stairways to go down in different parts of the vessel?" He answered: "We most always do that when we can, when the lumber comes right, but sometimes we have to go right over it when we can't." He was then asked, "Are you or not familiar with the deck load of the 'Olive Pecker' when she sailed from Boston on the 20th of June?" He answered: "No, I don't know anything about that."

Counsel now contends that defendant moved to strike out the testimony as to what was customary, but the record contains no such motion, and we think the reference must be to the motion above mentioned, which was properly disposed of.

4. John Lind had testified, on cross examination, that Andersen asked the mate: "'Won't you protect me until we get to port?'" and that the mate said: "'Get to port! You will get killed anyhow,' or something like that." The question was then put: "How came he to ask the mate to protect him?" He answered: "The captain was cussing and treating him badly." Objection was made by the district attorney on the ground that counsel had no right to go into any altercation *between the[**503** accused and the captain, but counsel for the accused insisted that he might "ask what took place between the captain and Andersen that morning, whether the mate was present or not, and let the jury infer whether Andersen was alluding to that when he asked the mate for protection." The court ruled: "You may ask it. We want all the facts in the case, and if it is not relevant testimony it will be excluded." The witness thereupon gave an account of the quarrel about the captain's dog.

He was then asked: "Do you know of any other circumstances? Had this captain been brutal or inhuman to this cook in any other way?" This question was objected to on the ground "that the character of the captain and his treatment of the accused prior to this time was not an issue in this case, which was a trial for the killing of the mate, and was not a part of the *res gestæ* of this case." After argument, the court sustained the objection and excluded the question, and exception was taken. Counsel for plaintiff in error immediately remarked: "I mean by the interrogatories I am going to propound now to confine myself to that morning," and continued the cross examination. The record makes it plain that all evidence offered as to what occurred that morning was admitted, and that what was excluded in this instance was evidence of the conduct of the captain prior to the day the mate was killed. And there was nothing to indicate that that antecedent conduct of the captain was so connected with the killing of the mate as to form part of the *res gestæ*, or that it could have any legitimate tendency to justify, excuse, or mitigate the crime for the commission of which Andersen was on trial.

5. After the government had closed its case in chief, defendant's counsel moved that a verdict of not guilty be directed, because the indictment charged that the mate met his death by drowning, whereas the proof showed that his death resulted from pistol shots. There was no error in denying this motion.

We repeat that the indictment charged the death to have resulted from shooting and drowning, and that the fact was uncontroverted that the mate was shot and immediately [504]*thrown into the sea. There was no examination to ascertain whether he was then dead or not. He was lying face down and was picked up and thrown overboard as ordered by the accused, according to the testimony for the government. Lind and March believed he was dead. Horsburgh said he appeared so. Barstad was doubtful, and Barrial testified he told the cook he was alive.

So far as this motion was concerned it was enough that the evidence was not conclusive that he was killed by the pistol shots.

And, as already indicated, the government was not required to make the charge in the alternative and elect to proceed in respect of one means of death rather than the other, where the murderous action was continuous.

6. Several of the errors assigned related to the rulings of the court limiting the testimony to the transactions on the day of the homicide. These rulings were made on certain questions propounded to the accused. His counsel asked: "Now, I want to ask this question to the witness: I want you to detail, with truth, to the jury everything that occurred in reference to this business, from the time you shipped on the 16th day of June until you left the vessel on the 6th day of August."

This was objected to, and after argument the court, through Goff, circuit judge, ruled as follows: "I have no objection to your having the accused commence in his own way and detail as to him is best, confining himself to the truth, just what took place there on the morning of that day, and without any assistance from you, but I cannot permit him to detail to the jury the incidents of the voyage from the time they left Boston in June, as I understand your question to indicate." Exception was taken. Counsel then proceeded: "*Q.* Did you ship on the 'Olive Pecker?' *A.* Yes, sir. *Q.* Did you have trouble with the captain?"

This was objected to, and the court said: "I must say, Mr. McIntosh, that I fail to see the pertinency of testimony as to a quarrel with the captain in June or in July. Suppose the mate was a party, the charge is that of killing Saunders in *August and the testimony is con-[505 fined to that time. You can show, if you can, what was the feeling between the accused and the mate, and that it was such growing out of previous quarrels or threats by the mate to take the life of the accused, or anything in that line which would tend to explain the standing of the parties at the time of this occurrence. Now, anything that bears upon what had taken place, so far as the mate is concerned, can go before this jury." Exception was taken.

Counsel continued: "*Q.* You shipped on board the 'Olive Pecker' some time in June, 1897? *A.* Yes, sir. *Q.* Now state to the jury all that occurred between you and the mate during that time, including all the facts and circumstances attending the 6th of August?"

All that part of the question intended to elicit what occurred between the mate and the cook from the time they left Boston was objected to.

The court said: "The trouble, Mr. McIntosh, is this, in the present condition of the testimony of this witness it is hard to see the pertinency of it now, but I do not say that it may not be pertinent. You had better first let the witness detail the transactions of the 6th of August, and if anything is developed thereby which makes it pertinent to bring in previous incidents as tending to explain what took place on the 6th, it can come in." Exception was taken.

The accused was then asked: "Detail to the court and jury all the occurrences which took place on the morning of the 6th of August, 1897." Thereupon the accused gave his account of the transactions of that date, the trip to shore, and the subsequent arrest. After he had concluded his counsel put this question: "Now state what trouble, if any, you had had with this mate previous to this occasion?" The question was objected to on the ground that the testimony of the witness should be confined to what occurred on the day of the homicide. After argument, Goff, J., delivered this opinion:

"The reason I suggested to counsel for the accused that the statement as to the occurrences relating to the killing of the mate should be stated as they took place on that day was that *the testimony might be confined to a [506 certain limit. Now, there is no doubt in the world that a party may protect his own life against the party assailing him. If he believes that he is about to suffer harm from one who has attacked; if he bases that belief upon a previous threat; if he bases that upon previous personal encounters; if he bases that upon the known brutal character of the party, the law, out of tender consideration for the frailties of human nature, will permit him to act

upon that belief and upon that understanding. But can we apply that in this case? Now, we must look at the matter as it is before the jury, as it is presented by this witness. The witness states that he had a controversy with the captain; that the captain was cruel to him; then, in that hour, he turned to the mate and advised with the mate; he asked the protection of the mate. His conduct, at least, does not indicate that there was any feeling between him and the mate at that time. If the testimony is admissible, it is upon the theory that it must tend to explain the situation as it then existed. He had turned to the mate to ask his protection from the captain. Now, if the mate had attacked him, it would be perfectly competent for Andersen to show that the mate, previous to this day, had threatened him or had been cruel to him. We must look at the testimony as the witness has given it himself. It was the witness who sought the mate, and not the mate who sought the witness. I fail to see how a party can, under the circumstances, show, either by himself or by another, that he had had a controversy with the party he is about to attack, the day before or the week before, if he has had time to cool. If there had been a controversy of that kind, even under any circumstances of that kind, it does not authorize the party to take the law into his own hands. I must exclude the testimony and adhere to the intimation I gave some time ago, on another ruling, with reference to threats."

To this ruling exception was taken. Counsel then said:

"Now, in order that this matter may go down right, and in order that I may save the point, but without any disrespect to the court, I want to propound this question to the witness.

507] *"*Q.* I don't want you to answer this, Andersen, until the court passes upon it. I want it to go down in the record. I want to ask you whether on the day before you had had a difficulty with the mate, and, without provocation on your part, the mate had not attempted to throw you overboard?

"Mr. McIntosh. I understand that your honor rules that I cannot ask that?

"The Court. The question is improper and cannot be answered."

And to this exception was taken.

The preliminary rulings of the court which required the incidents of August 6 to be given at the outset are not open to criticism. The point to be considered is whether evidence of transactions previous to that day was admissible in the light of the testimony of the accused in respect to what passed on that day. It will be perceived that no specific offer of proof was made. But, assuming that counsel had offered to show by the accused that he had had trouble with the mate previously to August 6, and that the day before he had had a difficulty with him, and the mate, without provocation, had attempted to throw the accused overboard, would such testimony by the accused have been admissible in view of his own detailed account of the homicide and its surrounding circumstances? On what legal principle could it have been held to have a tendency in justification, excuse, or mitigation?

Andersen's story was that on the morning of August 6 he had a difficulty with the captain about the dog; that the captain cursed him, struck him, and sent him on top the red-hot stove and the pots and pans; that he subsequently appealed to the mate for protection, and he treated the application with scorn and profanity; that some time afterwards he went to the cabin to sweep it, and that the captain glared at him and cursed him. He commenced sweeping the cabin, and started into the mate's room first; saw the mate's gun lying on the shelf and took it down, thinking that if the worst came to the worst he would have to defend himself. He finished the cabin and started into the captain's room; the captain arose and was about to assault him with a bottle and he shot him. *"*Then I thought about the* [508 *mate.* I ran into the captain's room then and got his two guns." He ran up on deck; asked Lind where the mate was; was told he was aloft; looked up and saw him there, and called him down or waited for him. As the mate came down he asked Andersen where he got the guns and where the captain was, but Andersen made no answer to this, and stayed on top of the forecastle house. Then, as he stood on the house with the pistols, and the mate was 8 feet below on the forecastle head, but coming towards witness as if "to take the marlin spike off his neck and shove the marlin spike into me," witness pulled his gun and shot him. He shot him several times—the mate begging him not to shoot. Immediately after he called up the sailors and the body was thrown overboard.

It is true that a homicide committed in actual defense of life or limb is excusable if it appear that the slayer was acting under a reasonable belief that he was in imminent danger of death or great bodily harm from the deceased, and that his act in causing death was necessary in order to avoid the death or great bodily harm which was apparently imminent. But where there is manifestly no adequate or reasonable ground for such belief, or the slayer brings on the difficulty for the purpose of killing the deceased, or violation of law on his part is the reason of his expectation of an attack, the plea of self-defense cannot avail. *Wallace* v. *United States*, 162 U. S. 466 [40: 1039]; *Allen* v. *United States*, 164 U. S. 492 [41: 528]; *Addington* v. *United States*, 165 U. S. 184 [41: 679].

According to his own statement, Andersen, after he had shot the captain, thought about the mate, armed himself with the captain's pistols, went in search of his victim, and finding him aloft on the mainmast at work, called him down, or, seeing him coming down, awaited him, and shot him. He was not only the aggressor but the premeditated aggressor. The captain being dead, he knew the mate would assume command, and that it would be his duty to arrest him and take him ashore for trial. The imminent danger which threatened him was the danger of the gallows. The inference is irresistible that to avert that danger he killed the mate, cast the bodies into the *sea, [509 burned the ship and took to the open boat. There can be no pretense that he was acting under a reasonable belief that he was in imminent danger of death or great bodily harm at the hands of the mate. He testified, to be sure, that when he had armed himself, gone in search of

the mate, and stood on the forecastle house ready to receive him, he thought the mate was going to use against him the marlin spike, which he had been using at his work in the rigging, and to protect himself against that marlin spike, swung around the neck of a man standing 3 feet below him, the accused shot him down while he was asking for his life. It was, indeed, the duty of the mate to attack Andersen as he stood there with three pistols, fresh from the slaughter of the captain, and in open mutiny. But as the accused told his story he was not repelling violence, and if the mate attempted to make use of the marlin spike, it was simply in self-defense.

The case as Andersen's testimony made it afforded no basis for the introduction of evidence of prior provocation, or even of injuries previously inflicted, for no overt act on the mate's part provoked the evil intent with which Andersen sought him out on this occasion. Such evidence would not have been relevant, in view of the circumstances, as tending either to make out self-defense or to reduce the grade of the crime.

We are not insensible to the suggestion that persons confined to the narrow limits of a small vessel, alone upon the sea, are placed in a situation where brutal conduct on the part of their superiors, from which there is then no possible escape, may possess special circumstances of aggravation. But that does not furnish ground for the particular sufferer from such conduct to take the law into his own hands, nor for the suspension of those general rules intended for the protection of all alike on land or sea.

7. Complaint is made because the court refused to allow a witness to testify as to the general reputation of the captain. If there had been any adequate basis for the contention that Andersen killed the mate in self-defense, by reason of a reasonable belief in imminent danger from him, evidence of his character for ferocity, brutality, and vindictiveness might 510]have been *admissible. *Smith* v. *United States*, 161 U. S. 85 [40: 626]. But, as the record stood, the character of the captain could have no legal hearing on the issue of the guilt of the accused of the murder of the mate.

8. Various instructions were asked on behalf of the defendant, as well as on behalf of the government, which were, respectively, refused by the court, except so far as included in the instructions given. But the only ruling in this regard pressed on our attention is the alleged error of the court in instructing the jury as follows: "The other felonious homicide to which I called your attention, manslaughter, is the unlawful killing of a human being without malice, either express or implied. I find it to be my duty, gentlemen of the jury, to say to you that if the defendant has committed a felonious homicide, of which you are the only judges, there is nothing before you that reduces it below the grade of murder."

This instruction was similar to that given by Mr. Justice McKenna, then circuit judge, which was reviewed and approved in *Sparf* v. *United States*, 156 U. S. 51, 63 [39: 343, 347]. That case is decisive of this, for the evidence disclosed no ground whatever upon which the jury could properly have reached the conclusion that the defendant was only guilty of an offense included in the one charged, or of a mere attempt to commit the offense charged. The testimony of the accused did not develop the existence of any facts which operated in law to reduce the crime from murder to manslaughter.

The law, in recognition of the frailty of human nature, regards a homicide committed under the influence of sudden passion, or in hot blood produced by adequate cause, and before a reasonable time has elapsed for the blood to cool, as an offense of a less heinous character than murder. But if there be sufficient time for the passions to subside, and shaken reason to resume its sway, no such distinction can be entertained. And if the circumstances show a killing "with deliberate mind and formed design,"—with comprehension of the act and determination to perform it, the elements of self-defense being wanting,—the act is murder. Nor is the *presumption of malice nega [511 tived by previous provocation, having no causal connection with the murderous act, or separated from it by such an interval of time as gives reasonable opportunity for the access of fury to moderate. Kerr, Homicide, § 68 *et seq.*; 2 Bishop, New Crim. L. § 673 *et seq.*; Whart. Crim. L. § 455 *et seq.*, and cases cited.

There is nothing in *Stevenson's Case* [*Stevenson* v. *United States*], 162 U. S. 313 [40: 980], to the contrary. The doctrine of *Sparf's Case* is there reaffirmed, that "the jury would not be justified in finding a verdict of manslaughter if there were no evidence upon which to base such a finding, and in that event the court would have the right to instruct the jury to that effect."

No other error assigned requires notice.

Judgment affirmed.

Mr. Justice **McKenna** dissented.

PLAQUEMINES TROPICAL FRUIT COMPANY, *Appt.*,

v.

WILLIAM HENDERSON and Henry J. Leovy.

(See S. C. Reporter's ed. 511-521.)

Jurisdiction of state court—suits brought by a state against citizens of other states—may be brought in state court.

1. The failure of Congress to provide for the review, by removal or writ of error, of a decision of a state court in a suit brought by the state against citizens of other states and involving no

NOTE.—*As to review by United States Supreme Court of territorial decisions; extent and manner of; distinction between an appeal and a writ of error*,—see note to Miners' Bank v. Iowa, 13: 867.

As to what questions the United States Supreme Court will review on writ of error; bill of exceptions,—see note to Parks v. Turner, 13: 883.

As to what is "final decree" or judgment of state or other court from which appeal lies, see note to Gibbons v. Ogden, 5: 302.

As to effect of decision of state courts in Federal courts; rule of property; questions of general or com-

question of a Federal nature, does not defeat the jurisdiction of the state court in such a case.

2. The mere extension of the judicial power of the United States to suits brought by a state against citizens of other states did not, of itself, devest the state courts of jurisdiction to hear and determine such cases.

3. As Congress has not invested the national courts with exclusive jurisdiction in cases of that kind, the courts of a state may, so far as the Constitution and laws of the United States are concerned, take cognizance of a suit brought by the state in its own courts against citizens of other states, subject, of course, to the right of the defendant to have such suit removed in a proper case to a Federal court, and subject, also, to the authority of this court to review the final judgment of the state court, if the case be one within its appellate jurisdiction.

[No. 204.]

Argued April 15, 1898. Decided May 2, 1898.

APPEAL from a judgment of the Circuit Court of the United States for the Eastern District of Louisiana dismissing a suit brought by the Plaquemines Tropical Fruit Company, plaintiff, against William Henderson *et al*, to quiet the title of the plaintiff to certain lands in the parish of Plaquemines in that state, and to restrain the defendants from committing trespasses thereon. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Duane E. Fox** and *J. Ward Gurley* for appellant.

Messrs. **Victor Leovy**, *Henry J. Leovy*, *Joseph Paxton Blair*, and *Alexander Porter Morse* for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

This suit was commenced February 11, 1895, in the circuit court of the United States for the eastern district of Louisiana by the Plaquemines Tropical Fruit Company, a New Jersey corporation, against the defendants in error, William Henderson and Henry J Leovy, citizens of Louisiana.

It is, in effect, a suit to quiet the title of the plaintiff to certain lands in the parish of Plaquemines in that state, and to restrain the defendants from committing trespasses thereon.

The defendants filed a joint and several plea, in which it was averred: That in 1892 a suit was instituted by the state of Louisiana in the civil district court of the parish of Orleans, Louisiana, against the Plaquemines Tropical Fruit Company, Charles C. Buck the vice president of that company and a citizen of Maryland, and others, in which suit the state sought a decree adjudging it to be the owner of certain lands within the limits; in which action, the defendants having appeared, it was found by the verdict of a jury, and in accordance with the verdict it was adjudged by the court, that the lands here in question belonged to the state, and that the Plaquemines Tropical Fruit Company and Buck had no title thereto; that such judgment, upon appeal of the company and Buck, was affirmed by the supreme court of Louisiana; that a writ of error sued out by the same defendants to this court was dismissed; that the lands the title to which is involved in this suit are part of those the title to which was involved in that action; that Henderson and Leovy acquired title from the state after the above judgment obtained by it had become final; and that such judgment remained unreversed and unmodified.

The defendants Henderson and Leovy pleaded the above proceedings and the judgment obtained by the state in bar of the present suit.

At the hearing below, the plaintiff having admitted the *correctness in point of fact [513] of the defendant's plea in bar, it was adjudged that the plea was sufficient. The bill was accordingly dismissed.

The contention of the appellant is that the civil district court of the parish of Orleans could not, consistently with the Constitution of the United States, take cognizance of any suit brought by the state of Louisiana against citizens of other states, and consequently its judgment, now pleaded in bar, was null and void. If that contention be overruled the judgment below must be affirmed; otherwise it must be reversed, and the cause remanded with directions to hold the plea insufficient.

The appellant, in support of its contention, insists that the entire judicial power surrendered to the United States by the people of the several states vested absolutely in the United States under the Constitution; that by that instrument the nation acquired certain portions of the judicial power naturally inherent in sovereignty; that thereafter a state court could not, without the expressed consent of the United States, take cognizance of a case embraced in such cession of judicial power; and that the judicial power of the United States, not distributed by the Constitution itself, cannot be so distributed that a state court may take cognizance of a case or controversy to which that power is extended, *if* its determination thereof is not made by Congress subject to re-examination by some court of the United States.

These propositions applied to the case before us mean that the civil district court of the parish of Orleans was without jurisdiction to render judgment in the above suit instituted by the state, because there was no provision in the acts of Congress whereby its judgment could be reviewed by some court of the United States.

The Constitution provides—

"The judicial power of the United States shall be vested in one Supreme Court, and in

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mercial law; effect of state decisions in other states; Federal questions,—see note to Forepaugh v. Delaware, L. & W. R. Co. (Pa.) 5 L. R. A. 508.

As to jurisdiction in case of diverse citizenship, see note to Seddon v. Virginia, T. & C. Steel & I. Co. (C. C. N. D. Va.) 1 L. R. A. 108.

As to adoption by Federal courts of remedies created by state statutes; preservation of equity jurisdiction; enlargement of equitable remedies; limitation or enlargement of equity powers; extending legal remedies; limiting equitable jurisdiction,—see note to Leighton v. Young (C. C. App. 8th C.) 18 L. R. A. 266.

As to residence or citizenship of corporations for purpose of Federal jurisdiction in state other than that where created; adoption or new incorporation; consolidation with domestic corporation; residence; an "inhabitant" where; where "found," under act of 1875,—see note to Stephens v. St. Louis & S. F. R. Co. (C. C. N. D. Ark.) 14 L. R. A. 184.

such inferior courts as the Congress may from time to time ordain and establish." Art. 3, § 1.

"The judicial power shall extend to all cases **514**] in law and *equity arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

"In all cases affecting ambassadors, other public ministers or consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make." Art. 3, § 2.

Do the words, "the judicial power shall extend . . . to controversies . . . between a state and citizens of other states," and the words "in all cases . . . in which a state shall be a party, the Supreme Court shall have original jurisdiction," necessarily manifest a purpose to exclude all such controversies from cognizance by the courts of the several states? Was it intended that the Constitution should, by its own force, without legislation by Congress, devest the courts of the states of jurisdiction of cases or controversies to which the judicial power of the United States was extended?

These questions were the subject of earnest consideration while the Constitution was before the people of the United States for acceptance or rejection. It was contended by some who recommended its rejection that the proposed Constitution, without legislation by Congress, would give to the one Supreme Court established by it, and to such other courts as Congress should from time to time create, *exclusive* jurisdiction in all such cases or controversies. That interpretation was disputed, and Hamilton in The Federalist said: "The principles established in a former paper teach us that the state will retain all *pre-existing* authorities, **515**]which may not be exclusively *delegated to the Federal head; and that this exclusive delegation can only exist in one of three cases: Where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the states; or where an authority is granted to the Union, with which a similar authority in the states would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former, as well as the latter. And under this impression I shall lay it down as a rule that the state courts will *retain* the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.' He recognized the fact that there was apparent support to the objection referred to in the clause, "The *judical power* of the United States *shall be vested* in one Supreme Court, and in *such* inferior courts as the Congress shall from time to time ordain and establish." That clause, he said, "might either be construed to signify that the supreme and subordinate courts of the Union should alone have the power of deciding those causes, to which their authority is to extend; or simply to denote that the organs of the national judiciary should be one Supreme Court, and as many subordinate courts as Congress should think proper to appoint; in other words, that the United States should exercise the judicial power with which they are to be invested through one supreme tribunal, and a certain number of inferior ones, to be instituted by them. The first excludes, the last admits, the concurrent jurisdiction of the state tribunals. And as the first would amount to an alienation of state power by implication, the last appears to me the most defensible construction." He also said that the judicial power of every government "looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider *the state[**516** governments and the national government, as they truly are, in the light of kindred systems and as parts of one whole, the inference seems to be conclusive that the state courts would have a concurrent jurisdiction in cases arising under the laws of the Union, where it was not expressly prohibited." Federalist, No. 82.

The first Congress acted upon this view of the scope and effect of the Constitution when it passed the judiciary act of 1789, creating the circuit and district courts of the United States, and defining their jurisdiction. 1 Stat. at L. 73, chap. 20. By that act it was declared that the district courts should have, "exclusively of the courts of the several states," cognizance of specified crimes and of certain named civil causes or suits, and cognizance "concurrent with the courts of the several states or the circuit courts, as the case may be," of certain other causes or suits. By that act also the circuit courts were given cognizance, "concurrent with the courts of the several states," of all suits of a civil nature at common law or in equity, where the matter in dispute exceeded, exclusive of costs, the sum or value of $500, and the United States were plaintiffs or petitioners, or where an alien was a party, or where the suit was between a citizen of the state in which it was brought and a citizen of another state. And by the same act it was provided that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; *and except also between a state and citizens of other states*, or aliens, in which latter case it shall have original, but not exclusive, jurisdiction, . . . and original, but not exclusive, jurisdiction of all

suits brought by ambassadors or other public ministers, or in which a consul or vice consul shall be a party." The act also made provision for the removal of a suit commenced in a state court against an alien, or by a citizen of one state against a citizen of another state, if the matter in dispute exceeded the above sum or value; but it contained no provision giving the circuit courts original jurisdiction of a suit by a state against a citizen of another state, nor 517] for the removal into a *subordinate Federal court of a suit brought by a state in one of its own courts against a citizen of another state. Nor did that act provide for the review by this court of the final judgment of the state court simply because it was rendered in a suit brought by a state against a citizen of another state which involved no question of a Federal nature.

So that in the first judiciary act—passed by a Congress many of whose members, as was the eminent jurist who drew the act, were delegates in the convention that framed the Constitution—we have a contemporaneous interpretation of the clauses relating to the exercise of the judicial power of the United States which negatives the suggestions now made on behalf of the appellant.

It cannot be doubted that each of the original states had, prior to the adoption of the Constitution, complete and exclusive jurisdiction by its judicial tribunals over all legal questions, of whatsoever nature, capable of judicial determination, and involved in any case within its limits between parties over whom it could exercise jurisdiction. *Tennessee* v. *Davis*, 100 U. S. 257 [25: 648].

If it was intended to withdraw from the states authority to determine by its courts all cases and controversies to which the judicial power of the United States was extended, and of which jurisdiction was not given to the national courts exclusively, such a purpose would have been manifested by clear language. Nothing more was done by the Constitution than to extend the judicial power of the United States to specified cases and controversies; leaving to Congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise jurisdiction concurrent with the courts of the several states.

This was the view taken of this question by Chancellor Kent in his commentaries. Referring to the clauses of the Constitution relative to the judicial power of the United States, he said: "The conclusion then is that in judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasures 518]of Congress, and may be *revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the Federal courts; and that, without an express provision to the contrary, the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject matter." 1 Kent, Com. 400.

In *Gittings* v. *Crawford*, Taney, 1, the question was considered whether the 9th section of the judiciary act of 1789, giving jurisdiction to the district court of the United States of cases against consuls and vice consuls, was consistent with the clause of the Constitution providing that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction." It was held that those words did not expressly exclude the jurisdiction of other courts of the United States in the cases mentioned, Chief Justice Taney observing: "The true rule in this case is, I think, the rule which is constantly applied to ordinary acts of legislation, in which the grant of jurisdiction over a certain subject-matter to one court does not, of itself, imply that that jurisdiction is to be exclusive. In the clause in question there is nothing but mere affirmative words of grant, and none that import a design to exclude the subordinate jurisdiction of other courts of the United States on the same matter." That case, it is true, did not present any question as to the jurisdiction of the state courts, but it affirms the rule that the grant of original jurisdiction to a particular court in enumerated cases does not, of itself, import that the jurisdiction of that court is exclusive in such cases. If the clause just quoted is not to be interpreted as giving this court exclusive jurisdiction in cases affecting consuls, upon like grounds it cannot be interpreted as giving this court exclusive jurisdiction in suits instituted by a state, simply because of the provision giving the Supreme Court original jurisdiction where the state is a party.

But the cases most directly in point are those reported under the title of *Ames* v. *Kansas* [*Johnston*], 111 U. S. 449, 457 [28: 482, 486]. One was a suit against the Kansas Pacific Railway, a corporation organized *under the[519 laws of the United States; the other a suit against certain persons constituting the board of directors of the Union Pacific Railway Company and citizens of states other than Kansas. Both suits were brought by the state in one of its own courts. It was contended that as the state was a party to those suits, this court had exclusive jurisdiction. After observing that the evident purpose of the Constitution was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a state or a diplomatic or commercial representative of a foreign government, this court said: "So much was due to the rank and dignity of those for whom the provision was made; but to compel a state to resort to this one tribunal for the redress of all its grievances, or to deprive an ambassador, public minister, or consul of the privilege of suing in any court he chose having jurisdiction of the parties and the subject-matter of his action, would be, in many cases, to convert what was intended as a favor into a burden. Acting on this construction of the Constitution, Congress took care to provide [in the original judiciary act] that no suit should be brought *against* an ambassador or other public minister except in the Supreme Court, but that he might sue in any court he chose that was open to him. As to consuls, the commercial representatives of foreign governments, the jurisdiction of the Supreme Court was made concurrent with the district courts, and suits of a civil nature could be brought against them in either tribunal. With respect

to states, it was provided that the jurisdiction of the Supreme Court should be exclusive in all controversies of a civil nature where a state was a party, except between a state and its citizens, and *except*, also, between a state and citizens of other states or aliens, in which latter case its jurisdiction should be original, but not exclusive. Thus, the original jurisdiction of the Supreme Court was made concurrent with any other court to which jurisdiction might be given in suits between a state and citizens of other states or aliens. No jurisdiction was given in such cases to any other court of the United States, and the practical effect of the enactment was, therefore, to give the Supreme 520] Court *exclusive original jurisdiction in suits against a state begun without its consent, and to allow the state to sue for itself in any tribunal that could entertain its case. In this way states, ambassadors, and public ministers were protected from the compulsory process of any court other than one suited to their high positions, but were left free to seek redress for their own grievances in any court that had the requisite jurisdiction. No limits were set on their powers of choice in this particular. This, of course, did not prevent a state from allowing itself to be sued in its own courts or elsewhere in any way or to any extent it chose."

And in *Robb* v. *Connolly*, 111 U. S. 624, 636 [28: 542, 546], it was held that in defining and regulating the jurisdiction of the courts of the United States, Congress has taken care not to exclude the jurisdiction of the state courts from every case to which by the Constitution the judicial power of the United States extends. The reason given for this view was that upon the state courts, equally with the courts of the Union, rested the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, whenever those rights were involved in any suit or proceeding before them; for, the court said, "the judges of the state courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the Constitution or laws of any state to the contrary notwithstanding.'"

It is said that the present case differs from *Ames* v. *Kansas* [*Johnston*] in that the latter was a suit arising under the Constitution and laws of the United States, and was therefore removable into the circuit court of the United States, while the present suit was not removable from the state court under any statute regulating the jurisdiction of the courts of the United States. But that difference only shows that Congress has not seen proper to provide for the removal from a state court of a suit brought by the state against citizens of other states and involving no question of a Federal 521] nature, nor for the review *by this court upon appeal or writ of error of the final judgment in such a suit. It is for Congress to say how much of the judicial power of the United States shall be exercised by the subordinate courts it may establish from time to time. Its failure to invest the national courts with jurisdiction by removal from the state courts of a suit brought by a state against citizens of other states which involves no Federal question, cannot have the effect to deprive the states of the right which they possessed prior to the adoption of the Constitution to submit to one of its own courts all matters in which it was concerned and which were capable of judicial determination, to be there finally adjudicated as between the state and the parties who were within its jurisdiction so as to be bound by any judgment rendered, and who were not, by reason of their representative character or for other cause, placed exclusively under Federal jurisdiction, and exempted altogether from process issuing from state tribunals.

As, under the long-settled interpretation of the Constitution, the mere extension of the judicial power of the United States to suits brought by a state against citizens of other states did not, of itself, devest the state courts of jurisdiction to hear and determine such cases, and as Congress has not invested the national courts with exclusive jurisdiction in cases of that kind, it follows that the courts of a state may, so far as the Constitution and laws of the United States are concerned, take cognizance of a suit brought by the state in its own courts against citizens of other states, subject, of course, to the right of the defendant to have such suit removed to the proper circuit court of the United States, whenever the removal thereof is authorized by the acts of Congress, and subject, also, to the authority of this court to review the final judgment of the state court, if the case be one within our appellate jurisdiction.

For the reasons stated, it is adjudged that *the court below did not err in sustaining the plea, and its judgment is affirmed.*

UNITED STATES, *Plff. in Err.*, [522
v.
PATRICK HENRY WINSTON.

(See S. C. Reporter's ed. 522-527.)

Pay of district attorney as special counsel—certificate of attorney general—presumption.

1. Whenever the Attorney General calls upon the district attorney to appear for the government in a case pending in the court of appeals, he is not directing him in the discharge of his official duties as district attorney, but is employing him as special counsel; and the compensation which he may receive is not a part of his compensation as district attorney.
2. The certificate of the Attorney General prescribed in U. S. Rev. Stat. § 365, is a prerequisite to the allowance of compensation to a district

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NOTE.—*As to extra pay or compensation to officers*, see note to United States v. Macdaniel, 8: 587.

As to constitutional prohibition against change of salary during term as affecting fees, see note to Gobrecht v. Cincinnati (Ohio) 23 L. R. A. 609.

As to right of officer de jure to salary for period during which a de facto officer has acted and received pay, see note to State, Greeley County, v. Milne (Neb.) 19 L. R. A. 689.

attorney for his services as attorney or counselor under that section.

8. When it is expressly found that the Attorney General allowed a claim to a district attorney, and no showing is made of the particular form in which the allowance was made or certificate given, and no assignment of error raises a question as to the sufficiency of any certificate, this court may assume that the allowance was made in such a way as to secure to the plaintiff the compensation to which he was entitled.

[No. 205.]

Submitted April 14, 1898. Decided May 9, 1898.

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment of that court affirming with modification the judgment of the Circuit Court of the United States for the District of Washington, Eastern Division, for compensation for special services of Patrick Henry Winston, district attorney of the United States for said District, which services were rendered for the government in a case in the Court of Appeals. *Affirmed.*

See same case below, 44 U. S. App. 401.

Statement by Mr. Justice **Brewer:**

The defendant in error, who had been the district attorney of the United States for the district of Washington from February 19, 1890, to May 30, 1893, brought this action in the circuit court to recover for special services as an attorney rendered during that period, and there recovered a judgment. The court of appeals for the ninth circuit struck out one claim which had been allowed, but otherwise affirmed the judgment. 44 U. S. App. 401. Whereupon the United States sued out this writ of error.

The government concedes that some of the items included in the judgment of the court of appeals are correct, and disputes only three. With respect to one of these disputed items, the circuit court made the following finding of fact:

"4. That during said term of office, to wit, about the month of April, 1892, plaintiff, at the request of the defendant, appeared in the circuit court of appeals, ninth judicial circuit, at San Francisco, in a case wherein the defend ant was appellee, and the owner of the steam tug 'Pilot' was appellant, and as such attorney conducted the trial of said cause to its conclusion for the defendant. That the Attorney General of the United States allowed plaintiff for services in said cause the sum of $400, the 523]law providing no specific*compensation, and that said services were reasonably worth said sum. Of this sum defendant paid plaintiff $212.79, retaining the balance of $187.21 on account of excess of earnings above the maximum of personal compensation and emoluments which the law permitted the plaintiff to receive for the year in which these services were rendered and the money earned."

The other items are substantially similar, and it is therefore unnecessary to state the particular facts as to them.

Mr. **Louis A. Pradt,** Assistant Attorney General, for plaintiff in error.

Messrs. **Patrick Henry Winston,** in proper person, and **Alexander M. Winston** for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

Is a district attorney entitled to extra compensation for services rendered under the direction of the Attorney General in the conduct of a government case in the court of appeals? Section 767, Revised Statutes, provides that:

"There shall be appointed in each district, except in the middle district of Alabama and the northern district of Georgia and the western district of South Carolina, a person learned in the law, to act as attorney for the United States in such district."

Section 771 is:

"It shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury."

*These two sections define the place, [524 character, and extent of his duties. He is the district attorney of the United States in the district. So far as locality is concerned, the boundaries of the districts are the limits of duty. Within these boundaries he is to discharge all his official duties. Beyond them he is not called to go. Sections 773, 774, and 775 prescribe some details in respect to the duties enjoined by § 771, but do not add to their scope.

The suit in the court of appeals in which the plaintiff rendered services was not one then pending in his district. The sessions of that court were held in San Francisco, in the northern district of California. But, wherever held, the court of appeals is not a court in or for any district The act creating that court (26 Stat. at L. 826, chap. 517) does not create a court in or for a district, but one in and for each circuit. The relations of that court to a district are similar to those of this court. The Supreme Court is not a court in or of or for a district, but in and of and for the United States as a whole. The fact that this case was originally pending in the circuit or district court of the district of Washington does not make the court of appeals a court of that district when engaged in hearing the case on appeal. The case when it reached the court of appeals passed out of the courts of the district, just as fully as if appealed to this court. In other words, when a case is transferred to the court of appeals or to this court it passes beyond the limits within which a district attorney has jurisdiction and exercises his powers.

When a case in which the government is interested comes to this court from any lower court it falls by the terms of the statute within the special care of the Attorney General. Section 359, Rev. Stat., provides:

"Except when the Attorney General in particular cases otherwise directs, the Attorney

General and Solicitor General shall conduct and argue suits and writs of error and appeals in the Supreme Court and suits in the court of claims in which the United States is interested, and the Attorney General may, whenever he deems it for the interest of the United States either in person conduct and argue any case in
525] any *court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so."

Under this section the Attorney General may, in his discretion, make other arrangements for the management of such a case, but this discretion does not abridge the fact that the full responsibility and control are imposed directly upon him as the head of the department of justice. In the act creating the court of appeals there is no special direction to any attorney to represent the government. Clerks and marshals were provided for, but the act is silent as to who shall represent the government as its counsel. Undoubtedly, however, the matter falls within the general jurisdiction of the department of justice, and the Attorney General, by virtue of § 359 or §§ 362 and 363, may either himself assume the management of all government cases, or direct what officer shall have the control and management, or, if he deems it essential, employ special counsel. Whenever the Attorney General calls upon a district attorney to appear for the government in a case pending in the court of appeals, he is not directing him in the discharge of his official duties as district attorney, but is employing him as special counsel. The duties so performed are not performed by him as district attorney, but by virtue of the special designation and employment by the Attorney General, and the compensation which he may receive is not a part of his compensation as district attorney or limited by the maximum prescribed therefor. It seems to us that this is the clear import of the statutes, and we have no difficulty in agreeing with the court of appeals in its opinion upon this question.

A more difficult matter is presented by these facts. Section 365, Revised Statutes, provides:

"No compensation shall hereafter be allowed to any person, besides the respective district attorneys and assistant district attorneys for services as an attorney or counselor to the United States, or to any branch or department of the government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney General that
526] such *services were actually rendered, and that same could not be performed by the Attorney General, or Solicitor General, or the officers of the department of justice, or by the district attorneys."

We held in *United States* v. *Crosthwaite*, 168 U. S. 375 [*ante*, 507], that this section is controlling, and that "the certificate of the Attorney General prescribed therein, which even that officer cannot dispense with, is a prerequisite to the allowance of compensation." There is in this record no finding that this particular certificate was ever made, nor, on the other hand, is there anything to suggest that it was not made. It does appear affirmatively that the Attorney General allowed plaintiff for his services, the law providing no specific compensation, and that the services were reasonably worth the sum so allowed. We find no reference anywhere in the pleadings, or the opinion of the circuit court, or in that of the court of appeals, to the particular terms of the certificate called for by this section. The language of its findings and opinion seems, however, to indicate that the circuit court found that proper certificates were given, and that everything necessary to entitle plaintiff to extra compensation had been performed, providing the case was one in which he could receive such compensation and in which the services rendered were not included within his duties as district attorney. We are strengthened in this conclusion by the fact that neither in the assignments of error made when the case was taken to the court of appeals nor in those filed when the case was brought here is there a suggestion that any certificate was lacking or deficient. It seems to us, therefore, that when it is expressly found that the Attorney General allowed this claim, and no showing is made of the particular form in which the allowance was made or certificate given, and no assignment of error raises a question as to the sufficiency of any certificate, we have a right to assume that the allowance was made in such a way as to secure to the plaintiff the compensation to which he was entitled. An so, although we adhere to the rule laid down in *United States* v. *Crosthwaite*, *supra*, and do not intend to qualify it in the least, we think a *fair conclusion from this [527 record is that the proper certificate was given.

The judgment of the Court of Appeals will therefore be affirmed.

UNITED STATES, *Appt.*,
v.
JOHN W. HERRON.

(See S. C. Reporter's ed. 527.)

Compensation to district attorney.

The certificate of the Attorney General, prescribed by U. S. Rev. Stat. § 365, is a prerequisite to the allowance of compensation to a district attorney for his services as attorney or counselor under that section; and where there is a distinct finding in the record by the court of claims that the certificate required by said section was not given, there can be no recovery by a district attorney for services rendered thereunder.

[No. 272.]

Submitted April 14, 1898. Decided May 9, 1898.

APPEAL from a judgment of the Court of Claims for the recovery by John W. Herron, United States District Attorney, for services rendered in a Court of Appeals outside the limits of his district. *Reversed*, and case remanded for further proceedings.

The facts are stated in the opinion.

See same case below, 31 Ct. Cl. 473.

Mr. **Louis A. Pradt,** Assistant Attorney General, for appellant.

Messrs. **W. W. Dudley, L. T. Michener,** and **F. P. Dewees** for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

This case, like the preceding, is one for the

recovery by a district attorney for services rendered in a court of appeals outside the limits of his district. But in this record there is a distinct finding by the court of claims that the certificate required by § 365, Revised Statutes, was not given. We are constrained, therefore, under *United States* v. *Crosthwaite*, 168 U. S. 375 [*ante*, 507], to hold that the judgment cannot be sustained.

The order will be that the judgment be reversed, and the case remanded to the court of claims for further proceedings.

UNITED STATES, *Appt.*,
v.
CHARLES A. GARTER.

(See S. C. Reporter's ed. 527-530.)

Compensation of district attorney—services in circuit court of appeals.

1. A district attorney appearing in the circuit court of appeals, although it sits within the limits of his district, when employed by the Attorney General to represent the government, acts as special counsel, and his compensation therefor is not a part of that received as district attorney.
2. An allowance for services by a district attorney in the circuit court of appeals, made by the Attorney General, is deemed on appeal to have been made in such a way as to entitle him to compensation, where there is a general finding of the allowance, without showing the form of it, and there is no assignment of error raising a question as to the sufficiency of any certificate.

[No. 274.]

Submitted April 14, 1898. Decided May 9, 1898.

APPEAL from a judgment of the Court of Claims in favor of Charles A. Garter against the United States for services rendered by him in the Court of Appeals for the defendant. *Affirmed.*

See same case below, 31 Ct. Cl. 344.

The facts are stated in the opinion.

Mr. **Louis A. Pradt,** Assistant Attorney General, for appellant.

Messrs. **W. W. Dudley, L. T. Michener,** and **F. P. Dewees** for appellee.

528] *Mr. Justice **Brewer** delivered the opinion of the court:

This case, like the two preceding, is one brought by a district attorney to recover for services rendered in a court of appeals. There is this difference, however, between them: The plaintiff in the court below was district attorney for the northern district of California. The court of appeals was held at San Francisco, within the limits of that district, though the case in which he was employed and in which he rendered the services was one coming to that court from the district court of Alaska.

In a geographical sense the services were rendered in a government case pending in the district for which he was district attorney, and technically, therefore, it may be said that those services were within the statutory designation of his duties. But we are of the opinion that this fact is not decisive, and for these reasons: At the time the sections defining his duties were enacted there was no court of appeals, and therefore no service in such court could have been within the contemplation of Congress in their enactment. Undoubtedly the fact that Congress thereafter added to his duties would not of itself change the measure or limits of compensation. But the question is whether a fair construction of the court of appeals act casts upon him any duties in respect to cases pending in that court. That act was a new and great departure in the judicial system of the United States. It divided the appellate jurisdiction theretofore vested in this court and distributed it between this and the newly created courts of appeal. To accommodate suitors it provided that the sessions of those courts should be held within their respective circuits, but for all practical purposes those courts became for several classes of cases practically the supreme court, and this notwithstanding the fact that there was reserved to this court a control over their proceedings. They were, as we held in the opinion just filed, in no sense courts in or for a district, but distinctively appellate courts for the entire circuit. No express provision was made for appearances in those courts by the district attorneys of the several districts, and the control of *cases in them comes within the general [529 jurisdiction of the Attorney General as head of the Department of Justice.

While one city in each circuit was named as a place for holding at least one term of the court, authority was given to the judges to hold terms at other places within the circuit, and in fact in several circuits the courts of appeals are held at more than one place. Obviously great practical inconvenience would result if the management and control of a case pending in a court of appeal was adjudged the duty of the district attorney of the district in which the court is held. For if the case was placed on the docket for one term and the district attorney of the district in which that term was held should assume the management and control of the case, it might often be that before the case was reached for argument the court would have finished its term there and adjourned to a place in some other district, and then upon the district attorney of that district would rest the duty of undertaking the management and control. So not merely the nature of the court and its relations to the entire circuit, but the practical difficulties which would attend the matter, concur in compelling the conclusion that it is not a part of the official duties of the district attorney of the district in which, at the time, a session of the court of appeals is held to assume the management and control of government cases in that court.

As we indicated in *United States* v. *Winston*, 170 U.S. 522 [*ante*, 1130], that court must stand in relation to cases pending therein, so far as concerns the legal representatives of the government, precisely as this court, and the management and control of all cases therein, must be regarded as a part of the immediate duties

NOTE.—*As to extra pay or compensation to officers*, see note to United States v. Macdaniel, 8; 587.

of the Department of Justice and under the control of the Attorney General. So, although the particular case in which this plaintiff was employed was pending in the court of appeals, whose sessions were then held within the territorial limits of his district, the duty of attending to the management of that case was not cast upon him, and when he was employed by the Attorney General to represent the government in that case he was employed as a special counsel, and the rule of compensation must be the same as adjudged in the prior case.

530] *The same observations must be made here as in *United States* v. *Winston*, 170 U. S. 522 [*ante*, 1130], in reference to the matter of certificate, and the conclusions to which we came in that case find additional support from the fact that this case and the one immediately preceding (*United States* v. *Herron*, 170 U. S. 527 [*ante*, 1132]), were tried in the court of claims, and both were decided during the same month. 31 Ct. Cl. 344, 473. In that there was an express finding, as we have seen, that no certificate was given, as required by § 365, Revised Statutes, while in this such finding is omitted, and simply the general finding of an allowance by the Attorney General. We think, therefore, this comes within the rule laid down in *United States* v. *Winston*, 170 U. S. 522 [*ante*, 1130], and *the judgment of the Court of Claims is affirmed.*

TEXAS & PACIFIC RAILWAY COMPANY
v.
ALEXANDER REEDER.

(See S. C. Reporter's ed. 530-537.)

Drover's pass—construction of same — recovery for injuries.

1. A clause in a drover's pass or contract with a railway company, that he "shall remain in the caboose car attached to the train while the same is in motion," is obligatory upon him only while the car is in motion.
2. The word "motion" in such a contract means that continuous movement of the cars towards their destination which is commonly understood when we speak of moving trains or trains in motion, and does not mean a sudden jolt or jar of the car while the train is stationary.
3. Riding in a stock car when in motion in violation of a condition in a drover's or emigrant's pass will not preclude his recovery for injuries received while his part of the train was left standing on the track and he was caring for the stock as his contract required him to do.

[No. 208.]

Submitted April 15, 1898. Decided May 9, 1898.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of that court affirming the judgment of the United States Circuit Court for the Eastern District of Texas in favor of the plaintiff, Alexander Reeder, against the Texas & Pacific Railway Company for personal injuries sustained by plaintiff by reason of defendant's negligence. *Affirmed.*

See same case below, **41 U. S. App. 775.**

Statement by **Mr. Justice Brown:**

This was an action originally instituted by Alexander Reeder against the Texas & Pacific Railway Company in the district court of Marion county, Texas, to recover for personal injuries sustained by Reeder. The action was afterwards removed upon petition of the defendant to the United *States circuit court for the[**531** eastern district of Texas. The facts of the case were substantially as follows:

Reeder shipped from Scottsville, Kansas, to Houston, Texas, a car loaded with an emigrant outfit, consisting of ten head of live stock and of household goods, and accompanied the same upon a drover's pass. It was provided in the contract, which he entered into with the railway company, that he should "assume all risk and expense of feeding, watering, bedding, and otherwise caring for the live stock" while on the way, and to better care for the stock he rode in the car with them. In the ninth paragraph of the contract it was further provided "that the person or persons in charge of live stock covered by this contract shall remain in the caboose car attached to the train while the same is in motion, and that whenever such person or persons shall leave the caboose, or pass over or along the cars or track, they shall do so at their own risk of personal injury from every cause whatever."

The evidence shows that it was the custom on the road of the defendant company for stockmen to ride in the caboose, but that in a case of an "emigrant outfit," like the one in question, it was not unusual for the person in charge to ride in the car with the live stock. Reeder rode with the live stock during the whole trip, and although his car was next to the caboose, and he was invited by the conductor and trainmen to ride in the caboose, he declined for the reason that it would be inconvenient for him to get in and out of the car to look after his stock.

Reeder, whose age was about seventy, testified that he had traveled about 500 miles over connecting lines before reaching the line of the defendant company, and in that distance neither his stock not himself had sustained any injury. He further testified that during his whole trip on the line of the defendant his stock was roughly handled by the sudden stopping and starting of the engine, and had been knocked down at least eight times, and that his complaints to the trainmen that the jerks

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NOTE.—*As to liability of carrier for injury to passenger carried free or riding on a pass*, see note to New York C. R. Co. v. Lockwood, 21: 627.

From what liability a contract that a common carrier is not to be responsible for loss or damage will exonerate, see note to New Jersey Steam Nav. Co. v. Merchant's Bank, 12: 465.

As to rights of a person riding on pass or contract for free passage; stockbroker; drover's pass; assuming risk; express agents, newsboys, and the like; complimentary or gratuitous pass,—see note to Muldoon v. Seattle City R. Co. (Wash.) 22 L. R. A. 794.

As to duties and liabilities of carriers of live stock, see note to Missouri P. R. Co. v. Fagan (Tex.) 2 L. R. A. 75.

and jolts were killing his stock did no good. He also testified that at or about the place along the line of the road where he received his 532]injury, called *Longview, the train was stalled on a steep grade, and the engineer in trying to get headway would back the train a short distance and then start with a sudden jerk as he took up the slack of the train; that one of the jerks threw down three cows and two horses, whose halters had been snapped by the jerk; that the engineer uncoupled the train, taking part up the grade, leaving his car; that after the car stopped he got the stock up and was on his way back to his seat when the engine came back against the train with such a sudden jar that he was thrown off his feet, and to save himself he grabbed an iron support. It seems that the sudden jar or jerk pulled his right arm out of joint at the shoulder, which subsequently was followed by a partial paralysis of the shoulder muscles.

The engineer and others of the train crew testified that the train was not uncoupled at the place mentioned by Reeder, but was uncoupled at another place called Marshall, where there was a very steep grade. The witnesses for the defendant also testified that the trip was no rougher than usual, and one of the brakemen said on the stand that he was riding in the caboose at the time of the jerk which caused the injury, and that he did not suffer from it in any way.

After all the evidence was in, the defendant requested the court to charge the jury to return a verdict for the defendant. This the court refused to do, whereupon the defendant requested the court to charge the jury to find for the defendant in case it should find from the evidence that the plaintiff would not have been injured if he had been in the caboose instead of the stock car; that he was invited to ride in the caboose; that the latter was a safer place than the stock car, and that the plaintiff knew it. The court refused to grant any of the instructions requested by the defendant, and charged the jury as follows:

"If you believe from the evidence that the plaintiff, Alexander Reeder, was riding in the stock car in which his horses and cattle and goods were being transported over defendant's road, and that while the train was stationary, his cattle being down, and needed his attention, 533]he at the time, in a *prudent and careful manner, attempted or did give the horses and cattle the attention or assistance which they needed, and that the plaintiff was injured at that time, by a sudden and unusual hard jerk or jolt or bumping of the cars in which he was riding, through and by the negligence of the defendant company or its operatives, you will find for the plaintiff, and assess actual damages as hereinafter instructed.

"If, however, you believe from the evidence that at the time the plaintiff was hurt, that the train upon which he was riding was in motion, at the time he was giving the horses and cattle the assistance which they needed, the plaintiff would not be entitled to recover, and you will find for the defendant."

The jury returned a verdict for the plaintiff in the sum of $1,500, upon which judgment was entered. The case was then taken to the court of appeals for the fifth circuit (41 U. S. App. 775), where the judgment below was affirmed, and the case is now before this court on writ of error.

Messrs. **John F. Dillon, Winslow S. Pierce,** and **David D. Duncan** for plaintiff in error.

Messrs. **Presley K. Ewing, Henry F. Ring,** and **L. S. Schluter** for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

The several assignments of error in this case all resolve themselves into the two questions whether the defendant railway company was entitled to a peremptory instruction in its favor, or, in case of a refusal of such instruction, whether it was entitled to submit to the jury the question of the contributory negligence of the plaintiff in the mere fact of riding in the stock car.

In this connection defendant relies upon the ninth clause of the contract under which plaintiff was traveling and transporting his stock, which provides that "the person or persons *in charge of live stock covered by[534 this contract shall remain in the caboose car attached to the train while the same is in motion." This clause was undoubtedly intended to provide a safe place for drovers in attendance upon their stock, although in the case of emigrants accompanying their outfits it was a common custom to permit them to ride in the car with their outfits. But, assuming that the plaintiff was bound by this stipulation, it was manifestly obligatory upon him only while the car was in motion, the design evidently being that drovers should be permitted to visit their stock cars and see to their cattle while the train was at rest. Indeed, the contract specially provided that the plaintiff should "assume all risk and expense of feeding, watering, bedding, and otherwise caring for the live stock provided for by this contract, while in yards, pens, or elsewhere." The stipulation was doubtless primarily intended to permit drovers to visit their stock cars while the train was stopping at its regular stations, but as there is no such limitation in the contract, we think the plaintiff was not guilty of contributory negligence in attending to his cattle whenever the train was not in motion, whatever may have been the cause of its stoppage, and whether the same occurred at a station or not. The company might doubtless have restricted the right of its drovers to visit their stock while the train was stopping at its regular stations, but it did not choose to do so, and there evidently was as much necessity in the present case for the plaintiff to care for his stock and to protect it against injury as there would have been if the train had been stopping at such a station.

If the plaintiff, while riding in a caboose, might, within the terms of the contract, have been visiting his cattle at the time the accident occurred, then the fact that he was actually riding in the same car with them while the car was in motion becomes immaterial, since the propriety of his action in being in the stock car must be gauged by the

fact whether the train was in motion or not. Had the accident occurred while the plaintiff should have been riding in the caboose, that is, while the train was in motion, it would have been strong, if not conclusive, evidence of contributory negligence on his part.

535] *What, then, is meant by the train being "in motion"? The jar or sudden jolt which occasioned the injury doubtless presupposes a momentary motion of the car, but that is an extremely limited sense of the word, and one inconsistent with the obvious purpose of the license, since, while stopping at a regular station, freight trains are frequently subject to be moved short distances in order to drop off or take on cars, to be switched on side tracks in order to accommodate passenger trains, or to take on fuel or water. If cars were held to be in motion while making these trifling changes, the privilege of entering a stock car while the train was at rest would be of no practical value. The more reasonable interpretation is that by the word "motion," as here used is intended that continuous movement of the cars towards their destination which is commonly understood when we speak of moving trains or trains in motion. Whether the train was really in motion was a question which was submitted to the jury, and we have no criticism to make of the instructions of the court in that particular: "That if you believe from the evidence that the plaintiff, Alexander Reeder, was riding in the stock car in which his horses and cattle and goods were being transported over defendant's road, and that while the train was stationary, his cattle being down and needed his attention, he at the time, in a prudent and careful manner, attempted to or did give the horses and cattle the attention or assistance which they needed, and that the plaintiff was injured at that time by a sudden and unusual hard jerk or jolt or bumping of the cars in which he was riding, through and by the negligence of the defendant company or its operatives, you will find for the plaintiff, and assess actual damages as hereinafter instructed."

Evidently the action of the plaintiff upon the occasion in question was entitled to some liberality of construction, and was dictated by a manifest prudence for the care of his stock. In his deposition he states:

"My car was next to the caboose and received the full force of the jerk and threw several of my cows down and the horses on top of them; the jar broke the halters that held 536] the horses; *I saw they were being killed by the repeated jerks and I climbed in the trough (I was afraid to get in where they were in any other way) and held on to the side of the car; while in that position they uncoupled the train and took a part of it up the grade, leaving my car stationary for a time; I then managed to get the stock all up and was still holding on to the side of the car and up in the feed trough, when the engine came back against the train without my knowing that it was coming, with such force as to throw me out of the trough, but I held on to the side of the car, knowing that if I got under my stock I would be killed. The car jerked my arm out of place in the shoulder joint. Soon afterwards I called the conductor and he came to my assistance. . . The engine came back against the car with great force and then plunged forward taking up the slack, and jerked the car I was in with such force as to hurt me, as already stated. I was up in the feed trough and was just going to get down when the jerk came, and was entirely unexpected to me."

When on the stand the plaintiff testified:

"Just before I was injured the jar knocked three cows down, and two of the horses fell on top of them, and when the car stopped I got down in front to get them up again, and after I got them up I was going back to take the seat again, and when I got about a foot from the end a jar came and knocked me off my feet, and I grabbed hold of some iron, and that swung me back this way until they got started all right, and after they got started on the run, and then I got down and got on my feet again; as soon as they stopped again I called to the conductor and brakemen."

The truth seems to be that the train was not provided with sufficient traction power, and that a stronger or additional locomotive should have been employed. If the train was not in motion when the accident occurred, we think that, in view of the obviously negligent conduct of the defendant, motives of humanity as well as of prudence may have required of the plaintiff more than ordinary care in looking after and protecting his stock.

The company was evidently not entitled to an instruction *that plaintiff, by riding in [537 the stock car while the train was in motion, was guilty of contributory negligence, or even to go to the jury on that point. The real question was whether the train was actually in motion when the injury was received, and, if there was any error at all in submitting that question to the jury, it was not one of which the defendant was entitled to complain.

There was no error in the action of the Court of Appeals, and its judgment is therefore affirmed.

Mr. Justice **White** dissented.

GEORGE WESTINGHOUSE, JR., *et al.*, *Appts.*,
v.
BOYDEN POWER BRAKE COMPANY *et al.*

BOYDEN POWER BRAKE COMPANY *et al.*, *Appts.*,
v.
GEORGE WESTINGHOUSE, JR., *et al.*

(See S. C. Reporter's ed. 537-584.)

Westinghouse patent—construction of same—when the specification is to be considered—infringement—equivalent devices—differences—test of infringement—the Boyden device does not infringe.

1. In the patent 360,070 issued March 29, 1887, to George Westinghouse, Jr., for a fluid-pressure,

NOTE.—*For what patents are granted; when declared void,*—see note to Evans v. Eaton, 4: 433.

automatic-brake mechanism the patentability of a function is not involved, for there is no claim made for an independent process, and the whole theory of the specification and claims is based upon the novelty of the mechanism.

2. The claim in such patent for a triple valve device, etc., for admitting air from the main air pipe to the brake cylinder, "substantially as set forth," must be construed in connection with the specifications and as if the auxiliary valve described therein were inserted in the claim in so many words.

3. The words "substantially as set forth," in a claim for a patent, import into the claim the particulars of the specifications.

4. A device within the letter of the claims of a patent is not necessarily an infringement, if these, literally construed, do not represent the actual invention.

5. A combination of devices in a machine is not necessarily an equivalent for any other combination used for the same purpose and producing the same effect.

6. Where the invention is functional, a device which differs from that of the patentee only in form, or in a rearrangement of the same elements of a combination, is an infringement, even if, in certain particulars, it is an improvement upon that of the patentee.

7. An infringer of a patent, even if it is a pioneer patent, must do something more than reach the same result; he must reach it by substantially the same or similar means.

8. The Westinghouse patent, 360,070, is not infringed by the Boyden device covered by patents 481,134 and 481,135, the underlying distinction between the two devices being that in one a separate valve and separate by-passage are provided for the train-pipe air, while in the other, the patentee has taken the old triple or quadruple valve, and, by a slight change in the functions of two of its valves and the incorporation of a new element, partition 9, has made a more perfect brake than the one described in the Westinghouse patent.

(Nos. 116, 99.)

Argued October 22, 23, 1896. Ordered for Reargument November 16, 1896. Reargued March 1, 2, 1897. Ordered for Reargument December 13, 1897. Reargued March 10, 11, 1898. Decided May 9, 1898.

ON WRIT OF CERTIORARI to the Circuit Court of Appeals for the Fourth Circuit, to review a decree of that court reversing a decree of the Circuit Court for the District of Maryland which sustained in part an action brought by George Westinghouse, Jr., *et al.*, against the Boyden Power Brake Company *et al.*, for the infringement of patent No. 360,070, and from which decree both parties had appealed to the Circuit Court of Appeals. *Decree of the Circuit Court of Appeals affirmed.*

See same case below, 70 Fed. 816, 17 C. C. A. 430, 25 U. S. App. 475.

Statement by Mr. Justice **Brown:**

This was a writ of certiorari to review a decree of the circuit court of appeals, reversing a decree of the circuit court for the district of Maryland, which had sustained, in part, a bill filed by Westinghouse against the Boyden Power Brake Company for the infringement of patent No. 360,070, and from which decree both parties had taken an appeal to the circuit court of appeals.

The patent in suit, which was issued March 29, 1887, to George Westinghouse, Jr., is for a fluid-pressure automatic-brake mechanism, the object of which is said in the specification to *be "to enable the application of brake [538 shoes to car wheels by fluid pressure to be effected with greater rapidity and effectiveness than heretofore, more particularly in trains of considerable length, as well as to economize compressed air in the operation of braking, by utilizing in the brake cylinders the greater portion of the volume of air which in former practice was directly discharged into the atmosphere."

"To this end my invention, generally stated, consists in a novel combination of a brake pipe, an auxiliary reservoir, a brake cylinder, and a 'triple valve' device, governing, primarily, communication between the auxiliary reservoir and the brake cylinder, and, secondarily, communication directly from the brake pipe to the brake cylinder."

There follows here a description of the Westinghouse automatic brake as theretofore used, its mode of operation, and the defects or insufficiencies which attended its application to long trains, in the following language:

"In the application of the Westinghouse automatic brake as heretofore and at present commonly in use, each car is provided with a main air pipe, an auxiliary reservoir, a brake cylinder, and a triple valve, the triple valve having three connections, to wit, one to the main air brake pipe, one to the auxiliary reservoir and one to the brake cylinder. The main air pipe has a stopcock at or near each of its ends, to be opened or closed as required, and is fitted with flexible connections and couplings for connecting the pipes from car to car of a train, so as to form a continuous line for the transmission of compressed air from a main reservoir supplied by an air pump on the engine. When the brakes are off or released, but in readiness for action upon the wheels of the train, the air which fills the main reservoir and main air pipes has a pressure of from sixty-five to seventy-five pounds to the square inch, and by reason of the connections referred to the same pressure is exerted in the casings of the triple valves on both sides of their pistons and in the auxiliary reservoirs connected there-

As to patentability of inventions, see notes to Thompson v. Boisselier, 29: 76; and Corning v. Burden, 14: 683.

As to abandonment of invention, see note to Pennock v. Dialogue, 7: 327.

As to distinction between inventions of mechanism, articles, or products and processes; when latter patented,—see note to Corning v. Burden, 14: 683.

As to including process and product in same patent; separate patents therefor,—see note to Evans v. Eaton, 4: 433.

As to when assignee may sue for infringement; when patentee must; when they must join,—see note to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages,—see note to Hogg v. Emerson, 13. 824.

As to patentability of inventions; patentable subject matter; utility; what constitutes invention; patentable novelty; combinations; foreign patents and their effects,—see note to Grant v. Walter, 37: 553.

As to what constitutes infringement of patent; similarity of devises; designs; combinations; machines; construction of patent,—see note to Royer v. Coupe, 36: 1073.

with. At the same time passages called 'release ports' are open from the brake cylinders to the atmosphere. When it is desired to apply the 539] brakes, air is *allowed to escape from the main air pipes through the engineer's valve, thereby reducing the pressure in the main air pipes, whereupon the then higher pressure in the auxiliary reservoirs moves the pistons of the triple valves, so as to first close the passages from the triple valves to the brake pipe and at the same time close the release ports of all the brake cylinders, and then open the passages from the auxiliary reservoirs to the brake cylinders, the pistons of which are forced out by the compressed air thereby admitted to the brake cylinders, applying the brakes by means of suitable levers and connections, all of which mechanism is fully shown in various letters patent granted to me."

"The application of the brakes with their full force has heretofore required a discharge of air from the main pipe sufficient to reduce the pressure in said pipe below that remaining in the auxiliary reservoir after the brakes have been fully applied, and it has been found that, while the brakes are sufficiently quick in action on comparatively short trains, their action on long trains of from thirty to fifty cars which are common in freight service under present practice, is in a measure slow, particularly by reason of the fact that all the air required to be discharged from the main pipe to set the brakes must travel from the rear of the train to a single discharge opening on the engine. This discharge of air at the engine has not only involved a serious loss of time in braking, but also a waste of air. Under my present invention a quicker and more efficient action of the brakes is obtained, and air which has been heretofore wasted in the application of the brakes is almost wholly utilized to act upon the brake pistons."

After a detailed description of the invention an important feature of which is a triple valve (hereinafter more fully explained in the opinion), with references to the accompanying drawings, the specification proceeds to state that, "so far as the performance of its preliminary function in ordinary braking is concerned—that is to say, effecting the closure of communication between the main air pipe and the auxiliary reservoir, and the opening of commu-540]nication between the auxiliary *reservoir and the brake cylinder in applying the brakes, and the reverse operations in releasing the brakes—the triple valve 10 accords substantially with that set forth in letters patent of the United States No. 220,556, granted and issued to me October 14, 1879, and is not, therefore, saving as to the structural features by which it performs the further function of effecting the direct admission of air from the main air pipe to the brake cylinder, as presently to be described, claimed as of my present invention. Certain of its elements devised and employed by me prior thereto will, however, be herein specified, in order to render its construction and operative relation to other members of the brake mechanism fully intelligible."

After a further reference to the drawings he again states that "so far as hereinbefore described, the triple valve accords in all substantial particulars with and is adapted to operate similarly to those of my letters patent Nos. 168,359, 172,064, and 220,556, and, in order that it may perform the further functions requisite in the practice of my present invention, it is provided with certain additional members which will now be described." These additional members, which are said to be for the purpose of effecting the admission of air directly from the main air pipe to the brake cylinder when it is desired to apply the brakes with great rapidity and full force, consist of (1) a passageway through which air can be admitted directly from the main air (or train) pipe to the brake cylinder, without passing through the auxiliary reservoir; and (2) an auxiliary valve in connection with such passage, that, when the triple valve piston makes a short or preliminary movement, the passageway direct from the train pipe to brake cylinder, controlled by said valve, will not be opened, while in the event of a long or full movement of the piston, or "further traverse," as it is called, such direct passageway will be thrown wide open to the admission of train pipe air, and the brake cylinder will be rapidly filled thereby.

After describing the auxiliary sliding valve 41 and its connections, as well as the operation of the device in ordinary (nonemergency) cases of checking the speed of or stopping trains, already fully provided for in previous patents, he proceeds *to state its operation in [541 cases of emergency which the patent was specially designed to cover, as follows:

"In the event, however, of its becoming necessary to apply the brakes with great rapidity and with their greatest available force, the engineer, by means of the valve at his command, instantly discharges sufficient air from the front end of the main air pipe to effect a sudden reduction of pressure of about twenty pounds per square inch therein, whereupon the piston 12 of the triple valve is forced to the extreme limit of its stroke in the direction of the drain cup 19, carrying with it the stem 36 and auxiliary slide valve 41, which instantly uncovers the port 42 and discharges air from the main air pipe through the opening of the check valve 49 and the passages 46 and 48 to the brake cylinder, and, each car being provided with one of these devices, it will be seen that they are successively moved with great rapidity, there being practically on a train of fifty cars fifty openings for discharging compressed air from the main pipe instead of the single opening heretofore commonly used. Not only is there a passage of considerable size opened from the brake pipe on each car, whereby the pressure is more quickly reduced, but the air so discharged is utilized in the performance of preliminary work, it being found in practice that the air so taken from the pipe will exert a pressure of about twenty five pounds in the brake cylinders. When the piston 12 arrives at the extremity of its stroke as above specified, the supplemental port 35 of the slide valve 14 is brought into communication with the port 33 and passages 22 and 16, which serves to discharge the reservoir pressure into the brake cylinder, thereby augmenting the pressure already exerted in the brake cylinder by the air admitted from the main air

pipe. Upon the reduction of the pressure in the main air pipe below that in the brake cylinders, as by the breaking in two of the train, the check valve 49 closes communication between the passages 46 and 18, thereby preventing the return of the air from the brake cylinder to the main air pipe. The feed opening for the admission of air from the auxiliary reservoir to the brake cylinder is purposely made of comparatively small diameter, it hav-
542]ing been determined *by experiment that the initial application of the brakes should not be made with maximum force, and this opening may be made of such size as to apply the brakes exactly in accord with the requirements of the most efficient work."

"In using the terms 'triple valve' and 'triple valve device' I refer to a valve device, however specifically constructed, having a connection with the main air or brake pipe, another with an auxiliary reservoir or chamber for the storage of power, and another with a brake cylinder or its equivalent for the utilization of the stored power and with a release or discharge passage for releasing the operative power from the brake cylinder, whether the valves governing these passages or connections are arranged in one or more cases and are moved by a piston or its equivalent or by a series of pistons or their equivalents, there being numerous examples in the art of constructions varying materially in appearance whereby these functions are performed, both in plenum and vacuum brake mechanisms."

The above drawings [See opposite] are somewhat clearer than those annexed to the patent, and exhibit the triple valve and its connections in three positions, *viz.*: No. 13, Released or "Brakes Off;" No. 14, Ordinary Service Application; and No. 16, "Quick Action" Position.

The only claims of the patent alleged to have been infringed are the first, second, and fourth, which read as follows:

"1. In a brake mechanism the combination of
543] a main air *pipe, an auxiliary reservoir, a brake cylinder, a triple valve, and an auxiliary valve device, actuated by the piston of the triple valve and independent of the main valve thereof, for admitting air in the application of the brake directly from the main air pipe to the brake cylinder, substantially as set forth."

"2. In a brake mechanism, the combination of a main air pipe, an auxiliary reservoir, a brake cylinder, and a triple valve having a piston whose preliminary traverse admits air from the auxiliary reservoir to the brake cylinder, and which by a further traverse admits air directly from the main air pipe to the brake cylinder, substantially as set forth."

"4. The combination, in a triple-valve device, of a case or chest, a piston fixed upon a stem and working in a chamber therein, a valve moving with the piston stem and governing ports and passages in the case leading to connections with an auxiliary reservoir and a brake cylinder and to the atmosphere, respectively, and an auxiliary valve actuated by the piston stem and controlling communication between passages leading to connections with a main air pipe and with the brake cylinder, respectively, substantially as set forth."

The joint and several answer of the Boyden Brake Company and the individual defendants admitted that such company was engaged in manufacturing and selling a fluid-pressure brake, but denied that the same was an infringment upon complainant's patent, and also denied that Westinghouse was the original inventor of the mechanism covered by the patent, and alleged that an apparatus, substantially identical in character, had been previously granted Westinghouse, March 5, 1872 (No. 124,404), and that a like apparatus was previously described in the following patents issued to Westinghouse, *viz.*: No. 138,827, May 13, 1873; No. 144,006, October 28, 1873; No. 168 359, October 5, 1875; No. 172,064, January 11, 1876; No. 220,556, October 14, 1879; and also in three patents to other parties, not necessary here to be specifically mentioned.

The answer further denied any infringement of the first, fourth, and fifth claims of the patent sued upon (No. 360,070), and, with respect to the second claim, averred the same to be*invalid because the combination of [**544** parts therein named is inoperative to perform and incapable of performing the function set forth in said claim; and that, if the said claim be considered merely as the combination of parts therein set forth, and without reference to the function described as performed by it, it is invalid for the reason that the same combination of parts is shown in most of the prior patents above cited, and has been publicly used by the complainants for a long time prior to the date of the said letters patent No. 360,070.

The answer further averred the claim to be uncertain and ambiguous, and if the functions recited by it are construed as amplifying the description of the combination to distinguish this combination from that shown in the prior patents, "then the defendants say that the said claim is anticipated by the prior letters patent issued to George A. Boyden on June 26, 1883, for the reason that air brake valves made in accordance with the last-mentioned patent embody the same combination of parts, and will perform the same functions, and operate in substantially the same manner as stated in said second claim."

Upon a hearing in the circuit court upon the pleadings and proofs, that court was of opinion that the second claim was valid, and had been infringed, but that defendants had not infringed claims one and four and as to those the bill was dismissed. 66 Fed. Rep. 997. From the decree entered in pursuance of this opinion both parties appealed to the court of appeals for the fourth circuit, which affirmed the action of the circuit court with respect to the first and fourth claims, but reversed it with respect to the second claim, and dismissed the bill. 25 U. S. App. 475. Whereupon complainants applied for and were granted a writ of certiorari.

Full copies of the principal Westinghouse patents are printed in *Westinghouse Air Brake Co* v. *New York Air Brake Co* 26 U. S. App. 248 and of the Boyden patents in the report of this case in 25 U. S. App. 475.

Messrs. **George H. Christy, Frederic H. Betts,** *J. Snowden Bell,* and *Bernard Car-*

ter & Sons for Westinghouse *et al.* on first, second, and third arguments.

Messrs. **Lysander Hill, Hector T. Fenton,** and *Melville Church* for Boyden Power Brake Co. *et al.*, on first and second arguments.

Messrs. **Lysander Hill, Philip Mauro,** *Hector T. Fenton*, *Melville Church*, and *Anthony Pollok* for Boyden Power Brake Co. *et al.* on third argument.

Mr. Justice **Brown** delivered the opinion of the court:

The history of arresting the speed of railway trains by the application of compressed air is one to which the records of the Patent Office bear frequent witness, of a gradual progress from rude and imperfect beginnings, step by step, to a final consummation, which, in respect to this invention, had not been reached when the patent in suit was taken out, and which, it is quite possible, has not been reached to this day. It is not disputed that the most important steps in this direction have been taken by Westinghouse himself.

The original substitution of the air brake for the old hand brake was itself almost a revolution, but the main difficulty seems to have arisen in the subsequent extension of that system to long trains of freight cars, in securing a simultaneous application of brakes to each of perhaps forty or fifty cars in such a train, and finally in bringing about the instantaneous as well as simultaneous application of such brakes in cases of emergency, when the speediest possible stoppage of the train is desired to avoid a catastrophe.

Patent No. 88,929, issued April 13, 1869, appears to have been the earliest of the Westinghouse series. This brake, known as the *straight-air brake*, consisted of an air-compressing pump, operated by steam from the locomotive boiler, by which air was compressed into a reservoir, located under the locomotive, to a pressure of about 80 pounds to the square inch. This reservoir, being still in use, is now known as the main reservoir. From this reservoir an air pipe, usually called the train pipe, led into the cab, where the supply of air was regulated by an "engineer's valve," thence down the back under the tender and cars, being united between the cars by a flexible hose with metal couplings, rendering the train pipe continuous. These **546**] couplings were *automatically detachable; that is, while they kept their grip upon each other under the ordinary strains incident to the running of the train, they would readily pull apart under unusual strains, as when the car coupling broke and the train pulled in two.

From the train pipe of each car, a branch pipe connected with the forward end of a cylinder, called the "brake cylinder," which contained a piston, the stem of which was connected with the brake levers of the car. This piston was moved and the brakes applied, by means of compressed air admitted through the train pipe and its branches, into the forward end of the brake cylinder. When the brakes were to be applied, the engineer opened his valve, admitted the compressed air into the train pipes and brake cylinders, whereby the levers were operated and the brakes applied. To release the brakes, he reversed the valve, whereby the compressed air escaped from the brake cylinders, flowed forward along the train pipe to the escape port of the engineer's valve, thence into the atmosphere. Upon the release of the compressed air, the pistons of the brake cylinders were forced forward again by means of springs, and the brake shoes removed from the wheels. By means of this apparatus, the train might be wholly stopped or slowed down by a full or partial application of the brakes. As between a full stop and a partial stop, or slow speed, there was only a question of the amount of air to be released from the main reservoir. The validity of this patent was sustained by the circuit court for the northern district of Ohio, Mr. Justice Swayne and Judge Welker sitting. in *Westinghouse* v. *Gardner & R. Air-Brake Company* [2 Barn. & Ard. 55] 9 Pat. Off. Gaz. 538. The court said, in its opinion, that while Westinghouse was not the first to conceive the idea of operating railway brakes by air pressure, such fact did not detract at all from his merits or rights as a successful inventor; that the new elements introduced by him "fully substantiate his pretensions as an original and meritorious inventor, and entitle him as such to the amplest protection of the law;" and that it appeared from the record and briefs that he was the first to put an air brake into successful actual use.

While the application of this brake to short trains was *reasonably successful, the [**547** time required for the air to pass from the locomotive to the rear cars of a long train (about one second per car) rendered it impossible to stop the train with the requisite celerity, since in a train of ten cars it would be ten seconds before the brakes could be applied to the rear car, and to a freight train of fifty cars nearly a minute. While the speed of the foremost car would be checked at once, those in the rear would proceed at unabated speed, and in their sudden contact with the forward cars would produce such shocks as to often cause damage. As a train moving at the rate of 50 miles an hour makes over 70 feet per second, a train of 50 cars would run half a mile before the brakes could be applied to the rear car. So, too, if the rear end of the train became detached from the forward end by the rupture of the train pipe or couplings, the brakes could not be applied at all, since the compressed air admitted to the train pipe by opening the engineer's valve would escape into the atmosphere without operating the brakes, or if the brakes were already applied, they would be instantly released when such rupture occurred.

The first step taken toward the removal of these defects resulted in what is known as "the automatic brake," described first in patent No. 124,404 in a crude form, and, after several improvements, finally culminating in patent No. 220,556 of 1880. The salient features of this brake were an auxiliary reservoir beneath each car for the reception and storage of compressed air from the main reservoir, and a triple valve, so called, automatically controlling the flow of compressed air in three directions, by opening and closing, at the proper times, three ports or valve openings, *viz.*: 1. A port or valve known as the "feeding-in valve" from the train pipe to the auxiliary

reservoir, allowing the auxiliary reservoir to fill so as to be ready when the brakes were applied; 2. A port or valve from the auxiliary reservoir to the brake cylinder, which allowed a flow of compressed air to apply the brakes, and was called the "main valve;" 3. A port or valve from the brake cylinder to the open air, denominated the "release valve," to be opened when it was desired to release the brakes.

548] *The operation of these valves was as follows: Before the train starts, compressed air from the main reservoir is permitted to flow back through the train pipe, and through valve No. 1, for the purpose of charging the auxiliary reservoir beneath each car with a full working pressure of air. When it is desired to apply the brakes, the engineer's valve is shifted, and the air in the train pipe is allowed to escape into the atmosphere at the engine. Thereupon the compressed air in the auxiliary reservoir closes valve No. 1, leading to the train pipe, and opens the main valve No. 2, from the auxiliary reservoir to the brake cylinder, whereby the piston of that cylinder operates upon the brake levers and applies the brakes. By this use of the auxiliary reservoirs a practically simultaneous application of the brakes is secured for each car. This application of the brakes is secured, not by direct application of compressed air from the engine through the train pipe, but by a reverse action, whereby the air is allowed to escape from the train pipe toward the engine, the pressure being applied by the air escaping from the auxiliary reservoirs. It also results that, if a train should pull in two, or a car become detached, the same escape of air occurs, the same action takes place automatically at the broken part, and the same result follows by the escape of the compressed air through the separated couplings. When it is desired to release the brakes, the engineer's valve is again shifted, and the compressed air not only opens valve No. 1 from the train pipe to the auxiliary reservoir, but valve No. 3 from the brake cylinder to the open air, which allows the air from the brake cylinder to escape and thus release the brake.

From this description it will be seen that the action of the automatic brake was, in fact, the converse of that of the straight air brake, and that the result was to obviate the most serious defects which had attended the employment of the former.

This automatic brake appears, in its perfected form, in patent No. 220,556, although this patent was but the culmination of a series of experiments, each successive step in which appears in the prior patents. Thus in patent No. 549] 124,404 (1872) is *introduced the auxiliary reservoir beneath each car in connection with a double line of brake pipes and a single cock with suitable ports for charging the reservoir and for operating the brakes—a device which was obviously the foundation of the triple valve which first made its appearance in patent No. 141,685 (1873), in which the main valve, which admitted air from the auxiliary reservoir to the brake cylinder, was of the poppet form; and as a poppet valve can govern only one port, separate valves had to be provided for feeding in the air from the train pipe to the auxiliary reservoir, and for discharging the air from the brake cylinder to release the brakes.

In subsequent patents, No. 144,006 (1873) and No. 163,242 (issued in 1875 to C. H. Perkins and assigned to Westinghouse) Mr. Westinghouse improved upon his prior devices by substituting a sliding piston valve for the poppet form of main valve previously used by him. This enabled the piston to perform the feed-valve function of admitting air from the train pipe to the auxiliary reservoir; the main-valve function of admitting air from the auxiliary reservoir to the brake cylinder to apply the brakes and the release-valve function of discharging the air from the cylinder to release the brakes. In patent No. 168,359 (1875) a piston actuating a slide valve was substituted for the piston valve, and, after a series of experiments, which did not seem to have been successful, he introduced into patent No. 217,838 the idea of venting the train pipe, not only at the locomotive, but also under each car, in order to quicken the application of the brakes. Prior to this time, "when the engineer desired to apply his brakes with full force he operated the valve at the engine and opened the port wide, letting the compressed air out of the train pipe at the locomotive, then its only vent. The air, as before said, had to travel from the rear cars along the cars forward to the engine before it could lessen the pressure of the train-pipe air, . . . and before the brake cylinder could be operated with air from the auxiliary reservoirs. In a train of fifty cars it would have to travel nearly half a mile to get out at the engine." He embodied in patent No. 220,556 (1879) the most complete form of the automatic brake, and, as stated by *the [550 court below, "the ordinary work of braking was performed by a partial traverse of its chamber by the triple-valve piston, graduated according to the purpose desired, at the will of the engineer, and emergency work was done by an extreme traverse of the piston to the end of its chamber."

While the automatic brake had thus obviated the most important defects of the old or straight air brake, and came into general use upon passenger trains throughout the country, it was found, in practice upon long freight trains, that the air from the auxiliary reservoirs did not act with sufficient promptness upon the brakes of the rear cars, where a particularly speedy action was required, and that it would be necessary to devise some other means for cases of special emergency. In the business of transporting freight over long distances, the tendency has been in the direction of increasing the load by using stronger and heavier cars and larger locomotives. Upon a long train of this kind, composed of thirty to fifty cars, a demand was made for quicker action in cases of emergency than had yet been contemplated, although for ordinary work, such as checking the speed of a train while running, holding it at a slow speed on a down grade, and also for making the ordinary station stops, the automatic brake was still sufficient, and produced satisfactory results even in the equipment of long and heavy trains. But, however effective for ordinary purposes, the automatic brake did not sufficiently provide for such emergencies requiring prompt action, and therefore failed in a single important particular.

Upon examination of these defects it was found

that they could only be remedied by securing: (1) in cases of emergency, a more abundant discharge of compressed air into the brake cylinder; and (2) an escape of air near to each triple valve without requiring the escaping air to travel all the way back to the engine. The latter device having been already embodied in patent No. 217,838, these features Mr. Westinghouse introduced into the patent in suit, by which a passage was opened directly from the train pipe, filled from the main reservoir on the engine, to the brake cylinder through which, in case of emergency, the train-pipe air, instead of **551**] being discharged *into the atmosphere, could pour directly from the train pipe into the brake cylinder. This operation resulted in charging the brake cylinder and applying the brakes more quickly than before, and also, by reason of the fact that the filling of the brake cylinder from the train pipe on one car made what was, in effect, a local vent for the release of pressure sufficient to operate the valve on the next car behind, each successive valve operated more quickly than when a diminution of pressure was caused by an escape of air only at the locomotive. The direct passage of the air from the train pipe to the brake cylinder was effected by a valve (41), colored red in the above diagrams, which is never opened except in cases of emergency. In ordinary cases, when the brakes are desired to be applied, sufficient air is released from the train pipe to open the passage from the auxiliary reservoir to the brake cylinder by what is called a preliminary traverse of the piston (12), but when a quick action is required sufficient air is drawn from the train pipe, not only to open this passage, but, by a further traverse of the piston, to show valve 41 off its port, and introduce air directly from the train pipe to the brake cylinder, as shown in the third drawing, above set forth.

In the foregoing [opposite] skeleton drawings, from which all details of construction, and all figures of reference, not necessary for a clear understanding of the structure are omitted, the **552**] *essential parts are colored, so that their changes of position in the different stages of action can be easily followed.

The access of train-pipe air is shown located at the right end of the structure, instead of the left (as in the patent drawings), simply for greater clearness. Its course from the train pipe to the auxiliary cylinder is through the small port above the upper arm of the piston 12.

The "main valve" of the triple is *black*. Its office is to admit auxiliary reservoir air to brake cylinder.

The "quick action" valve is colored *red*. Its office is to admit *train-pipe air* to brake cylinder.

The release port is colored *green*. Its office is to discharge air from brake cylinder, in releasing the brakes.

There is also shown in *yellow* what is known as the graduating valve, the function of which will be hereafter explained. As at present used, the triple valve is in reality a quadruple valve.

The flow or movement of air in the several positions of the structure is also shown by colored lines and arrows, *viz.:*

Air released from brake cylinder to open air by *green* arrow.

Air flowing from auxiliary reservoir to brake cylinder, in "service" application of the brakes, by *red* line. And air flowing from train pipe to brake cylinder in "quick-action" application by *blue* line.

This patent, although it introduced a novel feature into the art, does not seem to have been entirely successful in its practical operation, since in October of the same year an improvement was patented, No. 376,837, with the object of still further increasing the rapidity of action. As observed by the district judge in this connection, "the success of this improved device [No. 376,837] has demonstrated that the invention by which the further traverse of the triple valve piston beyond the extent of the traverse required for the ordinary application of the brakes is made to admit a large volume of train-pipe air directly to the brake cylinder, was one of great importance. The proofs show that a quick-action automatic brake, which would give the results which this brake has accomplished, was earnestly *sought after by inventors and car build [**553** ers, and all had failed until Westinghouse discovered that it could be done by this mode of operation." [66 Fed. Rep. 999.]

We are now in position to take up the several claims of the patent in suit, and their defenses thereto. It may be stated generally that the position of complainants in this connection is, that the novel feature of this patent, in respect to which they are entitled to be protected, is the opening of a passage directly from the train pipe to the brake cylinder, without passing through the auxiliary reservoir and without reference to the means by which such passageway is controlled. Defendants' theory is that they are limited to such passageway when governed by the auxiliary valve 41, a device which, although of no utility as arranged in the patent in suit, became afterwards exceedingly useful when further combined with the supplementary piston shown in patent No. 376,837. The further inference is that, as they do not use the auxiliary valve of this patent, they cannot be held liable as infringers.

Complainants' case must rest either upon the theory that the admission of compressed air directly from the train pipe to the brake cylinder is patentable as a function, or that the means employed by the defendants for that purpose are a mechanical equivalent for the auxiliary valve 41, described in the patent.

1. The first theory is based upon the second claim, which is "in a brake mechanism, the combination of a main air pipe, an auxiliary reservoir, a brake cylinder, and a triple valve having a piston, whose preliminary traverse admits air from the auxiliary reservoir to the brake cylinder, and which by a further traverse admits air directly from the main air pipe to the brake cylinder, substantially as set forth." [25 U. S. App. 567, 568.]

In the construction of this claim, the district judge was of opinion that it was broad enough to cover other devices in which air was admitted directly from the train pipe to the brake cylinder by the further traverse of the piston actuating a valve admitting such

air, and that the defendants could not exculpate themselves from the charge of infringement, from the fact that in their device the train-
554]pipe air was admitted *through the triple-valve chamber, and not through a by-passage, nor by the fact that in their device the further traverse of the piston opens the main valve in a special manner, which produces the same result, but does not make use of a separate auxiliary valve.

Upon the other hand, the circuit court of appeals held that "the transmission of train-pipe air and auxiliary reservoir air simultaneously to the brake cylinder is a result of [or] function, and is not patentable;" that "the means by which this or any other result or function is accomplished may be many and various, and if these several means are not mechanical equivalents, each of them is patentable." It was of opinion that when the second claim, "in its language describing the action of that device, failed to describe any means by which the extreme traverse of the piston produced it, declaring merely that the piston, 'by a further traverse, admits air directly from the main air pipe to the brake cylinder,' it was fatally defective, claiming only a result which is public property, and not identifying the specific means (his own property) by which the result is achieved."

It is true, as observed by the court of appeals, that the further traverse of the piston for use in cases of emergency had been shown in prior patents, but it had never been employed for the purpose of admitting air directly from the main air pipe to the brake cylinder until the patent in suit was taken out.

The claim in question is, to a certain extent, for a function, *viz.*, the admission of air directly from the train pipe to the brake cylinder, and is only limited to such function when performed by the further traverse of the piston of the triple valve. This limitation, however, does not obviate the objection that the means are not fully and specifically set forth for the performance of the function in question.

The difficulty we have found with this claim is this: That, if it be interpreted simply as a claim for the function of admitting air to the brake cylinder directly from the train pipe, it is open to the objection, held in several cases to be fatal, that the mere function of a machine cannot be patented.

555] *This rule was clearly laid down in the leading case of *Corning* v. *Burden*, 56 U. S. 15 How. 252 [14:683], in which Mr. Justice Grier, delivering the opinion of the court, drew the distinction between such processes as were the result or effect of "chemical action, by the operation or application of some element or power of nature, or of one substance to another," and the mere result of the operation of a machine, with regard to which he says:

"It is for the discovery or invention of some practical method or means of producing a beneficial result or effect, that a patent is granted, and not for the result or effect itself. It is when the term "process" is used to represent the means or method of producing a result that it is patentable, and it will include all methods or means which are not affected by mechanism or mechanical combinations.

"But the term 'process' is often used in a more vague sense, in which it cannot be the subject of a patent. Thus we say that a board is undergoing the process of being planed, grain of being ground, iron of being hammered or rolled. Here the term is used subjectively or passively as applied to the material operated on, and not to the method or mode of producing that operation, which is by mechanical means, or the use of a machine, as distinguished from a process."

"In this use of the term it represents the function of a machine, or the effect produced by it on the material subjected to the action of the machine. But it is well settled that a man cannot have a patent for the function or abstract effect of a machine, but only for the machine which produces it."

In the subsequent case of *Burr* v. *Duryee*, 68 U. S. 1 Wall. 531, 570 [17: 650, 658], Mr. Justice Grier laid down the same principle as follows:

"The patent act grants a monopoly 'to anyone who may have discovered or invented any new and useful art, machine, manufacture, or composition of matter.' . . . The law requires that the specification 'should set forth the principle and the several modes in which he has contemplated the application of that principle, or character by which it may be distinguished from other inventions, and shall particularly point out the part, improvement, or combination which he claims as *his own inven-[556
tion or discovery.' We find here no authority to grant a patent for a 'principle' or a 'mode of operation,' or an *idea*, or any other abstraction. A machine is a concrete thing, consisting of parts, or of certain devices and combination of devices. The principle of a machine is properly defined to be 'its mode of operation,' or that peculiar combination of devices which distinguish it from other machines. A machine is not a principle or an idea. The use of ill defined abstract phraseology is the frequent source of error. It requires no great ingenuity to mystify a subject by the use of abstract terms of indefinite or equivocal meaning. Because the law requires a patentee to explain the mode of operation of his peculiar machine, which distinguishes it from others, it does not authorize a patent for a 'mode of operation as exhibited in a machine.' much less can any inference be drawn from the statute, that an inventor who has made an improvement in a machine, and thus effects the desired result in a better or cheaper manner than before, can include all previous inventions, and have a claim to the whole art, discovery, or machine which he has improved. All others have an equal right to make improved machines, provided they do not embody the same, or substantially the same, devices, or combination of devices, which constitute the peculiar characteristic of the previous invention."

So, also, in *Fuller* v. *Yentzer*, 94 U. S. 288 [24: 103], this court, speaking through Mr. Justice Clifford, also said:

"Patents for a machine will not be sustained if the claim is for a result, the established rule being that the invention, if any, within the meaning of the patent act, consists in the means or apparatus by which the result is obtained,

and not merely in the mode of operation, independent of the mechanical devices employed; nor will a patent be held valid for a principle or for an idea, or any other mere abstraction."

Most of the prior authorities upon this subject are reviewed in the recent case of *Risdon Iron & Locomotive Works* v. *Medart*, 158 U. S. 68 [39: 899], in which it was also held that a valid patent could not be obtained for a process which involved nothing more than the operation of a piece of mechanism, or the function of 557]*a machine. See, also, to the same effect, *Wicke* v. *Ostrum*, 103 U. S. 461, 469 [26: 409, 410]. These cases assume, although they do not expressly decide, that a process to be patentable must involve a chemical or other similar elemental action, and it may be still regarded as an open question whether the patentability of processes extends beyond this class of inventions. Where the process is simply the function or operative effect of a machine, the above cases are conclusive against its patentability; but where it is one which, though ordinarily and most successfully performed by machinery, may also be performed by simple manipulation, such, for instance, as the folding of a paper in a peculiar way for the manufacture of paper bags, or a new method of weaving a hammock, there are cases to the effect that such a process is patentable, though none of the powers of nature be invoked to aid in producing the result. *Eastern Paper-Bag Co.* v. *Standard Paper-Bag Co.* 30 Fed. Rep. 63; *Union Paper-Bag Machine Co.* v. *Waterbury*, 39 Fed. Rep. 389; *Travers* v. *American Cordage Co.* 64 Fed. Rep. 771. This case, however, does not call for an expression of our opinion upon this point, nor even upon the question whether the function of admitting air directly from the train pipe to the brake cylinder be patentable or not, since there is no claim made for an independent process in this patent, and the whole theory of the specification and claims is based upon the novelty of the mechanism.

But if the second claim be not susceptible of the interpretation that it is simply for a function, then the performance of that function must be limited to the particular means described in the specification for the admission of air from the train pipe to the brake cylinder. This we understand to be the theory of the defendants, and this raises the same question which is raised under the first and fourth claims, whether defendants' device contains the auxiliary valve of the Westinghouse patent, or its mechanical equivalent.

In this view, it becomes unnecessary to express an opinion whether the second claim be valid or not, since, in the aspect of the case most favorable to the complainants, it is necessary to read into it something which is not 558]found there, or, in the *language of complainants' brief, "to refer back to the specification; not, it is true, for a slavish adoption of the identical instrumentalities therein described, but for the understanding of the essential and substantial features of the means therein illustrated." In thus reading the specification into the claim, we can adopt no other construction than to consider it as if the auxiliary valve were inserted in the claim in so many words, and then to inquire whether the defendants make use of such valve, or its mechanical equivalent.

There are two other facts which have a strong bearing in the same connection, and preclude the idea that this can be interpreted as a claim for a function, without reading into it the particular device described in the specification.

One of these is that the claim is for a triple-valve device, etc., for admitting air from the main air pipe to the brake cylinder, "substantially as set forth." These words have been uniformly held by us to import into the claim the particulars of the specification, or, as was said in *Seymour* v. *Osborne*, 78 U. S. 11 Wall. 516, 547 [20: 33, 40], "where the claim immediately follows the description of the invention it may be construed in connection with the explanations contained in the specifications, and where it contains words referring back to the specifications, it cannot properly be construed in any other way." In that case it was held that a claim which might otherwise be bad, as covering a function or result, when containing the words "substantially as described," should be construed in connection with the specification, and when so construed was held to be valid. To the same effect is *The Corn Planter Patent* [*Brown* v. *Guild*], 90 U. S. 23 Wall. 181, 218 [23: 161, 168].

Again, it appears from the file wrapper and contents that in his original application Mr. Westinghouse made a broad claim for the admission of air directly from the main air pipe to the brake cylinder, which was rejected upon reference to a prior patent to Boyden, No. 280,285, and that on January 19, 1887, his attorney wrote the Patent Office in the following terms:

"It is respectfully submitted that while the Boyden patent No. 280, 285, referred to, shows that what the inventor terms*'an always-[559 open one-way passage,' by which communication may be established under certain conditions, between the main air pipe or train pipe, and might be held to meet the terms of the claim as originally broadly drawn, yet it fails to embody a device which in structure or function corresponds with the auxiliary valve of applicant, which in no sense relates to 'an always-open one-way passage. This amended claim, above submitted, prescribes a valve device actuated by the piston of the triple valve for admitting air to the brake cylinder in the application of the brake, while Boyden's check valve *d* is not actuated by the piston, and is designed to recharge the auxiliary reservoir and brake cylinder while the brakes are on. It is submitted, as to claim 2, that a piston, which by its preliminary traverse, admits air from the auxiliary reservoir to the brake cylinder and by its further traverse admits air directly from the main air pipe to the brake cylinder, as set forth in said claim, is not found in the Boyden patent, the check valve *d* of which is described as actuated by the manipulation of the cock *q* on the locomotive to 'recharge and continue charging the reservoir and brake cylinder while the brakes are applied.' . . . It is to be understood that applicant *does not seek to broadly claim a device for admitting air directly from the main air pipe to the brake cylinder*, as the four-way cock long heretofore employed by him (similar to the cock K of the Boyden patent) would be a

structure of such character. When, however, the triple valve is provided with an *auxiliary valve, operated by its piston which performs a new function* additional to that of the triple valve as previously employed, it is believed that such *combination* is wholly novel."

So, too, in the specification it is stated:

"So far as the performance of its preliminary function in ordinary braking is concerned—that is to say, effecting the closure of communication between the main air pipe and the auxiliary reservoir, and the opening of communication between the auxiliary reservoir and the brake cylinder in applying the brakes, and the reverse operations in releasing the brakes—the triple valve 10 accords substantially with that set forth in letters patent of the Unit-
560] ed States No. 220,556, granted *and issued to me October 14, 1879, and is not, therefore, saving as to the *structural features* by which it performs the further function of effecting the direct admission of air from the main air pipe to the brake cylinder, as presently to be described, claimed as of my present invention."

Apparently, too, in consequence of the above letter of January 19, 1887, the patentee erased from his original specification the following sentence: "Further, while in the specific construction described and shown, the function of admitting air from the main pipe is performed by a valve separate from that which effects the preliminary admission of reservoir pressure to the cylinder, a modification in which the same office is performed by a valve integral with the main valve and formed by an extension thereof, would be included in and embody the essential operative features of my invention," and inserted in its place the following: "I am aware that a construction in which 'an always-open one-way passage' from the main air pipe to the brake cylinder is uncovered by the piston of the triple valve simultaneously with the opening of the passage from the auxiliary reservoir to the brake cylinder has been heretofore proposed, and such construction, which involves an operation different from that of my invention, I therefore hereby disclaim."

We agree with the defendant that this correspondence, and the specification as so amended, should be construed as reading the auxiliary valve into the claim, and as repelling the idea that this claim should be construed as one for a method or process. Language more explicit upon this subject could hardly have been employed.

While it is true that no claim is formally made for the admission of train-pipe air directly to the brake cylinder as a method or process, a construction is given by the complainants and the circuit court to the second claim which eliminates the mechanical features described, and one which could only be supported upon the theory that the claim was for a method or process. If the mechanism described by Westinghouse, and particularly the auxiliary valve, be not essential to the validity of the second claim, then it could only be sup-
561] ported *upon the theory that it was for the process of admitting train-pipe air directly to the brake cylinder.

2. The first and fourth claims of this patent are as follows:

"1. In a brake mechanism, the combination of a main air pipe, an auxiliary reservoir, a brake cylinder, a triple valve, and an auxiliary valve device, actuated by the piston of the triple valve and independent of the main valve thereof, for admitting air in the application of the brake directly from the main air pipe to the brake cylinder, substantially as set forth."

"4. The combination, in a triple valve device, of a case or chest, a piston fixed upon a stem and working in a chamber therein, a valve moving with the piston stem and governing ports and passages in the case leading to connections with an auxiliary reservoir and a brake cylinder and to the atmosphere, respectively, and an auxiliary valve actuated by the piston stem and controlling communication between passages leading to connections with a main air pipe and with the brake cylinder, respectively, substantially as set forth."

These two claims are practically little more than different expressions of one and the same invention. In both of them there is a main air pipe, an auxiliary reservoir, a brake cylinder, a triple valve and piston, described in the fourth claim as "fixed upon a stem and working in a chamber" in a case or chest, and an auxiliary valve; and in the fourth claim also a case or chest, which contains the whole device, and is immaterial.

In both of these claims an auxiliary valve is named as an element. In the first it is described as "actuated by the piston of the triple valve and independent of the main valve thereof;" and in the fourth as "actuated by the piston stem and controlling communication between passages leading to connections with a main air pipe and with the brake cylinder."

To what liberality of construction these claims are entitled depends to a certain extent upon the character of the invention, and whether it is what is termed in ordinary parlance a "pioneer." This word, although used somewhat loosely, is commonly understood to denote a patent covering a *function [562 never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what had gone before. Most conspicuous examples of such patents are: The one to Howe of the sewing machine; to Morse of the electrical telegraph; and to Bell of the telephone. The record in this case would indicate that the same honorable appellation might be safely bestowed upon the original air brake of Westinghouse, and, perhaps, also, upon his automatic brake. In view of the fact that the invention in this case was never put into successful operation, and was to a limited extent anticipated by the Boyden patent of 1883, it is perhaps an unwarrantable extension of the term to speak of it as a "pioneer," although the principle involved subsequently and through improvements upon this invention became one of great value to the public. The fact that this invention was first in the line of those which resulted in placing it within the power of an engineer, running a long train, to stop in about half the time and half the distance within which any similar train had stopped, is certainly deserving of recognition, and entitles the patent to a liberality of con-

struction which would not be accorded to an ordinary improvement upon prior devices. At the same time, as hereinafter observed, this liberality must be exercised in subordination to the general principle above stated: that the function of a machine cannot be patented, and hence, that the fact that the defendants' machine performs the same function is not conclusive that it is an infringement.

The device made use of by the defendants is exhibited in patents No. 481,134, and No. 481,135, both dated August 16, 1892, and both of which were granted after the commencement of this suit. There are two forms of this patent, one of which, illustrated in patent No. 481,135, is here given in its three positions of release (20), service application (21), and quick action (22).

In this device there is found a main air pipe, an auxiliary reservoir, a brake cylinder, a triple, or rather a quadruple, valve and piston (29) **563**]with three ports; first, for the *admission of air from the train pipe to the brake cylinder though the feeding-in valve 26; second, for the passage of air from the auxiliary reservoir to the brake cylinder though the apertures *i*, *j*, *k*, in the steam slide valve 18; and, third, for the release of air from the brake cylinder to the exhaust port by means of valve 17, colored green. Whether this device has an auxiliary valve or not is one of the main questions in the case, complainants' theory being that poppet valve 22 is an auxiliary valve, while defendants' claim it that it is in reality the main valve.

The operation of this device is best shown by the foregoing [opposite, 14-14-14] skeleton drawings.

The auxiliary reservoirs are charged by air **564**]under pressure, *entering from the train pipe, raising and passing through the feeding-in valve piston 26, and flowing slowly into and through the passage A to the auxiliary reservoir until such reservoir is filled. In this condition the brake cylinder is emptied and opened to the atmosphere through the exhaust passage G.

In order to apply the brakes gradually, so as to slacken speed or make an ordinary stop, air pressure in the train pipe is reduced slightly (say from three to five pounds) by action of the engineer's valve, and the reduction of pressure on the right side of the piston 29 causes the piston to make what is termed a "preliminary traverse" to the position shown in diagram "Service Application." Such preliminary traverse pulls the steam slide valve 18 to the right, and opens the apertures *i*, *j* and *k* (one of these apertures being to the right and the other to the left of valve 22), and through these apertures air rushes from the auxiliary reservoir to the brake cylinder; but the poppet valve 22 still remains upon its seat.

If quick action be required, the pressure in the train pipe is suddenly lowered to the extent of fifteen to twenty pounds, and the traveling piston 29, instead of making a preliminary traverse to the intermediate position shown in the "Service Application," makes a full traverse to the extreme right, the effect of which is that the valve 22 is pulled off its seat by the collar M, and a large passage is open to the brake cylinder under the valve 22 and around the stem 18. The result is, as shown in the last diagram, that not only does the air in the auxiliary reservoir escape in full volume to the brake cylinder, but air from the train pipe rushes directly to the brake cylinder, through the large passage F into the chamber C and under valve 22.

The argument of the defendants in this connection is that, in this device, there is no auxiliary valve or by-passage, but the quick-action result is effected simply by proportioning the ports and passages of the old triple valve, and using a fixed partition, 9, to divide the piston chamber D from the main valve chamber C; that it is this partition which produces the quick action, and that such partition is not a valve, nor the mechanical equivalent of a valve, but merely a metal ring *screwed immov-[**565** ably into the triple-valve casing, and serving to divide the piston chamber from the main-valve chamber; that this partition was a new element, never before found in triple valves, and introduced a new principle and mode of operation, totally different from anything ever invented by Mr. Westinghouse or any other inventor, and that its effect is to make valve 22, termed by them the main valve, admit the train-pipe air to the brake cylinder at the same time that it admits the auxiliary air thereto.

It is claimed that, in embodying this new principle, Mr. Boyden adopted the form of triple valve shown in the expired Westinghouse patent No. 141,685 (1873), in which the main valve, 22, is of the poppet form and the separate valve 17, controlled by a rod sliding through the main valve, is employed for releasing the brakes. For charging the auxiliary reservoir he adopted, from the expired Westinghouse patent No. 144,006 (1873), a check valve feed passage through the triple-valve piston, but arranged the feed passage and its check valve, 26, in a tubular extension, F, of the piston, and substantially in the form shown in Boyden patent No. 280,285 (1883). He also provided a sensitive graduating valve, similar in result to the graduating valve *é* of the Westinghouse patent No. 220,556 (1879), by so arranging a small passage 40, in the sliding stem, which actuates the release valve, that such passage will be opened and closed by the sliding of such stem through the main valve 22. As thus constructed the triple valve operates much the same as that of patent No. 220,556, and, like the latter, is incapable of quick action.

In both the complainants' and defendants' devices there is (1) a feeding-in valve to charge the auxiliary reservoir; (2) a valve which complainants call their "main valve," and which the defendants denominate a "graduating valve," which is opened by the preliminary traverse of the piston to admit reservoir air to the brake cylinder; (3) a release valve which discharges air from the brake cylinder to the atmosphere; and (4) a quick-action valve—41 in the complainants' patent, and 22 in the defendants'—which is opened by the further traverse of the piston to admit train-pipe air to the brake *cylinder. In defendants' pa-[**566** tent, it may also be used to admit auxiliary reservoir air to the brake cylinder.

One of the main controversies in the case turns upon the construction and operation of the poppet valve 22, called by the defendants

their "main valve." Complainants insist that the office of *their* main valve is performed by the stem slide valve 18 of defendants' patent, and by its apertures *i*, *j*, and *k*, through which air passes from the auxiliary reservoir to the brake cylinder, and that the poppet valve 22 is only called into action in emergency cases, when a large quantity of air is suddenly withdrawn from the train pipe, and the valve is unseated by the traverse of the piston to the extreme right.

There is no doubt that the function of admiting air from the auxiliary reservoir to the brake cylinder, which is performed in the Westinghouse patent by what the complainants term the main valve (aided, however, by the graduating valve), is, in ordinary cases, performed principally, if not altogether, by the stem slide valve 18 and its three ports, *i*, *j*, *k*, of the Boyden patent, which defendants term their graduating valve. It is equally clear that, in emergencies, where quick action is required, air, which in the Westinghouse patent passes through auxiliary valve 41 (opened by the further traverse of the piston), in the Boyden patent finds its way through the poppet valve 22, which has also been lifted from its seat by the further traverse of the piston.

One of the main differences between the two devices is this: That in the preliminary traverse of the piston of the Westinghouse patent, there is a movement, first, of the graduating valve to open its port from the auxiliary reservoir, and then of the main valve, carrying the graduating valve also with it, to open a passage to the brake cylinder, while in the Boyden patent it is only the graduating valve which is opened by the preliminary traverse of the piston. In doing this, the graduating valve moves *through* the poppet valve, but does not lift it from its seat. In emergency cases not only do the graduating valve and the main valve of the Westinghouse patent move as before, but, by the extreme traverse of the piston, the auxiliary valve 41 is shoved from its seat, and a separate **567**] *passage is opened for the air from the train pipe to the brake cylinder. In the Boyden patent, however, the extreme traverse of the piston lifts the poppet valve from its seat, and opens a wide passage to the brake cylinder, not only for the air from the auxiliary reservoir, but through the peculiar operation of the partition 9 and its aperture B, directly from the train pipe. As the graduating valve of the Boyden patent practically does all the work in ordinary cases, and the poppet valve is only called into action in emergency cases, the latter is practically an auxiliary valve, by which, we understand, not necessarily an independent valve, nor one of a particular construction, but simply a valve which in emergency cases is called into the assistance of the graduating valve. In this particular, the poppet valve of the Boyden device performs practically the same function as the slide valve 41 of the Westinghouse. It is not material in this connection that it is a poppet valve while the other is a slide valve, since there is no invention in substituting one valve or spring of familiar shape for another (*Imhaeuser* v. *Buerk*, 101 U. S. 647, 656 [25: 945, 946]); nor, that in one case the piston *pushes* the valve off its seat, and in the other *pulls* it off; nor is it material that this poppet valve may have been used in prior patents to perform the function of a main valve, so long as it is used for a different purpose here. Indeed, this valve seems to have been taken bodily from Westinghouse patent No. 141, 685, where it was used as a main valve, and the stem valve 18 with its ports *i*, *j*, *k*, added for ordinary uses, and the poppet valve thus converted from a main valve to an auxiliary valve.

We have not overlooked in this connection the argument that the poppet valve 22 is also sometimes used for graduating purposes, but it is not commonly so used, and appears to be entirely unnecessary for that purpose. It seems to be possible to move the piston 29 to its extreme traverse so slowly, and hence to open valve 22 so gradually, that the pressure in the chamber C will be reduced so slightly, that the train-pipe air will not have sufficient force to throw open the check valve 26, and hence, in such case no train-pipe air will be admitted directly to the brake cylinder, which will be filled with auxiliary *reservoir air only. But,[**568** as a matter of fact, this seldom or never takes place in the practical operation of the device, and is an unnecessary and wholly unimportant incident, and for all practical purposes valve 22 is solely a quick-action valve. As this valve is actuated by the piston of the triple valve, and in such action is independent of the main valve, it meets the demand of the first claim of the patent, and as it is actuated by the piston stem, and controls communication between passages leading to connections with the main air pipe and with the brake cylinder, it seems also to be covered by the fourth claim.

But even if it be conceded that the Boyden device corresponds with the letter of the Westinghouse claims, that does not settle conclusively the question of infringement. We have repeatedly held that a charge of infringement is sometimes made out, though the letter of the claims be avoided. *Union Paper Bag Machine Co.* v. *Murphy*, 97 U. S. 120 [24: 935]; *Ives* v. *Hamilton*, 92 U. S. 431 [23: 496]; *Morey* v. *Lockwood*, 75 U. S. 8 Wall. 230 [19: 339]; *Elizabeth* v. *American Nicholson Pavement Company*, 97 U. S. 137 [24: 1005]; *Sessions* v. *Romadka*, 145 U. S. 29 [36: 609]; *Hoyt* v. *Horne*, 145 U. S. 302 [36: 713]. The converse is equally true. The patentee may bring the defendant within the letter of his claims, but if the latter has so far changed the principle of the device that the claims of the patent, literally construed, have ceased to represent his actual invention, he is as little subject to be adjudged an infringer as one who has violated the letter of a statute has to be convicted, when he has done nothing in conflict with its spirit and intent. "An infringement," says Mr. Justice Grier in *Burr* v. *Duryee*, 68 U. S. 1 Wall. 531, 572 [17: 650, 658], "involves substantial identity, whether that identity be described by the terms, 'same principle,' same '*modus operandi*,' or any other. . . . The argument used to show infringement assumes that every combination of devices in a machine which is used to produce the same effect is necessarily an equivalent for any other combination used for the same purpose. This is a flagrant abuse of the term 'equivalent.'"

We have no desire to qualify the repeated

expressions of this court to the effect that where the invention is functional, and the defendant's device differs from that of the **569**] patentee *only in form, or in a rearrangement of the same elements of a combination, he would be adjudged an infringer, even if, in certain particulars, his device be an improvement upon that of the patentee. But, after all, even if the patent for a machine be a pioneer, the alleged infringer must have done something more than reach the same result. He must have reached it by substantially the same or similar means, or the rule that the function of a machine cannot be patented is of no practical value. To say that the patentee of a pioneer invention for a new mechanism is entitled to every mechanical device which produces the same result is to hold, in other language, that he is entitled to patent his function. Mere variations of form may be disregarded, but the substance of the invention must be there. As was said in *Burr* v. *Duryee*, 68 U. S. 1 Wall. 531, 573 [17: 650, 659], an infringement "is a copy of the thing described in the specification of the patentee, either without variation, or with such variations as are consistent with its being in substance the same thing. If the invention of the patentee be a machine, it will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of mechanism which performs the same service or produces the same effect in the same way, or substantially the same way." "That two machines produce the same effect will not justify the assertion that they are substantially the same, or that the devices used by one are therefore mere equivalents for those of the other."

Not only is this sound as a general principle of law, but is peculiarly appropriate for this case. Under the very terms of the first and fourth claims of the Westinghouse patent, the infringing device must not only contain an auxiliary valve, or its mechanical equivalent, but it must contain the elements of the combination, "substantially as set forth." In other words, there must not only be an auxiliary valve, but substantially such a one as is described in the patent, *i. e.*, independent of the triple valve. Not only has the Boyden patent a poppet instead of a slide valve—a matter of minor importance—but it performs a somewhat different function. In the Westinghouse patent the valve is not in the line of **570**] travel between the *auxiliary reservoir and the brake cylinder, and admits train-pipe air only. In the Boyden patent, it is in the line of travel, both from the auxiliary reservoir and from the train pipe, and admits both currents of air to the brake cylinder. The by-passage, to which the auxiliary reservoir is merely an adit, is wholly wanting in the Boyden device, both currents of air uniting in chamber C and passing to the brake cylinder together, through the poppet valve.

But a much more radical departure from the Westinghouse patent is found in the partition separating the valve chamber C from the piston chamber D. This partition has an aperture, B, the capacity of which is less than that of the large passage A, and intermediate in size between that of the graduating passage 40, and that of the port covered by the valve 22. The office of this partition is thus explained by the defendants in their briefs: When the engineer's valve is thrown wide open, the poppet valve is lifted from its seat by the extreme traverse of the piston, and a new action takes place. "The port of the main valve 22 is so much larger than the passage B, that the pressure in the main valve chamber C is instantly emptied into the brake cylinder, and, as the passage B cannot supply air so fast as the main-valve port can exhaust it, the pressure in the main-valve chamber suddenly drops to about five pounds. Meanwhile the passage A, leading from the auxiliary reservoir to the inner end of the piston chamber, is so much larger than the passage B leading from the piston chamber to the main-valve chamber, that full reservoir pressure is maintained in the piston chamber between the partition 9 and the inner side of the piston, thereby holding the piston back firmly at its extreme traverse. But the feed valve 26 is now exposed on the one side to a train-pipe pressure of about fifty-five pounds, and on the other side to a main-valve chamber pressure of only about five pounds, and therefore valve 26 is instantly forced open by the greater train-pipe pressure, which then vents freely through the said feed-valve port into the main-valve chamber C, where it commingles with the auxiliary reservoir air passing through said chamber, and both airs pass together through the port opened by the main valve 22 to *the brake cylinder. The [**571** whole operation is substantially instantaneous, and the result is that the train pipe is freely vented at each car, the time of serially or successively applying the brakes of the several cars from one end of the train to the other is reduced to a minimum, and the train is quickly stopped without shock, a result which Mr. Westinghouse did not attain with the device of patent No. 360,070, nor did he attain it until he had invented his later apparatus of patent No. 376,837, not here in suit."

In a word, this partition maintains upon the outside of valve 26 a much higher pressure than upon the inside, the effect of which is to open feed valve 26 and admit a full volume of train-pipe air upon the brake cylinder.

Conceding that the functions of the two devices are practically the same, the means used in accomplishing this function are so different that we find it impossible to say, even in favor of a primary patent, that they are mechanical equivalents. While the poppet valve, which for the purposes of this case, we may term the auxiliary valve, is in its operation independent of the main valve, the word "independent" in the claims of the Westinghouse patent evidently refers to a valve auxiliary to the triple valve, and independently located as well as operated. The difference is that in one case the air from the train pipe is introduced into the brake cylinder separately and independently from the air from the auxiliary reservoir; while in the other case they unite in the chamber C and pass through the same valve to the brake cylinder. In the Westinghouse patent there is one valve operated by the direct thrust of the piston, opening a by-passage; in the other, there is a poppet valve also opened by the piston, and another valve, 26, opened by

the pressure maintained upon the outside of the partition 9.

It is claimed, however, by the complainants that Boyden was not the inventor of the differential pressure theory; that there is such a differential pressure in their own patent, caused by the fact that the air from the auxiliary reservoir in passing to the brake cylinder travels through a restricted port, 35, and as the entrance to the brake cylinder is through a much larger port, the air is taken up by it much more **572**] rapidly than it is *supplied by the restricted port, which reduces the pressure in the by-passage so much that when the quick-action valve 41 is opened, the pressure from the train-pipe air is sufficient to open valve 49 and admit a full volume of train-pipe air, at a pressure of 55 pounds, to the brake cylinder. The fact, however, that no suggestion is made in the patent of such a function of the restricted port 35, indicates either that none such had been discovered, or that it was not considered of sufficient importance to mention it. Indeed, it seems to have been an afterthought, suggested by the necessity of an answer to defendant's argument, based upon their partition 9. That when the auxiliary valve is opened there must be a difference in pressure above and below the check valve 49, in order to open it, is manifest; yet, this is rather an incident to the Westinghouse device than the controlling feature that is made in the Boyden patent. There is no partition in the proper sense of the word—certainly none located as in the Boyden device—between the chambers D and C, and no aperture in such partition opened for the express purpose of maintaining this differential pressure. If such differential pressure existed to the extent claimed in the Westinghouse patent, it certainly was not productive of the results flowing from the same device in the Boyden patent.

We are induced to look with more favor upon this device, not only because it is a novel one and a manifest departure from the principle of the Westinghouse patent, but because it solved at once in the simplest manner the problem of quick action, whereas the Westinghouse patent did not prove to be a success until certain additional members had been incorporated into it. The underlying distinction between the two devices is that in one, a separate valve and separate by-passage are provided for the train pipe air, while in the other, the patentee has taken the old triple (or quadruple) valve, and by a slight change in the functions of two of its valves and the incorporation of a new element (partition 9), has made a more perfect brake than the one described in the Westinghouse patent. If credit be due to Mr. Westinghouse for having invented the function, Mr. Boyden has certainly exhib-**573**]ited *great ingenuity in the discovery of a new and more perfect method of performing such function. If his patent be compared with the later Westinghouse patent No. 376,837, which appears to have been the first completely successful one, the difference between the two, both in form and principle, becomes still more apparent, and the greater simplicity of the Boyden patent certainly entitles it to a favorable consideration. If the method pursued by the patentee for the performance of the function discovered by him would naturally have suggested the device adopted by the defendants, that is in itself evidence of an intended infringement; but, although Mr. Boyden may have intended to accomplish the same results, the Westinghouse patent, if he had had it before him, would scarcely have suggested the method he adopted to accomplish these results. Under such circumstances, the law entitles him to the rights of an independent inventor.

Upon a careful consideration of the testimony we have come to the conclusion that the Boyden device is not an infringement of the complainants' patent, and *the decree of the Circuit Court of Appeals is therefore affirmed.*

Mr. Justice **Shiras,** with whom concurred Mr. Justice **Brewer,** dissented and filed the following opinion:

I am unable to concur in the reasoning and conclusion of the court, and shall briefly state my views.

The history of the art discloses that the patent in suit was what is called a "pioneer invention." In it, for the first time, was brought to light a method or process which, by the co-operation of the air from the train pipe with that from the car reservoir, created the "quick action" brake. The patent, in its specification and claims, clearly described a machine or mechanical combination whereby the invention was exemplified or rendered operative.

It is not an unwarrantable extension of the term to speak of this invention in suit as a pioneer, since it is practically conceded in this case, and justly observed by the court below, *"one of the highest value to the public,"[**574** and conspicuously one "which entitles the proprietor to a liberal protection from the courts in construing the claim." The very fact that this invention resulted in placing it within the power of an engineer, running a long train, to stop in about half the time and half the distance within which any similar train had been stopped, is certainly deserving of recognition. The claims of such patents have from time out of mind been allowed a liberal construction, and considered as entitled to the fullest benefit of the doctrine of mechanical equivalents.

It in no wise detracts from the merit of this invention that later devices have been adopted which render its practical operation more efficient. The very term, "pioneer patent," signifies that the invention has been followed by others. A pioneer patent does not shut but opens the door for subsequent invention.

The particular patent in suit was, as I understand it to be admitted, an entire success in supplying passenger trains and short freight trains with a "quick action" brake; but while it enabled even the longest freight trains to stop in half the time and half the distance previously occupied, there remained difficulties which required further devices to give to the invention the perfect success which it has now attained.

Being of the character so described as a pioneer, the patent in suit is entitled to a broad or liberal construction. In other words, the invention is not to be restricted narrowly to the mere details of the mechanism described as a

means of carrying the invention into practicable operation.

I cannot assent to what is, perhaps, rather intimated than decided in the opinion of the court that what is called a "process in order to be patentable must involve a chemical or other similar elemental action." The term "process" or "method," as describing the subject of a patent, is not found in the statutes. No reason is given in the authorities, and I can think of none in the nature of things, why a new process or method may not be patentable, even though a mechanical device or a mechanical combination may be necessary to render the new process practicable. It seems to be used by 575]the courts *as descriptive of an invention which, from its novelty and priority in the art to which it belongs, is not to be construed as inhering only in the particular means described, in the letters patent, as sufficient to exemplify the invention and bring it into practical use.

Thus in the case of *Winans* v. *Denmead*, 56 U. S. 15 How. 330 [14:717], the patent was for a new form of the body of a car for the transportation of coal, thus avoiding certain practical difficulties or disadvantages in such cars as previously made. To the argument on behalf of the infringer, that the claim of the patent was confined to a single form, and only through and by that form to the principle which it embodies, this court said, per Mr. Justice Curtis:

"It is generally true, when a patentee describes a machine, and then claims it as described, that he is understood to intend to claim, and does by law actually cover, not only the precise forms he had described, but all other forms which embodied his invention; it being a familiar rule that to copy the principle or mode of operation described is an infringement, although such copy should be totally unlike the original in form or proportions. . . . It is not sufficient to distinguish this case to say that here the invention consists in a change of form, and the patentee has claimed one form only. Patentable improvements in machinery are almost always made by changing some one or more forms of one or more parts, and thereby introducing some mechanical principle or mode of action not previously existing in the machine, and so securing a new or improved result. And, in the numerous cases in which it has been held, that to copy the patentee's mode of operation was an infringement, the infringer had got forms and proportions not described, and not in terms claimed. If it were not so, no question of infringement could arise. If the machine complained of were a copy, in form, of the machine described in the specification, of course it would be at once seen to be an infringement. It could be nothing else. It is only ingenious diversities of form and proportion, presenting the appearance of something unlike the thing patented, which give rise to questions; and the property of the inventors would be value-576]less, *if it were enough for the defendant to say, Your improvement consisted in a change of form; you describe and claim but one form; I have not taken that, and so have not infringed.

"The answer is, My improvement did not consist in a change of form, but in the new employment of principle for powers, in a new mode of operation, embodied in a form by means of which a new or better result is produced; it was this which constituted my invention; this you have copied, changing only the form. . . . Where form and substance are inseparable, it is enough to look at the form only. Where they are separable—where the whole substance of the invention may be copied in a different form—it is the duty of courts and juries to look through the form for the substance of the invention, for that which entitled the inventor to his patent, and which the patent was designed to secure; where that is found, there is an infringement; and it is not a defense, that it is embodied in a form not described, and in terms claimed by the patentee. Patentees sometimes add to their claims an express declaration, to the effect that the claim extends to the thing patented, however its form or proportions may be varied. But this is unnecessary. The law so interprets the claim without the addition of these words."

McCormick v. *Talcott*, 61 U. S. 20 How. 402 [15: 930], was also a case of a mechanical patent, and it was said by Mr. Justice Grier, who delivered the opinion of the court: "If he [the patentee] be the original inventor of the device or machine called the divider, he will have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such."

In *Morley Sewing Machine Co.* v. *Lancaster*, 129 U. S. 263 [32: 715], there was also a question of an alleged invention of a primary character, and wherein the invention was embodied in a mechanical combination; and it was held that, in a pioneer patent, such as that of Morley, the patentee, the special devices set forth by Morley were not necessary constituents *of the claims; that his patent was to re [577 ceive a liberal construction, in view of the fact that he was a pioneer in the construction of an automatic button sewing machine, and that his patent was not to be limited to the particular devices or instrumentalities described by him.

In that case extending and approving reference was made to the case of *Proctor* v. *Bennis*, L. R 36 Ch. Div. 740, which was a case of an invention embodied in a mechanical contrivance, and the following language of Lord Justice Bowen was quoted:

"Now, I think it goes to the root of this case to remember that this is, as was described by one of the counsel, really a pioneer invention, and it is by the light of that, as it seems to me, that we ought to consider the question whether there have been variations, or omissions, and additions, which prevent the machine which is complained of from being an infringement of the plaintiff's. . . . With regard to the additions and omissions, it is obvious that additions may be an improvement, and that omissions may be an improvement; but the mere fact that there is an addition, or the mere fact that there is an omission, does not enable you to take the substance of the plaintiff's patent. The question is not whether the addition is

material, or whether the omission is material, hut whether what has been taken is the substance and essence of the invention."

These were cases wherein the discovery or invention was made effective through machines or mechanical combinations, and wherein it was held that the merit of the process or method was not to he confined, in the case of a pioneer patent, to the mere form described in the specifications as sufficient to make the invention practically operative.

Neilson's Patent [*Neilson* v. *Thompson*], Web. Pat. Cas. 275, was a noted case, in which the true distinction was drawn between a mere principle, as the subject of a patent, and a process by which a principle is applied to effect a new and useful result. The court of exchequer, in answering the objection that Neilson's patent was for a principle, said:

"It is very difficult to distinguish it from the **578**] specification *of a patent for a principle, and this at first created in the minds of some of the court much difficulty; hut, after full consideration, we think that the plaintiff does not merely claim a principle, hut a machine embodying a principle, and a very valuable one. We think the case must he considered as if, the principle being well known, the plaintiff had first invented a mode of applying it by a mechanical apparatus to furnaces; and his invention consists in this,—by interposing a receptacle for heated air between the blowing apparatus and the furnace. In this receptacle he directs the air to he heated by the application of heat externally to the receptacle, and thus he accomplishes the object of applying the hlast, which was before of cold air, in a heated state to the furnace."

And when the case came before the House of Lords, Lord Campbell said:

"After the construction first put upon the patent by the learned judges of the court of exchequer, . . . I think the patent must extend to all machines, of whatever construction, wherehy the air is heated intermediately between the blowing apparatus and the blast furnace. That being so, the learned judge was perfectly justified in telling the jury that it was unnecessary for them to compare one apparatus with another, because, confessedly, that system of conduit pipes was a mode of heating air by an intermediate vessel between the blowing apparatus and the blast furnace, and therefore it was an infringement of the patent." Web. Pat. Cas. 715.

Very applicahle to the present case is the doctrine of *Tilghman* v. *Procter*, 102 U. S. 707 [26: 279]. It was there held, overruling the case of *Mitchell* v. *Tilghman*, 86 U. S. 19 Wall. 287 [22: 125], that a patent may be validly granted for carrying a principle into effect; and if the patentee suggests and discovers not only the principle, but suggests and invents how it may be applied to a practical result by mechanical contrivances and apparatus, and shows that he is aware that no particular sort or modification of form of apparatus is essential to obtain benefit from the principle, then he may **579**]take his patent for the mode *of carrying it into effect, and is not under the necessity of confining himself to one form of apparatus.

Having discussed the previous cases, particularly that of *Neilson* and of *O'Reilly* v. *Morse*, 56 U. S. 15 How. 62 [14: 601], Mr. Justice Bradley said:

"'Whoever discovers that a certain useful result will be produced in any art by the use of certain means is entitled to a patent for it, provided he specifies the means.' But everything turns on the force and meaning of the word 'means.' It is very certain that the means need not be a machine, or an apparatus; it may . . . be a process. A machine is a thing. A process is an act, or a mode of acting. The one is visible to the eye—an ohject of perpetual observation. The other is a conception of the mind, seen only by its effects when being executed or performed. Either may he the means of producing a useful result. . . . Perhaps the process is susceptible of being applied in many modes and hy the use of many forms of apparatus. The inventor is not bound to describe them all in order to secure to himself the exclusive right to the process, if he is really its inventor or discoverer. But he must describe some particular mode, or some apparatus, by which the process can he applied with at least some beneficial result, in order to show that it is capable of heing exhibited and performed in actual experience."

The *Telephone Cases*, 126 U. S. 1, 532, 533 [31: 863, 989], contain an apt illustration of these principles. Mr. Chief Justice Waite, in discussing the case, said:

"In this art,—or what is the same thing under the patent law, this process, this way of transmitting speech—electricity, one of the forces of nature, is employed; but electricity, left to itself, will not do what is wanted. The art consists in so controlling the force as to make it accomplish the purpose. It had long been believed that if the vibrations of air caused hy the voice in speaking could be reproduced at a distance hy means of electricity, the speech itself would be reproduced and understood. How to do it was the question. Bell discovered that it could he done by gradually changing the intensity of a continuous electric current so as to make it *correspond[**580** exactly to the changes in the density of the air caused by the sound of the voice. This was his art. He then devised a way in which these changes of intensity could be made and speech actually transmitted. Thus his art was put in a condition for practical use. In doing this, hoth discovery and invention, in the popular sense of those terms, were involved; discovery in finding the art, and invention in devising the means of making it useful. For such discoveries and such inventions the law has given the discoverer and inventor the right to a patent,—as discoverer, for the useful art, process, method of doing a thing he has found; and, as inventor, for the means he has devised to make his discovery one of actual value. . . . The patent for the art does not necessarily involve a patent for the particular means employed for using it. Indeed, the mention of any means in the specification or descriptive portion of the patent is only necessary to show that the art can he used; for it is only useful arts—arts which may be used to advantage—that can he made the subject of a patent. The language of the statute is, that 'any person who has invented or discovered any new and useful art, machine, manufacture, or composition of mat-

ter,' may obtain a patent therefor. . . . Thus, an art—a process—which is useful is as much the subject of a patent, as a machine, manufacture, or composition of matter. . . . But it is insisted that the claim cannot be sustained, because when the patent was issued Bell had not in fact completed his discovery. While it is conceded that he was acting on the right principle and had adopted the true theory, it is claimed that the discovery lacked that practical development which was necessary to make it patentable. In the language of counsel, 'there was still work to be done, and work calling for the exercise of the utmost ingenuity, and calling for the very highest degree of practical invention.' It is quite true that when Bell applied for his patent he had never actually transmitted telegraphically spoken words so that they could be distinctly heard and understood at the receiving end of his line, but in his specification he did describe, accurately and with admirable clear-
581] ness, his process, that is to say, *the exact electrical condition that must be created to accomplish his purpose, and he also described, with sufficient precision to enable one of ordinary skill in such matters to make it, a form of apparatus which, if used in the way pointed out, would produce the required effect, receive the words, and carry them to and deliver them at the appointed place. The particular instrument which he had and which he used in his experiments did not, under the circumstances in which it was tried, reproduce the words spoken, so that they could be clearly understood, but the proof is abundant and of the most convincing character, that other instruments, carefully constructed and made exactly in accordance with the specification, without any additions whatever, have operated and will operate successfully. . . . The law does not require that a discoverer or inventor, in order to get a patent for a process, must have succeeded in bringing his art to the highest degree of perfection. It is enough if he describes his method with sufficient clearness and precision to enable those skilled in the matter to understand what the process is, and if he points out some practicable way of putting it into operation. . . . Surely a patent for such a discovery is not to be confined to the mere means he improvised to prove the reality of his conception."

The conclusion justified by the authorities is that whether you call Westinghouse's discovery that "quick action" may be accomplished by the co operation of the main-pipe air and that from the car reservoir, a process, or a mode of operation, yet if he was the first to disclose it and to describe a mechanical means to give practical effect to the invention, he must be regarded as a pioneer inventor, and as entitled to protection against those who, availing themselves of the discovery, seek to justify themselves by pointing to mere differences in form in the mechanical devices used.

Much stress was laid in the argument on an alleged disclaimer by the patentee while the application was pending in the Patent Office, whereby it is said Westinghouse must be understood to have abandoned the second claim, or, at any rate, to have consented that that
582] claim should be interpreted *by the courts as if it contained an auxiliary valve as a material element in the claim.

There are cases, no doubt, in which it has been held that when a claimant has, under objection in the Patent Office, withdrawn certain claims, or has modified them by adding or striking out terms or phrases, and accepts a patent which does not grant the abandoned or unmodified claims, he cannot be heard to insist upon such a construction of the allowed claims as would cover what had been previously rejected. *Shepard* v. *Carrigan*, 116 U. S. 593 [29: 723]; *Roemer* v. *Peddie*, 132 U. S. 313 [33: 382]; *Corbin Cabinet Lock Co.* v. *Eagle Lock Co.* 150 U. S. 38 [37: 989].

An examination of the cited cases, however, will disclose, as I think, that they turned upon matters of construction. In other words, were cases where it was questionable what the patent, as actually granted, meant. In such cases, as in other cases of ambiguity, it may be allowable to consult the application and file wrapper, and possibly written communications, which may throw light upon claims that are ambiguous or capable of different constructions.

But where the claims allowed are not uncertain or ambiguous, the courts should be slow to permit their construction of a patent, actually granted and delivered, to be affected or controlled by alleged interlocutions between the officers in the Patent Office and the claimant. No doubt, in proceedings to revoke or cancel a patent granted by inadvertence or by fraudulent representations, it would be competent to show what had taken place in the Patent Office pending the application. But when we consider that often the employees in the Patent Office are inexperienced persons, and that the mass of the business is so vast that it is impossible for the commissioner or the chief examiner to review it, except in a perfunctory way, it can be readily seen how dangerous it would be to modify or invalidate a patent, clear and definite in its terms, by resorting to such uncertain sources of information.

However this may be, I do not perceive that the matters alleged in the present case are entitled to any weight in the construction of the patent. Even if the letter of the claimant's attorney, written on January 19, 1887, can be looked to *as helping us to understand [583 the meaning of a patent granted on March 29, 1887, it only appears to be an argument as to the meaning or legal effect of the language used in the claims, and does not amount to a withdrawal or modification of them.

Accordingly the second claim of the patent is before us for construction on its own terms, and, to avoid protracting this discussion, the opinion of Judge Morris in the circuit court is referred to and adopted as a sound construction of that claim. 66 Fed. Rep. 997. This claim is not, as I read it, open to the objection that it aims to patent a principle. It sets forth the discovery that by a co-operation of the air from the auxiliary reservoir and that from the main air pipe, the action of the brakes is quickened and the air vented from the main air pipe directly to the brake cylinder.

But even if the second claim must, as argued in the opinion of the court, be read, by

reason of the letter of the claimant's attorney, as if it called for the auxiliary valve described in the first and fourth claims, and even if, when not so read, it can be regarded as void because simply for a function or principle, nevertheless the invention, as described in the other claims and specifications, is clearly set forth, and, under the evidence as to the state of the art, is entitled to be regarded as a pioneer. Regarding the second claim as a mere statement of the idea or invention and the other claims as describing a form or combination of mechanism which embodies the invention and renders it operative, all the requisites of the law are sufficiently complied with.

The only remaining question is that of the infringement, and that is readily disposed of. For it is conceded in the opinion of the majority of the court that, if the patent in suit is entitled to a broad construction as a pioneer, embodying a new mode of operation, not limited to the particular means described in the specification, then the defendant's device is an adoption of the idea or principle of the Westinghouse patent with a mechanical equivalent or substitute for the auxiliary valve.

Upon the whole I am of the opinion that the 584] decree of the *circuit court of appeals should be reversed and that the cause should be remanded with directions to restore the decree of the circuit court.

Mr. Justice **Brewer** concurred in the dissenting opinion.

Mr. Justice **Gray** and Mr. Justice **McKenna** also dissented from the opinion and from the decision of the court.

FREDERICK W. FINK and Albert Plait, Trading as Lehn & Fink, Appts.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 584–587.)

Duty on imported goods—muriate of cocaine.

1. Under which of two paragraphs of the tariff act an article is to be classed is to be determined by ascertaining which one of the two paragraphs is more definite in its application to the article than the other.
2. Muriate of cocaine is properly dutiable under ¶ 74 of the tariff act of October 1, 1890, and not under ¶ 76 of that act.

[No. 120.]

Argued April 28, 1898. Decided May 23, 1898.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit certifying certain questions for decision in an action brought by Frederick W. Fink et al. against the United States in the Circuit Court of the United States for the Southern District of New York and appealed to said Circuit Court of Appeals. Questions answered, the first in the affirmative and the second in the negative.

The facts are stated in the opinion.

Mr. **Albert Comstock** for appellants.

Mr. **Henry M. Hoyt,** Assistant Attorney General, for appellee.

Mr. Justice **White** delivered the opinion of the court:

This record presents for consideration certain questions of law certified to this court by the court of appeals for the second circuit. The certificate and questions therein stated are as follows:

"A judgment or decree of the circuit court of the United States for the southern district of New York having been made and entered February 4, 1895, by which it was ordered, adjudged, and decreed that there was no error in certain proceedings herein before the board of United States general appraisers, and that their decisions herein be, and the same are hereby, in all things affirmed, and an appeal having been taken from said judgment or decree to this court by the above-named appellants, and the cause having come on for *hearing and argument in this [585 court, certain questions of law arose concerning which this court desires the instruction of the Supreme Court of the United States for its proper decision. The facts out of which such questions arose are as follows:

"The firm of Lehn & Fink imported into the port of New York, on April 6, 1894, certain parcels of muriate or hydrochlorate of cocaine in crystals, on which duty was exacted at twenty-five per cent ad valorem, under paragraph 76 of the tariff act of October 1, 1890, as a chemical salt. The importers duly and seasonably protested against such exaction, upon the ground that the merchandise was dutiable at fifty cents per pound under paragraph 74 of the same act as a medicinal preparation in which alcohol is used. After decisions by the board of general appraisers and by the United States circuit court of New York the question duly came by appeal from the decision of the circuit court to this court.

"Paragraphs 74 and 76 of said act are as follows:

"74. All medicinal preparations, including medicinal proprietary preparations, of which alcohol is a component part, or in the preparation of which alcohol is used, not specially provided for in this act, fifty cents per pound."

"76. Products or preparations known as alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing, and all chemical compounds and salts, not specially provided for

"Muriate of cocaine is an alkaloidal salt in this act, twenty-five per cent ad valorem." and is a chemical salt produced by combination of the alkaloid cocaine and muriatic acid. Salts are either alkaloidal or alkaline, produced by combination of either alkaloid or alkalies with acids. In its preparation alcohol is necessarily used as a solvent. Muriate of cocaine is a medicinal preparation and is known as such by the physician, the chemist, the druggist, and in commerce, and was so known definitely, generally, and uniformly at

NOTE.—*As to lien of United States for duties,* see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect,—see note to Greely v. Thompson, 13: 397.

and prior to the enactment of the tariff law of 1890. The term 'salts' or 'chemical salts' is a generic term and includes a commercial class of articles known by chemists and by 586] pharmacists *and druggists at the date of the passage of the tariff act as covering, among others, muriate of cocaine. The commercial meaning of the term 'medicinal preparation' is the same as its ordinary meaning, viz., a substance used solely in medicine and prepared for the use of the apothecary or physician to be administered as a remedy in disease. Muriate of cocaine is dispensed in the form in which it is imported, or more often reduced therefrom to a powder by means of a mortar and pestle, or diluted in water or admixed with inert or neutral matter.

"The number of chemical salts is excessively large. A very small proportion of this number is used in medicine or as medicinal preparations. There is no adequate testimony in regard to the relative number of imported or importable medicinal preparations in the preparation of which alcohol is used, and of imported or importable chemical salts. The testimony does not disclose which paragraph includes the greater number of articles.

"Upon the foregoing facts the questions to be certified are:

"1. Is muriate of cocaine properly dutiable under paragraph 74 of the tariff act of October 1, 1890?

"2. Is muriate of cocaine properly dutiable under paragraph 76 of the tariff act of October 1, 1890?

"And to that end this court hereby certifies such questions to the Supreme Court of the United States."

There can be no doubt that the article in question from some points of consideration might be classified under either of the paragraphs of the statute referred to in the certificate. Thus, within the purview of paragraph 74, it is obviously a medicinal preparation, in the preparation of which alcohol is used. It is also equally clear that it is likewise, chemically speaking, a salt, and hence within the reach of paragraph 76. It would then follow that if either of the paragraphs stood alone in the statute, disembarrassed of the provisions found in the other, the preparation might properly come under the head of either. Being reached, then, in some of its aspects by some of the provisions found in both paragraphs, the question is, Which, if either of the two, is so dominant in its con-587] trol *of the article in question as to exclude the operation thereon of the other? The rule is that this, if possible, is to be determined by ascertaining whether one of the two paragraphs is more definite in its application to the article in question than is the other. Isaac v. Jonas, 148 U. S. 648 [37:596]; Bogle v. Magone, 152 U. S. 623 [38:574]. Being a medicinal preparation, made as such and solely used as a medicine, the language of paragraph 74 clearly more definitely applies to it than does the generic provision 'of chemical compounds and salts" found in paragraph 76. Magone v. Heller, 150 U. S. 70 [37:1001]; Robertson v. Salomon, 130 U. S. 412 [32:995]. The fact that the certificate states that "muriate of cocaine is a medicinal preparation, and is known as such by the physician, the chemist, the druggist, and in commerce, and was so known definitely, generally, and uniformly at and prior to the enactment of the tariff law of 1890," becomes a factor, adding cogency to the demonstration that the article falls with more definite certainty under the classification of a medicinal preparation than it does under that of a chemical salt. De Jonge v. Magone, 159 U. S. 562 [40:260]; Berbecker v. Robertson, 152 U. S. 373 [38:484]; Robertson v. Salomon, 130 U. S. 412 [32:995]. And the force of this view is not weakened by the statement in the certificate that the term "salts or chemical salts is a generic term, and includes a commercial class of articles known by chemists and by pharmacists and druggists at the date of the passage of the tariff act as covering, among others, muriate of cocaine." In reason, the result of the certified facts is simply this, that muriate of cocaine is in its narrow aspect a medicinal preparation, in its wider a chemical salt, and hence that chemical salt is a generic term designating all articles of that character, and hence embracing muriate of cocaine as the genus must, as a matter of course, contain within itself the species which are embodied in it. In its ultimate analysis, therefore, the question asked is only this: Is the genus, chemical salt, more comprehensive than the species, muriate of cocaine? Thus understood, it becomes of course necessary to answer the first question in the affirmative and the second in the negative, and it is so ordered.

D. WAGONER, W. T. Wagoner, and [588
S. B. Burnett, Appts.,

v.

NEIL W. EVANS, Treasurer of Canadian County, I. N. Canon, Sheriff of Canadian County, et al.

NEIL W. EVANS, Treasurer of Canadian County, I. N. Canon, Sheriff of Canadian County, et al., Appts.,

v.

D. WAGONER, W. T. Wagoner, and S. B. Burnett.

(See S. C. Reporter's ed. 588–593.)

Taxation of cattle on Indian reservation—territorial statute—county purposes.

1. The taxation of cattle kept for grazing purposes upon Indian reservations in Oklahoma,

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NOTE.—*As to direct taxes*, see note to Scholey v. Rew, 23: 99.

As to power of states to tax, see note to Dobbins v. Erie County Comrs. 10: 1022.

As to when an injunction to restrain the collection of a tax will be granted, see note to Dows v. Chicago, 20: 65.

As to when taxes illegally assessed can be recovered back, see note to Erskine v. Van Arsdale, 21: 63.

under leases authorized by Congress on condition that Indians shall be employed in herding the cattle, does not violate the rights of the Indians or invade the jurisdiction and control of the United States over them and their lands.

2. A territorial statute authorizing taxation of property for the taxation of which there was previously no legal authority cannot justify the taxation of such property for previous years before the statute was passed.

3. Cattle within the protection of the laws of Oklahoma, but situated on an Indian reservation which is attached to an organized county may be subjected to taxation for county purposes as well as for territorial and judicial purposes.

[Nos. 252, 262.]

Submitted April 29, 1898. Decided May 23, 1898.

APPEALS from a decree of the Supreme Court of the Territory of Oklahoma affirming the decree of the District Court of Canadian County in that Territory in favor of Neil W. Evans, treasurer, et al., for the collection of part of a tax in an action brought by D. Wagoner et al., plaintiffs, to enjoin the said defendants from levying or collecting certain taxes from cattle and horses kept on an Indian reservation in Oklahoma. Affirmed in part and reversed in part.

See same case below, 5 Okla. 31.

Statement by Mr. Justice **Shiras**:

In November, 1895, D. Wagoner, W. T. Wagoner, and S. B. Burnett filed in the district court of Canadian county, territory of Oklahoma, a petition against Neil W. Evans, as treasurer, and I. M. Cannon, as sheriff, and Osborne, Hutchinson, and Vasey, as county commissioners of Canadian county, asking to enjoin the said defendants from levying or collecting certain taxes upon herds of cattle and horses belonging to the complainants, and by them kept and grazed on the Kiowa and Comanche Indian reservation which is a part of the territory of Oklahoma, but not embraced in any organized county of that territory. In pursuance of the act of Congress of May 2, 1890 (26 Stat. at L. 86, chap. 182), that Indian reservation was attached to Canadian county for judicial purposes, and by an act of March 5, 1895, of the territorial legislature, the authorities of any county to 589] which any reservation had been *attached for judicial purposes were authorized to assess taxes upon any cattle or other personal property kept or situated within such reservation. The petition alleged that in pursuance of the said act, the defendants were proceeding to assess and collect taxes for the years 1892 to 1895, both inclusive; that, for several reasons set forth in the petition, the said act of March 5, 1895, was invalid, and that said defendants were proceeding without warrant of law. To this petition a demurrer was filed, which was overruled, and thereupon the defendant filed answers admitting that they were proceeding to levy and collect taxes as complained of in the petition, and alleging that their action in the premises was in pursuance of a valid statutory enactment of the territorial legislature.

An agreed statement of the facts was filed, and the cause was submitted to the court upon the petition, answer and statement of facts, and thereupon the court found that the defendants were fully authorized by the laws of Oklahoma territory to collect from the petitioners taxes for territorial and judicial purposes for the year 1895 only, but that they were without authority to collect from the petitioners taxes for county, township, or other than the territorial and judicial purposes. It was therefore decreed by the court that the defendants were authorized and permitted to collect those parts of the tax which were for territorial and judicial purposes for the year 1895 only, and enjoined them from collecting any part of the taxes which were for county, township or other than territorial or judicial purposes, and no taxes whatever for the years 1892, 1893, and 1894.

From this decree both parties appealed to the supreme court of the territory of Oklahoma, which, on September 4, 1896, affirmed the decree of the district court.

From that decree of affirmance both parties were allowed an appeal to this court by the chief justice of the supreme court of the territory.

Messrs. **A. H. Garland** and **R. C. Garland** for Wagoner *et al.*

Messrs. **Fred Beall, Amos Green,** and **C. M. Green** for Evans *et al.*

Mr. Justice **Shiras** delivered the opinion of the court:

The appeal of Wagoner and others, owners of cattle kept by them on the Indian reservation attached to Canadian county, brings up the same questions which were considered and determined by us at the present term in the case of Thomas v. Gay, 169 U. S. 264 [ante, 740].

That was an appeal from the supreme court of the territory of Oklahoma, involving the validity of the territorial act of March 5, 1895, which subjected cattle, kept and grazed in any unorganized country, district, or reservation, to taxation in the organized county to which said country, district, or reservation is attached for judicial purposes, and it appears in the present record that the supreme court of the territory regarded that case as identical in principle with the present one. Our examination of the records in the two cases has brought us to the same conclusion.

We therefore deem it unnecessary to again discuss at length questions so recently disposed of. The main contentions are that by reason of the treaty relations existing between the United States and the Indian tribes resident on the reservations it is not competent for the territorial legislature of Oklahoma to subject cattle within those reservations to taxation, even although such cattle are owned by persons other than Indians; and that the legislature of Oklahoma cannot validly empower the authorities of an organized county to tax personal property situated in a reservation attached to such county for judicial purposes.

In Thomas v. Gay it was held that there was nothing in the treaties between the United States and the Indians occupying these reservations which disabled the United States from bringing the reservations within the limits of the territory of Oklahoma; that taxing personal property of persons other than Indians, and situated within the **591**] reservation, *did not impair the rights of person or property pertaining to the Indians; and that the taxation of cattle kept for grazing purposes upon the reservations, under leases duly authorized by act of Congress, was not a violation of the rights of the Indians, nor an invasion of the jurisdiction and control of the United States over them and their lands.

No additional fact is presented to distinguish the present case from that one, in particular, now under consideration, except that the United States authorities made it a condition on which the owners of cattle should have a right to obtain grazing leases from the Indians that they should employ Indians in herding their cattle. It is said that the purpose of that condition was to alienate the Indians from their tribal relations and to incline them to peaceful pursuits. Such may have been the object, but we are unable to see that such a clause in these grazing leases has any bearing on the power of the territory to exercise the power of taxation. It is, indeed, contended that to permit the territory to tax the cattle would tend to discourage the making of such leases, and thus deprive the Indians of the advantages coming to them. This seems to us too indirect and far-fetched an incident to affect our conclusions.

In Thomas v. Gay it was further held that the power to legislate delegated to the territorial legislature included the right to pass and enforce laws for the assessment and collection of taxes; that the act of March 5, 1895, was a valid enactment, under which it was competent for the taxing authorities of an organized county to levy and collect taxes on personal property situated within the attached reservations, and belonging to other persons than Indians.

These considerations cover and dispose of the contentions urged on behalf of the owners of the property taxed, and their appeal is accordingly dismissed.

It remains to consider the appeal of the taxing authorities of Canadian county.

They object, in the first place, to that portion of the decree below which restrains them from the collection of taxes for the years 1892, 1893, and 1894. They point to a provision **592**] *contained in the act of March 5, 1895, enabling the special assessor to assess or reassess property that at any time has, by oversight or negligence, or for any other cause, escaped taxation; and they contend that the act of 1895 was an amendatory statute and intended to cure a supposed defect in the then existing laws, and cases are cited in which it has been held that such curative statutes can have a retrospective effect, and enable the authorities to assess and collect taxes on property which should have been theretofore assessed.

It is sufficient to say that, prior to the passage of the act of March 5, 1895, there existed no power in the authorities of Canadian county to tax property within the attached reservation. Such authority was first given by that act, and could only be validly exercised on property subjected to its terms after its enactment.

Another objection on behalf of the county officers to the decree below appears to us to be well taken. It respects that feature of the decree which restricts the collection of taxes for the year 1895 to those imposed only for territorial and judicial purposes, and forbids the collection of taxes imposed for county purposes.

The same question arose in the case of Thomas v. Gay, and the conclusion there reached, upon an examination of the authorities, both state and Federal, was, that it cannot be maintained that those whose cattle are within the protection of the laws of Oklahoma, but are situated on a reservation, receive no benefit from the expenditures of public moneys in the organized county to which the reservation is attached. Cases cited, wherein the power of municipal organizations to tax property outside of their boundaries has been denied, are not applicable when the power is conferred by a general law, enacted by a legislature having jurisdiction over the subject. Nor are taxes, otherwise lawful, invalidated by the allegation, or even the fact, that the resulting benefits are unequally shared.

The appeal is sustained in this particular, and the decree of the Supreme Court of the Territory is reversed, and the cause remanded to that court with directions to reverse *the decree of the district court in so [**593** far as it restrains the county authorities from collecting taxes for county purposes for the year 1895, and to affirm the rest of that decree.

The costs in No. 252 to be paid by the appellants, and in No. 262 by the appellees.

PROVIDENT LIFE & TRUST COMPANY of Philadelphia, Petitioner,

v.

COUNTY OF MERCER, in the State of Kentucky.

(See S. C. Reporter's ed. 593–606.)

Construction of statute—performance of work—recitals in county bonds—county bonds, when valid—meaning of "through"—delivery of bonds—negotiability thereof.

1. When the good faith of all the parties is unquestionable the courts will lean to that construction of the statute which will uphold the transaction as consummated.
2. Especially will that be so in a case in which

NOTE.—*As to negotiability of railroad bonds*, see note to White v. Vermont & M. R. Co. 16: 221.
As to municipal bonds; power to issue; amount; in

the question of construction having been raised the one party commences preparations to perform work which will put the matter beyond question, and desists therefrom only upon the representations of the other party that it is satisfied the work has been completed according to the terms of the contract.

8. Recitals in county bonds are conclusive in favor of a bona fide holder that precedent conditions prescribed by statute and subject to the determination of the county officers have been fully complied with.

4. County bonds in aid of a railroad, issued under a statute providing that they shall not be binding until the railway is "so completed through such county that a train of cars shall have passed over the same," and "unless such railroad shall pass to or through the corporate limits" of a certain town in the county, are valid.—at least in the hands of a bona fide purchaser,—although the road does not extend entirely across the county, but at its nearest point is 2 miles from the county line on one side, where the railroad company was preparing to continue the road across the county line, but desisted because the trustees of the bonds, relying on the opinions of the members of the county court of claims, decided the contract fully complied with and delivered the bonds, and the county received stock of the company in return, voted upon it at stockholders' meetings, and has ever since retained it and paid interest on the bonds.

5. The word "through" does not always mean from end to end, or from side to side, but frequently means simply "within."

6. A delivery of negotiable county bonds held in escrow by a trustee may be sufficient to make them valid in the hands of a bona fide holder for value and before maturity, although the conditions under which they were held had not in fact been fully performed, but the trustee, the agent of the county, had decided that such conditions had been complied with.

7. Negotiable county bonds issued under express statutory authority are negotiable as between the county and bona fide holders for value and before maturity, and not merely between successive holders.

[No. 243.]

Argued April 29, and May 2, 1898. Decided May 23, 1898.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment of that court reversing the judgment of the Circuit Court of the United States for the District of Kentucky in favor of the Provident Life & Trust Company of Philadelphia, and remanding the case with instructions to enter a judgment in favor of the defendant, the County of Mercer, in an action brought by the said Provident Life & Trust Company, against said County to recover on unpaid coupons of county bonds of said County. Judgment of Circuit Court of Appeals reversed, and judgment of the Circuit Court affirmed.

See same case below, 43 U. S. App. 21.

Statement by Mr. Justice **Brewer**:

On May 15, 1886, the general assembly of the commonwealth of Kentucky passed an act *entitled "An Act to Authorize the [594 County of Mercer to Subscribe Aid to the Louisville Southern Railroad Company" the 1st section of which is as follows:

"Sec. 1. That the county of Mercer may subscribe to the capital stock of the Louisville Southern Railroad Company as hereinafter provided, and may pay therefor, in the negotiable coupon bonds of said county, payable not more than thirty years after date, and bearing interest at a rate not to exceed six per centum per annum, payable semiannually, and which bonds and interest shall be payable at a place designated therein."

The 2d and 3d sections contain provisions in detail in respect to a vote of the people of the county, the subscription to the stock of the company, and the execution of the bonds. The 4th section reads:

"Sec. 4. The said bonds shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow, and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county: Provided, however, That such trust company or trustee shall, before receiving such bonds, give bond, with good surety, approved by the county judge, for the faithful performance of his or its duty in the premises: And provided further, That no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg."

In pursuance of this act an election was held in the county, resulting in favor of making the subscription and issuing the bonds. The subscription was made and the bonds executed. The bonds were, omitting a provision for repayment, in the following form:

*UNITED STATES OF AMERICA. [595

$1,000. No. 105.

LOUISVILLE SOUTHERN RAILROAD AID BONDS.

County of Mercer, State of Kentucky.

The county of Mercer, in the state of Kentucky, hereby acknowledges itself indebted and promises to pay to the Louisville Southern Railroad Company, or bearer, the sum of $1,000 on or before the tenth day of January, A. D. 1917, at the Louisville Banking Company in the city of Louisville, Kentucky,

aid of railroads; ratifying; conditions of issue; rights of bona fide holders; recitals; effect of overissue; validity.—see note to Sutliff v. Lake County Comrs. 37: 145.

As to bonds, official and other, and for debts; liability of sureties on.—see notes to United States v. Giles, 3: 708; and Postmaster General v. Early, 6:577.

As to bonds in aid of railroads, see note to Cantillon v. Dubuque & N. W.R. Co.(Iowa) 5 L.R.A.726, 728.

with interest thereon at the rate of 5 per cent per annum, payable semianually at said bank on the tenth days of July and January after date respectively in each year, on presentation and surrender of the annexed coupons representing such interest. This bond is one of a series of one hundred and twenty-five bonds of even date berewith, all of the same denomination and tenor, and numbered consecutively from one to one hundred and twenty-five, the same having been issued pursuant to the authority conferred upon the said county by an act of the legislature of Kentucky, entitled 'An Act to Authorize the County of Mercer to Subscribe Aid to the Louisville Southern Railroad Company,' approved May 15, 1886, and pursuant to an order entered by the county judge of said county in conformity with said act subscribing in behalf of said county for the capital stock of the Louisville Southern Railroad Company in the sum of $125,000, which order was entered of record in said court on January 10, A. D. 1887.

. . . . . .

In witness whereof, the county of Mercer, by John W. Hughes, county judge thereof, has in the name and on behalf of said county subscribed and executed this bond, and the same has been attested by the county clerk of said county, with his official seal affixed hereto, and the interest coupons attached thereto have been signed by the said clerk.

Done on the tenth day of January, A. D. 1887.

The County of Mercer [Seal.]
By John W. Hughes, County Judge.
Attest: Ben. C. Allin, Clerk.

596] *On February 7, 1887, the county court appointed D. L. Moore trustee, as prescribed by § 4 of the act. Moore accepted the trust and gave bond with good surety, as required, and on March 3, 1887, the bonds were deposited with him.

Prior to June 1, 1888, the railroad was completed from Louisville, in Jefferson county, via Shelbyville, in Shelby county, and Lawrenceburg, in Anderson county, south through Mercer county to the depot of the Southwestern Railroad in Harrodsburg, the county seat; there it connected with a short line of road constructed by the Southwestern Railroad Company, and extending from Harrodsburg to Burgin, on the Cincinnati Southern Railroad; the Southern Company owned all the stock of the Southwestern Company, had possession of its road, and subsequently the two companies were consolidated and the latter merged in the former company. On said 1st day of June, 1888, a train of cars, moved by an engine, passed over the road from Louisville through Harrodsburg to Burgin and then returned to Louisville, and from that time the railroad from Louisville to Burgin has been continually operated as the Louisville Southern Railroad. The distance from the northern line of Mercer county to Harrodsburg is 15 miles, from Harrodsburg to Burgin, 4.72 miles. Burgin is 3 miles from the south line of Mercer county and 4.74 miles from the east line. The nearest point that the road runs to the south line of Mercer county is 2 miles.

On July 3, 1888, Moore resigned his position as trustee, and Isaac Pearson was appointed in his place. He gave security to the county, as required by the act, and received from the prior trustee all the bonds and coupons in his hands. About the 1st of June, 1888, the time of the passage of a train of cars from Louisville to Burgin and back, as hereinbefore stated, there arose a question whether the condition precedent to the delivery of the bonds had been complied with by the railroad company, and it was in view of this difference of opinion and the doubts of the trustee Moore that he resigned his position. This question was publicly and generally discussed, and while the discussion was going on, and before Pearson, the trustee, had determined that the condition precedent had been performed *and that he would deliver [597 the bonds the railroad company prepared to extend its road toward and to the town of Danville, in Boyle county, which was 7.47 miles distant from Harrodsburg, and with one exception acquired all the rights of way to the southern line of Mercer county. A movement was made in the county to have the court of claims of the county instruct the trustee as to his duty in the premises, and that court, consisting of the county judge and the justices of the peace of his county, met on June 26, 1888, and the question was fully discussed before them. After argument they declined to instruct the trustee as to his action, but, upon motion of one of the justices, passed and spread upon the records this resolution:

At a county court of claims for Mercer county, at the court-house in Harrodsburg, on Tuesday, the 26th day of June, 1888.

Present: John W. Hughes, J. P. M. C. C., and M. Cummins, C. B. Connor, James Yeast, Sr., A. S. Hendrew, John W. Reed, E. R. Norton, R. L. Mullins, E. I. Massie, N. Harris, G. J. Johnson, B. O. Jones, A. Johnson, J. C. McIntire, and John T. Pankey, justices of the peace of Mercer county.

G. J. Johnson, as justice of the peace of this county, offered into court the following motion, which is ordered to be noted of record, and is as follows:

The members of this court do not believe that they have any right to enter an order directing the trustee to deliver the bonds of this county to the Louisville Southern Railroad, but as individuals they are of the opinion that such delivery should be made and the construction of the railroad not forced to the Boyle county line.

And said motion being seconded, the ayes and nays were taken, and resulted as follows:

Ayes, 12, as follows: M. Cummins, C. B. Connor, James Yeast, Sr., A. S. Hendrew, John W. Reed, E. R. Norton, R. L. Mullins, N. Harris, G. J. Johnson, B. O. Jones, J. C. McIntire, and John T. Pankey.

Nays, none; not voting, two, as follows: W. I. Massie and A. Johnson.

598] *After this, Pearson, the trustee, decided that the conditions had been performed, and on the — day of August, 1888, in the presence of the county judge of the county, delivered the bonds, first cutting off and burning the past due coupons. At the same time the Louisville Southern Railroad Company delivered to the county its certificate for an equal amount of its capital stock. The stock was accepted by the county and voted by the county judge at a stockholders' meeting on at least two occasions, one on December 18, 1888, and another on May 26, 1890, and the stock certificate is still held by the county of Mercer and has never been tendered to the railroad company, or anyone representing it. At these two meetings Mercer county voted its shares in support of certain resolutions materially affecting the business affairs of the railroad company and also accepting a legislative amendment to its charter, as well as in the election of directors. The county regularly levied an annual tax to meet the semi-annual interest on the bonds, and paid such interest for the years 1889, 1890, 1891, and January 1, 1892. Since then it has paid no interest. The Provident Life & Trust Company is a bona fide purchaser of $100,000 of the bonds, and on default in payment of the coupons it commenced this action on November 3, 1892, in the circuit court of the United States for the district of Kentucky. The pleadings having been perfected, the case was tried before the court without a jury. Special findings of facts were made, and upon them judgment was, on April 30, 1895, rendered in favor of the plaintiff. From this judgment the county took the case on error to the court of appeals for that circuit. That court, on March 3, 1896, filed an opinion holding the bonds void (43 U. S. App. 21), and entered a judgment reversing the judgment of the circuit court and remanding the case with instructions to enter a judgment in accordance with the opinion. Thereupon, on October 20, 1896, the case was brought to this court on certiorari.

Messrs. **Samuel Dickson** and **Thomas W. Bullitt** for petitioner, the Provident Life & Trust Co.

Messrs. **John B. Thompson, Alexander Pope Humphrey,** *George M. Davie,* and *John W. Hughes* for respondent, Mercer county.

Mr. Justice **Brewer** delivered the opinion of the court:

No one can read the facts above stated, as found by the circuit court, without being impressed that the transactions between the county and the company, culminating in the delivery of the bonds to the latter, were had in the utmost good faith. There was no misrepresentation, concealment, or fraud. The work done by the company in constructing the railroad was obvious and satisfactory. The question whether that work was a compliance with the terms of the subscription was publicly discussed, was fully considered at a meeting of the county court of claims, whose opinion was, and was so expressed, that the contract had been fully complied with, and that the bonds ought to be delivered. Prior to the time that such conclusion was reached the company, in view of the question, commenced its preparations to construct the road to the south county line, and had obtained, with a single exception, the necessary right of way therefor. When advised by the opinion of the court of claims that the construction of the additional 2 miles of road was unnecessary, and the judgment of the trustee was announced that he considered the contract of subscription fully complied with, the company desisted and took the bonds. The county accepted the stock issued by the company, voted upon it at stockholders' meetings, and has ever since retained it. For three years and a half it paid the interest on the bonds, without questioning their validity. So that if good faith on the part of all concerned was the sole condition of the validity of these bonds, no question could be made concerning it.

We do not mean to imply that good faith is the only requisite, or that a condition plainly prescribed by the legislature can be ignored by a county, even with the best of intentions. On the contrary, we reaffirm the proposition laid down in Barnum v. Okolona, 148 U. S. 393, 395 [37:495,497]:

*"That municipal corporations have [600 no power to issue bonds in aid of a railroad except by legislative permission; that the legislature in granting permission to a municipality to issue its bonds in aid of a railroad may impose such conditions as it may choose; and that such legislative permission does not carry with it authority to execute negotiable bonds except subject to the restrictions and conditions of the enabling act, are propositions so well settled by frequent decisions of this court that we need not pause to consider them. Sheboygan County [Supers.] v. Parker, 70 U. S. 3 Wall. 93, 96 [18:33,34]; Wells v. Pontotoc County Supervisors, 102 U. S. 625 [26:122]; Claiborne County v. Brooks, 111 U. S. 400 [28:470]; Young v. Clarendon Twp. 132 U. S. 340, 346 [33:356,360]."

At the same time when the good faith of all the parties is unquestionable the courts will lean to that construction of the statute which will uphold the transaction as consummated. Especially will that be so in a case in which the question of construction having been raised the one party commences preparations to perform work which will put the matter beyond question and desists therefrom only upon the representations of the other party that it is satisfied the work has been completed according to the terms of the contract. As said in Andes v. Ely, 158 U. S. 312, 321 [39:996,1001]:

"While courts may properly see to it that proceedings for casting burdens upon a community comply with all the substantial requisitions of a statute in order that no such burden may be recklessly or fraudulently imposed, yet such statutes are not of a criminal

character, and proceedings are not to be so technically construed and limited as to make them a mere snare to those who are encouraged to invest in the securities of the municipality. These considerations are appropriate to this case. The proceedings on the part of the town and the railroad company were carried on in evident good faith. No one questioned their validity, no effort was made to review the action of the county judge, the bonds were issued, more than $100,000 was spent within the limits of the town in the construction of the road, and years went by during which the town paid the interest and part of the principal before any question was made as to their validity."

601] *See also Mercer County v. Hacket, 68 U. S. 1 Wall. 83 [17:548]; Van Hostrup v. Madison City, 68 U. S. 1 Wall. 291 [17:538]; Ray County v. Vansycle, 96 U. S. 675 [24:800].

With these preliminary observations we pass to a consideration of the questions presented: and in the first place it must be noticed that no matter of constitutional limitation is involved. The only inquiry is whether the conditions prescribed in the statute have been fully complied with, and, if not, whether the county is in a position to avail itself of the non-compliance. The statute in terms authorizes the issue of negotiable bonds. The bonds are negotiable, and issued by the proper county officers; carry on their face recitals that they have "been issued pursuant to the authority conferred" by an act of the legislature, which is named, and "pursuant to an order entered by the county judge of said county in conformity with said act subscribing in behalf of said county for the capital stock" of the railroad company. By a long series of decisions such recitals are held conclusive in favor of a bona fide holder of bonds that precedent conditions prescribed by statute and subject to the determination of those county officers have been fully complied with. For instance, whether an election has been held, whether at such an election a majority voted in favor of the issue of bonds, whether the terms of the subscription have been complied with, and matters of a kindred nature which either expressly or by necessary implication are to be determined in the first instance by the officers of the county, will, in favor of a bona fide holder, be conclusively presumed to have been fully performed, provided the bonds contain recitals similar to those in the bonds before us. See among other cases Town of Coloma v. Eaves, 92 U. S. 484 [23:579]; County of Warren v. Marcy, 97 U. S. 96 [24:977]; Buchanan v. Litchfield, 102 U. S. 278 [26:138]; Northern Nat. Bank v. Porter Township, 110 U. S. 608 [28:258]; Bernards Township v. Morrison, 133 U. S. 523 [33:726]; Citizens' Savings & L. Asso. v. Perry County, 156 U. S. 692 [39:585]; Andes v. Ely, 158 U. S. 312 [39:996].

But it is said that the recitals in this case can be held conclusive only as to matters transpiring before the placing of the bonds in the hands of the trustee, such as the election, **602**] *etc., because by § 4 of the statute the bonds, when executed, were to be deposited with a trustee, to be held in escrow and delivered only upon the performance of a certain condition—a condition to be performed subsequently to the execution of the bonds. Assuming, without deciding, that such limitation must be placed upon the recitals, we pass to inquire whether that condition was in fact performed, and if not, whether after delivery by the trustee the county can be permitted to raise the question as against bona fide holders. That condition is that the bonds shall not be binding "until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same." It is contended that the word "through" means clear through the county, from one end of the county to the other; and that while the railway enters the north line of the county and runs within the county limits a distance of nearly 20 miles, it does not touch the south county line, nor come within a nearer distance of it than 2 miles. So it is said the railway does not run through the county, and therefore the condition upon which the bonds could become binding and valid obligations did not and does not exist. It is true the primary meaning of the word "through" is from end to end, or from side to side, but it is used in a narrower and different sense. Its meaning is often qualified by the context. Thus, if one should say that he had spent the summer traveling through New England it would not be understood as carrying an affirmation that he had been from one side clear to the other or from one end clear to the other, but that his travels had been within the limits of New England. That book which is said to have had a wider circulation than any except the Bible, Bunyan's Pilgrim's Progress, opens with this sentence "As I walked through the wilderness of this world, I lighted on a certain place where there was a den, and laid me down in that place to sleep." Does the writer mean that he passed from one end of the wilderness to the other, and at the further end found the den, or simply that as he traveled in the wilderness he lighted on the den? Obviously the latter. Many similar illustrations might *be cited. They show that "through" [**603** does not always mean from end to end or from side to side, but frequently means simply "within." Now, the language here is "so completed through such county that a train of cars shall have passed over the same." Obviously, the primary thought is not the extent of the line, but the extent to which the work shall be completed. In other words, the principal thing is not that a railroad shall be partially completed from one end of the county to the other, but that a railroad shall be so completed within and substantially through the county that a train of cars passes over it. It may well be believed that, inasmuch as the company's road was to commence at Louisville, on the northern border of the state, and its principal city, the purpose was to connect the county with that city, and that the road should be so fully completed as to permit the moving of trains over it, i. e.,

be in a condition for actual use, and not that a road, no matter how far constructed, should be extended from one end of the county to the other. This view of the intent of the legislature is sustained by the last clause of the section, which provides "that no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg." This contemplates that the line coming from the north shall enter the county and pass through it so far as to reach the corporate limits of the town of Harrodsburg, that town being the county seat. The proviso is not that the road in passing through the county shall touch or pass through the town of Harrodsburg, but simply that it shall pass to or through that town, and either is sufficient. It seems not an unreasonable construction of this statute that the condition of subscription was fully complied with when the railroad was so completed from the northern line of the county to Harrodsburg, the county seat, that a train of cars passed over it. If that be the correct construction, then of course we need inquire no further; and, on the other hand, if, though not correct, it be not an unreasonable construction, the courts should, in view of the unquestioned good faith of both parties, of the fact that it was adopted by the authorities of the county, and 604] that *by reason thereof the company desisted from further work—accept, if possible, the interpretation placed by the parties as correct. This view is certainly persuasive.

But if the true, the only permissible, construction be otherwise, and the demand of the statute is that the road be actually constructed from the north to the south line of the county, and so constructed that a train of cars shall have passed over it, then the question arises as to the effect of the decision of the trustee that the condition had been complied with, and of his delivery of the bonds, and their subsequent purchase by a bona fide holder. It is said that the bonds were placed in escrow, and that when an instrument is so placed there can be no valid delivery until the condition of the escrow has been performed, and if without performance the instrument passes out of the hands of the one holding the instrument in escrow it is not enforceable against the maker, and that in a suit on the instrument the inquiry is always open whether the condition of the escrow has been performed. Whatever may be the rule in case the instrument so placed in escrow be a deed or non-negotiable contract, we are of opinion that a different rule obtains when the instrument is a negotiable obligation.

"It is generally agreed that the delivery of negotiable paper left in escrow, contrary to the terms upon which it was to have been delivered will pass a good title to the bona fide transferee for value and before maturity." Long Island Loan & Trust Company v. Columbus C. & I. C. Railway Company, 65 Fed. Rep. 455, 485.

In Fearing v. Clark, 16 Gray, 74, 76, [77 Am. Dec. 394] Chief Justice Bigelow thus states the law:

"The rule is different in regard to a deed, bond, or other instrument placed in the hands of a third person as an escrow, to be delivered on the happening of a future event or contingency. In that case, no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it bona fide without notice. It therefore makes the consequences, which follow from the negotiation *of [605 promissory notes and bills of exchange through the fraud, deception, or mistake of those persons to whom they are intrusted by the makers, to fall on those who enable them to hold themselves out as owners of the paper jure disponendi, and not on innocent holders who have taken it for value without notice."

In Burson v. Huntington, 21 Mich. 415, 433 [4 Am. Rep. 497], it is said:

"If the maker or indorser, before delivery to the payee, leave the note in the hands of a third person as an escrow, to be delivered upon certain conditions only, . . . and the person to whom it is thus intrusted violate the confidence reposed in him, and put the note into circulation; this, though not a valid delivery as to the orginal parties, must, as between a bona fide holder for value, and the maker or indorser, be treated as a delivery, rendering the note or indorsment valid in the hands of such bona fide holder."

See also Vallett v. Parker, 6 Wend. 615, 620; Chase National Bank v. Faurot, 149 N. Y. 532 [35 L. R. A. 605]; Graff v. Logue, 61 Iowa, 704.

Within these authorities it must be held that when the trustee adjudged that the condition had been complied with and delivered the bonds the railroad company took such a title as, transferred to a bona fide holder, enabled him to recover against the county, notwithstanding the condition had in fact not been performed. That the trustee was the agent of the county and responsible to it for the manner in which he discharged this duty is obvious from the provision in the statute that he shall give "bond, with good surety, approved by the county judge, for the faithful performance" of his duty. If, in case the condition was not performed, the county had a perfect defense to the bonds, even in the hands of a bona fide holder, there were little need of requiring the trustee to give any security.

Another significant feature in this connection is the fact that by statute the bonds were to be negotiable. Counsel for the county suggest that this provision of the statute can be satisfied by giving to the bonds the benefit of negotiability as between successive holders, but we know of no reason why the general significance of the word "negotiable" should be *so limited. The [606 third of the three peculiar and distinguishing characteristics of negotiable instruments, as stated in 1 Daniels on Negotiable Instruments, § 1, is respecting the consideration, and the author says:

"As between immediate parties, the true

state of the case may be shown, and the presumption of consideration rebutted. But when a bill of exchange or negotiable note has passed to a bona fide holder for value, and before maturity, no want or failure of consideration can be shown. Its defects perish with its transfer; while, if the instrument be not a bill of exchange or negotiable note, they adhere to it in whosesoever hands it may go."

To hold that by this provision the legislature intended that the quality of negotiability should inhere in the instruments only as between the successive holders, and not between the maker and any bona fide holder, cannot be justified by any reasonable construction of the language used.

It follows from these considerations that these bonds in the hands of the Life & Trust Company, a bona fide holder, must be adjudged the valid obligations of the county. The judgment of the Court of Appeals is therefore reversed and the judgment of the Circuit Court is affirmed.

WILLIAM L. LEDBEITER, Plff. in Err.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 606–614.)

Indictment for carrying on business of retail liquor dealer—sufficiency of—words of statute—time—place of offense.

1. An indictment for carrying on the business of a retail liquor dealer without having paid the special tax therefor, which describes the offense in the language of § 16 of the act of Congress of February 8, 1875, is sufficient on motion in arrest of judgment after conviction.
2. The fact that the business of a retail liquor dealer is defined in § 18 of said act of Congress does not make it necessary for an indictment under § 16 of said act, for carrying on the business of such liquor dealer, to charge the offense in the language of such definition.
3. Where the statute sets forth every ingredient of the offense, an indictment in its very words is sufficient, though that offense be more fully defined in another section.
4. An allegation that a crime was committed on the —— day of the month in which the indictment was found is not fatally defective, upon motion in arrest of judgment, for failing to state the particular day,—especially when the offense is that of carrying on a business.
5. An indictment which fails to specify the town, but states the county, in which the crime was committed, is sufficient on motion in arrest of judgment after conviction.

[No. 196.]

Submitted April 12, 1898. Decided May 23, 1898.

IN ERROR to the District Court of the United States for the Southern District of Iowa to review the conviction of William L. Ledbetter upon an indictment for carrying on the business of retail liquor dealer in violation of § 16 of the act of February 8, 1875. Affirmed.

Statement by Mr. Justice **Brown**:

This was a writ of error to review the conviction of the plaintiff in error upon an indictment found against him by the grand jury for the southern district of Iowa, April 28, 1896, for a violation of § 16 of the act of February 8, 1875 (18 Stat. at L. 307, chap. 36) in carrying on the business of a retail dealer in liquors without the payment of the special tax required by law.

Defendant was convicted upon the first count in the indictment, which reads as follows:

"The grand jurors of the United States of America duly impaneled, sworn, and charged to inquire in and for the body of said southern district of Iowa, at a term of the United States district court begun and held at Keokuk, in said district, on the 14th day of April, A. D. 1896, in the name and by the authority of the United States of America, upon their oaths do find and present that Lewis Ledbetter, late of said district, heretofore, to wit, on the — day of April, A. D. 1896, in the county of Appanoose, in the southern district of Iowa, and within the jurisdiction of this court, did then and there wilfully, unlawfully, and feloniously carry on the business of a retail liquor dealer without having paid the special tax therefor, as required by law, contrary to the statute in such case made and provided and against the peace and dignity of the United States of America."

After his conviction defendant moved for an arrest of judgment upon the insufficiency of the indictment. This motion was overruled, and the defendant sentenced to pay a fine of $250 and costs of prosecution.

Defendant thereupon sued out a writ of error from this court, assigning as error that the indictment did not state facts constituting an offense against the laws of the United *States (1) because it did not set forth [608 that the defendant sold or offered for sale foreign or domestic spirituous or malt liquors otherwise than as provided by law; (2) that he was not informed with sufficient particularity as to the time and place and means so prise him of the crime of which he was charged; and (3) that the indictment did not allege that any crime had been committed at a date prior to the finding of the indictment.

Messrs. **H. Scott Howell** and **William C. Howell** for plaintiff in error.

Mr. **James E. Boyd**, Assistant Attorney General, for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

Defendant did not demur to the indictment, nor move to quash or take advantage of its alleged insufficiency upon the trial, but after conviction moved in arrest of judgment, upon the ground that it failed to aver with sufficient particularity the details of the offense and the time and place of its commission.

1. The principal alleged defect in the in-

dictment is set forth in the third, fourth, and fifth assignments of error, which charge that the indictment did not state facts which would constitute an offense against the laws; in that it did not allege that the defendant sold or offered for sale foreign or domestic distilled spirits, wines, or malt liquors otherwise than as provided by law, or any of said liquors, or to whom said liquors were sold or offered for sale, and because it did not allege that defendants had sold or offered for sale any of said liquors in quantities less than 5 wine gallons at the same time, and because the indictment did not allege that the defendant had not paid $25, the amount of the tax provided by the statute, and generally, because the allegations of the indictment are only a legal conclusion, unsupported by **609**] *the primary and individualizing facts which constituted an offense, etc.

By § 16 of the act of February 8, 1875 (18 Stat. at L. 310, chap. 36), under which defendant was convicted, it is provided that "any person who shall carry on the business of a . . . retail liquor dealer . . . without having paid the special tax as required by law . . . shall, for every such offense, be fined, etc.," and the first count of the indictment charged in the very words of this section that the defendant "did then and there wilfully, unlawfully, and feloniously carry on the business of a retail liquor dealer without having paid the special tax therefor, as required by law, contrary to the statute in such case made and provided and against the peace and dignity of the United States of America."

Defendant insists that it was not sufficient to charge him with the offense in the language of the statute, but that the indictment should have set forth the particular facts which showed that he was a retail liquor dealer, and should also have averred that he had not paid the tax of $25 provided by law.

By § 18 of the same act retail dealers in liquor are required to pay a special tax of $25, and "every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereinafter provided, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors."

The question presented for our consideration is whether it is sufficient to charge the offense in the language of the statute creating such offense and fixing the punishment therefor, or whether it is necessary to charge it in the language of the statute defining the business of a retail liquor dealer, averring that the defendant had done the acts therein stated without payment of the special tax, and had therefore rendered himself amenable to the punishment provided by the former section.

We do not undertake to say that the latter would not be a proper course, but we think an allegation in the language of the statute creating the offense is sufficient. We have **610**] no disposition *to qualify what has already been frequently decided by this court that where the crime is a statutory one it must be charged with precision and certainty, and every ingredient of which it is composed must be clearly and accurately set forth, and that even in the cases of misdemeanors the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged. United States v. Cook, 84 U. S. 17 Wall. 168, 174 [21: 538,539]; United States v. Cruikshank, 92 U. S. 542, 558 [23: 588,593]; United States v. Carll, 105 U. S. 611 [26: 1135]; United States v. Simmons, 96 U. S. 360 [24: 819]; United States v. Hess, 124 U. S. 483 [31: 516]; Pettibone v. United States, 148 U. S. 197 [37: 419]; Evans v. United States, 153 U. S. 584 [38: 830].

But we are of opinion that the statute in this case (§ 16) does define the offense with the requisite precision, and that the pleader has chosen the safer course in charging it in the language of this section. The offense does not consist in selling or offering for sale to a particular person distilled spirits, etc., in less quantities than 5 gallons at one time, but in carrying this on as a business; in other words, in the defendant holding himself out to the public as selling or offering for sale, etc. While it has been sometimes held that proof of selling to one person was at least prima facie evidence of criminality, the real offense consists in carrying on such business, and if only a single sale were proved it might be a good defense to show that such sale was exceptional, accidental, or made under such circumstances as to indicate that it was not the business of the vendor. United States v. Jackson, 1 Hughes, 531; United States v. Rennecke, 28 Fed. Rep. 847. It is quite evident that an indictment averring in the language of § 18 that the defendant sold or offered for sale the liquors named, without averring that he made this a business, and that he had not paid the special tax required by law, would be insufficient.

In addition to this, however, § 18, in defining retail dealers in liquors, declares that "every person who sells or offers for sale foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereinafter provided, in less *quantities than five [**611** wine gallons at the same time, shall be regarded as a retail dealer in liquors." The statute, by the use of the words "otherwise than as hereinafter provided," thus introduces an exception into the general words of the definition, and it might be open to doubt whether an indictment which charged only the selling or offering for sale in the language of this section should not also negative the fact that the sale was not within such exception. The general rule is that while the pleader is not bound to negative a proviso, he is bound to aver that the defendant is not within any of the exceptions contained in the enacting clause of the statute. United States v. Cook, 84 U. S. 17 Wall. 168 [21: 538]; Maxwell Land Grant Co. v. Dawson, 151 U. S. 586, 604 [38: 279,285]; State v. Haden, 15 Mo. 447; State v. Walsh, 14 R. I. 507; State v. Sommers, 3 Vt. 157; State v. Munger, 15 Vt.

290; Thompson v. State, 37 Ark. 408; State v. O'Brien, 74 Mo. 550. The words "otherwise than as hereinafter provided" in this section probably refer to wholesale liquor dealers in distilled spirits, wholesale and retail dealers in malt liquors, brewers, and others who are either exempt from taxation or pay a different tax, and if it were necessary to aver that the defendant was not within either of these exceptions the indictment might be drawn out to an intolerable length. Upon the other hand, when it is averred in the language of § 16 that the defendant carried on the business of a retail liquor dealer without payment of a special tax, the description, though brief, is comprehensive, although § 18 may be referred to as defining the offense with more particularity. But we do not think it necessary to charge the offense in the language of the definition. If Congress had not defined a retail liquor dealer it would be proper to resort to a dictionary for a definition of this term; but it is no more necessary in one case than in another to charge the offense in the language of the definition.

The cases wherein it is held that an indictment in the exact language of the statute is not sufficient are those wherein the statute does not contain all the elements of the of-
612] fense, as in *United States v. Carll, 105 U. S. 611 [26:1135] where a statute against passing counterfeit money failed to aver the scienter: but where the statute sets forth every ingredient of the offense, an indictment in its very words is sufficient, though that offense be more fully defined in some other section. United States v. Gooding, 25 U. S. 12 Wheat. 460, 473 [6: 693,697]; United States v. Wilson, Baldw. 78, 119; Hess v. State, 5 Ohio, 5; Harrington v. State, 54 Miss. 494.

Notwithstanding the cases above cited from our reports, the general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense. Where the statute completely covers the offense, the indictment need not be made more complete by specifying particulars elsewhere obtained. Whiting v. State, 14 Conn. 487; Simmons v. State, 12 Mo. 268; State v. Smart, 4 Rich. L. 356; Parkinson v. State, 14 Md. 184 [74 Am. Dec. 522].

2. The only allegation of time and place in this indictment is that the offense was committed "on the — day of April, A. D. 1896, in the county of Appanoose, in the southern district of Iowa."

Good pleading undoubtedly requires an allegation that the offense was committed on a particular day, month, and year, but it does not necessarily follow that the omission to state a particular day is fatal upon a motion in arrest of judgment. Neither is it necessary to prove that the offense was committed upon the day alleged, unless a particular day be made material by the statute creating the offense. Ordinarily, proof of any day before the finding of the indictment, and within the statute of limitations, will be sufficient. Armstrong v. State, 145 Ind. 609; Gratz v. Commonwealth, 96 Ky. 162; United States v. Conrad, 59 Fed. Rep. 458; Fleming v. State, 136 Ind. 149; State v. McCarthy, 44 La. Ann. 323.

In the case under consideration the indictment was found on the 28th day of April, 1896, and the allegation is that the crime was committed "on the —day of April, 1896," which *must necessarily have been a day[**613** preceding the finding of the indictment. Under such circumstances, the defendant could not possibly have been misled by the allegation, particularly in view of the fact that the carrying on of a business is in the nature of a continuing offense; and while it is true that a business can be carried on only for a single day, the ordinary inference would be that it was carried on for a longer period. It would seem illogical to hold that, if the offense had been charged to have been committed upon a particular day in April, evidence could have been given of any day within the statute of limitations, and yet to hold that the defendant could be misled by an averment that the offense was committed on the — day of the month in which the indictment was found.

3. Much the same observations may be made with respect to the averment of place, which was simply "in the county of Appanoose, in the southern district of Iowa, and within the jurisdiction of this court."

Properly speaking, the indictment should state not only the county, but the township, city, or other municipality within which the crime is alleged to have been committed. But the authorities in this particular are much less rigid than formerly. Under the early English law, where the jurymen were also witnesses and were summoned from the vicinage, it was necessary that the locality of the crime should be stated with great particularity in order that the sheriff might be informed from what vicinage he should summon the jury. But this requirement was long since abolished in England by statute, and it is not now necessary there to state any venue "in the body of any indictment, but the county, city, or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment." 1 Bishop, Crim. Proc. § 368.

While in this country it is usual to state the town as well as the county, it has not been generally deemed necessary to do so, and most of the authorities assume that an allegation is sufficient after verdict which shows it to have been done within the jurisdiction of the court. Heikes v. Commonwealth, 26 Pa. 513; United States v. Wilson, Baldw. 78; Carlisle v. State, 32 Ind. 55; State v. Goode, 24 Mo. 361; State v. Smith, 5 Harr. (Del.) 490; Barnes v. State, 5 Yerg. 186; Covy v. State, 4 Port. (Ala.) 186; Wingard v. State, 13 Ga. 396; State v. Warner, 4 Ind. 604. *Indeed, an indictment [**614** charging the offense to have been committed

in one town is supported by proof that it was committed in a different town within the same county, and within the jurisdiction of the court. Com. v. Tolliver, 8 Gray, 386 [69 Am. Dec. 252]; Com. v. Creed, 8 Gray, 387; Carlisle v. State, 32 Ind. 55; Com. v. Lavery, 101 Mass. 207; People v. Honeyman, 3 Denio, 121.

We do not wish to be understood as approving the practice that was pursued in this case, or even as holding that this indictment might not have been open to special demurrer for insufficiency as to the allegations of time and place, but upon motion in arrest of judgment we think it is sufficient.

The judgment of the court below is affirmed.

NEW YORK INDIANS
v.
UNITED STATES.

(See S. C. Reporter's ed. 614, 615.)

The judgment and mandate of this court in this case (ante, 927) amended.

[No. 106.]

Announced May 23, 1898.

APPEAL from a judgment of the Court of Claims dismissing a petition of the New York Indians, which was reversed with instructions. For a full statement of the case, see the same case, ante, 927.

Messrs. **Joseph H. Choate**, *James B. Jenkins, Jonas H. McGowan, Guion Miller*, and *George Barker* for appellants.

Messrs. **Charles C. Binney** and *L. A. Pradt*, Assistant Attorney General, for appellee.

In this case it is ordered that the judgment and mandate be amended so as to read as follows:

"The judgment of the court of claims is therefore reversed and the cause remanded with instructions to enter a new judgment for the net amount actually received by the government for the Kansas lands, without interest, less any increase in value attributable to the fact that certain of these lands were donated for public purposes, as well as the net amount which the court below may find could have been obtained for the lands otherwise disposed of if they had all been sold as public lands, less the amount of lands upon **615**] the basis of which settlement *was made with the Tonawandas, and less the 10,240 acres allotted to the thirty-two New York Indians, as set forth in finding twelve, together with such other deductions as may seem to the court below to be just, and for such other proceedings as may be necessary and in conformity with this opinion."

JOHN R. HOLLOWAY, Plff. in Err.,
v.
JAMES H. DUNHAM et al.

(See S. C. Reporter's ed. 615–620.)

Findings of fact, when conclusive—immaterial error—want of exception—general exception, when insufficient.

1. On an appeal from the supreme court of a territory this court cannot examine the evidence as to its weight or sufficiency, and the findings of fact are conclusive upon this court.
2. Where the jury sustained an attachment on the grounds both of nonresidence and fraud, and their finding of fraud is sufficient alone to sustain the attachment, an error in charging the jury as to nonresidence is immaterial.
3. Where the record does not show that the verdict was returned by less than the twelve jurors, an error in charging the jury that the verdict need not be unanimous but that nine jurors could determine it, if not excepted to, will not be considered.
4. One general exception to the giving of thirteen different instructions to the jury, many of which contain more than one proposition of law or fact, is insufficient.

[No. 247.]

Argued May 4, 1898. Decided May 23, 1898.

IN ERROR to the Supreme Court of the Territory of Oklahoma to review a judgment of that court affirming the judgment of the District Court of that Territory in favor of the plaintiffs, John H. Dunham et al., in an action brought by them against John R. Holloway, for the value of certain goods sold by and delivered by the plaintiffs to the defendant. Affirmed.

See same case below, 3 Okla. 244.

Statement by Mr. Justice **Peckham**:

This action was brought in a district court of the territory of Oklahoma to recover the value of certain goods sold and delivered by the plaintiffs (defendants in error here) to the defendant below, amounting to the sum of $5,004.58, the sales having been made between the 1st of November, 1890, and the 10th of March, 1891, and the defendant at the time of the sales being a resident of Fort Worth in the state of Texas. At the time of the commencement of the action plaintiffs also commenced attachment proceedings against the defendant on the ground that he was at that time a nonresident of the territory of Oklaho-

NOTE.—*As to review by United States Supreme Court of territorial decisions; extent and manner of; distinction between an appeal and a writ of error,*—see note to Miners' Bank v. Iowa, 13: 867.

As to what particularity in exceptions is necessary in order to a review in appellate court, see note to Moore v. Bank of the Metropolis, 10: 172.

As to what questions the United States Supreme Court will review on writ of error; bill of exceptions,—see note to Parks v. Turner, 13: 883.

As to exception, when must be taken, to be available on review, see note to Phelps v Mayer, 14: 643.

ma, and also on the ground that he was about to sell, convey, and otherwise dispose of his property subject to execution, with a fraudulent intent to cheat, hinder, and delay his creditors.

The defendant filed an answer, denying the plaintiff's complaint, and also one denying each and every material allegation contained in the plaintiffs' petition and affidavits for an attachment.

616] *Under the practice in Oklahoma there were two issues thus made: one in regard to the existence and amount of defendant's indebtedness to the plaintiffs, and the other as to the facts upon which the attachment could be sustained. These two separate issues came on for trial on the 16th of June, 1892, before the district court and a jury, and after the evidence was in the court submitted to the jury the two issues, and directed a separate verdict to be returned in regard to each issue. The jury returned the following verdicts:

"We the jury, duly impaneled and sworn in the above case, find for the plaintiff on the attachment issue.

"Eugene Walker, Foreman."

"We, the jury, duly impaneled and sworn in the above entitled case, find for the plaintiffs and assess their damages at $5,434.61.

"Eugene Walker, Foreman."

At the request of the defendant the court also submitted to the jury the following questions in writing:

(1) "Was J. R. Holloway, on the 31st day of October, 1891, about to sell and convey or otherwise dispose of his property subject to execution, with the intent to cheat, hinder, and delay his creditors?"

(2) "Was J. R. Holloway, on the 31st day of October, 1891, a nonresident of Oklahoma territory?"

The jury returned an affirmative answer to each question. Judgment was entered for the amount of the verdict.

The defendant appealed to the supreme court of the territory where the judgment was affirmed, and thereupon he obtained a writ of error from this court, and the record is now here for review.

Messrs. **Fred Beall,** *Amos Green,* and *O. M. Green* for plaintiff in error.

Messrs. **Selwyn Douglas,** *W. W. Dudley, L. T. Michener,* and *MacGregor Douglas* for defendant in error.

Mr. Justice **Peckham** delivered the opinion of the court:

This is a very confused record. There would seem to be two bills of exceptions, one containing the evidence and the other reciting certain exceptions, but containing no part of the evidence taken upon the trial. Both seem to have been signed by the judge who tried the case, while neither purports to have been signed by him until months subsequent to the day of trial.

The bill of exceptions containing the evidence is the first bill set forth in the record, and the other bill follows it. It is not material here which bill may be regarded as the regular one, because on an appeal from the supreme court of a territory we cannot examine the evidence as to its weight or sufficiency, and the findings of fact are conclusive upon this court. Harrison v. Perea, 168 U. S. 311 [ante, 478], and cases cited.

There are left only the exceptions to rulings on the admission or rejection of evidence and those taken to the instructions of the court to the jury. The former are not particularly urged, and the latter are substantially confined to two. They arise upon the instructions of the court to the jury in regard to what is sufficient proof of nonresidence, and also as to the number of the jury necessary to agree upon a verdict.

The jury found for the plaintiffs on the attachment issue, and also for the plaintiffs in the main action, and assessed their damages at $5,434.61. In addition to that the jury found that the defendant on the 31st of October, 1891, was about to sell and convey or otherwise dispose of his property subject to execution, with the intent to cheat, hinder and delay his creditors, and also that on the 31st day of October, 1891, he was a nonresident of Oklahoma territory.

Without at this moment considering whether the exceptions taken to the charge of the judge were sufficiently and *properly [618 taken, we think it is not material now to inquire as to the correctness of the charge of the court in relation to the question of defendant's nonresidence. If he were a nonresident when the attachment was issued it could be sustained on that ground. But it could also be sustained if at the time it was issued the defendant was about to sell and convey or otherwise dispose of his property subject to execution, with the intent to cheat, hinder, and delay his creditors. So there were two facts entirely separate and distinct from each other, either of which being found to exist would justify and support the attachment.

The jury having found that the defendant at the time the attachment was issued did intend to convey his property, and thus cheat his creditors, that fact is conclusive upon this court, and, being in itself sufficient to uphold the attachment, without reference to the other fact of the defendant's nonresidence, a complete answer is furnished to any alleged error in the instruction of the court as to what constitutes a nonresident.

Whether the court erred in charging the law in relation to nonresidence is therefore immaterial. There is no such connection between the two grounds upon either of which the attachment could be supported, that an error in the charge of the court in regard to one can be said to affect the other, and thus furnish cause for a new trial.

The other error complained of relates to the instruction of the court that the jury need not be unanimous in their verdict, and that nine could determine it.

The record does not show that the verdict was returned by a less number than twelve jurors nor does the statute require the verdict to be signed by all the jurors. At the

time when the verdict was rendered the jury was not polled. It does not therefore affirmatively appear that this verdict was a verdict of less than twelve jurors. If, however, the instruction to the jury had been properly excepted to the judgment would have to be reversed under our ruling in American Publishing Company v. Fisher, 166 U. S. 464 [41:1079]; and Springville v. Thomas, 166 U. S. 707 [41:1172]. We are of opinion, how-
619] ever, that no proper and *sufficient exception was taken by the defendant to the instruction of the judge to the jury on this question.

The record shows that the court gave some thirteen different instructions to the jury, the thirteenth being the one relating to the number necessary to find a verdict. All of the instructions are set forth at length. Many of them contain more than one proposition of law or fact. At the end of the instructions is the signature of the judge. Following the signature the record contains this further statement:

"The questions hereto attached you will answer in writing, after each question, the word 'yes' or 'no.' You need not be unanimous in determining these questions, but to answer either of them nine of you must agree upon the answer.

"Your foreman will sign each of the verdicts and also this special verdict when you are agreed. John G. Clark, Judge."

Then follow "the questions hereto attached," which were the special questions submitted to the jury and already mentioned, to which affirmative answers were made and signed by the foreman. Then follows this general statement:

"To the giving of which instructions and each of them the defendant at the time excepted."

On the same day that the verdict was rendered the defendant moved for a new trial on the grounds therein stated. The grounds are mentioned in great detail.

No mention is made of the thirteenth instruction to the jury, and it is nowhere alleged as ground for a new trial that there was any error in stating to the jury that nine of their number might find a verdict.

The statement in the record in regard to the manner in which the defendant took exceptions to the charge of the judge leaves the fact quite plain that those exceptions were taken generally and in a lump, and were not in reality taken separately or applied specifically to any particular instructions. It was a general statement that the whole charge of the judge was specifically excepted to.
620] No specifications *were given, nothing was said in the way of calling the attention of the judge to any particular portions of his charge which the defendant objected to. When we look at the instructions contained in these various paragraphs, we see that in many of them there are two or more different propositions of law, and that a general exception taken to any of such paragraphs would be insufficient if one of the several propositions were correct. Should one general exception to thirteen different instructions be considered sufficient when each instruction consists of different propositions of law and fact, and many of them are clearly correct? We think not. The wholesale manner of taking exceptions is unfair, both to the judge and the opposite party. After a judge has given a long charge to the jury, consisting of many different propositions of law and fact involved in the trial, a general exception noted at the end of the charge to each proposition separately of law or fact announced therein is not sufficient if any proposition of law contained in the charge is correct. Those propositions in regard to the correctness of which there is a real controversy should be at least called to the attention of the judge, so that if he thought it proper he might correct, modify, or explain them. It is evident the defendant's counsel had no reference in his exceptions to the charge, to many of the propositions therein contained, for they were favorable to the defendant. And it is equally plain that he had in fact no reference to the instructions as to the number necessary to find a verdict. This is shown by the motion for a new trial and the grounds therein mentioned. It would not conduce to the fair administration of justice to permit such an exception to be regarded as sufficient to raise the question herein sought to be reviewed.

Some other questi ns were made in the brief of the counsel for plaintiff in error, all of which we have carefully examined, but do not find any error which would lead to a reversal, and the judgment must therefore be affirmed.

Mr. Justice **Brewer** dissents.

UNITED STATES, Appt.,
v.
M. SALAMBIER.

(See S. C. Reporter's ed. 621-628.)

Sufficiency of protest by importer.

A protest by the importer against the exaction of the duty of 50 per cent ad valorem on sweetened chocolate, claiming that the goods are dutiable at 2 cents per pound and that the amount unjustly exacted be refunded, is sufficient, when the collector did not complain of any want of distinctness therein, and there are but two paragraphs of the tariff act which deal with the subject, except the one under which the collector acted, and under either of them the duty is that claimed by the importer.

[No. 117.]

Argued April 28, 1898. Resubmitted to full bench May 6, 1898. Decided May 23, 1898.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sec-

NOTE.—*As to lien of United States for duties,* see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect,—see note to Greely v. Thompson, 13: 397.

and Circuit certifying a question for instruction by this court in a suit brought by M. Salambier against the United States to recover duties illegally exacted upon goods imported by him in which he recovered judgment before the Circuit Court of the United States for the Southern District of New York. Question answered in the affirmative.

Statement by Mr. Justice **Shiras:**

A judgment or decree of the circuit court of the United States for the southern district of New York having been made and entered on the 4th day of January, 1895, by which it was ordered, adjudged, and decreed that there was no error in certain proceedings before the board of United States general appraisers, and that their decision be in all things affirmed, and an appeal having been duly taken from said judgment or decree to the circuit court of appeals by the United States, and the cause having come on for argument in that court, a certain question of law arose concerning which that court desired the instruction of the Supreme Court of the United States for its proper decision.

The facts out of which the question arose are as follows:

Certain merchandise consisting of sweetened chocolate in the form of small cakes or tablets manufactured from cocoa sweetened with sugar, known commercially as sweetened chocolate, was imported and entered for consumption by the appellee, M. Salambier, from a foreign country into the port of New York on June 23, 1891, which merchandise was classified for customs duties at 50 per cent ad valorem by the collector of the port of New York, under the provisions of paragraph 239 of the tariff act of October 1, 1890, and the duty was liquidated accordingly.

622] *The importer and appellee protested against this exaction and duly filed the following protest:

New York, July 26, 1891.

Hon. Joel B. Erhardt, Collector.

Sir: I do hereby protest against the rate of 50% assessed on chocolate imported by me, Str. La Bretagne, June 23, '91. Import entry 96,566.—M. S. No. 53/53.

I, claiming that the said goods under existing laws are dutiable at 2 cts. per lb., and the exaction of a higher rate is unjust and illegal, I pay the duty demanded to obtain possession of the goods, and claim to have the amt. unjustly exacted refunded.

Very respectfully,
M. Salambier,
J. H. Dumont, Atty.

The collector of the port of New York thereupon transmitted the said protest with the invoice and entry to the board of three general appraisers on duty at the port of New York, and said board on December 10, 1892, rendered their decision reversing the decision of the collector, and holding that the said merchandise was dutiable at 2 cents per pound under paragraph 319 of the tariff act of October 1, 1890, and that the importer should not be deprived of his remedy by reason of having failed to specifically claim classification of the said imported merchandise as a manufacture of cocoa under said paragraph 319.

From this decision of the board of United States general appraisers the United States appealed to the circuit court of the United States for the southern district of New York, by petition, praying for a review of said decision pursuant to § 15 of the act of June 10, 1890, claiming in their petition, among other things, that the said board were in error in failing to hold that the protest in question was insufficient and invalid, inasmuch as it did not set forth distinctly and specifically the reasons for the importer's objection to the collector's decision as to the rate and amount of duties charged upon the merchandise according to the provisions of law; also *in deciding an issue not raised by the [**623** protest or arising in the case; also in entertaining said protest and in failing to find the issue of law with the collector of customs; also in reversing the decision of the collector aforesaid in the premises.

The said circuit court, upon said petition, ordered the board of United States general appraisers to return to the circuit court the record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decision thereon, pursuant to § 15 of the act of June 10, 1890, and the said board of general appraisers thereafter made such return in conformity to the order of the court.

The case thereafter came on to be tried upon the record as above set forth and upon the invoice and entry, before Hon. Hoyt H. Wheeler, district judge holding the said circuit court. The circuit court affirmed the decision of the board of general appraisers herein, and judgment was thereupon made and entered as above set forth, from which judgment the present appeal was taken by the United States to this court.

Upon these facts that court desired instruction upon the following question of law for the proper decision of said cause, namely:

"Was the protest hereinabove set forth a good and sufficient protest under existing law against the decision of the collector in his assessment of duty upon the appellee's importation of sweetened chocolate, under the tariff act of October 1, 1890?

"And to that end that court hereby certifies such question to the Supreme Court of the United States."

Mr. **Henry M. Hoyt,** Assistant Attorney General, for appellant.

Mr. **Edwin B. Smith** for appellee.

Mr. Justice **Shiras** delivered the opinion of the court:

It was decided by the United States circuit court of appeals for the second circuit, in United States v. Schilling, 11 U. S. App. 604 that *"sweetened chocolate" was dutiable [**624** under paragraph 319 of the tariff act of October 1, 1890, at the rate of 2 cents per pound,

as "cocoa, prepared or manufactured, not specially provided for in the act."

From that decision the United States took no appeal. In the present case, the board of general appraisers held that "sweetened chocolate" was dutiable at the rate of 2 cents per pound under said paragraph 319. The United States appealed from the decision of the board of appraisers to the circuit court of the United States for the southern district of New York, not on the ground that the merchandise in question was not properly dutiable, under paragraph 319, at 2 cents per pound, but claiming that the protest made by the importer against the decision of the collector, who had assessed the sweetened chocolate, under paragraph 239 of said act, at 50 per cent ad valorem, was not a sufficient protest under existing law. From the judgment of the circuit court affirming the decision of the board of general appraisers an appeal was taken by the United States to the circuit court of appeals, and that court has certified to us the single question of the legal sufficiency of the protest which, omitting unnecessary words and figures, was as follows:

"I do hereby protest against the rate of 50% assessed on chocolate imported by me, Str. La Bretagne, June 23, '91. . . . I, claiming that the said goods under existing laws are dutiable at two cents per pound, and the exaction of a higher rate is unjust and illegal. I pay the duty demanded to obtain possession of the goods and claim to have the amount unjustly exacted refunded."

By the 14th section of an act approved June 10, 1890 (26 Stat. at L. 131, chap. 407) entitled "An Act to Simplify the Laws in Relation to the Collection of the Revenues," Congress enacted:

"That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of 625] such merchandise, *or the person paying such fees, charges, and exactions other than duties, shall, within ten days after, 'but not before,' such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon."

The three paragraphs concerned are as follows:

239. "All other confectionery, including chocolate confectionery, not specially provided for in this act, fifty per centum ad valorem."

318. "Chocolate (other than chocolate confectionery and chocolate commercially known as sweetened chocolate), two cents per pound."

319. "Cocoa, prepared or manufactured, not specially provided for in this act, two cents per pound." 26 Stat. at L. 584, 588, chap. 1244.

It is not claimed on behalf of the government in the present case that the protest was not made in writing by a person entitled to do so; or that it was not made within due time; or that the requisite payment under protest has not been duly made. In other words, it is conceded that the importer within the time prescribed in the statute, and having paid the full amount of the duties exacted, gave notice in writing to the collector that he was dissatisfied with his decision, and gave certain reasons for his objections thereto.

What is claimed by the government is that the nature of the importer's objections to the decision of the collector was not set forth with the distinctness and with the minuteness of specification required by the statute.

It does not appear that the collector deemed the protest insufficient in form or unintelligible. Not complaining of any want of distinctness in the protest, he adhered to his decision as to the nature of the merchandise and the amount of the duty, and, in pursuance of the statute, transmitted the protest *with the invoice and entry to the [626 board of general appraisers. The board regarded the protest as sufficient in respect to form and distinctness, reversed the decision of the collector, and held that the merchandise was dutiable at 2 cents per pound under paragraph 319 of the tariff act.

As already stated, it is admitted by the government that the collector was wrong in his classification of the imported article, and that the duty assessed by the board of general appraisers is the one that should have been exacted from the importer. Still, it is contended that the importer has lost his remedy by reason of having failed to specifically claim classification of the imported merchandise as a manufacture of cocoa under said paragraph 319.

Apart from the authorities cited, and which we shall presently examine, we have no difficulty in agreeing with the board of appraisers, and with the circuit court, that the protest was, in form and substance, a reasonable compliance with the law. The object of the statute, in requiring a protest, was to distinctly inform the collector of the position of the importer. In this instance, it was impossible for the collector to have read the protest without perceiving that his classification of the merchandise, as dutiable under paragraph 239 of the tariff act, at 50 per cent ad valorem, was objected to, and that the importer claimed that under the law, the goods were dutiable at 2 cents per pound. The collector could not have been perplexed by the omission to name the specific paragraph which the importer sought to have applied, for there were but two paragraphs, be-

sides 239, which dealt with the subject, namely, paragraphs 318 and 319, and under either of them the duty was that claimed by the importer, 2 cents per pound.

The conclusion thus reached is consistent with the authorities to which our attention has been called in the briefs of the respective parties:

"We are not, therefore, disposed to exact any nice precision, nor to apply any strict rule of construction upon the notices required under this statute. It is sufficient if the importer indicates distinctly and definitely the 627] source of his complaint, and his *design to make it the foundation for a claim against the government." Greeley's Administrator v. Burgess [Converse v. Burgess], 59 U. S. 18 How. 413 [15:455].

"Persons importing merchandise are required to make their protests distinct and specific [in order] to apprise the collectors of the customs of the nature of the objections . . . before it is too late to remove them or to modify the charge, and . . . that the officers of the government may know what they have to meet in case they decide to exact the duties [as intimated] notwithstanding the objection, and expose the government to the risk of litigation." Curtis's Administratrix v. Fiedler [Fiedler v. Curtis], 67 U. S. 2 Black, 461 [17:273].

"The object of the requirement is to prevent a party, if he suffers the mistake or oversight to pass without notice, from taking advantage of it when it is too late to make the correction, and to compel him to disclose the grounds of his objection at the time when he makes his protest. . . . Technical precision is not required; but the objections must be so distinct and specific, as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated." Davis v. Arthur, 96 U. S. 148 [24:758].

"A protest is not required to be made with technical precision, but is sufficient if it shows fairly that the objection afterwards made at the trial was in the mind of the party and was brought to the knowledge of the collector, so as to secure to the government the practical advantage which the statute was designed to secure." Arthur v. Morgan, 112 U. S. 495 [28:825].

"A protest which indicates to an intelligent man the ground of the importer's objection to the duty levied upon the articles should not be discarded because of the brevity with which the objection is stated." Schell's Executors v. Fauché, 138 U. S. 562 [34:1040]; Heinze v. Arthur's Ex'rs [Heinze v. Miller], 144 U. S. 9 [36:333].

In Herrman v. Robertson, 152 U. S. 521 [38:538], a protest was held insufficient, in that it failed to point out, or suggest in any way the provision which actually controlled, and in effect only raised a question which of two clauses, under one or the *other of which it was assumed that the [628 importation came, should govern as most applicable.

Under these and other authorities which we have examined, we conclude that the notice was sufficient, and accordingly answer the question certified to us by the Circuit Court of Appeals in the affirmative, and it is so ordered.

UNITED STATES, Appt.,
v.
GEORGE P. LIES & COMPANY.

(See S. C. Reporter's ed. 628–637.)

Appeal from board of general appraisers—affirmance of decision.

1. On an appeal from the decision of the board of general appraisers by the importer alone, the government cannot be heard to claim that the decision of the board, or any part thereof, should be reversed.
2. An affirmance of the decision of the board of general appraisers, and not a dismissal of the case, should be made when the importer only has appealed, and he concedes that the decision is right.

[No. 235.]

Argued April 26, 1898. Decided May 23, 1898.

ON WRIT OF CERTIORARI to the Circuit Court of Appeals for the Second Circuit to review a judgment affirming the judgment of the Circuit Court of the United States for the Southern District of New York affirming the decision of the board of general appraisers as to the matter of classification and duties imposed upon goods imported by George P. Lies & Company. Affirmed.

See same case below, 38 U. S. App. 655.

Statement by Mr. Justice **Peckham:**

This case comes here by virtue of a writ of certiorari, issued to the circuit court of appeals for the second circuit. It arose out of a conflict of views between the collector and the importers as to the manner of classification and the rate of duty to be imposed upon an importation of tobacco.

The importers had imported through the port of New York a certain amount of leaf tobacco, which was classified for duty by the collector of that port, a portion at 75 cents, and another portion at 35 cents per pound, under paragraphs 246 and 247 of schedule F of the tariff act of March 3, 1883 (22 Stat at L. 488, 503, chap. 121). As the decision herein does not turn upon those provisions, they are not set forth.

NOTE.—*As to lien of United States for duties*, see note to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect,—see note to Greely v. Thompson, 13: 397.

As to recovery for goods sold to smugglers, see note to Graves v. Johnson (Mass.) 15 L. R. A. 834.

The importers were dissatisfied with the matter of classification and with the duties imposed, and therefore, pursuant to § 14 of "An Act to Simplify the Laws in Relation to the Collection of the Revenues," approved June 10, 1890 (26 Stat. at L. 131, 137, chap. 407), gave notice in writing to the collector, **629**] setting *forth therein, by way of protest, distinctly and specifically, the reasons for their objections. Section 15 of the same act provides for a further review.

The sections of the act, so far as material, are set forth in the margin.†

630] *The protest made by the importers was a detailed and comprehensive statement, and it was evidently intended to cover all possible objections and claims upon the subject of the proper duties to be collected from and the classification of the tobacco.

The board of appraisers on the 18th July, 1893, decided the various questions raised by the protest of the importers, and held, among other things, that the bales of tobacco had been properly opened and examined by the appraiser, although only one bale in ten had been examined; that a fair average had been made under § 2901 of the Revised Statutes, and while the examination might not have furnished a precise description of the goods, the board held there was no reason to suppose that it was not as favorable to the importer as to the government. All the questions were decided against the importer with the exception that the decision of the board closed as follows: "In the absence of the merchandise and of any evidence to impugn the returns of the appraiser, or to show the character of the tobacco, we find that the returns were correct, and in accordance therewith we hold that in the reliquidation the lots must be prorated according to such returns; that is to say, that the proportion of the aggregate weight of the total number of bales examined in a lot, to be dutiable at 75 cents or 35 cents a pound, shall be estimated according to the proportion of the number of bales examined and returned by the appraiser as containing upward of 85 per *cent or less[**631** of wrapper tobacco. To this extent the protests are sustained; otherwise the decisions of the collector are affirmed."

It is now claimed by the government that the direction in regard to the reliquidation, as above quoted and which was favorable to the importer, was erroneous, and that the result of prorating, as directed in the decision, will be to reduce the amount of the duties to be collected on account of the tobacco.

The importers were dissatisfied with the decision of the board in overruling their protest as to the rate and amount of duty chargeable on the tobacco, and therefore, on August 15, 1893, they applied to the circuit court of the United States, sitting in the city of New York, for a review of the questions of law and fact involved in such decision. The government made no application of any kind, although the order of the board showed upon its face that, in respect to prorating, it altered the decision of the collector and to the extent of the alteration it was favorable to the importers. The circuit court upon reading and filing the application of the importers made an order that the board of appraisers should return to that court the record, together with a certified statement of facts in

† Sec. 14. That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner . . . give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of three general appraisers, . . . which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector, or person acting as such, who shall liquidate the entry accordingly, except in cases where an application shall be filed in the circuit court within the time and in the manner provided for in section fifteen of this act.

Sec. 15. That if the owner, importer, consignee, or agent of any imported merchandise, or the collector, or the Secretary of the Treasury, shall be dissatisfied with the decision of the board of general appraisers, as provided for in section fourteen of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they or either of them may, within thirty days next after such decision, and not afterwards, apply to the circuit court of the United States within the district in which the matter arises, for a review of the questions of law and fact involved in such decision. Such application shall be made by filing in the office of the clerk of said circuit court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall order the board of appraisers to return to said circuit court the record and the evidence taken by them, together with a certified statement of the facts involved in the case, and their decisions thereon; and all the evidence taken by and before said appraisers shall be competent evidence before said circuit court; and within twenty days after the aforesaid return is made the court may, upon the application of the Secretary of the Treasury, the collector of the port, or the importer, owner, consignee, or agent, as the case may be, refer it to one of said general appraisers, as an officer of the court, to take and return to the court such further evidence as may be offered by the Secretary of the Treasury, collector, importer, owner, consignee, or agent, within sixty days thereafter, in such order and under such rules as the court may prescribe; and such further evidence with the aforesaid returns shall constitute the record upon which said circuit court shall give priority to and proceed to hear and determine the questions of law and fact involved in such decision, respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, and the decision of such court shall be final, and the proper collector, or person acting as such shall liquidate the entry accordingly, unless such court shall be of opinion that the question involved is of such importance as to require a review of such decision, etc. (The balance of the section is rendered obsolete by the act of 1891, providing a circuit court of appeals to which such appeals now go instead of to this court. 26 Stat. at L. 826, chap. 517; Supplement to Rev. Stat. pp. 901, 903, § 6.

the case and their decision thereon, and in pursuanee of that order the board made return of the record, etc., and after such return had been made the importers filed a petition stating their desire to present further evidence in the matter, and an order was entered that it be referred to General Appraiser Sharpe to take and return to the court such further evidence as might be offered.

The only evidence taken before the general appraiser was "the entry in this case by the Rotterdam, June 30, 1890, entry number 104,642, and the invoice and other papers accompanying the same or thereto attached, with the exception of the protest."

No further proceedings were taken in the circuit court until the 19th of December, 1895. At that time the importers had become convinced that they could not succeed upon their appeal, and, as appears from the order of the court when the case came on for hearing and determination before it, they 632] *"conceded in open court that there was no error in said decision of the board of general appraisers, and it having been contended on behalf of the collector and Secretary of the Treasury that the said decision of the board of general appraisers should be reversed for manifest error therein;

"And the court having ruled that the collector and Secretary of the Treasury, or either of them, could not be allowed to impeach or in any way object to the said decision of the board of general appraisers, because they had not proceeded under the statute to seek a review of such decision of the said board of general appraisers;

. . . . . .

"It is ordered, adjudged, and decreed that the decision of the board of general appraisers be and the same is hereby in all things affirmed."

It appeared in the record that no application, pursuant to § 15 of the act above mentioned, for a review of the decision of the board of general appraisers, had been made by the collector or the Secretary of the Treasury.

An appeal having been taken by the government to the United States circuit court of appeals for the second circuit from the judgment of the circuit court, the judgment appealed from was in all things affirmed. 38 U. S. App. 655. Upon the application of the government a writ of certiorari from this court was issued, and the case brought here for review.

Mr. **John K. Richards,** Solicitor General, for appellant.

Messrs. **W. Wickham Smith** and *Charles Curie* for appellee.

Mr. Justice Peckham delivered the opinion of the court:

The circuit court of appeals held that the circuit court was right in refusing the request of the government to reverse the order of the board of general appraisers. The ground of the refusal of the circuit court was that the 633] United *States had not proceeded in accordance with the provisions of § 15 of the act above quoted in order to have the right to ask for such reversal, and that when the importers, who had sought the review pursuant to the statute, conceded the correctness of the decision of the board of general appraisers and withdrew further opposition, it was the duty of the court to affirm the decision of the board, and the government could not be heard to ask for a reversal of the order in the absence of an appeal by it.

The act of 1890 (above cited), under which reviews in relation to revenue decisions are to be taken, was passed "to simplify the laws in relation to the collection of the revenues.' It provides a particular system of procedure for obtaining a review of the decisions of the collector and of the board of general appraisers in revenue matters. Compliance with the provisions of the act is necessary in order that a review may be had on the part and for the benefit of the government as well as on that of the importers.

Under § 14 the decision of the collector is final and conclusive unless the owner, if dissatisfied with the decision, give notice in writing to the collector, setting forth therein distinctly and specifically his objections. If such notice be given, the collector transmits the invoice of all the papers and exhibits connected therewith to the board of general appraisers, which then examines and decides the case thus submitted, and the decision of the board, or that of a majority, is final and conclusive upon all persons interested therein, except in cases where an application is filed in the circuit court, within the time and in the manner provided for in the following (15th) section.

In that section, provision is made not only for a review by the importer, but it expressly includes the case where the collector or the Secretary of the Treasury shall be dissatisfied with the decision of the board, and it provides that the importer or the collector, or the Secretary of the Treasury, may, within thirty days after the decision, and not afterwards, apply to the circuit court of the United States for a review of the questions of law and fact involved in such decision. *The section provides further that the [634 application shall be made by filing in the office of the clerk of the circuit court a concise statement of the errors of law and fact complained of, and by serving a copy of such statement on the collector in the case of a review on the part of the importer, and in case of a review on the part of the collector this copy is to be served on the importer, consignee, or agent, as the case may be.

If, therefore, the government, through the collector or the Secretary of the Treasury, seeks to review a decision made by the board of general appraisers because either of such officers may think such decision is in any or all of its provisions too favorable to the importer, the section (15) provides the way and the only way in which that review is to be obtained. If neither officer should take the proceedings so provided for, by applying for a review and filing with the clerk the

statement of the errors of law and fact of which he complains and by serving a copy upon the importer, then the officer could not ask for a reversal of the decision, for it is clear that the appeal on the part of the importer would not give the government that right. What would be the purpose of the provision for filing and serving this paper defining the errors of law and fact complained of, if, without it, the decision or any part of it made by the board could be reversed upon the application of the government made on the appeal of the importer? The plan of the statute evidently contemplates action by both parties if both are dissatisfied.

We do not think the act can be fairly construed as meaning that where one party takes an appeal and files his statement of the errors of law and fact complained of by him and serves the same upon the opposite party, the latter can without himself making any application for a review, and without filing or serving any statement of errors complained of, seek a reversal of the decision of the board upon any ground whatever. The fact that one party appeals furnishes no reason for holding that the other can obtain all the benefits of an appeal himself, without complying in any particular with the statute giving an appeal. There [635] would be no reason *or fairness in so providing, and we are of opinion the statute properly construed does not so provide.

When, therefore, the case is before the circuit court upon the sole application of the importer, and he then admits that his appeal cannot be supported in law, and concedes that the decision of the board of general appraisers should be affirmed, the court ought to affirm that decision, and the government cannot be heard to claim that the decision of the board or any part thereof should be reversed.

It is said that the circuit court, when the case was called and the importer conceded that the decision of the board of general appraisers was right, should have dismissed the case, and that it ought not to have affirmed the judgment of the board. The proceedings up to the time when the case was called in the circuit court had been regular, and the case was properly pending in that court for the purpose of a review upon the appeal of the importer. It lost no jurisdiction to proceed because of the confession of the importer that his appeal was without merit, but, on the contrary, when the confession was made, it amounted to the same thing as if after opposition the court had so decided, and, in that case, of course, the judgment would be affirmed.

When § fifteen provides that the circuit court shall "proceed to hear and determine the questions of law and fact involved in such decision," it means the decision of the board of general appraisers, which was properly brought before the court by virtue of an application regularly filed to obtain such review by the party against whom the decision was made, and we do not think it was ever intended to permit the court to reverse the decision at the instance of a party who had asked for no review and taken no proceedings to obtain it. This would be neither just nor fair, and it would result in erasing from the statute the provision for filing and serving the statement of the questions of law and fact complained of and a review of which was the object of the application. The statute ought not to be so construed as to permit such a review unless its language plainly demands it, which is not the case in this instance.

*In the case of Re Crowley, 50 Fed. [636] Rep. 465, the circuit court for the southern district of New York decided this principle, only in that case it was against the importer. The collector sought a review of the decision of the board of general appraisers, and the court affirmed the decision as made, but declined the importer's request to examine the question whether the board had correctly determined certain other matters, for the reason that the importer had made no statement of any error of law or fact complained of touching that decision, and had made no application for a review of the decision in that particular. We think the same rule applies here.

Whether the collector has any right to reliquidate for the purpose of assessing higher duties under some sections of the Revised Statutes, when an error is alleged to have been discovered in the original liquidation, it is not necessary to here determine. He has no right under the statute to a reversal of the decision of the board of general appraisers.

The cases cited by the learned counsel for the government in relation to the California land titles, United States v. Ritchie, 58 U. S. 17 How. 525 [15:236], and Grisar v. McDowell, 73 U. S. 6 Wall. 363 [18:863], we think have no application, and do not aid in the proper construction of the act before us.

Although the circuit court has, upon the application of the parties, power to take further testimony after the case is brought before it, and to that extent it may be regarded as something in the nature of a new proceeding, yet the proper procedure in deciding the appeal is in no wise altered thereby, and unless a party has appealed, and filed and served his statement as above mentioned, the court ought not to reverse on his motion.

It is immaterial that the application is not named an appeal. It is such in substance, and the grounds and reasons for the appeal are to be stated. Although the board of general appraisers may not be a court, yet the proceedings to review its determination are pointed out by the statute, and they must be substantially followed and obeyed.

If the government desire to review any decision of the *board, it can do so by com-[637] plying with the statute and stating wherein it complains of such decision. If it make no complaint, it may be regarded as satisfied with the decision as made.

As the government in this case took no proceedings to review the decision of the

board of general appraisers, it cannot be heard to object to an affirmance of such decision.

The judgment of the Circuit Court of Appeals must be affirmed.

MARTIN B. HAYES, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 637–655.)

Mexican grant—legal presumption—power of territory of New Mexico—court of private land claims—just title—territorial officers—bona fide purchaser.

1. The territorial deputation of New Mexico had not power in the spring of 1825 to make grants of public lands situated within the boundaries of that territory, belonging to the Mexican nation.
2. In the absence of proof, the legal presumption is that the supreme executive power of Mexico caused to be published and circulated its laws and general Constitution, as required by such Constitution.
3. The imposing of a territorial status on New Mexico by the Constitution of Mexico restricted that territory to such powers alone as a territory might lawfully exercise, and therefore deprived it of the power to alienate the national domain.
4. The court of private land claims cannot adjudge in favor of the validity of a grant, unless satisfied by the evidence of the authority of the granting officer or body to convey the public domain, or that the exercise of that power, if unwarranted, was subsequently lawfully ratified.
5. A title made by one who has no legal power to convey is not a just title required for ordinary prescription by the Spanish law. The essential element of legal good faith, required by such law, is also wanting in such a title.
6. Town lands in New Mexico, being part of the public domain of Mexico, could not be sold in 1825 by territorial officers under the land law of the Spanish Cortes of January 4, 1813.
7. That the claimant of a Mexican land grant was a bona fide purchaser in good faith, who, in reliance upon the action of Congress as to similar grants, expended large sums of money on the faith of the validity of the title which he supposed he had acquired, cannot influence the action of this court in deciding upon such title. This court is bound by the language of the act creating the court of private land claims.

[No. 29.]

Argued January 28, 1897. Decided May 23, 1898.

APPEAL from a decree of the Court of Private Land Claims dismissing the petition of Martin B. Hayes in an action brought by him to obtain the confirmation of an alleged title to land in the county of Socorro, in the territory of New Mexico. Affirmed.

Statement by Mr. Justice **White**:

This action was begun by appellant Hayes to obtain the confirmation of an alleged complete and perfect title to a tract of land of the area of 130,138.98 acres, situated in the county of Socorro, territory of New Mexico.

In his petition Hayes averred that his alleged title was derived by mesne conveyances through one Antonio Chavez, to whom, on March 3, 1825, while the land was a part "of the public domain of the Republic of Mexico," a grant was made of the tract in question by the governor and departmental assembly "of the territory of New Mexico." The exhibits attached to the petition, however, show, and counsel for the appellant admits in his brief, that the correct designations of the officials intended to be referred to were, respectively, the "political chief" and "territorial deputation."

*The testimonio furnished Chavez, [638 as translated from the original Spanish, is reproduced in the margin.†

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†Testimonio.

Office of Secretary of the most excellent provincial deputation of the Territory of Santa Fé, of New Mexico.

Public session of the 16th day of February, and 3d day of March, 1825.

I, the undersigned, secretary of the most excellent provincial deputation of the territory of Santa Fé, of New Mexico, do certify that in book second, wherein appears recorded the journal of the proceedings of its excellency, on page 41 of the book, it appears there was report made to said honorable body upon a petition, the tenor whereof, copied letter for letter, is as follows:

"Most Excellent Sir: I, Antonio Chavez, a republican citizen of the United Mexican States, and a resident of the town of our Lady of Belem, jurisdiction of this province of New Mexico, in the most ample and due legal form appear before your excellency and state, that finding myself very much crowded in the possession of my property and its appurtenances, as well in the pasturing of my stock as in the extension of agriculture, and desiring to remove to another place of greater capacity, with the honest purpose of enlarging both businesses, I apply to the superior wisdom of your excellency, to the end that, if such should be your high pleasure, you may deign to assign and adjudge me the tract called the San Lorenzo Arroyo, whose description and boundaries are: On the south the ranche of Pablo Garcia; on the north the little table land of the Alamillo; on the east or west the Jara spring; and on the west or east the river known as the Del Norte; and the said land referred to in my petition being so uninviting, uncultivated, desolate, and bleak, I earnestly believe, from your superior discernment, that your excellency, having in view and considering the matter, will have presented to you no obstacle to the granting, the adjudging, and the assigning of the same to me; for, besides its contributing by cultivation and improvement to the benefit and security of the surrounding individuals, there will result to the province in general a great assistance and relief, inasmuch as at this point will be frustrated and prevented the incursions, ambushes, and assaults of the enemies of our quietude and peace, who often invade and attack; and it will stop the exportation, deterioration, and decrease of the little live stock they have left for the subsistence of the inhabitants and families of this needy province; wherefore I ask and pray that your excellency grant me what I pray for, whereby I will receive favor, grace, and justice. I declare not

NOTE.—*As to Missouri private land claims*, see note to Les Bois v. Bramell, 11: 1051.

As to what necessary to constitute adverse possession; requisites of.—see note to Ricard v. Williams, 5: 398.

As to occupancy necessary to constitute adverse possession, see note to Ewing v. Burnet, 9: 624.

639] *The juridical act evidencing the delivery of possession was read in evidence from a duly certified copy of the record thereof made on the records of the probate court **640**] *of the county of Socorro, and is also reproduced in the margin.†

It was averred that after receiving possession as aforesaid, *Chavez resided upon [**641** and cultivated the lands, and held and claimed the same as his private property in "fee simple absolute," free from all conditions or charges, "occupying the same openly, con-

to act with dissimulation, and as may be necessary, etc. Antonio Chavez."

Session of the 16th day of February, 1825.

This document will pass to the honorable the political chief of this territory in order that, in continuation, he report whether the land that this party asks for pertains to that of the settlements of Socorro and Sevilleta, and whether it is embraced in the same, and also whether, though it pertain to the settlements, it may, on account of their great extent, be granted to the petitioner without injury to a third party.

Antonio Ortiz, President.
Jose Francisco Baca.
Jose Francisco Ortiz.
Pedro Bautista Pino.
Matias Ortiz.

Juan Bantista Vigil, Secretary.

Most Excellent Sir: It is certain that the application of Antonio Chavez, a resident of Belem, refers to a part of the tract of Socorro and a portion of that which belongs to Sebilleto, but it is also certain that on account of the great extent of both tracts and it being where their possessions separate, far from being injurious to those settlements, there results to them a benefit, for the reasons which I will proceed to state, as follows: The first and most important is the increase of the population to such a degree that it will afford means to the said settlements of Socorro and Sebilleto by guarding a portion of the entrances and exits of the savages, who, though at peace, come to rob as those at war endeavor to harass the same settlements or those surrounding or near them. The second, that to the residents of the said new settlements there remain most ample lands for pastures, fields, uses, and transits, so that the land which may be granted to Chavez will cause them not the least scarcity, as on another occasion that granted to Sabinal did not to Belem, or even to Sebilleta itself, though it was an appurtenance of the first. The third, that making to the said Chavez the grant he asks would produce the emulation desired, so that the desirable vacant lands of the Bosque del Apache and San Pascual may be settled, which lands upon the one and the other bank present the greatest advantages to stock raisers and farmers, for, although they may have lands in the center of other settlements, these from their age are full of locusts and worn out by constant cultivation. Fourth. That the petition of Antonio Chavez has in it more of necessity than of affectation or covetousness, inasmuch as from that individual the Navajo tribe has taken the greater part of his live stock, and he requires a tract from which, through its productiveness, to re-establish himself from the losses he has suffered during the war with the said tribe. Fifth, that the slightest damage not resulting to Socorro and Sebilleta from the grant which Chavez asks, it is very probable that the people there, for their poverty is well known, will have a place where they may get employment which may furnish them subsistence and which (like their neighbors, who are subject to the same, almost, deplorable condition) they lack.

† For all these reasons and many others, which I omit in order not to trouble your excellency, I am of opinion that the petition of Antonio Chavez may be acceded to at once, to which the people of the settlements aforesaid will make no objection, unless some peevish person or other enemy of the welfare of his fellow-creatures should unjustly persuade them with pretexts which never lack against that which is not wanted. This is what I can report to your excellency in compliance with what was resolved and in accordance with the practical knowledge I have in the matter. God preserve your excellency many years.

Bartolome Baca.

Santa Fé, 25th of February, 1825.

Session of the 3d day of March, 1825.

Book two of the journal of the most excellent territorial deputation of New Mexico, on the 43d page thereof, says the reading of two reports was proceeded with, which his excellency the political chief then presented upon the petitions of Antonio Chavez and Pedro Jose Perea for lands, and this honorable body being advised thereof resolved that there be adjudged to the two individuals the land they ask, filing in the office of the secretary of this honorable body the original expedientes, as is provided, ordered and customary in similar cases and furnishing the parties interested the corresponding testimonio, which will serve them as title, and with which Antonio Chavez will present himself to the alcalde of Socorro that he may place him in possession, and Pedro Jose Perea to Juan Esteban Pino, esquire, for the same action.

This agrees faithfully and legally with the original from which, as due testimony and by direction of the most excellent territorial deputation of New Mexico, I have taken the present copy, of which there has been furnished the parties interested the corresponding testimonio, which will serve them as title.

Juan Bautista Vigil, Secretary.

Santa Fé, March 5, 1825. (Vigil's Rubric.)

Fees for all that has been done, twenty dollars.

I, Juan Francisco Baca, citizen and constitutional alcalde of the jurisdiction of San Miguel del Socorro, under the authority conferred upon me in the premises, proceeded on the twentieth of April, of the year one thousand eight hundred and twenty-five, to place in possession the citizen Anto. Chavez upon the land that he applies for; and in obedience to the order which, under date of the 5th of March of the said year, said Chavez, a resident of the district of Santa Maria de Belem, presented me, borne upon the grant he exhibited to me from the most excellent provincial deputation of this territory of New Mexico, with a report of the political chief, which accompanies said grant, directing me to proceed to place Chavez in possession of the land he asks; in consideration whereof, I should proceed, and I did proceed, with two aldermen of this ayuntamiento, and two residents of this district, to whom I caused to be exhibited the order and the grant, the former being Anselmo Tafoya and Marcos Baca, and the latter being the citizens Jose Lionicio Silva and Augustin Trugillo, and as such alcalde did place the citizen Antonio Chavez in possession on the said land which he applies for, performing the ceremonies the laws require of me, assigning him for landmarks on the north, where the small table land of the Alamillo begins; on the east, the del Norte river; on the south, a small forked cedar tree in the middle of the bend of the Pablo Garcia ranch, commonly so called, this little cedar being on the same side with the main road which is traveled toward said Socorro, on the side of the meadow; on the west, the spring known as the Jara spring. As alcalde aforesaid, in pursuance of direction, and in virtue and in form of law, I took the said Chavez by the hand and led him over his land, and he, in observance of the customary ceremonies, shouted, "Long endure the nation and our independence, and long live the sovereign," and he shouted and plucked up herbs, cast stones, and they praised the name of God, and by authority I left the party interested in peaceable possession, and I, under the authority which is conferred on me, authenticated and signed this, with two witnesses in my attendance, to which I certify on said day, month, and year.

Juan Francisco Baca.

Attending: Vicente Silba.
Attending: Julian Oreana. (X.)

tinually, notoriously, peaceably, and exclusively" until his death, the date of which is not stated, when his widow succeeded to the title, and similarly possessed and occupied the tract until October 26, 1850, "when she duly conveyed all and singular the said tract of land upon a pecuniary consideration to Rafeal Luna, Anastacio Garcia, and Ramon Luna." Similar allegations as to possession, claim of ownership, and cultivation were made concerning the subsequent conveyances in the claim of title.

It was averred that two reports upon the Chavez grant—the earlier favorable, the other unfavorable—were communicated to Congress by surveyors general for New Mexico; and it was further averred that prior to the making of the second report a committee of the House of Representatives reported 642] *back to that body a bill to confirm the claim, with a recommendation that it pass as amended. What, if any, action was taken thereafter by Congress, is left to conjecture.

It was also averred that the grant had been correctly surveyed by the United States, under the direction of the surveyor general for New Mexico, and a map showing the extent and boundaries of the tract was filed with the petition. About 20,000 acres of the land lying in the eastern portion of the tract delineated on the map was formerly appurtenant to the towns of Socorro and Sevilleta, referred to in the report of the political chief set out in the testimonio.

In substance, the answer of the United States averred that the grant to Chavez was void for want of authority in the granting body, and, further, that if the grant was valid, the survey did not correctly show the western boundary, and the area of the tract was much less than was claimed in the petition.

The government also denied that the land granted was possessed, cultivated, and occupied by Chavez and those claiming under him, as averred in the petition. An answer was also filed on behalf of the Atlantic & Pacific Railway Company, in which it set up title under its charter to odd-numbered sections of land within the limits of the premises described in the petition, and prayed that the petition of plaintiff be dismissed as to such sections.

Testimony was taken in the cause, and, after hearing, the court of private land claims entered a decree rejecting the grant and dismissing the petition. An application for a rehearing having been refused, an appeal to this court was allowed. The transcript of record contains a stipulation on behalf of the United States, admitting that on the trial "the petitioner proved sufficient proprietary interest in the subject-matter of this litigation to enable him to present and prosecute his petition herein."

Mr. **John H. Knaebel,** for appellant:

Assuming, for the sake of argument only; that the colonization law of 1824 was in force in New Mexico at the date of the grant in question (March 3, 1825), and furnished the principles by which the title is to be tested, still the grant is entitled to confirmation under that law, at least to the extent of 11 square leagues (Mexican), over and above the portion carved out of the town lands of Socorro and Sexilleta.

Fremont v. *United States*, 17 How. 542 (15:-241); *United States* v. *Osio*, 23 How. 283 (16: 461); *Gonzales* v. *Ross*, 120 U. S. 605 (30: 801); *United States* v. *Peralta*, 19 How. 347 (15: 680); *Fletcher* v. *Fuller*, 120 U. S. 534 (30: 759); *Hillary* v. *Waller*, 12 Ves. Jr. 239; *Eldridge* v. *Knott*, 1 Cowp. 214; *Edson* v. *Munsell*, 10 Allen, 557; *Casey* v. *Inloes*, 1 Gill. 430; *United States* v. *Chaves*, 159 U. S. 452 (40: 215); *Mitchel* v. *United States*, 9 Pet. 733, 761 (9:-291, 301); *The Pueblo Case*, 4 Sawy. 553; *Van Reynegan* v. *Bolton*, 95 U. S. 33 (24: 351); *United States* v. *Armijo*, 5 Wall. 444 (18: 492); *Winn* v. *Patterson*, 9 Pet. 663 (9: 266); *Patterson* v. *Jenks*, 2 Pet. 216 (7: 402).

So much of the granted land as was carved out of the common lands of the towns of Socorro and Sevilleta was within the jurisdiction and *jus disponendi* of the territorial government.

Gonzales v. *Ross*, 120 U. S. 605 (30: 801); *Albertson* v. *Robeson*, 1 Dall. 9 (1: 14); *Houston* v. *Robertson*, 2 Tex. 1; *Douglass* v. *Pike County*, 101 U. S. 677 (25: 968); *Arthur* v. *Morrison*, 96 U. S. 108 (24: 764); *United States* v. *Johnston*, 124 U. S. 236 (31: 389); *United States* v. *Hill*, 120 U. S. 169 (30: 627); *Cohas* v. *Raisin*, 3 Cal. 444; *Merryman* v. *Bourne*, 9 Wall. 593 (19: 683); *United States* v. *Pico*, 5 Wall. 536 (18: 695); *Grisar* v. *McDowell*, 6 Wall 363 (18: 863); *United States* v. *Workman*, 1 Wall. 761 (17: 711).

Our title presents, in addition to its perfect legal character, equities which it is the duty of the court to declare and enforce under the treaty and the law of nations.

United States v. *Chaves*, 159 U. S. 452 (40:-215); *United States* v. *Arredondo*, 6 Pet. 691 (8: 547); *Mitchel* v. *United States*, 9 Pet. 755 (9: 299); *Stoneroad* v. *Stoneroad*, 158 U. S. 240 (39: 966); *Adams* v. *Norris*, 23 How. 353 (16:-539; *People* v. *Trinity Church*, 22 N. Y. 49; *Fletcher* v. *Peck*, 6 Cranch, 142 (3: 179); *Com.* v. *Roxbury*, 9 Gray, 478; *Johnson* v. *M'Intosh*, 8 Wheat. 595 (5: 694); *Martin* v. *Waddell*, 16 Pet. 367 (10: 997); *Broder* v. *Natoma Water & Min. Co.* 101 U. S. 276 (25: 790); *Atchison* v. *Peterson*, 20 Wall. 507 (22: 414); *Forbes* v. *Gracey*, 94 U. S. 762 (24: 313); *Jennison* v. *Kirk*, 98 U. S. 453 (25: 240); *Slidell* v. *Grandjean*, 111 U. S. 412 (28: 321); *Beard* v. *Federy*, 3 Wall. 491 (18: 92); *United States* v. *Johnson*, 1 Wall. 328 (17: 598); *United States* v. *Augusisola*, 1 Wall. 358 (17: 616); *Soulard* v. *United States*, 4 Pet. 512 (7: 938); *Pollard* v. *Files*, 2 How. 602 (11: 395); *United States* v. *Alviso*, 23 How. 318 (16: 456).

The Antonio Chaves grant belongs to the class of complete titles and should be confirmed to the full extent claimed.

2 White, Land Laws, 739; *United States* v. *Clarke*, 8 Pet. 452 (8: 1007); *Strother* v. *Lucas*, 12 Pet. 433 (9: 1148); *United States* v. *Peralta*, 19 How. 343 (15: 678); *United States* v. *Cambuston*, 20 How. 59 (15; 828); *Elmendorf* v. *Taylor*, 10 Wheat. 152 (6: 289); *Hancock* v.

McKinney, 7 Tex. 442; *Hardiman* v. *Herbert*, 11 Tex. 656; *Cavazos* v. *Trevino*, 35 Tex. 165; *Brevoort* v. *Brevoort* 70 N. Y. 140; *United States* v. *Delespine*, 15 Pet. 329 (10: 719); *Rhode Island* v. *Massachusetts*, 12 Pet. 657 (9: 1233); *Albertson* v. *Robeson*, 1 Dall. 9 (1: 14); *People* v. *Trinity Church*, 22 N. Y. 50; *Mitchel* v. *United States*, 9 Pet. 711 (9: 283); *New Orleans* v. *United States*, 10 Pet. 721 (9: 596); *United States* v. *Chaves*, 159 U. S. 464 (40: 220); *Fletcher* v. *Fuller*, 120 U. S. 534 (30: 759); *United States* v. *Sutherland*, 19 How. 363 (15: 666).

Messrs. **Matthew G. Reynolds** and *Holmes Conrad*, Solicitor General, for appellee:

The grant is void for want of authority in the provincial deputation to make the same.

The action of the provincial deputation upon the report of the governor, made at its request, was without warrant or authority of law, and void.

Between August 18, 1824, and November 25, 1828, there was no provincial official or official body authorized to dispose of the public lands of the Republic of Mexico.

The grant should be rejected for failure on the part of the original grantee to comply with the promises made in his petition, and the requirements of settlement and cultivation.

If the grant is a valid grant, the west boundary is incorrectly located by the plaintiff.

United States v. *Vallejo*, 1 Black, 541 (17: 232); *United States* v. *Vigil*, 13 Wall. 449 (20: 602); *De Arguello* v. *United States*, 18 How. 539 (15: 478); *United States* v. *Teschmaker*, 22 How. 392 (16: 353).

643] *Mr. Justice **White** delivered the opinion of the court.

The main question presented by the contention of the parties is as to the power of the territorial deputation of New Mexico, in the spring of 1825, to make grants of public lands situated within the boundaries of that territory. We therefore pretermit an examination of the controverted issues as to possession in order to first address ourselves to the fundamental legal question upon which the decision of the cause substantially depends. To understand the issue to be considered it is necessary to recall a few facts connected with the overthrow of the dominion of Spain in Mexico and the establishment in the latter country of an independent government.

After the successful revolution by which Mexico was severed from the control of the crown of Spain, and following the deposition of the Emperor Iturbide, a representative body was assembled, which was known as the constituent Congress of Mexico, and this body adopted, on January 31, 1824, what is termed the constitutive act. In that instrument New Mexico was recognized as a state of the federation, and in article 7 it was provided that the territories of the federation should be directly subject to the supreme power, which, in article 9, was divided into legislative, executive, and judicial. 1 White, New Recop. p. 375; Reynolds, Spanish & Mexican Laws, p. 33.

Under the provisions of the constitutive act what has been styled the general constituent congress was elected, and on July 6, 1824, it decreed that "the province of New Mexico remains a territory of the federation." Reynolds, p. 117. Subsequently, on August 18, 1824, the same congress adopted a general colonization law which, in articles 11 and 16, vested the supreme executive power with sole authority to regulate and control the disposition of public lands in the territories. On October 24, 1824, the general constituent congress adopted a permanent Constitution, which, in article 5, enumerated, as one of the parts of the federation, the "territory of Santa Fé of New Mexico." Reynolds, p. 124.

*It is manifest that the necessary ef- [644 fect of the decree of July 6, 1824, the colonization law of 1824, and of the Constitution of October 24, 1824, was to deprive the officials of a territory of a power to dispose of the public lands, even though it be arguendo conceded that such power had theretofore been possessed by the officials who exercised authority within the area which was made a territory by the Constitution.

But it is earnestly and elaborately argued that as by the constitutive act New Mexico was recognized as a state of the federation, the congress could not subsequently constitutionally reduce New Mexico to the rank of a mere territory, and that this court, in disposing of this case, must therefore disregard the Mexican Constitution and hold that, as a state, New Mexico succeeded to the sovereignty and dominion of all the lands within its borders which formerly belonged to the King or Crown of Spain, and, further that we must in substance assume the acts of the officials who made the grant in question to have been those of state officials. The position thus taken, however, is so utterly in conflict with the facts and is so inconsistent with the case made by the petition as hardly to be entitled to serious notice.

Not only, as we have stated, had New Mexico been declared a territory prior to the passage of the colonization law of August 18, 1824, but such status had been reiterated in the fifth article of the Constitution of October 24, 1824. Moreover, it is averred in the petition that the grant for which confirmation is sought was made by the "Republic of Mexico," through the territorial deputation of New Mexico, and it is specifically alleged that the land granted was prior to the making of the grant part of the public domain of the Republic. And the muniments of title to the original grantee, put in evidence on behalf of the petitioner, support these averments, and clearly show a recognition of and execution by New Mexico of its status as a territory imposed by the decree of July 6, 1824, and the Constitution of the following October. Thus, in the preamble of the testimonio, it is recited that the official who certifies to it, his certificate being *dated [645 March 5, 1825, is "secretary of the most excellent provincial deputation of the territory of Santa Fé of New Mexico," and it will be remembered that this was the exact designation

of the territory employed in the Constitution of October 4, 1824. On February 16, 1825, in referring the petition to the political chief for report, the territorial deputation alluded to that official as the political chief of the "territory." Again, in the extract from the journal of March 3, 1825, the record is referred to as "book two of the journal of the most excellent territorial deputation of New Mexico," and in the juridical act the deputation is styled the "provincial deputation of this territory of New Mexico."

In this condition of the record there can be no reason suggested for our entering upon an inquiry as to whether New Mexico might, in 1825, have rightfully insisted that it was a state and not a territory of the federation, nor are we at all concerned with the question as to what, if any, rights in public lands were vested in a Mexican state in the year mentioned. The grant upon which, if at all, petitioner was entitled to relief in the court below was not made by state officials, did not purport to be a grant from a state, and was manifestly intended not to be such.

The lands covered by the grant being public lands of the nation, and being not subject to grant by the authorities of the territory of New Mexico, it follows that the title upon which the claimant relies vested no right in him and was clearly not within the purview of the act of Congress conferring jurisdiction on the court of private land claims, for obviously it cannot be in reason held that a title to land derived from a territory which the territorial authorities did not own, over which they had no power of disposition, was regularly derived from either Spain or Mexico or a state of the Mexican nation.

The contentions by which the plaintiff in error seeks to avoid the controlling effect of the foregoing considerations are as follows: 1st. That the territorial government of New Mexico had power to dispose of the public lands of the nation because it is not affirmatively shown that the colonization law of
646] *the 12th of August, 1824, had been promulgated in New Mexico at the time the grant in question was made. 2d. Because even if it be conceded that the authorities of the territory were without inherent legal power to have made the grant, nevertheless there is a presumption that they were authorized to make it by the chief executive power of the Mexican nation, or that their action in making it was subsequently ratified by the like authority. 3d. That any defect in the title of the plaintiff in error is barred by prescription. 4th. That whatever may be the want of title in the plaintiff in error as to all the lands embraced in the grant except the portions thereof taken from lands appurtenant to the towns of Socorro and Sebilleta, as to such lands there clearly is no want of title, because it is certain that as to such lands there was power vested in the authorities of the territory to make grant of the same, and hence, at least to the extent that lands of this character were embraced within the grant, there should be a confirmation. We will consider these contentions in the order stated.

1st. Whilst it is true the record does not affirmatively show that the colonization law of 1824 had been promulgated in the territory of New Mexico at the time the grant in question was made, it by the strongest implication gives rise to the inference that it had been. Besides, the legal presumption of promulgation arises in the absence of proof to the contrary. The granting papers show on their face that the Constitution adopted subsequent to the colonization law had been promulgated in New Mexico, and the inference of fact is fairly deducible that such also was the case as to the earlier law of 1824. The Constitution of Mexico in article 16, paragraph 13, made it the duty "of the supreme executive power to cause to be published, circulated, and observed, the laws and the general Constitution." 1 White, New Recop. 398. In the absence of proof the presumption of omnia rita creates the inference that the duty was performed. But the question of promulgation is an immaterial one. By the Constitution New Mexico was a territory. The grant itself, as we have seen, discloses this to be the fact, and describes the lands as *those of the nation. Whatever may [647 be the foundation for the claim that the states of the Mexican nation in virtue of their autonomy succeeded to the right of disposition of the public lands of the nation, as to which we express no opinion, clearly such power did not obtain as to the territories, and therefore whether or not the colonization law was promulgated becomes irrelevant, since the imposing of a territorial status on New Mexico by the Constitution operated to restrict that territory to such powers alone as a territory might lawfully exercise, and therefore had the effect of depriving it of the power to alienate the national domain.

2d. The claim that because by the colonization law of 1824, the chief executive was authorized to dispose of the public domain, and by the regulation of 1828, adopted to carry out the law of 1824, the executive delegated to certain territorial officers power to grant lands, therefore the presumption must be deduced that the act of the territory in granting public lands in question was either sanctioned by the executive at the time of the grant or at a date subsequent thereto was duly ratified by such authority, is without merit.

By the first subdivision of the 13th section of the act creating the court of private land claims that court and this court on appeal are expressly prohibited from allowing any claim under the act "that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the states of the Republic of Mexico having lawful authority to make grants of land." This manifest limitation upon the power of the court in passing upon the validity of an alleged complete grant requires that the court shall not adjudge in favor of validity unless satisfied from the inherent evidence contained in the grant, or otherwise, of an essential prerequisite to validity, viz., the authority of the granting officer or body to convey the public domain.

In this respect the act of 1891 is materially different from the statutes construed in the Arredondo Case, 31 U. S. 6 Pet. 691 [8:547]. That case concerned a grant by the King of Spain of land in Florida. The statutes under
648] which the court exercised *jurisdiction enjoined, among other things, as guides or rules of decision in passing upon a claim, "the stipulations of any treaty, and proceedings under the same; the several acts of Congress in relation thereto;" etc. In view of provisions of this character, the court, beginning on page 722 [8:558], devoted much attention to the question "whether the several acts of Congress relating to Spanish grants do not give this grant, and all others which are complete and perfect in their forms, 'legally and fully executed,' a greater and more conclusive effect as evidence of a grant by proper authority." Reviewing such acts, the conclusion was reached that it was the intention of Congress that a claimant should not be required to offer proof as to the authority of the officials executing a public grant, but that the court should, in deciding upon a claim, assume as a settled principle that a public grant is to be taken as evidence that it issued by lawful authority. P. 729 [8: 561]. And in the Peralta Case, 60 U. S. 19 How. 343 [15: 678], in a proceeding under the act of March 3, 1851, relating to lands in California, the doctrine of the Arredondo Case was applied.

But in the act of 1891 the court is required to be satisfied not simply as to the regularity in form, but it is made essential before a grant can be held legally valid that it must appear that the title was "lawfully and regularly derived," which imports that the court must be satisfied, from all the evidence, that the official body or person assuming to grant was vested with authority, or that the exercise of power, if unwarranted, was subsequently lawfully ratified.

Controlled, as we are, by the grant of power conferred by the act of Congress, we are unable when the record discloses that the grant was not "lawfully and regularly derived . . . from any state of the Republic of Mexico having authority to make grants," to hold that it should nevertheless be confirmed because, although the proof convincingly shows that the grant does not conform to the requirements of the act of Congress, the grant yet must be held valid because of a supposed legal presumption. Indeed, if a legal presumption on the subject could be indulged in, the granting papers would
649] *not authorize it to be invoked They make no reference whatever to the colonization law, contain no allusion to the quantity of land contained in the tract granted, and if its area was as now claimed the tract contained nearly three times the maximum quantity of land designated in the twelfth article of the colonization law of 1824, or which was authorized by the regulations of 1828. If the grant made in 1825 could be measured by the power for the first time conferred on territorial officers in 1828 such an unreasonable and retroactive rule would not help the grant. It was not in accord with the regulations of 1828 and hence finds no support from those regulations. United States v. Vigil, 80 U. S. 13 Wall. 452 [20:605]. Further, while it is reasonable to presume that any order or decree of the supreme executive of Mexico conferring authority to alienate the territorial lands or ratifying an unauthorized grant to the extent authorized by law was made matter of official record, the petition does not aver, and the grant does not recite, nor was there any evidence introduced showing a prior authorization or subsequent ratification. In fact, it was not even shown that at or about the time of the grant the territorial deputation habitually assumed to grant lands, particularly under circumstances which would justify an inference that the supreme executive was informed of such procedure.

3d. The contention that the land has been acquired by prescription is based upon the theory that the time for prescription ran against the government of Mexico, and to support this claim it is said that under the Spanish law, whilst prescription did not run against the King on subjects relating to his prerogative or inherent governmental authority, that with reference to the mere ownership of the public domain, the King, the Spanish nation, and the national government of Mexico as their successor, were subject to the bar of the statute of limitations like any private individual. But a decision as to the soundness of this proposition is wholly unnecessary for the purposes of this cause. By the Spanish law prescription was divided into ordinary and extraordinary. The term of the ordinary prescription as to immovable property *was ten years (Partidas 3, law 18, [650 tit. 29), and the term for immovable property by the extraordinary prescription was thirty years (Partidas 3, law 16, tit. 29). But the requisites for the ordinary prescription were, 1st, good faith; 2d, just title; 3d, continued and uninterrupted possession for the time required by law. Hall, p. 30; 2 White, 83; 1 Orozoco, Legislation & Jurisprudence on Public Lands, Mexico, 1895, p. 300. The just title required did not include a title which was absolutely void and derived from one who by operation of law had no power whatever to dispose of the property. Partidas 3, law 11, tit. 20. In speaking on these provisions of the Partidas, Schmidt, in his Civil Law of Spain and Mexico (p. 290), says: "It is also necessary that the contract by which the property was acquired should be a valid contract. Hence, a thing acquired by purchase, donation, or any other contract made with an insane person cannot be acquired by prescription; nor property obtained from a minor or any other mode which the law holds invalid; but even in such cases the prescription of thirty years applies as is explained in paragraph 1 of the next section."

The provisions in the Partidas as to the distinction between the ordinary and extraordinary prescription and the requirements essential to the former were substantially

common to the civil law countries. Their practical equivalent was found in the Roman law. L. 24, C. de rei Vindicat., L. 4, C. de præscript. Longi temp. They obtained in the intermediary law. They were reproduced in the Code Napoleon, art. 2265. They are also adopted in the Louisiana Code. La. Civ. Code, 3478 et seq. to 3484. Under all these systems in interpreting the meaning of what is meant by just title, it has invariably been held that they do not embrace a title made by one who by operation of law had absolutely no power to convey. In speaking on this subject in Francoise v. Delaronde, 8 Mart. (La.) 619, where it was claimed that a sale made at a time when the Spanish law was dominant, of a minor's property by a tutor, when by law the tutor had no authority to sell, could be the basis of the ten years' pre-
651] scription because the purchaser *was in good faith and the deed was a "just title," the court, speaking through Mathews, J., said:

"From the order of the judge, it is presumable that the defendant believed that he gained a just and legal title to the lot, under the act of sale, supposing that all the formalities required by law had been complied with. In this he mistook the law, for the manner of sale and forms required by law were not pursued; et nunquam in usucapionibus, juris error possessori prodest. ff. cod. lib. 3, 31.

"However much the commentators of the Roman law have differed the one from the other, and the same person from himself at different periods, on the subject of mistakes of law, they seem to agree in this, that juris error is never a good foundation for acquiring property. 2 Evans's Pothier, 409, d'Aguesseau's dissertation, 2."

Pothier, in his treatise on Prescription (No. 85), says:

"In order that a possessor can acquire by prescription the thing which he possesses (speaking of course of the short or ordinary prescription) it is essential that the title from which his possession proceeds should be a valid title. If his title is void, a void title being no title, the possession which it proceeds from it is a possession without title which cannot operate prescription."

In referring to the opinion of d'Argentrée, that a title absolutely void for want of legal power could not be the basis of a ten-year prescription, Troplong, in his treatise on Prescription, says, vol. 2, p. 905:

"This truth is so palpable that it cannot be contested. It has been acceded to by all the writers, whether civilists or canonists. It stands out plainly in the exposition of the reasons for the adoption of the title of prescription (in the Code Napoleon) given by M. Bigot de Preameneu. No one, said he, can believe in good faith that he possesses as owner, if he has not a just title; that is to say, a title which would in its nature be translative of the right of property, and which is otherwise valid. It would not be valid if it was contrary to law, and even although it be void only for a defect of legal form, it could not authorize prescription."

652] *And this reasoning at once suggests the necessary relation between the requirement of good faith and that of just title. In the Roman law the latter was substantially a mere resultant of the former. Marcadé, Prescription, p. 194; Ducaurroy, Inst., t. 1, p. 382 et. seq.

Where the want of just title is the result of a legal incapacity on the part of the seller, such a cause not only operates to render the title not just in legal intendment, but deprives the contract of the essential ingredients of legal good faith. "If then," says Marcadé (p. 201), "believing your vendor to be the owner when he was not, you knew he was a minor, an interdict, or otherwise incapable of selling, you could not then buy from him with the conviction that the contract was true and regular, and you could not therefore prescribe by ten years."

But here the deed on its face purported to be a conveyance of the domain of the nation by a territory thereof. The want of power in the territory was the resultant of the Constitution and laws of the nation, and was therefore an incapacity by operation of law, with knowledge of which the grantee was chargeable. Thus, not only did the just title not arise, but the essential element of legal good faith was wanting. And these two-fold consequences, that is, want of legal good faith and the absence of just title which necessarily arise where a sale is made of the public domain, by one wholly without authority to make it, is clearly stated by Orozco:

"The title is lacking, because a void title cannot be alleged nor be made to serve to prove the just cause of possession. Quod nullum est nullum producit effectum. For, as Pothier says, 'in order that a possessor may acquire, by prescription, the thing he possesses, it is indispensable that the title from which the possession proceeds be a legitimate title.' If his title is void, a void title cannot be considered a title, and the possession that proceeds from the same is a possession without title, which cannot produce prescription.

"The just cause is lacking, because this is nothing else than a proper title to transfer dominion, and a void title does not transfer it.

*"Finally, good faith is lacking, be- [653
cause this is based not on an error of fact, which may be excusable in us, but we can never take advantage of error as against law. Nunquam in usucapionibis juris error possessori prodest. Juris ignorantiam in usucapione negatur prodesse: facti vero ignorantiam prodesse constat."

As the ordinary prescription could not apply, and as the necessary time for the extraordinary prescription under the Spanish law had not run at the time of the acquisition of the territory by the United States, and as, clearly, whatever may have been the rule as to the operation of prescription against the Spanish or Mexican governments it did not run after the treaty against the United States, it follows that the claim of prescription is without foundation. We have dis-

cussed this question upon the hypothesis that the record showed such possession prior to the cession to the United States as would have authorized the running of prescription if there had been good faith and a just title, but because we have done this we must not be considered as so deciding or even so intimating.

4th. Nor is there merit in a contention made with respect to the portions of the land granted which were carved out of lands appurtenant to the towns of Socorro and Sevilleta. It is asserted that, at least as to these lands, the power to grant existed in the territorial deputation. This claim proceeds on the hypothesis that a land law of the Spanish Cortes of January 4, 1813 (Reynolds, p. 83), was in force in New Mexico in March, 1825. This law looked to the reduction to private ownership of "all public or crown lands, and those of the municipal domains and revenues, . . . except the necessary commons of the town."

One half of the public and crown lands of the monarchy, excepting town commons, were reserved, in article 6, for lucrative alienation; while provision was made in clauses 9 et seq. for disposition of the remaining public and crown lands, or of the farming lands of the municipal domain, in small tracts, the grants to be made by the common councils of such towns, subject to the approval of the provincial deputation. While counsel contends that this law empowered the legislative bod-
654] ies *of the province, known as the provincial deputations, to dispose of the surplus lands of towns, that law does not expressly confer such authority. Article 4, which is relied upon, merely requiring the deputations to make report to the Cortes as to the time and manner of carrying out the provisions of the law, to aid the Cortes in deciding what is best. Besides, this law of 1813 was held in United States v. Vallejo, 66 U. S. 1 Black, 541 [17: 232] to be inoperative in Mexico after the enactment of the colonization law of 1824, and we are clearly of opinion that, as applied to a territory, if entitled to the construction claimed for it by counsel for plaintiff in error, it was obviously repugnant to and inconsistent with the supreme power over the territories reserved to the national government, particularly with the sweeping powers over lands in the territories vested by the law of 1824 in the supreme executive power of the Republic.

Moreover, if the town lands could have been granted under the supposed authority of the law of the Cortes of January 4, 1813, that law treated such lands as in the category of crown lands. The granting papers in evidence also warrant the inference that the lands were so regarded. Even then though they were appurtenant to towns they were subject to the disposition of the Spanish Crown as part of the public domain, and authority to sell was not within the scope of territorial authority. United States v. Santa Fé, 165 U. S. 675, 700 [41:874, 886]; United States v. Sandoval, 167 U. S. 278 [42:168]; Rio Arriba Land and Cattle Co. v. United States, 167 U. S. 298 [42:175]. Lands of this character being a part of the public domain they were subject necessarily to the authority of the Mexican nation, and the territorial officers were as absolutely void of right to sell them as they were to sell any other part of the public lands of the nation.

Of course the fact, if it be such, that the present claimant was a bona fide purchaser in good faith, who, in reliance upon the action of Congress with reference to similar grants, expended large sums of money on the faith of the validity of the title which he supposed he had acquired, cannot influence the action of this court. As said in Crespin v. United States, 168 U. S. 208, 218 [ante, 438, 441].

*"If there be any hardship to the peti- [655
tioners in the rejection of this grant, they must apply for relief to another department of the government. We are bound by the language of the act creating the court of private land claims."

The decree of the court below is affirmed.

Mr. Justice **Shiras** dissenting, and Mr. Justice **McKenna**, not having heard the argument, takes no part.

JOSEPHINE W. WUPPERMANN, Appt.,
v.
THE CARIB PRINCE, Her Engines, etc.
Ernest Legge, Claimant.

(See S. C. "The Carib Prince" Reporter's ed. 655-665.)

Concurrent decisions—exceptions in bill of lading—unseaworthiness of vessel.

1. The concurrent decisions of the two lower courts that a vessel was in fact unseaworthy at the commencement of its voyage, by reason of a defect in a tank, will be followed in this court, unless shown to be clearly erroneous.

2. Exceptions in a bill of lading exempting the shipowner from loss or damage from accidents to or latent defects in the hull, tackle, boilers, and machinery, or their appurtenances, do not relieve him from damages caused by unseaworthiness existing at the inception of the voyage and at the time the bill of lading was signed.

3. Sections 2 and 3 of the Harter act of February 13, 1893, do not exempt a shipowner who has used due diligence to make the vessel seaworthy, but has no contract exempting him from liability, from the duty of furnishing a seaworthy vessel, or from the liability for damages caused by unseaworthiness, or

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NOTE.—*As to bill of lading; how far may be varied, contradicted, or explained by parol evidence; effect of,*—see note to King v. The Lady Franklin, 19: 455.

As to liability for necessaries, supplies, and repairs to ship; liability for conduct and acts of master and mariners,—see note to United States v. The Malek Adhel, 11: 239.

As to lien for freight; who has, and how waived or lost,—see note to Raymond v. Tyson, 15: 47.

As to carriers not liable as insurers; inevitable accident; negligence, what is.—see note to Palmer v. Pennsylvania Co. (N. Y.) 2 L. R. A. 252.

As to recovery for loss or destruction of cargo, see note to Hardman v. Brett (C. C. S. D. N. Y.) 2 L. R. A. 173.

from any risks except those specially mentioned in said § 3.

[No. 45.]

Argued April 23, 26, 1897. Ordered for reargument May 10, 1897. Reargued March 7, 8, 1898. Decided May 23, 1898.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Second Circuit to review the decree of that court affirming the decree of the United States District Court for the Eastern District of New York dismissing a libel filed by Josephine W. Wuppermann against the steamship Carib Prince et al. to recover damage occasioned to goods shipped on board of such vessel. Decrees of Circuit Court of Appeals and of the District Court reversed, and case remanded to the district court for further proceedings.

See same case below, 63 Fed. Rep. 266, 35 U. S. App. 390.

Statement by Mr. Justice **White**:

The Carib Prince, an iron and steel steamer, was built in England in the spring of 1893, for **656**] the carriage of passengers *and freight. She was fitted with a peak tank, triangular in shape extending from the bottom of the ship to the between deck, the tank being intended to hold water to be used as ballast in trimming the ship. The sides of the tank were the sides of the ship; the after end of it was the collision bulkheads. It was 24 feet deep, and had a capacity of 83 tons of water. The angle irons, beams, strengthening bars, etc., which enabled the collision bulkheads to sustain the strain of the water against it, were on the inside of the tank, the face of the bulkhead showing in the No. 1 hold being smooth, except that the plates were lap-jointed. The strengthening bars were fastened to the bulkhead by a series of horizontal rivets, the heads of the rivets, inside No. 1 hold, being situated three or more feet above the floor of the hold.

On September 14, 1892, the Carib Prince was chartered to the Trinidad Direct Line Steamship Company for the period of four years. On August 31, 1893, while the vessel was in possession of the charterers, and lying in the port of Trinidad, loading for a voyage to New York, a number of cases of bitters were delivered on board, consigned to J. W. Wuppermann. They were placed in the No. 1 hold. The bill of lading delivered to the consignor contained the following exceptions:

"The act of God, the Queen's enemies, pirates, robbers, restraints of princes, rulers, and people, loss or damage from heat or fire on board, in hulk or craft or on shore, explosion, steam, accidents to or latent defects in hull, tackle, boilers, and machinery, or their appurtenances, jettison, barratry, any act, neglect, or default whatsoever, of pilots, masters, or crew in the management or navigation of the ship, quarantine, collision, stranding, and all and every other dangers and accidents of the seas, rivers, or steam navigation, or whatever nature or kind always excepted."

The ship left Trinidad on August 31, 1893, stopped for a short time at Grenada, just north of the island of Trinidad, and from the latter port proceeded direct to New York. After leaving Grenada, and on the night of the 3d of September, by direction of the captain, the peak ballast tank referred to, and which adjoined the compartment in which the cases of bitters *were stored, was filled [**657** with sea water. This was done for the purpose of trimming the ship, which was several feet lower at the stern than she was forward. The next morning, or the second morning after, it was discovered that the water from the peak tank was escaping through a rivet hole into the No. 1 hold, the head of one of the rivets having been forced off. To recover the damage occasioned to the goods in question by the water which had thus gotten into the No. 1 hold, Mrs. Wuppermann filed her libel in the United States district court for the eastern district of New York. Ernest Legge, master, on behalf of the owner appeared and filed an answer, in which, after denying the material allegations of the complaint, the exceptions contained in the bill if lading were pleaded as a defense, and it was averred that said exceptions were valid in the port where the bills of lading were issued. It was also averred "that the owner and charterer used all due diligence to have her (the vessel) properly equipped, manned, provisioned, and outfitted, and in every way seaworthy and capable of performing her intended voyage, and used all due diligence in and about the transportation of the merchandise in question, and allege that if the cargo mentioned in the libel was damaged as alleged the damage was due to latent defects in certain rivets, angle irons, braces, and straps in the bulkhead between the No. 1 hold and the peak tank just forward of it, or to some error or fault in the management or navigation of the vessel in filling the said peak tank on the voyage, as will more fully appear on the trial of this cause."

The case was tried in June, 1894 and a final decree was entered in October following, dismissing the libel. 63 Fed. Rep. 266. From that decree an appeal was taken to the circuit court of appeals for the second circuit, which affirmed the decree of the district court. 35 U. S. App. 390. A writ of certiorari being allowed, the cause has been brought into this court for review.

Messrs. **Harrington Putnam** and *George A. Black*, for appellant on both arguments:

The damage to libellant's cargo is not within the exceptions of the bill of lading.

The Maori King v. *Hughes* [1895] 2 Q. B. 550; *The Caledonia*, 157 U. S. 124 (39: 644); *Gray* v. *Carr*, L. R. 6 Q. B. 549; *The Nith*, 36 Fed. Rep. 86; *Quebec Marine Ins. Co.* v. *Commercial Bank*, L. R. 3 P. C. 242; *Hegeman* v. *Western R. Corp.* 13 N. Y. 9, 64 Am. Dec. 517; *The City of Panama*, 101 U. S. 459 (25: 1061); *The Rover*, 33 Fed. Rep. 516; *Readhead* v. *Midland R. Co.* L. R. 4 Q. B. 379; *Steel* v. *State Line S. S. Co.* L. R. 3 App. Cas. 72; *Work* v. *Leathers*, 97 U. S. 379 (24: 1012); *The*

Edwin I. Morrison, 153 U. S. 199 (38: 688); *Pennsylvania Co.* v. *Roy*, 102 U. S. 455 (26: 144); *Robinson* v. *New York C. & H. R. R. Co.* 9 Fed. Rep. 877; *The Bergenseren*, 36 Fed. Rep. 700; *The Eugene Vesta*, 28 Fed. Rep. 762; *Cohn* v. *Davidson*, L. R. 2 Q. B. Div. 455.

Such an exemption as is claimed is contrary to the terms of the Harter act (27 Stat. at L. 445, chap. 105).

The Alvena, 74 Fed. Rep. 252; *The Delaware*, 161 U. S. 459 (40: 771); *Lawrence* v. *Minturn*, 17 How. 115 (15: 65); *The Northern Belle*, 9 Wall. 526 (19: 748) *Work* v. *Leathers*, 97 U. S. 379 (24: 1012); *The Caledonia*, 43 Fed. Rep. 681; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397 (32: 788); *Hubert* v. *Reckmajd*, 13 Fed. Rep. 912.

By the general maritime law the shipowner is liable for libellant's damage.

Such being the law of the principal maritime states, it is to be presumed that Congress did not intend by the act of 1893 to put our own law out of harmony with the law of the sea.

Mr. **J. Parker Kirlin**, for appellee on both arguments:

The proximate cause of the damage was the negligent filling of the tank at sea while the ship was rolling without taking adequate precautions to avoid damage. This was "an act, neglect, or default of the master or crew in the management or navigation of the ship" within the exception contained in the bill of lading.

The Titania, 19 Fed. Rep. 101, 107; *Svendsen* v. *Stursberg*, 31 Fed. Rep. 86; *Hedley* v. *Pinkney & Sons S. S. Co.* [1892] 1 Q. B. 58, 65 [1894] A. C. 222; *Howard F. Ins. Co.* v. *Norwich & N. Y. Transp. Co.* 12 Wall. 194 (20: 378); *Orient Ins. Co.* v. *Adams*, 123 U. S. 67 (31: 63); *Western Transp. Co.* v. *Downer*, 11 Wall. 129 (20: 160); *Memphis & C. R. Co.* v. *Reeves*, 10 Wall. 176 (19: 909); *Morrison* v. *Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Scheffer* v. *Washington City, V. M. & G. S. R. Co.* 105 U. S. 249 (26: 1070); *Northwestern Transp. Co.* v. *Boston Marine Ins. Co.* 41 Fed. Rep. 793; *City F. Ins. Co.* v. *Corlies*, 21 Wend. 367, 34 Am. Dec. 258; *Lewis* v. *Springfield F. & M. Ins. Co.* 10 Gray, 159; *Kenniston* v. *Merrimack County Mut. Ins. Co.* 14 N. H. 341, 40 Am. Dec. 193; *Babcock* v. *Montgomery County Mut. Ins Co.* 6 Barb. 637; *Grim* v. *Phœnix Ins. Co.* 13 Johns. 451.

The damage occurred on the high sea. In these circumstances the contractual rights and obligations of the parties under the bill of lading are to be determined according to English law.

The Titania, 19 Fed. Rep. 101; *Liverpool & G. W. Steam Co* v. *Phenix Ins. Co.* 129 U. S 397 (32: 788); *Fonseca* v. *Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 340; *O'Regan* v. *Cunard S. S. Co.* 160 Mass. 356.

If negligence in filling the tank was not the proximate cause of the damage the loss would be within the exemptions of "accidents to . . . hull, tackle, boilers, and machinery, or their appurtenances" and "accidents of the seas, rivers, or stream navigation of whatever nature or kind."

The Miranda, L. R. 3 Adm. 561; *Nine Thousand Bunches of Bananas*, 8 U. S. App. 405, 55 Fed. Rep. 1003, 5 C. C. A. 386; *The Curlew*, 51 Fed. Rep. 246; *The William Lindsay*, L. R. 5 P. C. 338; *The Virgo*, 3 Asp. Mar. Cas. N. S. 285; *The Xantho*, L. R. 12 App. Cas. 503.

If it be considered that the proximate cause of the damage was a defective condition of the rivet, such condition constituted a "latent defect" within the exception of "latent defects in hull, machinery, or their appurtenances," contained in the bill of lading.

The Benbrack, 33 Fed. Rep. 687; *The Dago*, 31 Fed. Rep. 574.

If the carrier purchases from reputable manufacturers, and gives the vehicles such inspection as is usual and practicable, he is not responsible for defects not so discoverable.

Readhead v. *Midland R. Co.* 4 Q. B. 380; *Grand Rapids & I. R. Co.* v. *Huntley*, 38 Mich. 537, 31 Am. Rep. 321; *Nashville & D. R. Co.* v. *Jones*, 9 Heisk. 27; *Illinois C. R. Co.* v. *Phillips*, 49 Ill. 234; *Allen* v. *Dry Dock, E. B. & B. R. Co.* 19 N. Y. S. R. 114; *Carlson* v. *Phœnix Bridge Co.* 132 N. Y. 273; *Carroll* v. *Staten Island R. Co.* 58 N. Y. 138, 17 Am. Rep. 221; *Ladd* v. *New Bedford R. Co.* 119 Mass. 412, 20 Am. Rep. 331; *Robinson* v. *New York C. & H. R. R. Co.* 20 Blatchf. 338; *Texas & P. R. Co.* v. *Barrett*, 166 U. S. 617, 618 (40: 1136, 1139).

The question as to what constitutes a latent defect has been passed upon in a number of admiralty cases, where it has uniformly been held the shipowner's measure of diligence to discover defects is the exercise of ordinary care.

The William Lindsay, L. R. 5 P. C. 338; *The Nederland*, 7 Fed. Rep. 926; *The Dago*, 31 Fed. Rep. 574; *The Flowergate*, 31 Fed. Rep. 762; *The Benbrack*, 33 Fed. Rep. 687; *The Concord*, 58 Fed. Rep. 913; *The France*, 20 U. S. App. 212, 59 Fed. Rep. 479, 8 C. C. A. 185; *Riley* v. *State Line S. S. Co.* 29 La. Ann. 791; *The Titania*, 19 Fed. Rep. 101; *The Lizzie Frank*, 31 Fed. Rep. 477; *The Olympia*, 22 U. S. App. 69, 61 Fed. Rep. 120, 9 C. C. A. 393; *Meier* v. *Pennsylvania R. Co.* 64 Pa. 225, 3 Am. Rep. 581; *The Bergenseren*, 36 Fed. Rep. 700; *Texas P. R. Co.* v. *Barrett*, 166 U. S. 617 (40: 1136); *The Warren Adams*, 38 U. S. App. 356, 74 Fed. Rep. 413; *The Sandfield*, 79 Fed. Rep. 371.

The evidence discloses no sufficient reason for depriving the shipowner of the benefit of the exception of "latent defects." He had used diligence to make the ship seaworthy for the voyage, and she was seaworthy, in fact, when she sailed.

York Mfg. Co. v. *Illinois C. R. Co.* 3 Wall. 107 (18: 170); *Clark* v. *Barnwell*, 12 How. 272 (13: 985); *The Victory*, 168 U. S. 410 (42: 519); *Western Transp. Co.* v. *Downer*, 11 Wall. 129 (20: 160); *Memphis & C. R. Co.* v. *Reeves*, 10 Wall. 176 (19: 909); *The Miranda*, L. R. 3 Adm. 561.

There is no hard and fast rule by which seaworthiness can be determined. It must be determined with reference to the judgment of competent and prudent experts, versed in such matters and upon previous experience.

Union Ins. Co. v. *Smith*, 124 U. S. 405 (31: 497); *Eastern Transp. Line* v. *Hope*, 95 U. S. 298 (24: 478); *Adderley* v. *American Mut.*

Ins. Co. Taney, 126; *Svendsen* v. *Stursberg*, 31 Fed. Rep. 86; *Janney* v. *Columbia Ins. Co.* 10 Wheat. 411 (6:354).

Seaworthiness in the hull of a vessel requires nothing more than reasonable fitness for the voyage.

Steel v. *State Line S. S. Co.* L. R. 8 App. Cas. 72; *Dupont de Nemours* v. *Vance*, 19 How. 162 (15: 584); *The Rover*, 33 Fed. Rep. 515.

The alleged defect of untrue rivet holes is insufficient to justify a finding of unsoundness.

The Sandfield, 79 Fed. Rep. 371.

The seaworthiness of a ship regularly employed in commerce is to be assumed as a fact, in the absence of countervailing facts.

Pickup v. *Thames Marine Ins. Co.* L. R. 3 Q. B. Div. 594; *Lunt* v. *Boston Marine Ins. Co.* 19 Blatchf. 151; *The Warren Adams*, 38 U. S. App. 356, 74 Fed. Rep. 413; *Cornell* v. *Green*, 163 U. S. 79 (41: 77).

In the circumstances, as two possible causes of damage exist, the libellant has the burden of showing that the real cause was one for which the ship is liable (The Exe, 14 U. S. App. 626, 57 Fed. Rep. 399, 6 C. C. A. 410), and, if that be left in doubt, she should not recover.

Searles v. *Manhattan R. Co.* 101 N. Y. 661; *The R. D. Bibber*, 8 U. S. App. 42, 50 Fed. Rep. 841, 2 C. C. A. 50; *Muddle* v. *Stride*, 9 Car. & P. 380.

The exception of latent defects in hull, machinery, or their appurtenances, imports a modification of the implied warranty of seaworthiness. It covers the loss and exempts the ship.

Baerselman v. *Bailey*, 8 Asp. Mar. Cas. 4, [1895] 2 Q. B. 301; *Hamilton* v. *Pandorf*, L. R. 12 App. Cas. 518; *The Wells City*, 26 U. S. App. 76, 61 Fed. Rep. 857, 10 C. C. A. 123

When, however, a bill of lading has been given and taken, its provisions must be considered to relate back, and apply to what has been done in regard to the shipment before it was given. It is to be taken as the expression of the contract under which everything has been done. Thus, the exceptions of risks contained in it apply to the stowage of the goods, although that may have been completed before the bill of lading was given.

The Duero, L. R. 2 Adm. 393; *Pyman* v. *Burt*, 1 Cab. & E. 207; *Norman* v. *Binnington*, L. R. 25 Q. B. Div. 475; *Nottebohn* v. *Richter*, L. R. 18 Q. B. Div. 63; *The Carron Park*, L. R. 15 Prob. Div. 203; *Scott* v. *Baltimore, C. & R. S. B. Co.* 19 Fed. Rep. 56; *Rubens* v. *Ludgate Hill S. S. Co.* 48 N. Y. S. R. 732 Affirmed 143 N. Y. 629; *The Southgate* [1893] P. 329; Pollock, Bills of Lading, 39.

The appellant is not in privity with the express warranty of seaworthiness in the charty-party between James Knott, owner, and George Christall, charterer of the vessel.

Baumvoll Manufactur von Scheibler v. *Gilchrest* [1892] 1 Q. B. Div. 258; *Baumwoll Manufactur von Carl Scheibler* v. *Furness* [1893] A. C. 8; *Meiklereid* v. *West*, L. R. 1 Q. B. Div. 428; *United States* v. *Shea*, 152 U. S. 178 (38: 403); *Reed* v. *United States*, 11 Wall. 591 (20: 220); *Hooe* v. *Groverman*, 1 Cranch, 214 (2: 86); *Marcardier* v. *Chesapeake Ins. Co.* 8 Cranch, 39 (3: 481); *Bramble* v. *Culmer*, 42 U. S. App. 303, 78 Fed. Rep. 497, 24 C. C. A. 182.

A libellant's rights, and the steamer's obligations to him are to be determined from the bill of lading.

St. Louis I. M. & S. R. Co. v. *Knight*, 122 U. S. 79, 92 (30: 1077); *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344 (12: 465).

It is alleged that the merchandise in question was libellant's property at the time of shipment. If this be true the shipper was her agent for the purpose of shipment and to make the contract. It is presumed he had authority to make it in the form adopted.

Zimmer v. *New York C. & H. R. R. Co.* 137 N. Y. 460; *Jennings* v. *Grand Trunk R. Co.* 127 N. Y. 438.

If the court holds that the loss is not within any of the exceptions contained in the bill of lading, the claimant would desire to invoke the protection afforded by the 3d section of the statute, assuming that, like the former acts relating to navigation, it is applicable to foreign vessels.

The Etona, 64 Fed. Rep. 880, 882, 38 U. S. App. 50, 71 Fed. Rep. 895, 18 C. C. A. 380; *The Silvia*, 35 U. S. App. 395, 68 Fed. Rep. 230, 15 C. C. A. 362; *The Strathairly*, 124 U. S. 558 (31: 580); *The Scotland*, 105 U. S. 24, 30 (26: 1001, 1003); *The State of Virginia*, 60 Fed. Rep. 1018; *Thommasen* v. *Whitwill*, 12 Fed. Rep. 891; *Re Leonard*, 14 Fed. Rep. 53; *Levinson* v. *Oceanic Steam Nav. Co.* 17 Alb. L. J. 285, 15 Fed. Cas. No. 8,292.

It is not shown that any usual or customary precaution for preserving and maintaining the sound condition of the vessel was neglected. The presumption of fact would be that she was still fit.

Pickup v. *Thames Marine Ins. Co.* L. R. 3 Q. B. Div. 594; *Lunt* v. *Boston Marine Ins. Co.* 19 Blatchf. 151; *The Warren Adams*, 38 U. S. App. 356, 74 Fed. Rep. 413; *The Rover*, 33 Fed. Rep. 515.

It has been argued that the proximate cause of the damage was the negligent filling of the tank at sea. If the court adopts that conclusion, it seems plain that the careless act, if not strictly of navigation, was a fault in the management of the vessel.

The Silvia, 64 Fed. Rep. 607, 35 U. S. App. 395, 68 Fed. Rep. 230, 15 C. C. A. 362; *The Sandfield*, 79 Fed. Rep. 371; *The Mexican Prince*, 82 Fed. Rep. 484; *Botany Worsted Mills* v. *Knott*, 76 Fed. Rep. 582; *The Colina*, 82 Fed. Rep. 665; *The Glenochil* [1896] P. 10; *Carmichael* v. *Liverpool Sailing Ship Owner's Mut. I. Asso.* L. R. 19 Q. B. Div. 242; *Good* v. *London S. S Owners' Mut. Protecting Asso.* L. R. 6 C. P. 563; *The Warkworth*, L. R. 9 Prob. Div. 20, 145.

If the failure to apply the water test before sailing was a fault, it was a fault of the master in the management of the ship, and not a want of due diligence in the owner.

Massey v. *Morriss* [1894] 2 Q. B. 412.

The 3d section of the act was plainly a provision for the limitation of the pre-existing liability of shipowners.

The Delaware, 161 U. S. 459 (40: 771); *The Silvia*, 64 Fed. Rep. 607, 35 U. S. App. 395, 68 Fed. Rep. 230, 15 C. C. A. 362; *The Colima*, 82 Fed. Rep. 665.

It should be construed as *in pari materia* with the prior limitation statutes.

Re Meyer, 74 Fed. Rep. 881.

By those statutes the liability of the owner was limited, in the cases specified, where the loss had not occurred from his "design or neglect" or "privity or knowledge." The decisions under them hold that the design, neglect, knowledge, or privity that excludes their operation must be actual, and not merely constructive or imputed.

Walker v. *Western Transp. Co.* 8 Wall. 150 (18: 172); *Craig* v. *Continental Ins. Co.* 141 U. S. 638 (35: 886); *Hill Mfg. Co.* v. *Providence & N. Y. S. S. Co.* 113 Mass. 495, 499, 500, 18 Am. Rep 527, 109 U. S. 578 (27: 1038); *Quinlan* v. *Pew*, 5 U. S. App. 382, 56 Fed. Rep. 111, 5 C. C. A. 438; *The Republic*, 20 U. S. App. 561, 61 Fed. Rep. 109, 112, 9 C. C. A. 386; *Butler* v. *Boston & S. S. S. Co.* 130 U. S. 527 (32: 1017); *Massey* v. *Morriss* [1894] 2 Q. B. 412.

The 3d section of the statute, providing that if the owner of the vessel has exercised due diligence to make her seaworthy he shall not be liable for faults or errors in navigation, etc., construed in connection with the 2d section, which prohibits the introduction of clauses modifying the obligation of the owner to use due diligence to make the vessel seaworthy, indicates that Congress intended by this statute to abrogate entirely the former absolute warranty of seaworthiness, and to substitute in its place the warranty of due diligence by the owner.

The Silvia, 64 Fed. Rep. 607, 35 U. S. App. 395, 68 Fed. Rep. 230, 15 C. C. A. 362; *The Sandfield*, 74 Fed. Rep. 371; *The Mexican Prince*, 82 Fed. Rep. 484; *The Colima*, 82 Fed. Rep. 665.

The court is not bound to construe this statute grudgingly and strictly, as in derogation of the common law. On the contrary, as a part of the law limiting the liability of shipowners, it should, like other similar acts, receive a liberal construction.

Walker v. *Western Transp. Co.* 8 Wall. 150 (18: 172); *Moore* v. *American Transp. Co.* 24 How. 1 (16: 674).

658] *Mr. Justice **White** delivered the opinion of the court:

It was averred, in the answer, that the damage to the property of the libellant "was due to latent defects in certain rivets, angle irons, braces, and straps in the bulkhead between the No. 1 hold and the peak tank just forward of it, or to some error or fault in the management or navigation of the vessel in filling the said peak tank on the voyage." The district court and the circuit court of appeals held that the sole cause of the accident was a latent defect in a rivet from which the head had come off, leaving the hole through which the water poured in and upon the merchandise of the libellant. This defective condition of the rivet was found to have been caused by the fact that the quality of iron had been injured during the construction of the vessel by too much hammering, so that it became brittle and weak, rendering it unfit to sustain the reasonable pressure caused by filling the tank with water while at sea, and consequently causing the vessel to be unseaworthy at the time the bills of lading were issued and the goods were received on board. The settled doctrine of this court is that the concurrent decisions of two courts upon a question of fact will be followed unless shown to be clearly erroneous. Compania de Navigacion La Flecha v. Brauer, 168 U. S. 104 [ante, 398] and cases there cited; Stuart v. Hayden, 169 U. S. 1, 14 [ante, 639, 643]; Baker v. Cummings, 169 U. S. 198 [ante, 711]. As after a careful examination of the evidence, we conclude that it does not clearly appear that the lower courts erred in their conclusion of fact, we accept as indisputable the finding that the Carib Prince was unseaworthy at the time of the commencement of the voyage in question, by reason of the defect in the tank above referred to.

Upon this premise of fact, the first question which arises for solution is this: Did the exceptions in the bill of lading exempting the shipowner "from loss or damage from . . accidents to or latent defects in hull, tackle, boilers, and machinery, or their appurtenances," operate to relieve him from damages caused by the state of unseaworthiness existing at *the inception of the voy- [659 age and at the time the bill of lading was signed? This question is no longer open, as it is fully answered in the negative by the decision in The Caledonia, 157 U. S. 124 [39: 644]. In that case the damage sought to be recovered had been caused by the breaking of the shaft of the steamer by reason of a latent defect which existed at the commencement of the voyage. The exemption from liability, which was there asserted to exist, was predicated on a provision in the bill of lading, relieving the owner from "loss or damage . . . from delays, steam boilers, and machinery, or defects therein." It was held that the clause in question operated prospectively only and did not relate to a condition of unseaworthiness existing at the commencement of the voyage, and that it must be construed as contemplating only a state of unseaworthiness arising during the voyage. The principle upon which the ruling rested was that clauses exempting the owner from the general obligation of furnishing a seaworthy vessel must be confined within strict limits, and were not to be extended by latitudinarian construction or forced implication so as to comprehend a state of unseaworthiness, whether patent or latent, existing at the commencement of the voyage. The rule thus announced in The Caledonia but expressed the doctrine stated by Lord Selborne in Steel v. State S. Line S. S. Co. L. R. 3 App. Cas. 72, that the exceptions in a bill of lading ought, if in reason it be possible to do so, to receive "a construction not nullifying and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken." The fact that the exempting clause in the present case refers to latent defects, whilst that passed on in The Caledonia embraced defects generally, does not take this case out of the control of the general rule laid down in The Caledonia.

The decision in The Caledonia was based, not on the particular character of the defects there referred to, but on the general ground that, unless there were express words to the contrary, the language of the exempting clause would not be held to apply to defects, whether patent or latent, existing when the voyage was commenced. In other words, 660] that where the owner desires the *exemption to cover a condition of unseaworthiness existing at the commencement of the voyage, he must unequivocally so contract. An illustration of such contract was found in The Latertes, L. R. 12 Prob. Div. 187, referred to in the opinion in The Caledonia. In that case the bill of lading stipulated, not merely against latent defects, but against all such defects existing at the time of the shipment.

The condition of unseaworthiness found to exist not being then within the exceptions contained in the bill of lading, it remains only to consider whether under the facts disclosed by the record, aside from the exceptions in the bill of lading, the shipowner was liable for the damages caused by the unseaworthy condition of the ship. The contention is that, as the owner exercised due diligence to make the ship seaworthy, he was consequently not liable, because, under the present state of the law, a shipowner is no longer under the obligation to furnish a seaworthy ship, but only to exercise due diligence to do so. The radical change in the duties and obligations of shipowners which this proposition involves is asserted to arise from the statute of February 13, 1893 (27 Stat. at L. 445, chap. 105), commonly described as the Harter act. The proposition rests on the assumed meaning of the 2d and 3d sections of that act. The 2d section is as follows:

"Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened, or avoided."

Now, it is patent that the foregoing provisions deal not with the general duty of the owner to furnish a seaworthy ship, but solely with his power to exempt himself from so do- 661] ing by *contract, when the particular conditions exacted by the statute obtain. Because the owner may, when he has used due diligence to furnish a seaworthy ship contract against the obligation of seaworthiness, it does not at all follow that when he has made no contract to so exempt himself he nevertheless is relieved from furnishing a seaworthy ship, and is subjected only to the duty of using due diligence. To make it unlawful to insert in a contract a provision exempting from seaworthiness where due diligence has not been used, cannot by any sound rule of construction be treated as implying that where due diligence has been used, and there is no contract exempting the owner, his obligation to furnish a seaworthy vessel has ceased to exist. The fallacy of the construction relied on consists in assuming that because the statute has forbidden the shipowner from contracting against the duty to furnish a seaworthy ship unless he has been diligent, that thereby the statute has declared that without contract no obligation to furnish a seaworthy ship obtains in the event due diligence has been used. And the same fallacy is involved in the contention that this construction is supported by the 3d section of the act. The 3d section is as follows:

"Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The exemption of the owners or charterers from loss resulting *from "faults or er- [662 rors in navigation or in the management of the vessel," and for certain other designated causes, in no way implies that because the owner is thus exempted when he has been duly diligent that thereby the law has also relieved him from the duty of furnishing a seaworthy vessel. The immunity from risks of a described character, where due diligence has been used, cannot be so extended as to cause the statute to say that the owner when he has been duly diligent is not only exempted in accordance with the tenor of the statute from the limited and designated risks which are named therein, but is also relieved, as respects every claim of every other description, from the duty of furnishing a seaworthy ship. These considerations dispose of all the questions arising on the record.

The decrees rendered both in the Circuit Court of Appeals and in the District Court must therefore be reversed, and the case be remanded to the district court for further proceedings in conformity with this opinion.

And it is so ordered.

Mr. Justice **Brown**, with whom was Mr. Justice **Brewer**, dissenting:

For the reasons stated by me in The Caledonia, 157 U. S. 124, 140 [39:644,649], I am compelled to dissent from the opinion of the court in this case. The accident in that case occurred by the breaking of a propeller shaft, owing to its having been weakened by meeting with extraordinarily heavy seas on previous voyages. No defect in the ship was visible, or could have been detected by the usual and reasonable means, if the shaft had been taken out and examined.

The minority of the court, conceding the general principle that, in every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of the beginning of the voyage, was of opinion that the Caledonia was exempt from the losses claimed by the exception in the bill of lading "of loss or damage from . . . machinery or defects [663] therein." It was argued that *this exception was obviously inserted for the purpose of exempting the ship from some liability to which, without such exception, it would be subject. It evidently was not intended to be limited to mere breakages of machinery which should occur after the voyage began, since the breaking of sound machinery through the stress of weather is treated as an inevitable accident or peril of the sea for which the ship would not be liable, whether there were an exception or not, and the following cases were cited as sustaining this proposition: The Virgo, 3 Asp. Mar. L. Cas. 285; The William Lindsay, L. R. 5 P. C. 338; The Miranda, L. R. 3 Adm. & Eccl. 561; The Cargo ex Laertes, L. R. 12 Prob. Div. 187; The Curlew, 51 Fed. Rep. 246.

In the case under consideration the exception is more specific and exempts the ship "from loss or damage from . . . accidents or latent defects in hull, tackle, boilers, and machinery, or their appurtenances." It was admitted that the sole cause of the accident was a latent defect in a rivet from which the head had come off; that this defective condition of the rivet was caused by the fact that the quality of the iron had been injured during the construction of the vessel by too much hammering, so that it had become brittle and weak, thus rendering it unfit to sustain the reasonable pressure caused by filling the tank with water while at sea.

It was further found by the courts below that abundant diligence had been used in the construction of the vessel; that the defect in the rivet was a latent one which occurred at the time she was built; that it was not discovered and was not discoverable at that time or subsequently, by the exercise of all the known and customary tests and methods of examination, which were all employed.

The question then arises as to what was meant by the exception of "latent defects." It evidently was not intended to refer to defects which became such after the beginning of the voyage through stress of weather or other perils of the sea, since the ship would not be liable for such defects or breakages, whether excepted or not in a bill of lading. A ship is never liable for an accident or breakage of machinery occasioned by perils of the sea, and the word "defect" is *never used in that connection. The [664 words "latent defect," as ordinarily understood, apply to something existing at the time the ship or other vehicle was constructed, and such as was not discovered and could not be discovered by ordinary methods of examination. To exempt a vessel from consequences of such a defect is neither unreasonable nor unjust, and most of the modern bills of lading contain a stipulation to that effect.

The case of the Cargo ex Laertes, L. R. 12 Prob. Div. 187, is in point. Bills of lading under which the cargo was shipped, contained, among other excepted perils, the clauses "warranted seaworthy only so far as ordinary care can provide," and "owners not to be liable for loss, detention, or damage . . . if arising directly or indirectly . . . from latent defects in boilers, machinery . . . even existing at time of shipment. The Laertes broke down from a latent defect which could not have been discovered by the exercise of all reasonable care, and it was held that the exception of latent defects, if it did not abrogate, at all events limited, the warranty which the law would otherwise imply that the ship was seaworthy at the beginning of the voyage. I do not regard the words "even existing at time of shipment" as adding anything to the words "latent defects," since in our view of those words, as ordinarily understood, they must have existed at the time of shipment.

The hardship of the ruling in the case under consideration appears the more manifest from the fact that the Carib Prince was a British steamer, and that the bill of lading was signed at Trinidad, a port governed by the English law.

I agree with the majority of the court that the Harter act cuts no figure in this case. While it is possible that the framers of this act may have intended to exonerate ships from the consequences of unseaworthiness where due diligence had been used to make them seaworthy, it must be conceded that the language of the 3d section does not express such intent, since it only exonerates them from loss or damage resulting from faults or errors in navigation or management. But I think that recent cases in this court have *imposed a most severe and [665 impracticable measure of liability—one which operates with great hardship upon the prudent and careful owner, and one which is calculated to invite further legislation in the direction of the Harter act.

TEXAS & PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.
ANDY ARCHIBALD.

(See S. C. Reporter's ed. 665-674.)

Duty of railway company toward employees to inspect cars—right of employee.

1. The duty of a railway company toward an employee, to inspect cars coming from other roads, is not limited to cars which are to be hauled over its own road, but extends to cars which it switches from another road, to which they are to be returned after loading.

2. An employee of a railway company has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because, by ordinary care, he might have known of the methods, and inferred therefrom that danger of insufficient appliances might arise.

[No. 207.]

Submitted April 15, 1898. Decided May 23, 1898.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment affirming the judgment of the Circuit Court of the United States for the Eastern District of Texas in favor of the plaintiff, Andy Archibald, against the Texas & Pacific Railway Company for damages for a personal injury to plaintiff while engaged as switchman in defendant's employ. Affirmed.

See same case below, 41 U. S. App. 567.

Messrs. **John F. Dillon, Winslow S. Pierce,** and **David D. Duncan,** for plaintiff in error:

When a servant enters into an employment he assumes all the risks ordinarily incident to the business, and is presumed to have contracted with reference to all the hazards and risks attending his employment. He cannot recover for injuries resulting to him therefrom.

Tuttle v. *Detroit, G. H. & M. R. Co.* 122 U. S. 189 (30: 1114); *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478 (27: 1003).

Included among such risks are those arising out of the master's mode of conducting his business, though a safer one might have been adopted, if the servant knows the custom of doing business and the risk occasioned thereby, or could know it by exercising ordinary care, and continues in his employment.

Texas & P. R. Co. v. *Minnick*, 13 U. S. App. 520, 57 Fed. Rep. 362, 6 C. C. A. 387; *Hewitt* v. *Flint & P. M. R. Co.* 23 U. S. App. 310, 61 Fed. Rep. 635, 10 C. C. A. 1, 67 Mich. 61; *Chicago, R. I. & P. R. Co.* v. *Linney*, 19 U. S. App. 315, 59 Fed. Rep. 45, 7 C. C. A. 656.

It is the general rule that the servant assumes the ordinary risks and dangers of the employment upon which he enters, not only so far as they are known to him, but also so far as they would have been known to one of ordinary prudence and sagacity in his situation by the exercise of ordinary care.

Bohn Mfg. Co. v. *Erickson*, 12 U. S. App. 260, 55 Fed Rep. 943, 5 C. C. A. 341; *Northwestern Fuel Co.* v. *Danielson*, 12 U. S. App. 688, 57 Fed. Rep. 915, 6 C. C. A. 636.

The duty to inspect cars coming from other roads applies only when the cars are to be sent out on the receiving road and does not apply when cars are switched from one road to be loaded and returned to the road from which they were received.

Baltimore & P. R. Co. v. *Mackey*, 157 U. S. 72 (39: 624); *Gottlieb* v. *New York, L. E. & W. R. Co.* 100 N. Y. 462; *Goodrich* v. *New York C. & H. R. R. Co.* 116 N. Y. 398, 5 L. R. A. 750; *Flanagan* v. *Chicago & N. W. R. Co.* 45 Wis. 103.

Messrs. **James Turner** and **J. Henry Shepherd,** for defendant in error:

It is the duty of the master to furnish the servant with tools and appliances reasonably safe for the work in hand. It is the duty of a railway company to furnish its servants with cars reasonably safe, if the servant is required to handle them.

Whart. Neg. §§ 209, 211; Rorer, Railroads, 1211; Cooley, Torts, 561; *Hough* v. *Texas & P. R. Co.* 100 U. S. 215 (25: 614); *Wright* v. *New York C. R. Co.* 25 N. Y. 565; *Loughlin* v. *State*, 105 N. Y. 159.

It is the duty of the company to inspect all cars which the servant is required to handle, whether its own cars or the cars of another road, and to know that they are in a reasonably safe condition.

Ford v. *Fitchburg R. Co.* 110 Mass. 240, 260, 14 Am. Rep. 598; *Corcoran* v. *Holbrook*, 59 N. Y. 517, 17 Am. Rep. 369; *Missouri P. R. Co.* v. *McElyea*, 71 Tex. 386, 1 L. R. A. 411; *Union P. R. Co.* v. *Snyder*, 152 U. S. 684 (38: 597); *Northern P. R. Co.* v. *Herbert*, 116 U. S. 652 (29: 760); Baily, Liability of Master to Servant, 101.

If Archibald had actual knowledge that the car with which he was working had not been inspected and was ordered by his superior to go and uncouple it as he did, but knew not of the defective brake rod, loose from its fastenings, and was injured in the manner shown by the evidence, he should recover, because the master has failed in a duty he owed to his servant to furnish reasonably safe cars.

Northern P. R. Co. v. *Herbert*, 116 U. S. 652 (29: 760); *Hough* v. *Texas & P. R. Co.* 100 U. S 215 (25: 614); *Baltimore & P. R. Co.* v. *Mackay*, 157 U. S. 73 (39: 625); *Ford* v. *Fitchburg R. Co.* 110 Mass. 240, 14 Am. Rep. 598; *Union P. R. Co.* v. *Snyder*, 152 U. S. 684 (38: 597; *Cocoran* v. *Holbrook*, 59 N. Y. 517, 17 Am. Rep. 369; *Crenshaw* v. *Missouri P. R. Co.* 71 Tex. 344; *Wright* v. *New York C. R. Co.* 25 N. Y. 565; *Loughlin* v. *State*, 105 N. Y. 159; *Gormly* v. *Vulcan Iron Works*, 61 Mo.

NOTE.—*As to who are coemployees or coservants, within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a coservant,* see note to Hough v. Texas & P. R. Co. 25: 612.

As to negligence; responsibility of master to servant for carefulness and competency of coservants,—see note to Wabash R. Co. v. McDaniels, 27: 605.

492; *Brabbits* v. *Chicago & N. W. R. Co.* 38 Wis. 289; *Stoddard* v. *St. Louis, K. C. & N. R. Co.* 65 Mo. 514.

It is not negligence to fail to anticipate that another will violate the law in a given particular and in failing to provide against such violation.

2 Thomp. Neg. 1172; *International & G. N. R. Co.* v. *Gray*, 65 Tex. 32.

The servant is not bound to anticipate that the master will violate the law and neglect a legal duty and is not bound to provide against such anticipated neglect.

Kellogg v. *Chicago & N. W. R. Co.* 26 Wis. 223, 7 Am. Rep. 69; *Fox* v. *Sackett*, 10 Allen, 535; *Damour* v. *Lyons City*, 44 Iowa, 276; *Shea* v. *Potero & B. V. R. Co.* 44 Cal. 414; *Cleveland, C. & C. R. Co.* v. *Terry*, 8 Ohio St. 570; *Fraler* v. *Sears Union Water Co.* 12 Cal. 555, 73 Am. Dec. 562; *Brown* v. *Lynn*, 31 Pa. 510, 72 Am. Dec. 768; *Dorsey* v. *Phillips & C. Constr. R. Co.* 42 Wis. 583.

Mr. Justice **White** delivered the opinion of the court:

This suit, commenced in a state court, was removed to the circuit court of the United States for the eastern district of Texas, on the ground that the defendant was incorporated under the laws of the United States. The 666] object of the *action was to recover damages for a personal injury suffered by the plaintiff whilst engaged as a switchman in the employ of defendant. On the trial by a jury there was a verdict in favor of the plaintiff, and the judgment of the trial court entered on such verdict was subsequently affirmed by the circuit court of appeals for the fifth circuit. 41 U. S. App. 567. To that court error was prosecuted.

The errors assigned are based entirely on the theory that the trial court erred in refusing to give to the jury certain instructions asked by the defendant, and that the court of appeals also fell into error in affirming the action of the trial court. To clearly understand the contentions of the plaintiff in error it becomes essential to outline the facts.

The Texas Pacific and the Cotton Belt Railway Companies both had tracks entering the city of Shreveport. These tracks of the two companies were connected. A short distance off the line of the Texas Pacific there was a cotton seed oil mill, which was united by a spur track with the main line of railroad as it ran through a railway yard. The Cotton Belt delivered to the Texas Pacific two oil tank cars in order that they might be by the latter delivered to the oil mill, where they were to be filled and then redelivered by the Texas Pacific to the Cotton Belt to be carried to their point of destination over its line. The tank cars were placed by the Texas Pacific near the oil mill on the spur track leading thereto. At a subsequent time —there being conflict in the testimony as to how long a period intervened—one of the tank cars having been filled with oil, the mill company requested that the loaded car be moved and the empty car be left on the spur track so that it might also be filled. To accomplish this purpose an engine with a box car moved down the spur track to couple to the oil cars, so as to place the loaded one on the main track preparatory to delivering it to the Cotton Belt. The plaintiff, a switchman, was ordered to uncouple the loaded from the empty tank car. These cars were both fitted with an appliance by which, if in good order, the coupling pin could be removed by a lever without the necessity of the switchman going between them. This appliance, *however, on the cars in question, when [667 the switchman sought to use it, was found to be out of order, and he was therefore compelled to lean in between the two cars to draw out the coupling pin for the purpose of uncoupling, an operation shown to be usually resorted to when necessary. As he was making this movement his feet became entangled, and he was thereby suddenly exposed to the risk of being thrown between the cars and to the danger of being crushed to death. The entanglement of the feet of the switchman was caused by a broken brake rod, with links of chain attached to it and a hook at its end, which was hanging down under one of the cars, and which, in the movement of the car, was projected out into the space between the two cars, and caught the feet and legs of the switchman as he leaned between the cars for the purpose of doing the uncoupling. In his effort to escape being thrown between the slowly moving cars the right arm of the switchman was caught between the drawheads of the cars and was so badly crushed at the elbow that amputation was rendered necessary.

There was proof tending to show that the Texas Pacific inspected the cars in use on its road, not only those belonging to it but those delivered to it from other roads, and that where a car was found out of order the inspector marked upon it the nature of the defect found to exist, thereby giving warning on the subject to those who might handle it. The uncontradicted proof was that there were no marks on the cars in question calling attention to any defect. There was proof tending to explain the absence of a mark or marks calling attention to the defective condition, by showing that the car inspector of the Texas Pacific performed his duty at a point called the junction, which was outside of the place where the tracks of the Texas Pacific and Cotton Belt were connected, and hence that where a car was delivered by the Cotton Belt to the Texas Pacific by means of the connecting track inside of the junction no inspection of such cars was made by the Texas Pacific. The proof tended to establish that this was only necessarily the case where the car delivered by the Cotton Belt to the Texas Pacific was by the *Texas Pacific redelivered to the Cotton [668 Belt by means of the connecting tracks between the two roads, because when a car was so redelivered it was not carried by the Texas Pacific over its main track to the junction where the car inspector was presumed to discharge his duties. In case of cars delivered as above stated, and which were not therefore

inspected by the Texas Pacific, there was proof giving rise to the inference that that company, in view of the fact that the cars were not intended to go out over its line, relied on the inspection which it presumed had been made by the Cotton Belt. The tendency of the proof on the foregoing subject was not, however, entirely concordant, as there was some proof tending to show that the duties of the car inspector of the Texas Pacific extended not only to the inspection of cars at the junction, but also to the inspection of cars received within that point under conditions similar to those under which the oil tank cars were received.

There are six assignments of error, the first of which may be at once dismissed from view as it simply avers that the court of appeals erred in affirming the judgment of the trial court, without any specification of any particular error committed. The remaining five we will consider in their logical sequence, rather than in the order in which they are pressed in the brief of counsel. The consideration of the fourth and fifth assignments involves substantially the same legal contention. The fourth rests upon the refusal of the trial judge to give the following instruction:

"The duty to inspect cars coming from other roads applies only when the car is to be sent out on the receiving road, and does not apply when cars are switched from one road to be loaded and returned to the road from which they were received."

The fifth upon a like refusal to give this instruction:

"It is the duty of a railroad company to use ordinary care in keeping the cars which their employees are called on to handle in repair, so as not to expose their employees to unnecessary danger, and this duty exists to use ordinary care to inspect cars that come from other roads to be hauled over
669] *their own roads. What is ordinary care is always measured by the facts and circumstances of the particular case, and ordinary care means more care in one case than in another. The amount of care and caution to inspect cars coming from other roads to be merely loaded and returned to the other road is not so great as when the car is to be sent out of the road of the defendant, because, in the first place, the car is to be handled only by switchmen, who have a much better opportunity to observe any defect and protect themselves than the trainmen do when a car is placed in a train and sent out on the road. Now, if the defendant used ordinary care to discover and repair defects in the car in question under the circumstances in this case, then defendant is not liable."

That it was the duty of the railroad company to use reasonable care to see that the cars employed on its road were in good order and fit for the purposes for which they were intended, and that its employees had a right to reply, upon this being the case, is too well settled to require anything but mere statement. That this duty of a railroad as regards the cars owned by it exists also as to cars of other railroads received by it, sometimes designated as foreign cars, is also settled. Baltimore and Potomac Railroad Co. v. Mackey, 157 U. S. 87 [39:630]. Said the court in that case (p. 91 [39:631]): "Sound reason and public policy concur in sustaining the principle that a railroad company is under a legal duty not to expose its employees to dangers arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted into its train." This general duty of reasonable care as to the safety of its appliances resting on the railroad, the instructions in question proposed to limit by confining its performance solely to such foreign cars as are received by a railroad "for the purpose of being hauled over its own road." In other words, the proposition is that where a car is received by a railroad only for the purpose of being locally handled, the railway as to such local business is dispensed from all duty of looking after the condition of the cars by it used, and may with complete legal impunity submit its employees to the risk arising from its neglect of duty. To *this length the proposition plainly [670 goes as is shown by its context, and is additionally illustrated by the argument at bar.

The argument wants foundation in reason and is unsupported by any authority. In reason, because as the duty of the company to use reasonable diligence to furnish safe appliances is ever present and applies to its entire business, it is beyond reason to attempt by a purely arbitrary distinction to take a particular part of the business of the company out of the operation of the general rule, and thereby to exempt it, as to the business so separated, from any obligation to observe reasonable precautions to furnish appliances which are in good condition. Indeed, the argument by which the proposition is supported is self-destructive, since it admits the general duty of the employer just stated, and affords no reason whatever for the distinction by which it is sought to take the case in hand out of its operation. The contention is without support of authority, since the cases cited to sustain it are directly to the contrary. They are: Baltimore & Potomac Railroad Co. v. Mackey, supra, and two New York cases, Gottlieb v. New York, L. E. & W. R. R. Co. 100 N. Y. 462; Goodrich v. New York Central & H. R. R. Co. 116 N. Y. 398 [5 L. R. A. 750], both of which were cited approvingly in the Mackey Case. The theory upon which in the argument at bar it is claimed that the cases cited overthrow the very doctrine which, in truth, they announce, is based upon the use of the words in the Mackey Case, "admitted into its train." Taking this as a premise, it is said the duty of a railroad to exercise reasonable diligence to furnish safe appliances exists only as to cars "admitted into its train," that is, cars which it receives and transports in one of its trains, and does not obtain as to cars which it receives and handles in its yards for local purposes only. It is obvious from a mere casual reading of both the Mackey Case and

the New York cases relied upon that the duty on the part of the railroad which they inculcate applies to all cars used by the road in its business. In addition, the case of Flanagan v. Chicago and N. W. Railroad Co. 45 Wis. 671] 103, is cited. But that case *gives no support whatever to the proposition. There a car which had been broken and damaged was put upon a spur track. To repair it, it became necessary to move it, and with the knowledge that the car was broken employees of the road took charge of it to remove it to the repair shop. The ruling was that under such circumstances the employee could not recover because of the defective condition of the car, and the case therefore but illustrates the general rule already referred to.

The second and third requests to charge were as follows:

"If you believe that the defendant company had car inspectors at Shreveport, but that it was not their duty under their employment to inspect cars that came from other roads onto defendant's tracks merely for the purpose of being loaded and returned, and if the cars that plaintiff was uncoupling when he was injured had been brought from the Cotton Belt road to be loaded with oil and returned to said road, and if the plaintiff knew, or by the exercise of ordinary care could have known, that it was the custom of the defendant company not to inspect cars that were brought in, as they were to be returned then the plaintiff would be held to assume the risk of being injured by reason of defects in said cars, and in such case he cannot recover.

"It appears in this case that plaintiff was injured while coupling two cars that did not belong to defendant company, but had been brought from the Cotton Belt road to be loaded and returned to that road. Now, if you believe it was the custom of defendant company not to inspect or repair cars when thus brought over to be loaded and returned, and the plaintiff knew this custom or could have known it by the exercise of ordinary care, then he assumed the risk of being injured by any defect in said car, and cannot recover."

These requests the court gave, except in the first it omitted the words therein italicized, that is, "by the exercise of ordinary care could have known," and the second, "or could have known it by the exercise of ordinary care." The court was clearly right in striking the words from the requests. The elementary rule is that it is the duty of the em-672] ployer to furnish *applicances free from defects discoverable by the exercise of ordinary care, and that the employee has a right to rely upon this duty being performed, and that whilst, in entering the employment, he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employee with respect to appliances furnished. An exception to this general rule is well established, which holds that where an employee receives for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used. But no reason can be found for, and no authority exists supporting, the contention that an employee, either from his knowledge of the employer's methods of business or from a failure to use ordinary care to ascertain such methods, subjects himself to the risks of appliances being furnished, which contain defects that might have been discovered by reasonable inspection. The employer, on the one hand, may rely on the fact that his employee assumes the risks usually incident to the employment. The employee, on the other, has the right to rest on the assumption that appliances furnished are free from defects discoverable by proper inspection, and is not submitted to the danger of using appliances containing such defects because of his knowledge of the general methods adopted by the employer in carrying on his business, or because by ordinary care he might have known of the methods, and inferred therefrom that danger of unsafe appliances might arise. The employee is not compelled to pass judgment on the employer's methods of business or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe and to deal with those furnished relying on this fact, subject, of course, to the exception which we have already stated, by which where an appliance is furnished an employee, in which there exists a defect known to him or plainly observable by him, he cannot recover for an injury caused by such defective appliance, if, with the knowledge above stated, he negligently continues *to use it. In [673 assuming the risks of the particular service in which he engages the employee may legally assume that the employer, by whatever rule he elects to conduct his business, will fulfil his legal duty by making reasonable efforts to furnish appliances reasonably safe for the purposes for which they are intended; and whilst this does not justify an employee in using an appliance which he knows to be defective, or relieve him from observing patent defects therein, it obviously does not compel him to know or investigate the employer's modes of business, under the penalty, if he does not do so, of taking the risk of the employer's fault in furnishing him unsafe appliances. In Davidson v. Cornell, 132 N. Y. 228, the court said:

"It is, as a general rule, true that a servant entering into employment which is hazardous assumes the usual risks of the service, and those which are apparent to ordinary observation, and when he accepts or continues in the service with knowledge of the character of structures from which injury may be apprehended, he also assumes the hazards incident to the situation. Gibson v. Erie Railway Co. 63 N. Y. 449 [20 Am. Rep. 552]; De Forest v. Jewett, 88 N. Y. 264; Sweeney v. Berlin & J. Envelope Co. 101 N. Y. 520, 5 N. E. 358 [54 Am. Rep. 722]; Hickey v. Taaffe,

105 N. Y. 26, 12 N. E. 286; Williams v. Delaware, L. & W. Railroad Co. 116 N. Y. 628, 22 N. E. 1117. Those not obvious assumed by the employee are such perils as exist after the master has used due care and precaution to guard the former against danger. And the defective condition of structures and appliances which, by the exercise of reasonable care of the master, may be obviated, and from the consequences of which he is relieved from responsibility to the servant by reason of the latter's knowledge of the situation, is such as is apparent to his observation. Kain v. Smith, 89 N. Y. 375; McGovern v. Central Vermont Railroad Co. 123 N. Y. 280, 25 N. E. 375."

In Missouri Pac. Ry. Co. v. Lehmberg, 75 Tex. 67, the court considered a refusal to give a requested instruction, that if there were "any patent defects in the engine or tank, and deceased knew, or might by ordinary diligence have known, of same, and said defects 674] caused or contributed to the *injuries complained of, the jury should find for defendants." The court said:

"Without now considering the question whether the rule in this respect charges an employee with knowledge of defects, except with regard to such appliances or instruments as he is engaged himself in using, we think it sufficient to say that the law does not, under any circumstances, exact of him the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation. Beyond that he has the right to presume, without inquiry or investigation, that his employer has discharged his duty of furnishing him with safe and proper instruments and appliances."

Indeed, the ultimate result of the argument of the plaintiff in error is to entirely absolve the employer from the duty of endeavoring to supply safe appliances, since it subjects an employee to all risks arising from unsafe ones, if the business be carried on by the employer without reasonable care, and the employee knew or by diligence could have known, not of the dangers incident to the business, but of the harm possibly to result from the employer's neglectful methods. Measured by the principles just stated the trial court not only did not err in striking out parts of the instructions which were asked, but in the portions given stated the law to the jury more favorably to the plaintiff in error than was sanctioned by true legal principles. The remaining assignment, the sixth, but presents, in a changed form, the questions which we have disposed of.

Affirmed.

Mr. Justice Brewer dissenting.

KINGMAN & COMPANY, Petitioner, [675
v.
WESTERN MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 675–681.)

Certiorari, when proper remedy—time for taking appeal or writ of error.

1. Certiorari is the proper remedy to review a decision of the circuit court of appeals dismissing for want of jurisdiction a case within the class of cases in which the judgment of that court is made final.

2. A judgment is not final so that the jurisdiction of the appellate court may be invoked or the time for taking an appeal or writ of error will begin to run, while it is still under the control of the trial court through the pendency of a motion for a new trial.

[No. 248.]

Submitted May 4, 1898. Decided May 23, 1898.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment of that court dismissing the appeal from a judgment of the Circuit Court of the United States for the District of Nebraska in favor of the Western Manufacturing Company, plaintiff, against Kingman & Company for the sum of $1,996.66. Judgment of Circuit Court of Appeals reversed, and cause remanded for further proceedings.

Statement by Mr. Chief Justice **Fuller:**

The Western Manufacturing Company, a corporation of the state of Nebraska, brought its action against Kingman & Company, a corporation of the state of Illinois, in the circuit court of the United States for the district of Nebraska, seeking a recovery of various amounts on four causes of action, and demanding judgment in the aggregate for the sum of $18,990. Such proceedings were had that the cause duly came on for trial before a jury at the May term, 1895, of said court, which resulted in a verdict on June 4, 1895, one of the days of that term, against Kingman & Company for the sum of $1,996.66. On the coming in of the verdict, the court, according to the practice in that jurisdiction, at once rendered judgment on the verdict. On June 6, 1895, it being still the May term, Kingman & Company filed its motion to vacate and set aside the judgment and for a new trial of the cause, for various reasons therein stated. The motion was heard, and on December 11, 1895, being one of the days of the November term, 1895, of the court, was overruled by an order entered that day in the following terms: "This cause having been heard on the motion

NOTE.—*As to what is final decree, or judgment of state or other court from which appeal lies,* see note to Gibbons v. Ogden, 5: 302.

As to certiorari in United States courts, see note to Clark v. Hackett, 17: 69.

As to use of writ; to review on habeas corpus,—see note to State, Matranga, v. Marr (La.) 10 L. R. A. 248.

of the defendant to set aside the judgment and the verdict and for a new trial herein, was argued and submitted to the court by the attorneys for the respective parties; whereupon, after careful consideration thereof and being fully advised in the premises, it is now on this day considered, ordered, and adjudged by the court that said motion be, and the 676] same is hereby, overruled, and *that the judgment heretofore entered herein be and remain absolute."

On the next day, December 12, one of the days of the November term, an order was entered giving Kingman & Company thirty days from that date "in which to prepare and present its bill of exceptions herein."

The bill of exceptions was duly served on the attorneys for the Western Manufacturing Company, and was by them indorsed: "Dec. 30, 1895. Returned without amendment;" was presented to the trial judge for his signature, and was by him duly allowed, signed, and filed January 11, 1896. The petition of Kingman & Company for writ of error and an assignment of errors were filed, the writ of error duly allowed and issued, bond approved and filed, and citation signed, all on January 20, 1896. The citation was served January 21 and returned, and filed January 22. The record was filed in the circuit court of appeals for the eighth circuit March 14, 1896, and was printed. On the first day of May, 1896, the Western Manufacturing Company filed its motion in the circuit court of appeals to dismiss the appeal because the court had no jurisdiction of the cause; and because more than six months had intervened between the date of the rendition of the judgment in the action and the date of allowing and taking out the writ of error; of the filing of the petition for the writ of error; of the filing of the assignment of errors; of the filing of the bond; and of the service of the citation. This motion was sustained and the writ of error dismissed, with costs, for want of jurisdiction. A petition for rehearing was denied and thereafterward a writ of certiorari was issued removing the cause to this court.

Mr. **James H. McIntosh** for petitioner.
Mr. **Walter J. Lamb** for respondent.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

677] *In Aztec Mining Company v. Ripley, 151 U. S. 79 [38: 80] it was held that this court had jurisdiction by appeal or writ of error to pass upon the jurisdiction of the circuit courts of appeals in cases involving the question whether their judgments were made final by § 6 of the act of March 3, 1891 (26 Stat. at L. 826, chap. 517). The present case was one of the classes of cases in which the judgments of the circuit courts of appeals were made final, and therefore the remedy was properly sought by certiorari.

By § 11 of that act it is provided that "no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed."

By § 6 the circuit courts of appeals are empowered to review final decisions of the district and circuit courts, except where cases are carried, under § 5, directly to this court, but by the 7th section, as amended by the act of February 19, 1895 (28 Stat. at L. 666, chap. 96), jurisdiction is given to the courts of appeals from appeals from interlocutory orders in injunction proceedings. Kirwan v. Murphy, 170 U. S. 205 [ante, 1009].

This provision is an exception to the general rule, and while the language of § 11 refers to the entry of the order, judgment, or decree, yet the meaning must be confined to final orders, judgments, or decrees.

The question is, then, whether the judgment of which Kingman & Company complained became final for the purposes of a writ of error six months before the writ was sued out.

By § 726 of the Revised Statutes, the courts of the United States are empowered to grant new trials "for reasons for which new trials have usually been granted in the courts of law;" and by § 987 provision is made where judgment had been entered on a verdict, or a finding of the court on the facts, for stay of execution for forty-two days, on motion for time to file a petition for a new trial, and if such petition should be filed by leave within that time, execution *was further 678] stayed as of course; and "if a new trial be granted, the former judgment shall be thereby rendered void." These sections were brought forward from §§ 17 and 18 of the original judiciary act of September 24, 1789 [1 Stat. at L. 73, chap. 20], and the latter section is supplementary and additional to the other.

At common law motions for a new trial were made before judgment, but under the statutes of many of the states judgment is entered at once on the return of the verdict, and the motion for new trial made afterwards.

By § 5889 of the Compiled Statutes of Nebraska applications for new trial must be made at the term when the verdict is rendered (except on the ground of newly discovered evidence), and within three days after verdict unless unavoidably prevented.

The motion for new trial in this case was filed within three days after the return of the verdict, and seasonably within the rule of the state statute, or the common-law rule, and, it is said, within the rule enforced by the United States courts in that district. No leave to file it was required, and as it was entertained by the court, argued by counsel without objection, and passed upon, it must be presumed that it was regularly and properly made. This being so, the case falls within the rule that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes

of the writ of error or appeal. Aspen Mining & S. Company v. Billings, 150 U. S. 31 [37:986]; Voorhees v. John T. Noye Manufacturing Company, 151 U. S. 135 [38:101]; Brockett v. Brockett, 43 U. S. 2 How. 238, 239 [11:251]; Texas and Pacific Railway Company v. Murphy, 111 U. S. 488 [28:492]; Memphis v. Brown, 94 U. S. 715 [24:244]; Northern Pacific Railroad Company v. Holmes, 155 U. S. 137 [39:99]. In Memphis v. Brown the judgment was in mandamus, and a motion had been made to set it aside, which was denied and thereupon the judgment was re-entered. The question here arose on a motion to vacate the supersedeas because the writ of error was not seasonably 679] sued out within § 1007,*Rev. Stat., sixty days having elapsed since the judgment was originally entered, and Mr. Chief Justice Waite, delivering the opinion of the court, said: "Under the ruling in Brockett v. Brockett, 43 U. S. 2 How. 241 [11: 252], the motion made during the term to set aside the judgment of March 2 suspended the operation of that judgment so that it did not take final effect for the purposes of a writ of error until May 20, when the motion was disposed of. In addition to this, the form of the entry of May 20 is equivalent to setting aside the judgment of March 2, and entering it anew as of that date. This the court had the right to do during the term, and for the very purpose of giving it effect for a supersedeas." No reference was made to any distinction between a motion for a rehearing in a suit in equity and a motion for a new trial in an action at law. Indeed, § 1012 of the Revised Statutes provides that appeals "shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error," and if the limitation on taking an appeal does not begin to run until after the denial of a pending petition for rehearing in an equity suit, it would seem to follow that this must be so as to bringing a writ of error after the overruling of a motion for a new trial.

The subject was much considered by Judge McCrary in Rutherford v. Penn Mutual Life Insurance Company, 1 McCrary, 120, where he held that "a writ of error will operate as a supersedeas . . . if duly served 'within sixty days, Sundays excluded,' after a motion for a new trial has been overruled," and by Judge Sabin in Brown v. Evans, 18 Fed. Rep. 56, where the same conclusion was reached, and it was held that where a motion for a new trial had been made and entertained, the judgment in the case did not become final and effectual for purposes of review until the date of the order of court overruling such motion. And see Alexander v. United States, 15 U. S. App. 158, 169; Scott's Administrator v. Stockton, 41 U. S. App. 579; Andrews v. Thum, 33 U. S. App. 430.

"A judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error," said Chief Justice *Waite in Bostwick v. Brinkerhoff,[680 106 U. S. 3 [27: 73],"must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here the court below would have nothing to do but to execute the judgment or decree it had already rendered."

And in McLish v. Roff, 141 U. S. 661, 665 [35:893,894], it was observed by Mr. Justice Lamar: "From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error (with the single exception of a provision in the act of 1875 in relation to cases of removal, which was repealed by the act of 1887), have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal."

The circuit courts of appeals are governed by the same principles.

Unquestionably it is the general rule that after the expiration of the term all final judgments, decrees or other final orders of the court thereat rendered and entered of record, pass beyond its control unless steps be taken during that term by motion or otherwise, to set aside, modify or correct them. Hickman v. Fort Scott, 141 U. S. 415 [35:775]. But this motion for new trial was filed in due course and in apt time during the term at which the verdict was returned and judgment rendered, and this being so, the case came within the exception.

It is true that a writ of error does not lie from this court or the courts of appeals to review an order denying a motion for a new trial, nor can error be assigned on such an order because the disposition of the motion is discretionary; but the court below while such a motion is pending has not lost its jurisdiction over the case, and having power to grant the motion, the judgment is not final for the purpose of taking out the writ. The effect of a judgment, entered at once on the return of the verdict, in other respects is not open for consideration. The question before us is merely whether a judgment is final so that the jurisdiction of the appellate court may be invoked while it is still under the control of the trial court through the pendency of a motion for new trial. We *do [681 not think it is, and are of opinion that the limitation did not commence to run in this case until the motion for a new trial was overruled.

The judgment of the Circuit Court of Appeals is reversed, and the cause remanded for further proceedings.

UNITED STATES, Appt.,
v.
EARL B. COE.

(See S. C. Reporter's ed. 681-702.)

Power of state of Sonora to grant Mexican lands —junta de almoneda—state in rebellion—approval of governor of Sonora.

1. The state of Sonora had no power in 1838 to make a grant of Mexican lands. The power of Sonora as a state was extinguished prior to 1838 by the Constitution and laws of Mexico.
2. The junta de almoneda could not dispose of public lands in the state of Sonora, without complying with the regulations of July 20, 1831, as to publishing and posting notices of sale.
3. A state in rebellion against the nation cannot act for it and convey its title.
4. The approval by the governor of Sonora of a sale of public land does not constitute an approval by the national government of Mexico.

[No. 8.]

Argued January 11, 12, 1897. Ordered for reargument March 22, 1897. Reargued March 14, 15, 1898. Decided May 23, 1898.

APPEAL from a decree of the Court of Private Land Claims in favor of Earl B. Coe against the United States confirming his title to certain lands in the former state of Sonora under a Mexican grant. Reversed, and cause remanded for further proceedings.

Statement by Mr. Justice **McKenna**:

This suit was originally instituted February 2, 1892, by the Algodones Land Company, under provisions of an act entitled "An Act to Establish a Court of Private Land Claims and to Provide for the Settlement of Private Land Claims in certain States and Territories," approved March 3, 1891.

Pending the litigation, the Algodones Land Company conveyed the property to Earl B. Coe, and upon motion the action was revived in his name.

The basis of the claim is an alleged grant, which shows: That one Fernando Rodriguez, on January 4, 1838, at Hermosillo, presented a petition to the treasurer general of the state of Sonora, Mexico, stating that he had sufficient means to settle and cultivate a tract of vacant desert land, on the northern frontier of the state, situated between the Colorado and Gila rivers, said lands including the tract from the southern side of the Gila river, in front of the junction of the same with the Colorado river, as far as the cross-**682**] ing (paso) of the Algodones, *and from said point following the eastern margin of the Colorado river as far as the junction of the same with the Gila, a distance of 5 leagues.

"Wherefore, in the name of the sovereign authority of the state," he formally registered the same and asked that a person be appointed to make the measurements and valuation and the necessary publications, "as required by law."

He also offered at the proper time to furnish satisfactory evidence as to his ability to pay the just taxes (derecho) into the public treasury—

"It being understood, senor treasurer, that the registry that I now make is under the condition that the settlement and occupation of the said vacant lands by me shall be when the notorious condition and circumstances of the region of the country in which said lands are situated may permit the same to be done; since the said vacant lands are situated in a country desert and uninhabitable on account of the hostility of savages; it being well known that a settlement made by the Spanish government in the desert country Colorado was entirely destroyed in a short time by the Yuma Indians and other savages, etc."

Thereupon a commissioner was appointed by the treasurer general, who was directed to ascertain whether the grant would conflict with the rights of any other parties; also to survey and appraise the lands and offer the same for sale under the provisions of certain designated laws of the state.

This commissioner, in the performance of the duties assigned him, caused the land to be appraised and surveyed, and thereafter offered the same for sale at public outcry on each day for thirty consecutive days.

In his petition Rodriguez offered to pay for the land the amount at which it should be appraised, and no other person having bid at any of the public offers, the record of the proceedings was returned to the treasurer general for final action. That officer thereupon referred the matter to the promoter fiscal of the public treasury, who, upon a review of the proceedings, declared that Rodriguez ought to be admitted to a composition with the treasury of the state for said lands, and *recommended that three public offers [**683** be made, closing his report with the following language:

"This is the report of the undersigned fiscal. Your honor (the treasurer general) will do what is proper in the premises."

The treasurer general thereupon ordered that three public offers of sale be made of said lands in the manner established by law. The "junta de almoneda," or board of sale, thereupon proceeded to make three public offers of sale on consecutive days, and on the third offer declared Rodriguez to be the purchaser.

Thereafter the treasurer general executed a formal instrument in writing, in which, after referring to the proceedings thereto had, he recites as follows:

"Wherefore in the exercise of the faculties conceded to me by the laws, decrees, and regulations and the superior existing orders in

NOTE—*As to Missouri private land claims*, see note to Les Bois v. Bramell, 11: 1051.

As to pre-emption rights, see note to United States v. Fitzgerald, 10: 785.

That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands; how construed,—see note to Watts v. Lindsey, 5: 423.

relation to lands, by these presents, and in the name of the free, independent sovereign state of Sonora, as well as that of the august Mexican nation, I concede and confer upon, in due form of law, the Senor Don Fernando Rodriguez, . . .

"The five square leagues, and adjudicate the same to him under the conditions which have been admitted as equitable and just by interested party, the Senor Don Fernando Rodriguez, that is, that he shall settle and cultivate said lands as soon as the circumstances surrounding that distant and desert portion of the state may permit him to do so, in view of the imminent risk and danger there is on account of the savages, but when the said lands shall once be settled and cultivated, they shall be kept in condition, and that they shall not be unoccupied and abandoned for any time; and if the same shall be abandoned for the space of three consecutive years, and anyone else denounce said lands, in that event, after the necessary proceedings, they shall be adjudicated anew to the highest bidder; excepting as is just, those years in which the abandonment was occasioned by the invasion of the enemies, and this only for the time that this condition of things exists," etc.

The "junta de almoneda," or board of sale, 684] consisted of *certain officers, among whom was the treasurer general. The powers of the board with reference to the sale of public lands were conferred and defined by the laws of the central Mexican government.

Messrs. **Matthew G. Reynolds,** special assistant to the Attorney General, and *Holmes Conrad,* Solicitor General, for appellant on both arguments:

Under the Spanish and Mexican systems of land tenure possession was necessary to an investure of title, so as to transfer any vested rights to the grantee against the King or government.

De Vilemont v. *United States*, 13 How. 261 (14: 138); *United States* v. *Boisdore*, 11 How. 63 (13: 605).

The grant in this case was not recorded as required by the 6th article of the treaty.

The indorsement on the grant in this case is untrue.

United States v. *Vallejo*, 1 Black, 549 (17:-233); *United States* v. *Osio*, 23 How. 273 (16:-457); *United States* v. *Teschmaker*, 22 How. 392 (16: 353); *United States* v. *Cambuston*, 20 How. 59 (15: 828).

The states of the Mexican Republic were not at any time owners of the vacant public lands within their boundaries and never possessed the unrestricted right of disposition of the same.

Vattel & Polson, International Law, 155, 164; *Texas* v. *Thorn*, 3 Tex. 499; *United States* v. *Hartnell*, 22 How. 288 (16: 341); Orozco, Legislation and Jurisprudence on Public Lands, 192.

It is not contended that any possession; either judicial or otherwise, was delivered to the original grantee or any one for him, prior to the treaty.

Graham v. *United States*, 4 Wall. 259 (18: 333).

The laws upon which disposition of the public lands might be executed are as follows:

National Colonization Law (Iturbide), January 4, 1823 (Reynolds, Spanish & Mexican Law, 100); Law of August 18, 1824 (Reynolds, Spanish & Mexican Law, 121); Law of January 26, 1831 (Reynolds, 151); Law of July 20, 1831 (Reynolds, 157); Law of April 25, 1835 (Reynolds, Spanish & Mexican Law, 193); Law of April 4, 1837 (Reynolds, Spanish & Mexican Law, 222); Law of April 17, 1837 (Reynolds, Spanish & Mexican Law, 224).

The grant cannot be sustained as a national or state grant.

United States v. *Hartnell*, 22 How. 288 (16: 341); *United States* v. *Cambuston*, 20 How. 59 (15: 828).

Messrs. **A. M. Stevenson** and **John F. Shafroth** for appellee on first argument:

Messrs. **A. M. Stevenson,** *S. L. Carpenter,* and *Frederick Hall,* for appellee on second argument:

It is not the duty of counsel representing the government to urge microscopic objections against an honest claimant, and urge the forfeiture of his property for some oversight of the commissioners in not requiring proof according to the strict rule of the common law.

United States v. *Johnson*, 1 Wall. 328 (17:-598).

The United States have never sought by their legislation to evade the obligation devolved upon them by the treaty of Gaudalupe Hidalgo to protect the rights of property of the inhabitants of the ceded territory, or discharge it in a narrow and illiberal manner.

United States v. *Auguisola*, 1 Wall. 358 (17:-616); *Strother* v. *Lucas*, 12 Pet. 447 (9: 1151).

Sonora owned her public lands, and had a right to dispose of them as directed by her legislature.

She asserted this ownership in her Constitution and legislation.

Constitution of Sonora and Sinaloa, 1825, art. 293, § 16. Laws of Sonora and Sinaloa, May 20, 1825 (Reynolds, Spanish & Mexican Laws, 129); Laws of Sonora, July 11, 1834 (Id. 186); White, Land Laws in California, & Texas, 375; *Chambers* v. *Fisk*, 22 Tex. 527; *Fletcher* v. *Peck*, 6 Cranch, 142 (3: 179).

To such lands as belonged to the respective colonial governments, the respective states which succeeded to the different colonies became entitled and acquired the power to dispose of them as they might provide by local laws.

3 Washb. Real. Prop. 164, 165; *Johnson* v. *M'Intosh*, 8 Wheat 543 (5: 681); *Martin* v. *Waddell*, 16 Pet. 367 (10: 997); *Worcester* v. *Georgia*, 6 Pet. 544 (8: 495); *Terrett* v. *Taylor*, 9 Cranch. 50 (3: 653); *United States* v. *Kagama*, 118 U. S. 375 (30: 228).

What is implied in a statute is as much a part of it as what is expressed.

Wilson County v. *Third Nat. Bank*, 103 U. S. 770 (26: 488); *Gelpcke* v. *Dubuque*, 1 Wall. 222 (17: 520); *Ex parte Yarbrough*, 110 U. S. 651 (28: 274); *Rhode Island* v. *Massachusetts*, 12 Pet. 657 (9: 1233).

The statute books of Mexico abound in acts offering every inducement to Mexican families to settle on the frontiers.

Arguelo v. *United States*, 18 How. 539 (15:478); *Chambers* v. *Fisk*, 22 Tex. 504.

The consent of the Federal executive of Mexico to the grant of a native Mexican of land within the border or littoral leagues was never necessary.

Wilcox v. *Chambers*, 26 Tex. 183; *Texas* v. *Thorn*, 3 Tex. 507; *Clinton* v. *Englebrecht*, 13 Wall. 434 (20: 659); *Elmendorf* v. *Taylor*, 10 Wheat. 152 (6: 289).

When there are no published reports of judicial decisions which show the received construction of the statute, and the powers exercised under it by the tribunals or officers of the government, it is often necessary to seek information from other authentic sources.

Fremont v. *United States*, 17 How. 542 (15: 241); *United States* v. *Arredondo*, 6 Pet. 714 (8: 556); Rogers, Expert Testimony, 217; *State* v. *Cuellar*, 47 Tex. 304.

The Spanish officers who usually acted as governors of the distant provinces of California were not restricted in their powers and could make grants of land.

The archives of the Mexican government show that such power has been exercised by the governors under Spain, and continued to be so exercised under Mexico.

United States v. *Peralta*, 19 How. 343, 347 (15: 678, 680); *Texas* v. *Thorn*, 3 Tex. 499, 509.

The states and departments were regarded as political and public corporations for the purpose of government and the management of public affairs.

North Hempstead v. *Hempstead*, 2 Wend. 135; *People, Atty. Gen.*, v. *Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243; *Indiana* v. *Worman*, 6 Hill, 33.

No general terms intended for property, to which they may be fairly applicable and not particularly applied by the legislature, no silent, implied, or constructed repeals ought ever to be understood as to devest a vested right.

Rutherford v. *Greene*, 2 Wheat. 196 (4: 218).

When Rodriguez bought the land in question, Sonora claimed to be acting as a free, independent, and sovereign state under the Constitution of 1824.

She was exercising all the prerogatives of statehood during this period, and was at least a state *de facto*, and as such could grant title to public lands in her possession, and these grants or sales would be good against either the nation or department.

Rhode Island v. *Massachusetts*, 12 Pet. 748, 749 (9: 1270); *Pollard* v. *Kibbe*, 14 Pet. 410 (10: 517); *Texas* v. *White*, 7 Wall. 732, 733 (19: 240).

Appellee acquired whatever title the nation possessed.

Delassus v. *United States*, 9 Pet. 117 (9: 71); *Strother* v. *Lucas*, 12 Pet. 410 (9: 1137); *Chouteau* v. *United States*, 9 Pet. 137 (9: 78); *Hornsby* v. *United States*, 10 Wall. 224 (19: 900); *United States* v. *Reading*, 18 How. 4 (15: 293); *United States* v. *Vaca*, 18 How. 556 (15: 485); *United States* v. *Larkin*, 18 How. 558 (15: 486); *United States* v. *Cervantes*, 18 How. 553 (15: 484); *United States* v. *Johnson*, 1 Wall. 329 (17: 599); *Gonzales* v. *Ross*, 120 U. S. 619 (30: 806).

The commissioner was a public officer, having a public duty to perform, and, in the absence of evidence to the contrary, the presumption would be that he acted in accordance with the law as known at the time.

Gonzales v. *Ross*, 120 U. S. 605 (30: 801); *Houston* v. *Robertson*, 2 Tex. 1; *Davis* v. *Police Jury*, 9 How. 279 (13: 138).

This government did not claim anything by virtue of the Santa Anna decrees, otherwise they would have been made party of the treaty.

Strother v. *Lucas*, 12 Pet. 446 (9: 1151); *Haver* v. *Yaker*, 9 Wall. 32 (19; 571); *United States* v. *Yorba*, 1 Wall. 412 (17: 635); *Voorhees* v. *Jackson Bank of U. S.* 10 Pet. 449 (9: 490).

A legislative act contrary to the great first principles of the social compact is invalid.

Calder v. *Bull*, 3 Dall. 386 (1: 648).

When two or more parties claim the same property, the declaration of neither party is decisive of the right of property.

United States v. *Texas*, 143 U. S. 621 (36: 285).

A condition precedent is one that must take effect before the estate can vest.

2 Devlin, Deeds, § 964.

All favorable presumptions will be made against the forfeiture of a grant.

Gonzales v. *Ross*, 120 U. S. 605 (30: 801).

A condition subsequent left the title of the grantee open to be denounced, but as the claimant was hindered from performing it by the revolutionary state of the country, the nonfulfilment of it would not work forfeiture of his title.

United States v. *Vaca*, 18 How. 556 (15: 485).

The conditions do not declare the land forfeited to the state, upon the failure of the grantee to perform them.

Fremont v. *United States*, 17 How. 542 (15: 241).

The answer of the United States, so far as it relates to the condition annexed to the grant, is evidently upon the theory that this case is within the provisions of the eighth subdivision of § 13 of the act creating the court of private land claims. Such is not the case. The eighth subdivision has no application to such title as the one now presented to the court.

Glenn v. *United States*, 13 How. 250 (14: 133); *United States* v. *Mills*, 12 Pet. 215 (9: 1061); *United States* v. *Kingsley*, 12 Pet. 477 (9: 1163); *United States* v. *Hanson*, 16 Pet. 196 (10:935); *Hancock* v. *McKinney*, 7 Tex. 384; *De Haro* v. *United States*, 5 Wall. 599 (18: 681).

Mr. Justice **McKenna** delivered the opinion of the court:

We shall assume the genuineness of the title papers. It was so found by all the judges of the court below and, notwithstanding some irregularities in them, we are disposed to concur in the finding. The question which remains is, Did the officers who made the grant have the power to do so?

Section 4 of the act establishing the court of private land claims provides that the petition of petitioners "shall set forth fully the nature of their claims to the lands, and particularly state the date and form of the grant, concession, warrant, or order of survey under which they claim, by whom made, . . . and pray in such petition that the validity of such title or claim may be inquired into and decided." [26 Stat. at L. 854, chap. 539.]

In conformity to the act the petition in this case, after alleging ownership of the land, proceeds as follows:

"Your petitioner further represents that it owns, holds, and possesses said land under and by virtue of a certain instrument of writing, now and hereafter designated as a grant title, bearing date the 12th day of April, 1838, duly made and executed by and on behalf of the state of Sonora, in the Republic of Mexico, under and by virtue of article two (2) of the sovereign decree number seventy (70) of the 4th of August, 1824, therein conceding to [685 the state the revenues *(rentas) which by said law are not reserved to the general government, one of which is the vacant land in the respective districts pertaining to the same; and thereunder the honorable constituent congress of Sonora and Sinaloa passed a law, being a law numbered thirty (30) bearing date 20th of May, 1825, and whereunder there was subsequent legislation passing other decrees, considering the same matter, and being embodied in sections 3, 4, 5, 6, and 7 of chapter 90 of the organic law of the treasury, being law numbered twenty-six (26) of the second of July, 1834."

The source of the title is therefore alleged to be in the state of Sonora, and the basis of its authority is explicitly given.

(1) Article two of the sovereign decree number seventy of the 4th of August, 1824.

(2) A law passed by the constituent congress of Sonora and Sinaloa, being number thirty and bearing date 20th of May, 1825.

(3) Other decrees being embodied in §§ 3, 4, 5, 6, and 7 of chapter ninety of the organic law of the treasury, being aw numbered twenty-six of the 2d of July, 1834.

The petition then proceeds to allege, that under and by virtue of said laws and decrees such proceedings were thereunder regularly and lawfully had as that the government of the state of Sonora, by its officers duly authorized by the laws aforesaid, and of said state, duly and regularly and for a good and valuable consideration, to wit, the sum of four hundred dollars ($400), in the lawful money of the state, and for other good and valuable considerations, in said grant title set forth and described, did on the 12th day of April, 1838, sell and convey to one Senor Don Fernando Rodriguez the land hereinbefore mentioned, and more particularly hereinafter described.

The allegation or claim, then, is a grant from the state of Sonora. There is no claim of a grant from the Mexican government. The grant, however, recites that it is done "in the name of the free and independent sovereign state of Sonora as well as of the august Mexican nation."

It is conceded that the ownership of the [686 public lands was in *Spain and passed to Mexico upon its independence, and afterwards vested in the Mexican confederation or Republic.

In Republic of Texas v. Thorn, 3 Tex. 499, Chief Justice Hemphill said:

"That the right of eminent domain over the public lands was originally vested in the Federal government of Mexico is, perhaps, not now subject to question. The confederacy of the Mexican states was not formed, originally, by a constitutional compact between several separate independent states, nor by a grant of powers originally vested in the several provinces, which afterwards constituted the states of the Union. The public lands of the United States of the north, before the acquisition of Louisiana and Florida, belonged originally to the several states, and became Federal property by purchase or voluntary cession from the states. But, in the Mexican union, the general government claimed, originally, the property in the public domain. It is true, that under the former governments the provincial authority had exercised certain powers of control over the public lands, but this was in subordination to the central or supreme authority of the country, whether vested in the crown, or represented by the vice royalty of New Spain, or in the sovereign provisions governing Juntas, in the Emperor Iturbide, or the other authorities which succeeded, before the assemblage of the constituent congress which finally adopted the Federal system and out of the municipal subdivisions of the territory formed the states of the confederation."

If the title was in the Mexican union, how did it get into the states? There was no law explicitly conveying it. It is claimed, as alleged in the petition, by virtue of the sovereign general decree numbered seventy of the 4th of August, 1824, and the recital of the grant is:

"Whereas article 2 of the sovereign general decree No. 70, of the fourth of August, 1824, conceded to the states the revenues (rentas) which by said law are not reserved to the national government, one of which is the vacant land in the respective districts pertaining to the same, in consequence of which the honorable constituent congress of Sonora and Sinalo passed *the law, No. [687 30, of the twentieth of May, 1825, and also subsequent legislations passed other decrees concerning the same matter, which dispositions have been embodied in sections 3, 4, 5, 6, and 7, of chapter 90 of the organic law of the treasury No. 26, of the 11th of July, 1834."

The decree of August 4, 1824, seems to be a revenue measure simply. We quote part of it, including §§ 9 and 11, upon which special stress is laid:

Decree of August 4, 1824.

Classification of general and special revenues.

The sovereign general constituent congress of the United States of Mexico has deemed it proper to decree:

1. That import and export duties already fixed, and those which may be hereafter fixed under any denomination in the ports and on the frontiers of the Republic, pertain to the general revenues of the federation.

2. The import duty of fifteen per cent. which shall be collected at the said ports and frontiers upon the tariff valuation, augmented by one-fourth part upon foreign goods, which, on account of this duty, shall

be free from local tax (alcabala) in the interior.

3. The duty on tobacco and gunpowder.

4. The local tax (alcabala) on tobacco at the places where it is raised.

5. The revenue from the post offices.

6. The revenue from the lottery.

7. The revenue from salt mines.

8. The revenue from the territories of the federation.

9. The national property, in which are included that of the inquisition and the temporalities, and all other rural and urban estates which now belong, or which may hereafter belong, to the public treasury.

10. The edifices, offices, and lands attached to these, which now belong, or which formerly belonged, to the general revenues, and those which have been paid for for two or more of those which formerly were provinces, are subject to the disposal of the Federal government.

688] *11. The revenues which are not included in the foregoing articles belong to the states.

This law was passed between the dates of the constitutive act and the adoption of the Constitution, the latter event taking place in October. It is claimed that nothing is said in the provisions of the decree preceding the eleventh article regarding the public lands, and that hence it is asserted that they are assigned to the states by that article. It is besides contended that the colonization act of August 18, 1824, confers the right on the states to dispose of the vacant lands within their borders. This contention is supported by Goode v. McQueen's Heirs, 3 Tex. 256; Chambers v. Fisk, 22 Tex. 504; Wilcox v. Chambers, 26 Tex. 180.

But if it be true that the state had rights in and powers of disposition of the public lands, these rights and this power could be surrendered, and it is contended by the appellant that they were surrendered by the Constitution of 1836. Preceding this Constitution, October 3, 1835, a law was passed abolishing state legislatures, and establishing departmental councils. (Reynolds, 195.) This law contained the following provision:

"5. All the subordinate employees of the state also shall continue for the present, but the places now vacant or that shall become vacant shall not be filled, and they as well as the offices, revenues, and branches of the service they manage are subject to and at the disposal of the supreme government of the nation, through the proper governor."

On the same day and as part of the same law the president made regulations, articles 10, 12, and 13 of which are as follows:

"10. In everything relating to the department of the treasury the governors and the respective officers shall proceed in accordance with the laws, regulations, and orders of each state, in so far as may be compatible with the new organization of said revenues for the future.

. . . . . .

"12. Said governors, in matters relating to the revenues, shall communicate directly with the supreme government *through [689 the secretary of the treasury, to whom they shall forward all documents and statements and consult when they consider necessary, being careful to cite the laws, orders, and proceedings (expedientes) there may be on the matter.

"13. Until the attributes of the government and departmental boards in what relates to the treasury are declared by law, said governors shall make no sales of land (fincas) or property (bienes), nor contracts nor extraordinary expenses for said department, without the previous approval of the supreme government."

Certainly, as far as this law could effect it, there could be no sales "without the previous approval of the supreme government."

Following this law and these regulations a law was enacted establishing bases for a new Constitution. The provisions which are pertinent to our inquiry are as follows:

"8. The national territory shall be divided into departments on the bases of population, locality, and other contributing circumstances. Their number, extent, and subdivision shall be given in detail in a constitutional law.

"9. For the government of the departments there shall be governors and departmental boards; the latter shall be elected by popular vote in the manner and number the law shall provide, and the former shall be appointed periodically by the supreme executive power, upon nomination by said boards.

"10. The executive power of the departments shall reside in the governors in subordination to the supreme executive of the nation. The departmental board shall be the council of the governor; they shall be charged with determining and promoting whatever conduces to the welfare and prosperity of the departments, and shall have the economic, municipal, electoral, and legislative powers the special law for their organization shall provide, being in the matter of the exercise of the latter class subordinate and responsible to the general congress of the nation.

. . . . . .

"14. A law shall systematize the public exchequer in all *its branches; shall [690 establish the method of accounts; shall organize the tribunal for the revision of accounts and regulate the economic and contentious jurisdiction in this department."

The Constitution of 1836 has no provision in regard to the public lands, nor does it define the duties of the minor administrative officers. As to divisions into departments it enacts as follows:

"Sixth Law.—Divisions of the territory of the Republic and internal government of its towns.

"Art. 1. The Republic shall be divided into departments according to the eighth law of the organic basis. The departments shall be divided into districts, and the districts into partidos.

"Art. 2. The divisions into departments shall be made by the first constitutional congress during the months of April, May and

June of the second year of its sessions; and it shall do so by a law that shall be a constitutional one.

"Art. 3. During the remaining portions of that same year the departmental assemblies shall divide their own departments into districts, and the districts into partidos. They shall report to congress for approval of the same. Until the divisions stated in the two foregoing articles shall be made, the territory of the Republic shall be temporarily divided by a secondary law."

By article 1 of law No. 1807, December 3, 1836, the Mexican territory was divided into as many departments as there were states, with certain modifications which did not affect Sonora. 3 Mexican Statutes, 258. The effect of the Constitution and laws necessarily was the destruction of the states as such. The government then ceased to be Federal in form, and became centralized in character. The power of Sonora as a state, therefore, was extinguished. We have said that the Constitution of 1836 has no provision in regard to the public lands, but the laws passed under it deal with them in such manner as to preclude the further rights of the states as such over them.

On January 17, 1837, a law was passed [691] (Reynolds, 210) *establishing a national bank and creating a fund for redeeming certain currency.

Articles 2 and 3 are as follows:

"2. The government, without loss of time, shall establish and provide regulations for a national bank, with the principal object of redeeming copper coin, the management of which shall be intrusted to persons elected by the different classes of society, in the manner said regulations shall provide, and who shall not be dependent on the government other than to render thereto an annual report of their administration.

"3. There are adjudicated to the bank for a redemption fund:

"First. All the real property of the nation that exists in all the territory of the Republic."

On April 12, 1837, a law was passed (Reynolds, 223) the 7th article of which is as follows:

"Art. 7. For greater security in the payment of the capital and interest of the consolidated fund, the government of Mexico especially mortgages, in the name of the nation, 100,000,000 acres of public lands in the departments of California, Chihuahua, New Mexico, Sonora, and Texas, as a special guaranty of said fund, until the total extinction of the credits; but if any sale of these mortgaged lands should be made, it shall be, at least, at the rate of said four acres to the pound sterling, and the proceeds thereof shall be paid by the purchaser to the agents of the government in London, from whom only he can receive the corresponding warrant, and the latter shall employ the proceeds of the same to pay the bonds of the new consolidated fund, which shall also be received in payment of said lands at the current price of said bonds in the market."

On April 17, 1837, a decree was promulgated (Reynolds, 224) creating the office of superior chief of the treasury, and providing for the manner of making purchases, sales, and contracts on behalf of the nation, articles 1, 2, 4, 37, 73, 76, and 92 of which are as follows:

"Art. 1. Until the general congress establishes the *revenues that are to form [692 the national exchequer of Mexico, the revenues, taxes, and property of which the supreme government is in possession and the revenues, taxes, and property which the departments established or acquired under the Federal system, and which existed at the time of the publication of the decree of October 3, 1835, shall continue.

"2. The revenues, taxes and property which by the law of the 17th of last January were assigned to the national bank are excepted from the provisions of the last article until it fulfils its object.

"4. Superior chiefs of the treasury shall be located in each department with the powers designated in this decree. All the employees of the treasury in their respective districts, in the instances and manner which shall be designated, shall be subordinate to them.

. . . . . .

"37. It is the duty of the departmental treasurers:

"To muster the troops that may be in the capital, to issue to them their vouchers, to make abstracts of the muster and estimates and to discharge, in the department of war, the powers given to the commissaries general and auditors of the treasury by the regulations of July 20, 1831, which for the present remain in force in all that is not opposed to this decree and subsequent laws.

. . . . . .

"73. All the purchases and sales that are offered on account of the treasury and exceed $500 shall be made necessarily by the board of sales, which, in the capital of each department, shall be composed of the superior chief of the treasury, the departmental treasurer, the first alcalde, the attorney general of the treasury and the auditor of the treasury, who shall act as secretary. Its minutes shall be spread on a book which shall be kept for the purpose, and shall be signed by all the members of the board, and a copy thereof shall be transmitted to the superior chief of the treasury for such purposes as may be necessary and to enable him to make a report to the supreme government.

. . . . . .

*"76. The minutes of the board shall [693 be spread on the proper book, which shall be signed by all the members thereof, and an authenticated copy transmitted to the superior chief of the treasury to enable him to make a report to the supreme government when the case requires it.

. . . . . .

"92. The power that by various laws are given to the commissaries general and subcommissaries shall be exercised in future by the superior chiefs of the treasury and their subordinates, in so far as they do not conflict

with this decree, for in that respect all existing laws stands repealed."

The regulations of July 20, 1831, referred to, provide for the organization of the boards of public sales, "junta de almoneda," and its powers. Sections 131, 132, and 133 are as follows:

"Art. 131. But in order to bold such meetings it is necessary that the sales or purchases to be made must be announced to the public at least eight days before, by means of placards to be posted at prominent and conspicuous places, having their contents published also in newspapers baving the largest circulation, if there be any such papers in the place, the commissaries being careful that in said notices both the more essential circumstances and the necessary instructions pertaining to tbe matter be inserted."

Article 132, which prescribes tbe manner in which the sale shall be conducted, which said article is as follows:

"Art. 132. Once that the meeting shall be opened and the corresponding proclamations made by the public crier, bids legally made shall be admitted until the closing day of the sale, when it shall be declared in favor of the highest bidder by a majority of the meeting. This act, together with whatever else took place at the auction sale, will be placed on record in a book kept by the commissaries or subcommissaries for that purpose, all the members signing therein, togetber with the attending witnesses, or with a notary, who (the notary) shall moreover write the other deeds connected with the transaction. In case there be no notary in the place, then a 694] *clerk, brought for the purpose by the commissary general, shall reduce to record the act and decision of the meeting."

Article 133, which is as follows:

"Art. 133. When the term prescribed by law expires the commissaries or subcommissaries shall send the expediente, together with an accompanying report, to the supreme government, without whose approval the sale, purchase, or contract cannot be carried into effect."

If the title to the vacant lands or the right to dispose of them belonged to the state of Sonora, the junta de almonedas had no function to perform in regard to them; in other words, it was a national instrumentality, not a state instrumentality. If, however, the vacant lands became tbe property of the national government by the Constitution of 1836, and could be disposed of by or through the junta de almonedas, the procedure required by the law creating it would have to be followed. This law provided that sales and purchases made by the board (junta) should be published for at least eight days beforehand, and by placards which shall be posted in the most public and frequented places, and shall be inserted in the newspapers of the greatest circulation, if there be any in the place, the notice to contain the more essential circumstances and the necessary instructions pertaining to the matter. These provisions are not shown to have been complied witb, and the record precludes any presumption that they were.

There are other laws of the national government which are inconsistent with the rights of the states after 1836, to dispose of the public lands. That of December 7, 1837, is of that character; also that of September 15, 1837. The law of December 7, 1837, provides as follows:

. . . . . .

"First. To witness or vise, in person in the capitals and by the civil authority in each one of the other places in the department, the monthly and annual cash statements made by tbe several chiefs of the offices of the treasury and to report without delay to the supreme government the omissions and abuses they may observe.

"Second. To preside over the boards of sale and of the treasury, *with power to [695 defer tbe resolutions of these latter until, in the first or second session thereafter, the matter under consideration is more thoroughly examined into."

The law of September 15, 1837, provided for a convention between English bondholders of Mexican bonds and the Mexican government (Reynolds, 227), § 7 of which reads as follows:

"7. For greater security in the payment of the principal and interest of the consolidated fund, the Mexican government, in tbe name of the nation, specifically mortgages 100,000,000 acres of public lands in the departments of the Californias, Chihuahua, New Mexico, Sonora, and Texas, as a special guarantee of said fund until a total extinction of the credits; but if any sale of the mortgaged lands should be made it shall be made at least at the rate of said four acres to the pound sterling, and the proceeds shall be paid by the purchaser to the agents of the government in London, from whom only he can receive the corresponding inscriptions, and they shall use the proceeds of the sale to redeem tbe bonds of the new consolidated fund, which may also be received in payment of said lands at the price said bonds have in the market.

"The Mexican government, besides the general mortgage contained in this article, expressly reserves, by a public decree, 25,000,000 acres of the lands of the government in tbe departments of closest communication with the Atlantic, and which appear most suitable for colonization from the outside. Said lands shall be specially and exclusively set aside for the deferred bonds, in case it is desired to exchange them for lands, and, if the government sell them, the proceeds therefrom shall be devoted to the redemption of said bonds."

On June 1,1839, a law was passed approving the above-named convention (Reynolds, 232) and article 3 of this law is as follows:

"3. With respect to the colonies that may be established by virtue of the convention, tbe government shall see that the existing laws on colonization, or those that may be enacted hereafter, are observed in so far as they are not contrary to the convention itself."

*It is not clear from the brief of [696 appellee that he claims that the state had the power of disposition of the lands under

the colonization laws. The petition does not claim it, nor is the grant in words based upon it. By the law of August 18, 1824, there was reserved to the general congress a power to prohibit colonization "to the individuals of some particular nation." This no doubt was directed to "individuals" from the United States. In pursuance of this power the general congress promulgated a law dated April 25, 1835, article 2 of which was as follows:

"Art. 2. In the exercise of the powers reserved to the general congress in article 7 of said law of August 18, 1824, the frontier and littoral states are prohibited from alienating their vacant lands for colonization until the regulations to be observed in carrying it out are established."

Between the date of the law and the grant in this case no regulations to be observed in carrying out colonization were established. On the contrary, by a law passed April 4, 1837, all colonization laws were certainly modified and may be repealed. The law was as follows:

"The government, in concurrence with the council, shall proceed to make effective the colonization of the lands that are or should be the property of the Republic, by sales, leases, or mortgages, and shall apply the proceeds (which in the first case shall not be less than $1.25 per acre) to the payment of the national debt, already contracted or which shall hereafter be contracted, always reserving enough to meet its obligations to the soldiers who took part in the war of independence, and for the remuneration and gifts congress may grant to the Indian tribes and nations, and those who assisted in the restoration of Texas, and it shall not be compromised by the laws heretofore enacted on colonization, which enactments are all repealed in so far as they conflict with this law, but the prohibition of article 11 of the law of April 6, 1830, shall remain in force."

As has already been stated, the grant recites that it was made "in the name of the free and independent and sovereign state of Sonora as well as that of the august Mexican nation." This, it is contended, authenticates 697] the power of the granting *officer, and Chief Justice Marshall in Delassus v. United States, 34 U. S. 9 Pet. 117 [9: 71] is quoted:

"A grant or a concession made by that officer, who is by law authorized to make it, carries with it prima facie evidence that it is within his power; no excess of them, or departure from them is to be presumed; he violates his duty by such excess, and is responsible for it. He who alleges that an officer intrusted with an important duty has violated his instructions must show it."

So also it was said by this court in Strother v. Lucas, 37 U. S. 12 Pet. 410 [9: 1137] that "where the act [of an officer to pass the title to land according to Spanish law] done is contrary to the written order of the King, produced at the trial, without any explanation, it will be presumed that the power has not been exceeded; that the act was done . . . according to some order known to the King and his officers, though not to his subjects, . . . and courts ought to require very full proof that he had transcended his powers, before they so determine it."

These principles were asserted of Spanish titles in the territories of Louisiana and Florida. They are disputable in their application to titles under the Mexican laws. United States v. Cambuston, 61 U. S. 20 How. 59 [15: 828]. But we need not dispute them, for the proof in this case satisfies their requirement. It is ample to show that the national laws were not pursued, and besides it is conceded that at the time of the grant the state of Sonora was in rebellion against the nation. It and its officers therefore were opponents of the national authority, not its instruments; while declaring independence of it, they could not claim to act for it and convey its title.

The appellee further contends that the national government approved the title of Rodriguez. The laws which have been quoted provide that when the property had been knocked down to the highest bidder a minute or report of the proceedings was required to be made and transmitted to the supreme government, either directly under the regulations of 1831, or first to the supreme chief of the treasury under the act of April 17, 1837, and the sale could not be executed until *the approval of the supreme [698 government. By supreme government was meant the national government, and hence the approval of the governor of Sonora, which the record shows was not sufficient. The certificate of the governor is limited and significant—

Supreme Government of the Free State, D. E. S. O. N. R. A.

This supreme authority approves the title which your honor has issued on yesterday in favor of the Senor Don Fernando Rodriguez, a resident of Hermosillo, for five square leagues of land in front of the confluence of the rivers Gila and Colorado, and the Paso de los Algodones, on the northern frontier of the state. I say this to you in reply to your note of yesterday reiterating the consideration of my regard.

God and liberty.

Arispe, April 13, 1838. Leonardo Escalante.

It is contended, however, that a communication of an officer of the state of Sonora to an officer of the general government made in 1847, and a certificate of the governor of Sonora given two days later, justify the presumption that the sale had been approved by the general government. We give them in full:

To the Treasurer General of the State:

Jose Maria Mendoza, provisional commissary general of the state of Sonora, certifies that on this day he has directed, under a separate cover, and as a special matter, to his excellency the minister of state, by del despacho de hacienda of the Republic, an official communication, of which the following is a copy:

General Commissary Department of the State of Sonora:

Sir: The Senor Don Fernando Rodriguez, a resident of the city of Hermosillo, has presented to me the title which was issued in his favor by the general treasury of the ancient state, on the twelfth of April, 1838, for five square leagues of vacant lands for cultiva-
699] tion, registered *by the said Rodriguez, contiguous to the rivers Gila and Colorado, in front of the confluence of the same, and the point named Paso de los Algodones, of the said river Colorado, in the northern part of this state, and which were for him surveyed, valued, and were sold by the Junta de Almonedas, and were adjudicated in the manner as shown by the (testimonio autorizado) certified copy, which I have the honor to transmit to your excellency to the end that the same may be presented to his excellency the President of the Republic, for which purpose the said Senor Rodriguez has presented the said title to me of the lands situated in front of the confluence of the Gila and Colorado rivers and the Paso de los Algodones of the Colorado.

I have the honor to repeat to your excellency the consideration of my regard.

God and liberty.

Jose Maria Mendoza.

Ures, June 6th, 1847.

To his excellency the minister of state del despacho de hacienda de la Republica Mexico.

In witness whereof I give this at the request of the interested party, Don Fernando Rodriguez, at Ures, the capital of the state of Sonora, on the sixth of June, 1847.

Jose Maria Mendoza.

The licendiado, Jose de Aguilar, governor of the state of Sonora, certifies in due form of law that the present title, which includes five square leagues of land contiguous to the rivers Gila and Colorado, in front of the confluence of the same, and also to the point named El Paso de los Algodones, of the said river Colorado, on the northern frontier of the state, measured and adjudicated in the year 1838 to Don Fernando Rodriguez, a resident and native of Hermosillo, was legally issued by the late Jose Justo Milla, contador of the general treasury of the state, and legally encharged with the said treasurer's office at the
700] date referred to; and that in *virtue of which he was competently authorized to for expedientes of lands, to measure and adjudicate the same and to issue titles therefor; and also that his signature, those of his assistants and the seal stamped on said title are the same that they are accustomed to use in their official acts, and with which they have legalized all their official acts of like nature. Finally he certifies that the approval of the government, which is attached to the title and the certificate of Don Jose Maria Mendoza, are legal, and that their signatures are such as they have used in their official acts, and as such are entitled to all faith and credit, judicially or extrajudicially.

And at the request of the interested party I give this in Guaymas, on the eighth of June, 1847.

Jose de Aguilar.

These do not establish the presumption claimed for them. The letter to the Mexican minister of state is dated nine years subsequent to the sale and grant to Rodriguez. It should have preceded the grant. Had it done so some presumption of approval might then have been dedueed from the grant of the performance of precedent conditions. The approval of the government stated in the eertificate of Governor Jose de Aguilar manifestly refers to the approval of his predecessor, Leonardo Escalante, and not an approval by the general government. There is no other approval "which is attached to the title and the certificate of Don Maria Mendoza."

There was introdueed in evidence an ex parte affidavit alleged to have been made in 1881 before the treasurer general of the state of Sonora by one Matias Moran and one Antonio Corvillo. Who these persons were is not stated. Matias has no identification but his name. Antonio Corrillo is designated "citizen." Of this paper the following testimony was given by Bartolome Rochin, keeper of the archives of the treasury at Hermosillo:

"Q. 41. In whose handwriting is this paper?

"A. It is in the writing of the same Mr. Telles, who was the same treasurer general.

*"Q. 42. When was Mr. Telles treas- [701
urer general?

"A. It is not mentioned the date here, but I have a great many documents that tell (after looking), '77 or '78.

"Q. 43. Has this paper been with the records of the treasurer general's office since you have had charge of the office?

"A. Yes, sir; I took this document from the archives of the treasurer general's office."

The following is as much of the affidavit as we think necessary to quote:

"I, Manuel Diaz, as treasurer general of the state of Sonora, Mexican republie, acting by notary public, appeared Matias Moran and citizen Antonio Corrillo, of this precinct, who do say that, being personally present in the treasury office for the purpose of giving (11) compliance to the foregoing disposition or order of the governor of the state, proceeded to examine, one by one, the signatures of which are contained in the expediente that forms the title to the lands situated between the Colorado and Gila rivers, that in the year 1838 was adjudieated to Don Fernando Rodriguez, in that of 1847 was approved by the supreme government of the nation, as a result of the examination we have made of the original expediente above referred to, the lines with which it is written and the signatures that accompany (?) it, we are able to certify."

This affidavit is very questionable. It was testified to be in the handwriting of a Mr. Telles, who, it was also testified, was treasurer general in 1877 and 1878, and was taken from the archives by the witness who pro-

lueed it. At whose instance it was taken, or for what purpose, does not appear, exeept that it is recited in it that the persons who made it were personally present "for the purpose of giving compliance to the foregoing disposition or order of the governor of the state." What disposition or order is not explained. The language of the paper is very ambiguous. It is not clear whether it is the notary, who, acting for Manuel Diaz, treasurer general, or the deposing witnesses, who recite that the title was in the year 1838 adjudicated to Don Fernando Rodriguez, and in that of 1847 was approved by the supreme government of the nation. But even if by 702] *the latter, it is distinctly not their testimony, but only an assumption preceding it. This testimony comes afterwards, and is confined to the verification of certain signatures.

It follows from these views that the decree of the Court of Private Land Claims should be and it is reversed, and the cause remanded for further proceedings.

Mr. Justice **Gray** concurred in the result.

Mr. Justice **Brewer**, Mr. Justice **Brown**, Mr. Justice **Shiras**, and Mr. Justice **Peckham** dissented.

AMBROSE P. S. STUART, *Appt.*,
v.
KENT K. HAYDEN, Receiver of Capital National Bank of Lincoln, Nebraska, *et al.*, *Appellees.*

AUGUST T. GRUETTER and Charles F. Joers, *Appts.*,
v.
AMBROSE P. S. STUART and Kent K. Hayden, Receiver, *et al.*, *Appellees.*

DECREE of this court in the above entitled suits, which are reported 169 U. S. 1 [*ante*, 639], modified.

[Nos. 151, 160.]

Submitted March 7, 1898. Decided March 14, 1898.

Mr. **G. M. Lambertson**, Solicitor for Kent K. Hayden, receiver, appellee, submitted the following:

Motion for modification of decree and brief.

Comes now Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, and moves the court for a modification of the decree of the court in the above-entitled suits so as to provide:

First. For the affirmance of the decree entered by the circuit court of the United States for the district of Nebraska as to Kent K. Hayden, receiver, and a reversal as to Gruetter & Joers, cross complainants in the court below.

Second. Providing for the allowance of interest on the amount of the stock assessment and on the decree of the circuit court since its rendition.

Notice of this motion has been served upon counsel for appellant and proof of service is filed with the clerk.

G. M. Lambertson,
Solicitor for appellee.

Sir: The supreme court will be moved as aforesaid on Monday, the 7th day of March, 1898, or as soon thereafter as counsel can be heard.

G. M. Lambertson,
Solicitor for appellee.

To C. C. Flansburg, Esq.,
Solicitor for appellant.

Brief in support of motion.

First. This suit was commenced in the circuit court of the United States for the district of Nebraska by Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, against Ambrose P. S. Stuart, to recover $15,000 and interest on a stock assessment made by the comptroller of the currency on 150 shares of stock held by Stuart in the Capital National Bank of Lincoln, Nebraska. On the 23d of April, 1895, a decree was entered in favor of Hayden, receiver, against Stuart for $15,000, together with interest at the rate of 7 per cent from the 10th day of July, 1893, amounting in the aggregate to $16,875.42 (See Record, 220).

Second. A decree was also entered in favor of Gruetter & Joers, cross-complainants, for $20,905 (See Record, 220).

Third. On appeal to the United States circuit court of appeals for the eighth circuit, the case was reversed and remanded to the court below with instructions to enter a decree to the effect that the transfer of 150 shares of stock from Stuart to Gruetter & Joers was fraudulent and voidable as to the receiver, Hayden, that it be held for naught as to him, and that he recover of Stuart the assessment levied thereon with his costs; that appellees Gruetter & Joers are entitled to no relief against Stuart in this suit; that their cross bill be dismissed and that Stuart recover of them his costs (See Record, 237).

Fourth. The decree of the supreme court simply affirms the decree of the circuit court of appeals but fails to allow interest either on the assessment made by the comptroller or on the decree rendered by the circuit court.

Fifth. As the interest on $15,000 at 7 per cent interest from the date the comptroller made the assessment, to wit, July 10, 1893, amounts to over $5,000, it is important to the trust which Mr. Hayden represents to have the mandate of this court direct the circuit court to enter a decree with interest.

Sixth. The effect of the decision of the court of appeals was to reverse the decision of the circuit court as to Gruetter & Joers and affirm it as to Hayden, receiver.

Gaines v. *Rugg*, 148 U. S. 228 (37: 432).

Such being the clear intention of the court, the failure to direct the lower court to enter a decree for the amount of the assessment, with interest and costs, was doubtless an inadvertence. The allowance of interest by the lower court was not assigned as error by counsel, was not discussed in the briefs, nor alluded to by the court. No reason can be assigned why an assessment on bank stock made by the comptroller should not bear interest. If by

fighting a case five years' interest can be avoided, then every stockholder would refuse to pay. To so hold is to give a litigious stockholder, who puts the receiver to delay, cost, and expense, an advantage over a stockholder who pays his contractual and statutory obligation when the same falls due.

In *Casey* v. *Galli*, 94 U. S. 677 (24: 169), where the order was to collect the full amount of the par of the stock, the supreme court say: "The sum to pay being liquidated, and due and payable when the comptroller's order was made, it follows that the amount bears interest from the date of the order. Otherwise there would be no motive to pay promptly, and no equality between those who should pay then and those who should pay at the end of a protracted litigation."

Seventh. In Nebraska it is provided that on "money due and withheld by unreasonable delay of payment, interest shall be allowed at the rate of 7 per cent per annum." See Comp. Stat. 1897, chap. 44, p. 692, § 4.

Section 3, same chapter, provides as follows: "Interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof at the rate of $7 upon each $100 annually until the same shall be paid."

In § 966, Revised Statutes of the United States, it is provided that interest "shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such state." See Rule 23 of Supreme Court.

It therefore seems clear that under the law of the state, the statutes of the United States, and the decision of the supreme court, that Hayden as receiver of the Capital National Bank is entitled to recover judgment for $15,000 and interest from the 10th day of July, 1893, to the 23d day of April, 1895. On that day judgment was entered for $16,875.42, which should bear interest at the rate of 7 per cent per annum until paid.

We contend that the court should affirm the decision of the circuit court with interest and costs. This would carry out the plain import of the decision of the court of appeals and the statutes cited, and would not be in conflict with the decision of this court or the court of appeals.

In another aspect of the case it is important that the decree of the circuit court be affirmed as to Hayden, receiver, instead of setting it aside and entering a new judgment for the amount of the assessment less the interest. If the judgment is affirmed the receiver of the bank will have the first lien on Stuart's real estate, if a new decree is entered other judgments since entered, aggregating $50,000, may be given precedence over the decree entered in favor of appellee.

We think the motion for the modification of the decree and for an instruction to the lower court to allow appellee interest on his claim and decree should be sustained.

G. M. Lambertson,
Solicitor for Kent K. Hayden,
Receiver, appellee.

Since filing the motion, the following confession of the motion has been filed by counsel for appellant:

"Comes now appellant, Ambrose P. S. Stuart, and confesses the motion of the appellee, Kent K. Hayden, receiver, filed herein praying for a modification of the decree heretofore entered in this cause, and consents that the decree be modified so as to affirm the decree of the circuit court for the district of Nebraska, with interest at 7 per cent on said decree.

"Ambrose P. S. Stuart, appellant,
by C. C. Flansburg, Attorney for
appellant Ambrose P. S. Stuart."

The court modified the decree as follows:

Monday, March 14, 1898.

No. 151. Ambrose P. S. Stuart, appt., *v.* Kent K. Hayden, receiver, etc., and

No. 160. August T. Gruetter *et al.*, appts., *v.* Ambrose P. S. Stuart *et al.* Decree of January 10, 1898, herein vacated and set aside.

No. 151. Ambrose P. S. Stuart, appt., *v.* Kent K. Hayden, receiver, etc., and

No. 160. August T. Gruetter *et al.*, appts., *v.* Ambrose P. S. Stuart, *et al.* Appeals from the United States Circuit Court of Appeals for the eighth circuit. Decree of the circuit court of the United States for the district of Nebraska in this cause of April 23, 1895, in favor of Hayden, receiver, and against Ambrose P. S. Stuart, for $16,875.42, affirmed, with interest until paid, at the same rate per annum that similar decrees bear in the courts of the state of Nebraska; and said decree in favor of Gruetter and Joers on their cross bill reversed, each appellant to pay one half of the costs in this court, and cause remanded to the said circuit court with directions to dismiss the cross bill of Gruetter and Joers without prejudice.

FOLLOWING ARE MEMORANDA

OF

ALL CASES DISPOSED OF AT OCTOBER TERM, 1897,

WITHOUT OPINIONS, AND NOT ELSEWHERE OR OTHERWISE REPORTED IN THIS EDITION.

TENTH RULE.

WILLIAM R. WATKINS, *Plaintiff in Error*, *v.* WILLIAM RENNIE. [No. 14.]

In Error to the United States Court for the Indian Territory.

Mr. W. H. Ledbetter for plaintiff in error. No counsel for defendant in error.

October 12, 1897. Dismissed with costs, pursuant to the 10th Rule.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, *Plaintiff in Error*, *v.* FRANK T. CAMPBELL *et al.*, Railroad Commissioners of the State of Iowa. [No. 32.]

In Error to the Supreme Court of the State of Iowa.

Messrs. John W. Cary and *George R. Peck* for plaintiff in error. No counsel for defendants in error.

October 13, 1897. Dismissed with costs, pursuant to the 10th Rule.

WILLIAM PINKERTON *et al.*, *Appellants*, *v.* UNITED STATES. [No 31.]

Appeal from the Court of Private Land Claims.

Mr. Frank Springer for appellants. *The Attorney General* for appellee.

October 13, 1897. Dismissed, pursuant to the 10th Rule.

LEVI S. WHITFIELD, *Plaintiff in Error*, *v.* UNITED STATES. [No. 37.]

In Error to the District Court of the United States for the Northern District of California.

Mr. J. C. Campbell for plaintiff in error. *The Attorney General* for defendant in error.

October 14, 1897. Dismissed, pursuant to the 10th Rule.

IRA CARLEY *et al.*, *Plaintiffs in Error*, *v.* ROLAND C. GITCHELL *et al.* [No. 68.]

In Error to the Supreme Court of the State of Michigan.

Mr. Herbert L. Baker for plaintiffs in error. No counsel for defendants in error.

October 22, 1897. Dismissed with costs, pursuant to the 10th Rule.

J. W. BULL, *Appellant*, *v.* CHARLES E. DICKERMAN *et al.* [No. 72.]

Appeal from the Circuit Court of the United States for the District of Minnesota.

Mr. A. A. Harris for appellant. *Messrs. R. R. Briggs* and *H. W. Childs* for appellees.

October 25, 1897. Dismissed with costs, pursuant to the 10th Rule.

LOUISE J. PURDY *et al.*, *Appellants*, *v.* UNITED STATES. [No. 74.]

Appeal from the Court of Private Land Claims.

Messrs. T. B. Catron and *James W. Vroom* for appellants. *The Attorney General* for appellee.

October 27, 1897. Dismissed, pursuant to the 10th Rule.

JAMES ADDISON PERALTAREAVIS, *Appt.*, *v.* UNITED STATES. [No. 81.]

Appeal from the Supreme Court of the Territory of New Mexico.

Mr. P. B. Thompson, Jr., for appellant. *The Attorney General* for appellee.

October 28, 1897. Dismissed, pursuant to the 10th Rule.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, *Plaintiff in Error*, *v.* TOWN OF CICERO. [No. 98.]

In Error to the Supreme Court of the State of Illinois.

Mr. Lloyd W. Bowers for plaintiff in error. *Mr. H. R. Pebbles* for defendant in error.

November 3, 1897. Dismissed with costs, pursuant to the 10th Rule.

ROBERT WARNOCK, *Appellant*, *v.* REUBEN DE WITT. [No. 102.]

Appeal from the Supreme Court of the Territory of Utah.

Mr. M. L. Ritchie for appellant. No counsel for appellee.

November 4, 1897. Dismissed with costs, pursuant to the 10th Rule, and cause remanded to the supreme court of the state of Utah.

ROMAN A. BACA, *Appellant*, *v.* UNITED STATES. [No. 107.]

Appeal from the Court of Private Land Claims.

Mr. T. B. Catron for appellant. *The Attorney General* for appellee.

November 4, 1897. Dismissed, pursuant to the 10th Rule.

ROMAN A. BACA, *Appellant*, *v.* UNITED STATES. [No. 108.]

Appeal from the Court of Private Land Claims.

Mr. T. B. Catron for appellant. *The Attorney General* for appellee.

November 5, 1897. Dismissed, pursuant to the 10th Rule.

HENRY C. ROUSE, Receiver, etc., *Plaintiff in Error*, *v.* F. O. HARRY. [No. 118.]

In Error to the Supreme Court of the State of Kansas.

Messrs. James Hagerman and *T. N. Sedgwick* for plaintiff in error. *Mr. John M. Thurston* for defendant in error.

November 9, 1897. Dismissed with costs, pursuant to the 10th Rule.

TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error*, *v.* ROBERT J. THOMPSON [No. 123], and

TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error*, *v.* MINNIE JUNEMAN [No. 124], and

TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error*, *v.* S. M. DIETZ [No. 125], and

TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error*, *v.* ROSA ELLIOTT, etc., *et al.* [No. 126.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. John F. Dillon and *Winslow S. Pierce* for plaintiff in error. *Mr. H. A. Herbert* for Juneman. No counsel entered for defendants in error in 123, 125, & 126.

November 10, 1897. Dismissed with costs, pursuant to the 10th Rule.

CHARLES E. SUMMERS, Assignee, etc., *Plaintiff in Error*, *v.* FRANK E. WHITE, United States Marshal *et al.* [No. 140.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. L. C. Burr for plaintiff in error. *Messrs. J. L. Webster* and *J. H. McIntosh* for defendants in error.

November 29, 1897. Dismissed with costs, pursuant to the 10th Rule.

TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error*, *v.* CLARA SPRADLING. [No. 153.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. J. F. Dillon and *W. S. Pierce* for plaintiff in error. *Mr. J. C. Kearby* for defendant in error.

December 3, 1897. Dismissed with costs, pursuant to the 10th Rule.

BENJAMIN L. HILL, *Appt.*, *v.* W. E. HALE, Warden, etc. [No. 480.]

Appeal from the District Court of the United States for the Northern District of California.

Mr. W. W. Foote for appellant. *Messrs. W. F. Fitzgerald* and *W. H. Anderson* for appellee.

December 7, 1897. Dismissed with costs, pursuant to the 10th Rule.

SALT LAKE CITY RAILROAD COMPANY, *Plff. in Err.*, *v.* MARY E. SMITH. [No. 162.]

In Error to the Supreme Court of the State of Utah.

Mr. J. L. Rawlins for plaintiff in error. *Mr. W. T. S. Curtis* for defendant in error.

December 13, 1897. Dismissed with costs, pursuant to the 10th Rule.

THOMAS C. PLATT, as President of the United States Express Company, *Plff. in Err.*, *v.* F. M. THREADGILL. [No. 170.]

In Error to the Circuit Court of the United States for the Western District of Virginia.

Messrs. W. W. Crump, B. F. Tracy, and *B. T. Crump* for plaintiff in error. No counsel for defendant in error.

December 17, 1897. Dismissed with costs, pursuant to the 10th Rule.

J. D. ADAMS, *Plff. in Err.*, *v.* STATE OF TEXAS. [No. 171.]

In Error to the Court of Criminal Appeals of the State of Texas.

Mr. J. Wharton Terry for plaintiff in error. No counsel for defendant in error.

January 4, 1898. Dismissed with costs, pursuant to the 10th Rule.

BENJAMIN W. CLARK, *Plff. in Err.*, *v.* ALFRED C. HARMER. [No. 187.]

In Error to the Court of Appeals of the District of Columbia.

Messrs. W. Willoughby and *Tracy L. Jeffords* for plaintiff in error. *Mr. A. A, Lipscomb* for defendant in error.

January 10, 1898. Dismissed with costs, pursuant to the 10th Rule.

JOHN H. MCBRIDE, *Appt.*, *v.* GRAND DE TOUR PLOW COMPANY *et al.* [No. 2.]

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

Mr. Albert B. Cummins for appellant. *Messrs. Edward Rector* and *John G. Manahan* for appellees.

January 11, 1898. Dismissed with costs, pursuant to the 10th Rule.

J. H. PARKER, *Appt.*, *v.* TERRITORY OF OKLAHOMA, *ex rel.* EVAN D. CAMERON. [No. 193.]

Appeal from the Supreme Court of the Territory of Oklahoma.

Mr. H. S. Cunningham for appellant. No counsel for appellee.

January 12, 1898. Dismissed with costs, pursuant to the 10th Rule.

MARY M. BLACK *et al.*, *Plffs. in Err.*, *v.* MARY K L. BLACK. [No. 200.]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. Francis T. Tobin for plaintiffs in error. No counsel for defendant in error.

January 21, 1898. Dismissed with costs, pursuant to the 10th Rule.

E. M. GALVIN *et al.*, *Plffs. in Err.*, *v.* E. F. PALMER. [No. 244.]

In Error to the Supreme Court of the State of California.

Mr. A. R. Cotton for plaintiffs in error. *Mr. J. E. Dodge* for defendant in error.

April 23, 1898. Dismissed with costs, pursuant to the 10th Rule.

HENRY C. BROWN *et al., Plffs. in Err.*, *v.* FIRST NAT. BANK of Fort Madison, Iowa. [No. 249.]

In Error to the Circuit Court of the United States for the District of Colorado.

Mr. James H. Brown for plaintiffs in error. No counsel for defendant in error.

April 29, 1898. Dismissed with costs, pursuant to the 10th Rule.

LOUIS LE CLAIRE, *Plff. in Err.*, *v.* OLD PEASUP. [No. 289.]

In Error to the Circuit Court of the United States for the District of Washington.

Mr. W. H. Pritchard for plaintiff in error. *The Attorney General* for defendant in error.

May 5, 1898. Dismissed with costs, pursuant to the 10th Rule.

T. E. B. MASON *et al., Plffs. in Err.*, *v.* ALEXANDER MCLEOD. [No. 265.]

In Error to the Supreme Court of the State of Kansas.

Mr. S. B. Bradford for plaintiffs in error. No counsel for defendant in error.

May 23, 1898. Dismissed with costs, pursuant to the 10th Rule.

SIXTEENTH RULE.

SIMON AMONI, *Plff. in Err.*, *v.* UNITED STATES. [No. 258.]

Error to the District Court of the United States for the Western District of Arkansas.

Mr. William M. Cravens for plaintiff in error. *Mr. Assistant Attorney General Boyd* for defendant in error.

May 6, 1898. Dismissed, pursuant to the 16th Rule, on motion of *Mr. Assistant Attorney General Boyd* for the defendant in error.

JAMES B HAWKINS, Sheriff, etc., *Appellant*, *v.* J. W. WATSON. [No. 112.]

Appeal from the Circuit Court of the United States for the District of Montana.

Mr J. W. Strevell for appellant. *The Attorney General* and *Solicitor General* for appellee.

November 9, 1897. Dismissed with costs, pursuant to the 16th Rule, on motion of *Mr. Solicitor General Richards* for the appellee.

NINETEENTH RULE.

GEORGE F. TUTTLE, *Plaintiff in Error*, *v.* P. CROWLEY, Chief of Police, etc. [No. 8.]

In Error to the Supreme Court of the State of California.

Mr. George R. B. Hayes for plaintiff in error. *Mr. James G. Maguire* for defendant in error.

October 12, 1897. Dismissed with costs, pursuant to the 19th Rule.

TWENTY-EIGHTH RULE.

GUS. POTSDAMER, *Plaintiff in Error*, *v.* UNITED STATES. [No. 226.]

In Error to the Circuit Court of the United States for the Southern District of Florida.

Mr. J. E. Hartridge for plaintiff in error. *The Attorney General* for defendant in error.

June 4, 1897. Dismissed, pursuant to the 28th Rule.

ADAMS EXPRESS COMPANY, *Plaintiff in Error*, *v.* STATE OF OHIO [No. 215], and AMERICAN EXPRESS COMPANY, *Plaintiff in Error*, *v.* STATE OF OHIO [No. 216], and UNITED STATES EXPRESS COMPANY, *Plaintiff in Error*, *v.* STATE OF OHIO. [No. 217.]

In Error to the Supreme Court of the State of Ohio.

Messrs. Lawrence Maxwell, Jr., and *W. Hallett Phillips* for plaintiffs in error. *Messrs F. S. Monnett* and *J. K. Richards* for defendant in error.

July 19, 1897. Dismissed, pursuant to the 28th Rule.

H. J. COLLIER *et al.*, *Appellants*, *v.* J. C. HOPKINS. [No. 213].

Appeal from the Circuit Court of the United States for the District of Kentucky.

Mr. B. F. Bucker for appellants. *Messrs. John F. Hager* and *W. A. Sudduths* for appellee.

July 26, 1897. Dismissed, pursuant to the 28th Rule.

MISCELLANEOUS.

BOSTON SAFE DEPOSIT & TRUST CO., *Appellant*, *v.* GRANT WILKINS *et al.* [No. 573.]

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Henry B. Tompkins for appellant. *Messrs. C. E. Lucky, L. H. Spilman, Alex. C. King*, and *H. J. May* for appellees.

May 10, 1897. Decree affirmed with costs, by a divided court, and cause remanded to the Circuit Court of the United States for the Northern District of Georgia.

TEXAS & P. R. CO., *Plaintiff in Error*, *v.* NANCY J. GAY *et al.* [No. 298.]

In Error to the Supreme Court of the State of Texas.

Messrs. John F. Dillon, W. S. Pierce, and *D. D. Duncan* for plaintiff in error. *Mr. W. Hallett Phillips* for defendants in error.

May 10, 1897. Judgment affirmed with costs, on the authority of *Texas & P. R. Co.* v. *Johnson*, 151 U. S. 81 [38: 81]; *Texas & P. R. Co.* v. *Anderson*, 149 U. S. 237 [37: 717]; *Sayward* v. *Denny*, 158 U. S. 180 [39: 941]; *Texas & P. R. Co.* v. *Bloom*, 164 U. S. 636 [41: 580].

JAMES P. MERRITT *et al.*, *Appellants*, *v.* PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE *et al.* [No. 798.]

Appeal from the Circuit Court of the United States for the Northern District of California.

Mr. Charles H. Lovell for appellants. *Messrs. T. H. Hubbard, E. S. Pillsbury*, and *Robert Y. Hayne* for appellees.

May 24, 1897. Dismissed for want of jurisdiction, on the authority of *Colvin* v. *Jacksonville*, 158 U. S. 456 [39: 1053]; *The Bayonne*, 159 U. S. 692 [40: 308]; *Chappell* v. *United States*, 160 U. S. 499, 507, 508 [40: 510, 512, 513], and cases therein cited. Announced by Mr. Justice Harlan. (The Chief Justice did not sit and took no part in the consideration and disposition of this motion.)

ALEXANDER D. BARROW, Syndic, *Petitioner*, *v.* RICHARD MILLIKEN. [No. 800.]

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Edgar H. Farrar, B. F. Jonas, and *E. B. Kruttschnitt* for petitioner. No opposition.

May 24, 1897. Denied.

HENRY T. BLYTHE *et al.*, *Plaintiffs in Err*, *v.* FLORENCE BLYTHE HINCKLEY. [No. 804.]

In Error to the Supreme Court of the State of California.

Messrs. Jeff. Chandler, E. B. Holladay, and *L. D. McKissick* for plaintiffs in error. *Messrs. W. H. H. Hart, John H. Boalt, Thos. B. Bishop, W. W. Foote, A. R. Cotton*, and *John Garber* for defendant in error.

May 24, 1897. Dismissed for want of jurisdiction.

MEXICAN CENTRAL R. CO., Limited, Petitioner, *v.* EDWARD EVEY. [No. 805.]

Petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. A. T. Britton and *A. B. Browne* for petitioner. No opposition.

May 24, 1897. Denied.

BONDHOLDERS & PURCHASERS OF THE IRON RAILROAD, *Appellants*, *v.* TOLEDO, DELPHOS, & BURLINGTON RAILROAD COMPANY *et al.* [No. 22.]

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. John C. Coombs and *Charles H. Hanson* for appellants. *Mr. Clarence Brown* for appellees.

October 12, 1897. Dismissed, per stipulation.

LEANDRO SANDOVAL *et al.*, *Appellants*, *v.* UNITED STATES *et al.* [No. 7.]

Appeal from the Court of Private Land Claims.

Mr. William E. Earle for appellants. *The Attorney General* and *Mr. Matt. G. Reynolds* for appellees.

October 12, 1897. Dismissed, per stipulation.

UNITED STATES, *Plaintiff in Error*, *v.* JOHN A. FOREMAN. [No. 360.]

In Error to the Supreme Court of the Territory of Oklahoma.

The Attorney General for plaintiff in error. No counsel for defendant in error.

October 12, 1897. Dismissed, on motion of *Mr. Solicitor General Richards* for the plaintiff in error.

UNITED STATES, *Appellant*, *v.* JOHN A. FOREMAN. [No. 394.]

Appeal from the Supreme Court of the Territory of Oklahoma.

The Attorney General for appellant. No counsel for appellee.

October 12, 1897. Dismissed, on motion of *Mr. Solicitor General Richards* for the appellant.

UNITED STATES, *Appellant*, *v.* THOMAS E. MILCHRIST. [No. 273.]

Appeal from the Court of Claims.

The Attorney General for appellant. No counsel for appellee.

October 12, 1897. Dismissed, on motion of *Mr. Solicitor General Richards* for the appellant.

UNITED STATES, *Appellant*, *v.* MARY E. SKELLY, Administratrix, etc. [No. 330.]

Appeal from the Court of Claims.

The Attorney General for appellant. *Messrs. George A. King* and *William B. King* for appellee.

October 12, 1897. Dismissed, on motion of *Mr. Solicitor General Richards* for the appellant.

JUANA WALKER, by Rosetta Jones, Her Guardian, *Plaintiff in Error*, *v.* A. J. DORAN, Administrator, *et al.* [No. 256.]

In Error to the Supreme Court of the Territory of Arizona.

Messrs. C. W. Wright, Barclay Henley, and *John Mullan* for plaintiff in error. *Mr. W. H. Barnes* for defendants in error.

October 12, 1897. Dismissed with costs, on authority of counsel for plaintiffs in error.

THOMAS P. BEAL, Receiver, etc., *Plaintiff in Error*, *v.* ESSEX SAV. BANK. [No. 75.]

In Error to the United States Circuit Court of Appeals for the First Circuit.

Messrs. E. W. Hutchins, Henry Wheeler, and *Edward Winslow Paige* for plaintiff in error.

Messrs. George O. Shattuck, and *William A. Munroe* for defendant in error.

October 14, 1897. Dismissed with costs, on authority of counsel for the plaintiff in error.

UNITED STATES, *Appt.*, *v.* JOHN D. KENNEDY. [No. 54.]

Appeal from the Court of Claims.

The Attorney General for appellant. *Mr. John J. Hemphill* for appellee.

October 15, 1897. Dismissed per stipulation.

AMERICAN GROCERY COMPANY, *Petitioner*, *v.* ALEXIS GODILOT, JR. [No. 380.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. W. H. Van Steenbergh for petitioner. *Mr. H. Aplington* for respondent.

October 18, 1897. Denied.

AULTMAN & TAYLOR COMPANY, *Petitioner*, *v.* FREDERICK J. SYME. [No. 473.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. William H. Blymyer for petitioner. *Mr Edward F. Brown* for respondent.

October 18, 1897. Denied.

CONTINENTAL TRUST COMPANY OF NEW YORK, Trustee, *Petitioner*, *v.* AMERICAN SURETY COMPANY. [No. 408.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. Willard Parker Butler and *A. H. Snow* for petitioner. *Mr. Bluford Wilson* for respondent.

October 18, 1897. Denied.

NATIONAL ACCIDENT SOCIETY, *Petitioner*, *v.* FANNIE SPIRO. [No. 382.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. H. D. McBurney for petitioner. *Mr. H. H. Ingersoll* for respondent.

October 18, 1897. Denied.

JAMES C. NEELY *et al.*, *Petitioners*, *v.* ISIDORE NEWMAN, SR. [No. 468.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. W. A. Gunter and *Thomas H. Clark* for petitioners. *Messrs. William Grant* and *J. D. Rouse* for respondent.

October 18, 1897. Denied.

THOMAS F. PICKHAM, *Petitioner*, *v.* WHEELER-BLISS MANUFACTURING COMPANY. [No. 371.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Allan C. Story for petitioner. *Messrs. James M. Flower*, *Frank J. Smith*, and *Harrison Musgrave* for respondent.

October 18, 1897. Denied.

WILLIS THORP, *Plaintiff in Error*, *v.* S. A. BONNIFIELD *et al.* [No. 270.]

On a Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. John M. Thurston for plaintiff in error. *Mr. E. S. Pillsbury* for defendants in error.

October 18, 1897. The question whether the United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction of the case answered in the negative, on the authority of *Aztec Min. Co.* v. *Ripley*, 151 U. S. 79 [38: 80]; and *The Coquitlam* v. *United States*, 163 U. S. 346 [41: 184.]

JAMES S. VALK, Survivor, etc., *Appellant*, *v.* UNITED STATES. [No. 18.]

Appeal from the Court of Claims.

Mr. John C. Chaney for the appellant. *Messrs. Assistant Attorney Generals Howry* and *Thompson* for appellee.

October 18, 1897. Judgment affirmed, on the authority of *Marks* v. *United States*, 161 U. S. 297 [40: 706]; and *Leighton* v. *United States*, 161 U. S. 291 [40: 703.]

ANNIE E. BARBOUR, *Plaintiff in Error*, *v.* DAVID MOORE *et al.* [No. 285].

In Error to the Court of Appeals of the District of Columbia.

Mr. R. Ross Perry for plaintiff in error. *Mr. A. S. Worthington* for defendants in error.

October 25, 1897. Dismissed with costs, per stipulation, on motion of *Mr. A. S. Worthington* for the defendants in error.

PETER DEFER, *Plaintiff in Error*, *v.* MARIE ROSE DE MAY *et al.* [No. 52.]

In Error to the Supreme Court of the State of Michigan.

Mr. George William Moore for plaintiff in error. *Mr. George Gartner* for defendants in error.

October 25, 1897. Dismissed for want of jurisdiction on the authority of *Burlington, C. R. & N. R. Co.* v. *Simmons*, 123 U. S. 52 [31: 73]; and *McGourkey* v. *Toledo & O. C. R. Co.* 146 U. S. 536 [36: 1079], and cases cited.

J. J. WARREN COMPANY, *Petitioner*, *v.* HARRY M. ROSENBLATT. [No. 481.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Samuel T. Fisher for petitioner. No counsel for respondent.

October 25, 1897. Denied.

MARY A. KETTENRING *et al.*, *Plaintiffs in Error*, *v.* UNITED STATES. [No. 58.]

In Error to the Circuit Court of the United States for the Western District of Arkansas.

Mr. W. M. Cravens for plaintiffs in error. *The Attorney General* for defendant in error.

October 25, 1897. Judgment reversed, upon confession of error by counsel for the defendant in error, and cause remanded for further proceedings in conformity to law.

ROCKER SPRING COMPANY, *Petitioner*, *v.* GEORGE A. THOMAS. [No. 477.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Ephraim Banning and *Thomas A. Banning* for petitioner. No counsel for respondent.

October 25, 1897. Denied.

WILLIAM ROEMER, *Petitioner*, *v.* T. B. PEDDIE & Co. [No. 485.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. William Roemer, in propria persona. No counsel for respondent.

October 25, 1897. Denied.

AUGUSTUS E. RONDOT, *Petitioner*, *v.* TOWNSHIP OF ROGERS. [No. 460].

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. James T. Keena for petitioner. *Mr. Henry M. Duffield* for respondent.

October 25, 1897. Denied.

CHARLESTON & SOUTH SIDE BRIDGE COMPANY, *Plaintiff in Error*, *v.* STATE OF WEST VIRGINIA *et al.* [No. 253.]

In Error to the Supreme Court of Appeals of the State of West Virginia.

Mr. Malcom Johnson for plaintiff in error. *Mr. W. S. Laidley* for defendants in error.

November 1, 1897. Dismissed for want of jurisdiction, on the authority of *Morrison* v. *Watson*, 154 U. S. 111 [38: 927]; and *Miller* v. *Cornwall R. Co.* 168 U. S. 131 [42: 409], and cases cited.

W. W. CROSSLEY, Master, *Petitioner*, *v.* GEORGE TAYLOR, Master, etc. [No. 483.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Floyd Hughes for petitioner. *Mr. Robert M. Hughes* for respondent.

November 1, 1897. Denied.

VIRGINIA A. GRAFTON, Executrix, etc., *Appellant*, *v.* HALBERT E PAINE. [No. 148.]

Appeal from the Court of Appeals of the District of Columbia.

Messrs. J. M. Wilson, *L. E. Payson*, and *H. O. Claughton* for appellant. *Messrs. W. D. Davidge* and *C. A. Brandenburg* for appellee.

November 1, 1897. Dismissed for want of jurisdiction, on the authority of *Davis* v. *Crouch*, 94 U. S. 514 [24: 281]; *Lodge* v. *Twell*, 135 U. S. 232 [34: 153]; and *McGourkey* v. *Toledo & O. C. R. Co.* 146 U. S. 536 [36: 1079].

JOHN W. HALL, Owner, etc., *et al.*, *Petitioners*, *v.* THE ALENE, etc. [No. 492.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. George Bethune Adams for petitioners. *Mr. Everett P. Wheeler* for respondent.

November 1, 1897. Denied.

ROBERT S. REAVES, *Plaintiff in Error and Appellant*, *v.* JAMES E. OLIVER [No. 60.]

In Error to and Appeal from the Supreme Court of the Territory of Oklahoma.

Mr. F. B. Cresthwaite for plaintiff in error and appellant. *Mr. George Chandler* for defendant in error and appellee.

November 1, 1897. Dismissed for the want of jurisdiction, because the order or decree sought to be reviewed was interlocutory and not final, on the authority of acts September 24, 1789 (1 Stat. at L. 81, 84, chap. 20, §§ 13, 22); March 3, 1803 (2 Stat. at L. 244, chap. 40); Rev. Stat. §§ 691, 692; act March 3, 1891 (26 Stat. at L. 826, chap. 517); *Forgay* v. *Conrad*, 6 How. 201, 205 [12: 404, 406]; *McLish* v. *Roff*, 141 U. S. 661 [35: 893]; *American Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.* 148 U. S. 373, 378 [37: 487, 489]; *Smith* v. *Vulcan Iron Works*, 165 U.S. 518, 524 [41: 810].

SOUTHERN EXPRESS COMPANY, *Plaintiff in Error*, *v.* COMMONWEALTH OF VIRGINIA, *ex rel.* JOHN BUFORD [No. 61], and

SOUTHERN EXPRESS COMPANY, *Plaintiff in Error*, *v.* COMMONWEALTH OF VIRGINIA, *ex rel.* EDMUND PENDLETON [No. 62], and

SOUTHERN EXPRESS COMPANY, *Plaintiff in Error*, *v.* COMMONWEALTH OF VIRGINIA, *ex rel.* M. G. MCCOLGAN [No. 63], and

SOUTHERN EXPRESS COMPANY, *Plaintiff in Error*, *v.* COMMONWEALTH OF VIRGINIA, *ex rel.* J. W. MCGAVOCK [No. 64], and

SOUTHERN EXPRESS COMPANY, *Plaintiff in Error*, *v.* COMMONWEALTH OF VIRGINIA, *ex rel.* JAMES A. WALKER. [No. 65].

In Error to the Supreme Court of Appeals of the State of Virginia.

Mr. F. S. Blair for plaintiff in error. *Messrs. James A. Walker* and *J. J. A. Powell* for defendant in error.

November 1, 1897. Judgments affirmed with costs and interest, on the authority of *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 339 [36: 176].

HARVEY ALLENDER, *Appellant*, *v.* W. E HALE, Warden, etc. [No. 502.]

Appeal from the Circuit Court of the United States for the Northern District of California.

Mr. W. F. Fitzgerald for appellee.

November 2, 1897. Docketed and dismissed with costs.

SAMUEL J. RITCHIE, *Petitioner*, *v* JAMES B MCMULLEN *et al.* [No. 489.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Benjamin Butterworth and *J. M. Wilson* for petitioner. No counsel for respondents.

November 4, 1897. Denied.

ST. PAUL & NORTHERN PACIFIC RAILROAD COMPANY, *Appellant*, *v.* ST. PAUL, MINNEAPOLIS, & MANITOBA RAILWAY COMPANY *et al.* [No. 122.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. F. M. Dudley and *C. W. Bunn* for appellant. *Messrs. George B. Young* and *M. D. Grover* for appellees.

November 4, 1897. Decree affirmed with costs, by consent of *Mr. C. W. Bunn*, of counsel for the appellant, and cause remanded to the circuit court of the United States for the district of Minnesota.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, *Plaintiff in Error*, *v.* VILLAGE OF ELMHURST. [No. 358.]

In Error to the Supreme Court of the State of Illinois.

Mr. Lloyd W. Bowers for plaintiff in error. No counsel for defendant in error.

November 5, 1897. Dismissed with costs, on authority of counsel for the plaintiff in error.

WILLIAM WOODWARD BALDWIN, Guardian, etc., *Plaintiff in Error*, *v.* COUNTY COMMISSIONERS OF WASHINGTON COUNTY *et al.* [No. 370.]

In error to the Court of Appeals of the State of Maryland.

Mr. Charles A. Boston for plaintiff in error. *Mr. Hy Kyd Douglas* for defendants in error.

November 8, 1897. Dismissed for the want of jurisdiction, on the authority of *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648 [41: 1149]; *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111], and cases cited.

W. H. T. DURRANT, *Appellant*, *v.* W. E. HALE, Warden, etc. [No. 429.]

Appeal from the Circuit Court of the United States for the Northern District of California.

Messrs. F. P. Dewees and *A. L. Hart* for appellant. *Messrs. T. C. Catchings* and *W. F. Fitzgerald* for appellee.

November 8, 1897. Final order affirmed, with costs, on authority of *Hurtado* v. *California*, 110 U. S. 516 [28: 232]; *Nordstorm* v. *Washington*, 164 U. S. 705 [41: 1183]; *Craemer* v. *Washington*, 168 U. S. 124 [42: 407.]

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, *Plaintiff in Error*, *v.* GEORGIA A. BOWLES *et al.* [No. 92], and

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY *et al.*, *Plaintiffs in Error*, *v.* MARTIN STRYCHARSKI *et al.* [No. 284.]

In Error to the Supreme Court of the State of Texas.

Messrs. C. H. Tweed, R. L. Lovett, and *Maxwell Evarts* for plaintiffs in error in both cases. *Messrs. H. M. Garwood* for Bowles *et al.* *Messrs. Henry F. Ring* and *Presley K. Ewing* for Strycharski *et al.*

November 8, 1897. Judgments affirmed with costs, and interest, on the authority of *Pennsylvania R. Co.* v. *Jones*, 155 U. S. 333, 350 [39: 176, 181]; *Washington, A. & G. R. Co.* v. *Brown*, 17 Wall. 445, 450 [21: 675, 677]; *Texas & P. R. Co.* v. *Johnson*, 151 U. S. 81 [38: 81]; *Texas & P. R. Co.* v. *Bloom*, 164 U. S. 636 [41: 580].

MERCANTILE TRUST COMPANY, *Petitioner*, *v.* FARMERS' LOAN & TRUST COMPANY, Trustee, etc., *et al.* [No. 493.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. L. F. Parker, A. T. Britton, and *A. B. Browne* for petitioner. *Messrs. John W. Noble, George H. Shields*, and *George Zabriskie* for respondents.

November 8, 1897. Denied.

E. J. PECK and Leo Simmons, Trustees, *Plaintiffs in Error*, *v.* DANIEL BIRTWELL. [No. 163.]

In Error to the Court of Appeals of the District of Columbia.

Messrs. F. H. Mackey and *A. A. Birney* for plaintiffs in error. *Messrs. Ashley M. Gould* and *Leon Tobriner* for defendant in error.

November 8, 1897. Dismissed with costs, on motion of counsel for the plaintiffs in error.

WESTERN ASSURANCE COMPANY OF TORONTO, *Petitioner*, *v.* J. H. MOHLMAN COMPANY [No. 494.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Michael H. Cardozo for petitioner. *Mr Treadwell Cleveland* for respondent.

November 8, 1897. Denied.

THEODORE G. MONTAGUE, *Appt.*, *v.* JOHN L. COX, Receiver, etc. [No. 344.]

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Xenophon Wheeler for appellant. *Mr. Robert Pritchard* for appellee.

November 10, 1897. Dismissed, per stipulation.

JOHN W. SCHOFIELD, Receiver, etc., *Plaintiff in Error*, *v.* S. M. FOLSOM. [No. 111.]

In Error to the Supreme Court of the Territory of New Mexico.

Mr. William B. Childers for plaintiff in error. *Messrs. F. W. Clancy* and *Neill B. Field* for defendant in error.

November 15, 1897. Dismissed for the want of jurisdiction, on the authority of *Gregory Consolidated Min. Co.* v. *Starr*, 141 U. S. 222 [35: 715.]

MILLS H. BEARDSLEY, *Appt.*, *v.* ESTHER BROOM, Administratrix, etc. [No. 96.]

Appeal from the Supreme Court of the Territory of Utah.

Messrs. J. G. Sutherland, Ogden Hiles, and *Charles C. Dey* for appellant. *Messrs. E. M. Allison, Jr.*, and *James M. Kimball* for appellee.

November 29, 1897. Decree affirmed with costs, by a divided court, and cause remanded to the supreme court of the state of Utah.

HIPOLITO MONTOYA *et al.*, etc., *Appt.*, *v.* UNITED STATES *et al.* [No. 519.]

Appeal from the Court of Private Land Claims.

Mr. Solicitor General Richards for appellees.

November 29, 1897. Docketed and dismissed, on motion of *Mr. Solicitor General Richards* for the appellees.

CHARLES M. STEWART *et al.*, *Petitioners*, *v.* GEORGE H. COFFIN, Administrator, etc., *et al.* [No. 486.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Messrs. Eugene P. Carver and *E. E. Blodgett* for petitioners. *Mr. Edward S. Dodge* for respondents.

November 29, 1897. Denied.

JOHN LEONARD, *Appt.*, *v.* R. A. SIMS, Sheriff, etc., *et al.* [No. 523.]

Appeal from the Circuit Court of the United States for the District of Washington.

Mr. Patrick Henry Winston for appellees.

December 2, 1897. Docketed and dismissed with costs, on motion of *Mr. Patrick Henry Winston* for the appellees.

STEVENSON BURKE *et al.*, *Petitioners*, *v.* WALTER PIERCE *et al.* [No. 518.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Mr. Samuel S. Mehard for petitioners. *Messrs. A. M. Imbrie* and *Q. A. Gordon* for respondents.

December 6, 1897. Denied.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY, *Plaintiff in Error*, *v.* SALLIE SMITH and her Husband, James Smith. [No. 152.]

In Error to the Court of Civil Appeals for the Third Supreme Judicial District of Texas.

Messrs. C. H. Tweed and *R. S. Lovett* for plaintiff in error. *Mr. H. M. Lovett* for defendants in error.

December 6, 1897. Dismissed with costs, per stipulation.

EMMA C. NOYES, *Plaintiff in Error*, *v.* SILVER QUEEN MINING COMPANY. [No. 128.]

On a Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. W. H. Doolittle for plaintiff in error. *Mr. John H. Miller* for defendant in error.

December 6, 1897. Questions answered in the negative, on the authority of *Thorp* v. *Bonnifield*, decided at this term [168 U. S. 703, *ante*, 1001] and cases cited.

ELIAS H. PARSONS, *Plaintiff in Error*, *v.* ARTHUR PRATT. [No. 176.]

In Error to the Supreme Court of the State of Utah.

Mr. J. L. Rawlins for plaintiff in error. *Mr. P. L. Williams* for defendant in error.

December 6, 1897. Judgment reversed with costs, pursuant to stipulation of counsel, on motion of *Mr. J. L. Rawlins* for the plaintiff in error, and cause remanded for further proceedings.

UNION STREET RAILWAY COMPANY OF SAGINAW, MICHIGAN, *Plaintiff in Error*, *v.* BYRON A. SNOW. [No. 467.]

In Error to the Supreme Court of the State of Michigan.

Mr. DeForest Paine for plaintiff in error. *Mr. Geo. W. Weadock* for defendant in error.

December 6, 1897. Dismissed for want of jurisdiction, on the authority of *Henderson Bridge Co.* v. *Henderson*, 141 U. S. 679 [35: 900]; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388 [30: 1059]; *Sioux City Street R. Co.* v. *Sioux City*, 138 U. S. 98 [34: 898]; *New Orleans & L. R. Co.* v. *Louisiana*, 157 U. S. 219 [39: 679.]

NATHANIEL T. BACON, Owner, etc., *Appt.*, *v.* THE POCONOKET *et al.* [No. 95.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. J. Rodman Paul and Theodore Bacon for appellant. *Messrs. E. F. Pugh and Henry Flanders* for appellees.

December 13, 1897. Decree affirmed with costs, by a divided court, and cause remanded to the district court of the United States for the eastern district of Pennsylvania.

HOUSTON & TEXAS CENTRAL RAILROAD COMPANY *et al.*, *Plaintiffs in Error*, *v.* MRS. M. J. MORGAN *et al.* [No. 222.]

In Error to the Court of Civil Appeals for the First Supreme Judicial District of the State of Texas.

Messrs. C. H. Tweed and *R. S. Lovett* for plaintiffs in error. *Mr. R. E. Pennington* for defendants in error.

December 13, 1897. Dismissed, per stipulation, on motion of *Mr. J. Hubley Ashton* in behalf of counsel.

WILLIAM MCQUEEN, *Plaintiff in Error*, *v.* SARAH T. JONES, Administratrix, etc. [No. 202.]

In Error to the Supreme Court of the State of Utah.

Mr. A. T. Schroeder for plaintiff in error. *Mr. J. L. Rawlins* for defendant in error.

December 13, 1897. Judgment reversed with costs, per stipulation of counsel, on motion of *Mr. J. L. Rawlins* for the defendant in error, and cause remanded for further proceedings in conformity to law.

SYLVESTER SMITH, *Plaintiff in Error*, *v.* WICHITA NATIONAL BANK OF WICHITA *et al.* [No. 186.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Thomas G. Frost for plaintiff in error. *Messrs. F. W. Bentley* and *David Smyth* for defendants in error.

December 17, 1897. Dismissed, per stipulation.

JOSEPH J. EBANKS, *Appt.*, *v.* WILLIAM E. HALE, Warden, etc. [No. 501.]

Appeal from the District Court of the United States for the Northern District of California.

Mr. W. S. Wood for appellant. *Messrs. T. C. Catchings, W. F. Fitzgerald*, and *W. H. Anderson* for appellee.

December 20, 1897. Order affirmed with costs, on the authority of *Durrant* v. *Hale*, warden, etc., decided at this term 168 U. S. 705 [*ante*, 1003.]

W. H. BAKER, *Petitioner*, *v.* WALTER BAKER & Co. Limited. [No. 534].

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. R. T. Barton and *Holmes Conrad* for petitioner. *Mr. George Putnam* for respondent.

January 3, 1898. Denied.

TOWN OF DARLINGTON, *Plaintiff in Error*, *v.* ATLANTIC TRUST COMPANY. [No. 313.]

In Error to the Circuit Court of the United States for the District of South Carolina.

Mr. Henry A. M. Smith for plaintiff in error. *Mr. A. T. Smythe* for defendant in error.

January 3, 1898. Dismissed with costs, per stipulation.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, *Plaintiff in Error*, *v.* ORANGE FULLER, Assignee, etc. [No. 146.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. James Hagerman and *George P. B. Jackson* for plaintiff in error. *Messrs. Harrison O. Shepard* and *W. T. Hutchings* for defendant in error.

January 3, 1898. Judgment affirmed with costs, by a divided court, and cause remanded to the United States court in the Indian territory.

UNITED STATES, *Plaintiff in Error*, *v.* ELIHU COLMAN. [No. 393.]

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

The Attorney General for plaintiff in error. *Messrs. Elihu Colman* and *James Coleman* for defendant in error.

January 3, 1898. Dismissed, on motion of *Mr. Solicitor General Richards* for the plaintiff in error.

HOWARD CARROLL, Trustee, *Petitioner*, *v.* DANIEL GOLDSCHMIDT *et al.* [No. 536.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. A. V. Briesen for petitioner. *Mr. Edwin H. Brown* for respondents.

January 10, 1898. Denied.

THOMAS C. CHAPPELL, *Plaintiff in Error*, *v.* DAVID STEWART. [No. 165.]

In Error to the Court of Appeals of the State of Maryland.

Mr. Thomas C. Chappell in propria persona. Mr. David Stewart in propria persona.

January 10, 1898. Dismissed for want of jurisdiction, on the authority of *San Francisco* v. *Itsell*, 133 U. S. 65 [33: 570]; *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648 [41: 1149]; *Saynard* v. *Denny*, 158 U. S. 180 [39: 941], and numerous cases therein cited.

FENWICK HALL COMPANY, *Plaintiff in Error*, *v.* TOWN OF OLD SAYBROOK *et al.* [No. 378.]

In Error to the Supreme Court of Errors of the State of Connecticut.

Mr. M. W. Seymour for plaintiff in error. *Mr. Lewis E. Stanton* for defendants in error.

January 10, 1898. Dismissed for want of jurisdiction, on the authority of *Castillo* v. *McConnico*, 168 U. S. 674 [42: 622]; *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111]; *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648 [41: 1149].

HORACE K. FULTON, *Petitioner*, *v.* ROBERT P. FLETCHER. [No. 555.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Mr. D. W. Baker for petitioner. No counsel for respondent.

January 10, 1898. Denied.

DAVID L. HAMMOND *et al.*, *Plaintiffs in Error*, *v.* BENJAMIN HORTON. [No. 440.]

In Error to the Supreme Court of the State of Missouri.

Mr. Henry H. Denison for plaintiffs in error. *Mr. John B. Henderson* for defendant in error.

January 10, 1898. Dismissed for want of jurisdiction, on the authority of *Hammond* v. *Johnston*, 142 U. S. 73 [35: 941]; *Hammond* v. *Connecticut Mut. L. Ins. Co.* 150 U. S. 633 [37: 1206]; *Romie* v. *Casanova*, 91 U. S. 379 [23: 874]; also, see *Hammond* v. *Horton*, 137 Mo. 151; *Hammond* v. *Johnson*, 93 Mo. 198; *Hammond* v. *Gordon*, 93 Mo. 223; *Block* v. *Morrison*, 112 Mo. 343.

ADA F. MCDONNELL, *Plaintiff in Err.*, *v.* LLEWELLYN JORDAN. [No. 510.]

In Error to the Circuit Court of the United States for the Northern District of Alabama.

Messrs. Lawrence Cooper and *William Richardson* for plaintiff in error. *Messrs. D. D. Shelby, R. W. Walker*, and *R. R. McMahon* for defendant in error.

January 10, 1898. Dismissed for want of jurisdiction, on the authority of *Bender* v. *Pennsylvania Co.* 148 U. S. 502 [37: 537], and cases cited.

HENRY A. V. POST *et al.*, *Petitioners*, *v.* GEORGE BURNHAM *et al.* [No. 554.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. Joseph S. Clark and *R. C. Dale* for petitioners. No counsel for respondents.

January 10, 1898. Denied.

N. S. SWENSON, *Plaintiff in Err.*, *v.* RUSSELL SAGE, Assignee, etc. [No. 220.]

In Error to the Supreme Court of the State of Minnesota.

Mr. Moses E. Clapp for plaintiff in error. *Messrs. A. T. Britton* and *A. B. Browne* for defendant in error. *Mr. Assistant Attorney General Dickinson* and *Mr. George H. Gorman* for the United States.

January 10, 1898. Dismissed with costs, with directions that the motion to dismiss and the affidavits and depositions filed thereon in this court be transmitted to the supreme court of Minnesota for such consideration and action as to that court may seem fit.

UNITED STATES and Comanche Indians, *Appts.*, *v.* SIMEON KEMP. [No. 405.]

Appeal from the Court of Claims.

Messrs. Assistant Attorney General Thompson and *Charles W. Russell* for appellants. *Messrs. William B. King* and *Silas Hair* for appellee.

January 10, 1898. Judgment affirmed by a divided court.

UNITED STATES, *Appellant*, *v.* ROBERT W. IRVINE. [No. 182.]

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

The Attorney General for appellant. No counsel for appellee.

January 12, 1898. Dismissed, on motion of *Mr. Assistant Attorney General Boyd* for the appellant.

UNITED STATES, *Appellant*, *v.* JOSEPH C. WAGNER. [No. 183.]

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

The Attorney General for appellant. No counsel for appellee.

January 12, 1898. Dismissed, on motion of *Mr. Assistant Attorney General Boyd* for the appellant.

FRED RICE ROWELL, Receiver, etc., *Plff. in Err.*, *v.* SARAH WOODWARD, Individually and as Executrix, etc. [No. 214.]

In Error to the Supreme Court of the State of Washington.

Mr. James B. Howe for plaintiff in error. *Mr. Edward B. Whitney* for defendant in error.

January 13, 1898. Dismissed with costs, on motion of counsel for the plaintiff in error.

ROBERT A. SMILEY, *Petitioner*, *v.* SAMUEL M. BARKER. [No. 562.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Frederic H. Bacon for petitioner. *Messrs. T. F. Burke* and *B. F. Fowler* for respondent.

January 17, 1898. Denied. (Mr. Justice Brewer took no part in the disposition of this application.)

CLARENCE P. ELDER, *Appellant*, *v.* UNITED STATES. [No. 503.]

Appeal from the Court of Private Land Claims.

Mr. John H. Knaebel for appellant. *The Attorney General* for appellee.

January 18, 1898. Dismissed, per stipulation.

BOARD OF SUPERVISORS OF THE COUNTY OF PRESQUE ISLE, *Petitioner*, *v.* WILLIAM J. ASHLEY. [No. 567.]

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Henry M. Duffield for petitioner. *Mr. O. E. Warner* for respondent.

January 31, 1898. Denied.

L. Z. AND M. Z. FARWELL, *Appellants*, *v.* UNITED STATES. [No. 307.]

Appeal from the Court of Private Land Claims.

Mr. T. B. Catron for appellants. *The Attorney General* for appellee.

February 21, 1898. Dismissed, on authority of counsel for the appellants.

JOHN A. BUCKSTAFF *et al.*, *Petitioners*, *v.* RUSSELL & Co. [No. 588.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. Charles O. Whedon, J. H. Ames, and *A. S. Tibbets* for petitioners. No counsel for respondents.

February 28, 1898. Denied.

THOMAS J. DARRAGH, *Appellant*, *v.* H. WETTER MANUFACTURING COMPANY *et al.* [No. 509.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. John McClure for appellant. *Messrs. U. M.* and *G. B. Rose* for appellees.

February 28, 1898. Dismissed for want of jurisdiction, on the authority of *Carey* v. *Houston & T. C. R. Co.* 161 U. S. 115 [40: 638].

CHAUNCEY W. DODGE *et al.*, *Petitioners*, *v.* ABRAHAM I. STRASBURGER *et al.* [No. 587.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Messrs. Chapin Brown, Arthur H. O'Connor, and *Henry P. Blair* for petitioners. *Messrs. Leon Tobriner* and *I. W. Nordlinger* for respondents.

February 28, 1898. Denied.

GEORGE C. W. MAGRUDER *et al.*, *Petitioners*, *v.* JOHN S. BELT. [No. 590.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

Mr. H. Randall Webb for petitioners. *Mr. F. H. Mackey* for respondent.

February 28, 1898. Denied.

C. A. WARREN, *Plaintiff in Error*, *v.* BERTRAND G. CHANDOS *et al.* [No. 327.]

In Error to the Supreme Court of the State of California.

Mr. J. C. Bates for plaintiff in error. *Mr. Horace G. Pratt* for defendants in error.

February 28, 1898. Dismissed for want of jurisdiction, on the authority of *Eustis* v. *Bolles*, 150 U. S. 361 [37: 1111]; *Dibble* v. *Bellingham Bay Land Co.* 163 U. S. 63 [41: 72]; *Castillo* v. *McConnico*, 168 U. S. 674, 679 [42: 622, 624].

CHARLES E. POPE, Receiver, etc., *Petitioner*, *v.* LOUISVILLE, NEW ALBANY, & CHICAGO RAILROAD COMPANY. [No 580.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. John S. Miller and *W. P. Fishback* for petitioner. *Messrs. G. W. Kretzinger* and *E. C. Field* for respondent.

March 7, 1898. Denied.

UNITED STATES, *Appellant*, *v.* JOHN DOBSON. [No. 302.]

Appeal from the Court of Claims.

The Attorney General for appellant. *Messrs. W. W. Dudley, L. T. Michener, John C. Chancy*, and *John R. Garrison* for appellee.

March 7, 1898. Dismissed, on motion of *Mr. Solicitor General Richards* for the appellant.

UNITED STATES, *Plaintiff in Error*, *v.* ISAAC W. PATRICK *et al.* [No. 223.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

The Attorney General for plaintiff in error. No counsel for defendant in error.

March 7, 1898. Dismissed, on motion of *Mr. Solicitor General Richards* for the plaintiff in error.

EDWARD J. DELANEY, Executor, etc., *Plaintiff in Error*, *v.* CITY AND COUNTY OF SAN FRANCISCO. [No. 219.]

In Error to the Supreme Court of the State of California.

Messrs. S. W. and *E. B. Holladay* for plaintiff in error. *Mr. J. H. Meredith* for defendant in error.

March 8, 1898. Dismissed for want of jurisdiction, per stipulation.

EDGAR HARDING, *Petitioner*, *v.* MINNEAPOLIS NORTHERN RAILWAY COMPANY. [No. 609.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. M. H. Boutelle for petitioner. *Mr. S. S. Burdett* for respondent.

March 21, 1898. Denied.

NATIONAL SAFE DEPOSIT, SAVINGS, & TRUST COMPANY, *Petitioner*, *v.* WILLIAM BRUCE GRAY. [No. 603.]

Petition for a writ of Certiorari to the Court of Appeals of the District of Columbia.

Mr. R. Ross Perry for petitioner. *Mr. Samuel Maddox* for respondent.

March 21, 1898. Denied.

UNITED STATES, *Appellant*, *v.* MOBILE & OHIO RAILROAD COMPANY. [No. 403.]

Appeal from the Court of Claims.

The Attorney General for appellant. *Mr. John C. Fay* for appellee.

March 21, 1898. Dismissed, on motion of *Mr. Solicitor General Richards* for the appellant.

WILLIAM W. DODGE *et al.*, *Petitioners*, *v.* MENASHA WOOD SPLIT PULLEY CO. *et al.* [No. 602.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Lysander Hill for petitioners.

Mr. William F. Vilas for respondents. *Mr. Edward Rector* for respondents (by special leave).

March 28, 1898. Denied.

CHARLES MEYER *et al.*, *Plaintiffs in Error*, *v.* NETTIE L. COX *et al.* [No. 546.]

In Error to the Superior Court of Milwaukee County, State of Wisconsin.

Mr. Rublee A. Cole for plaintiffs in error. *Mr. Howard Morris* for defendants in error.

March 28, 1898. Dismissed for the want of jurisdiction, on the authority of *Werner* v. *Charleston*, 151 U. S. 360 [38: 192]; *Union Mut. L. Ins. Co.* v. *Kirchoff*, 160 U. S. 874 [40: 461].

FRANCIS HENRY, *Petitioner*, *v.* PITTSBURG CLAY MANUFACTURING COMPANY *et al.* [No. 616.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Messrs. Albert H. Clarke and *F. D. McKenney* for petitioner. No counsel for respondents.

April 11, 1898. Denied.

TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error*, v. MAGGIE A. HOLLADAY, in Her Own Right, etc. [No. 445.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. John F. Dillon, Winslow S. Pierce, and *D. D. Duncan* for the plaintiff in errror. No counsel for defendant in error.

April 14, 1898. Dismissed with costs, on motion of *Mr. D. D. Duncan* for the plaintiff in error.

JACKSONVILLE, MAYPORT, PABLO RAILWAY & NAVIGATION COMPANY *et al.*, *Petitioners*, *v.* MARY J. HOOPER *et al.* [No. 630.]

Petition for a writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. A. W. Cockrell and *James Lowndes* for petitioners. *Mr. James R. Challen* for respondents.

April 25, 1898. Denied.

GEORGE F. STEARNS, *Petitioner*, *v.* JOHN S. LAWRENCE, Receiver, etc. [No. 637.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Mark Norris and *D. E. Fox* for petitioner. No counsel for respondent.

April 25, 1898. Denied.

HENRY B. TOMPKINS, *Plff. in Err.*, *v.* FRANCES M. COOPER, Administratrix, etc. [No. 225.]

In Error to the Supreme Court of the State of Georgia.

Messrs. Alex. C. King and *J. Hubley Ashton* for plaintiff in error. *Mr. W. C. Glenn* for defendant in error.

April 25, 1898. Dismissed for want of jurisdiction, on authority of *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648 [41: 1149], and cases there cited.

GEORGE R. LYMAN, Administrator, etc., *Plff. in Err.*, *v.* BOSTON & ALBANY RAILWAY COMPANY. [No. 229.]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Messrs. M. F. Dickinson, Jr., and *Samuel Williston* for plaintiff in error. *Mr. Samuel Hoar* for defendant in error.

April 25, 1898. Dismissed for the want of jurisdiction, on authority of *Davis* v. *Geissler* 162 U. S. 290 [40: 972], and cases cited.

UNITED STATES, *Plff. in Err.*, *v.* GROVENER C. CHARLES *et al.* [No. 232.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

The Attorney General for plaintiff in error.

April 25, 1898. Dismissed on motion of *Mr. Solicitor General Richards* for the plaintiff in error.

CHARLES POPE GLUCOSE COMPANY *et al.*, *Petitioners*, *v.* CHICAGO SUGAR REFINING COMPANY. [No. 639.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. L. L. Coburn for petitioners. *Mr. C. K. Offield* for respondent.

May 2, 1898. Denied.

L P. DAWSON, *Petitioner*, *v.* M. C. RUSHIN, Agent, etc., *et al.* [No. 556.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. William M. Cravens for petitioner. No counsel for respondents.

May 2, 1898. Denied.

ST. PAUL, MINNEAPOLIS, & MANITOBA RAILWAY COMPANY, *Appt.*, *v.* RUSSELL SAGE, Trustee. [No. 257.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Messrs. M. D. Grover and *George B. Young* for appellant. No counsel for appellee.

May 2, 1898. Dismissed with costs, on motion of *Mr. A. B. Browne* in behalf of counsel for appellant.

UNITED STATES, *Plff. in Err.*, *v.* R. E. MCGLASHAN. [No. 233.]

In Error to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Assistant Attorney General Boyd for plaintiff in error. *Messrs. George E. Sutherland* and *H. L. Eaton* for defendant in error.

May 2, 1898. Dismissed for want of jurisdiction, on the authority of *Hunt* v. *United States*, 166 U. S. 424 [41: 1063].

AMERICAN LOAN & TRUST COMPANY, etc., *Appt.*, *v.* SILAS H. H. CLARK *et al.*, Receivers, etc. [No. 516.]

Appeal from the Circuit Court of the United States for the District of Nebraska.

Mr. Edward W. Sheldon for appellant. No counsel for appellees.

May 4, 1898. Dismissed with costs, on motion of counsel for the appellant.

BOARD OF COUNTY COMMISSIONERS OF KIOWA COUNTY, KANSAS, *Petitioner*, *v.* CHARLES D. RATHBONE. [No. 626.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. Daniel Smyth for petitioner. *Messrs. John F. Dillon, Harry Hubbard*, and *John M. Dillon* for respondent.

May 9, 1898. Denied.

CITY OF DENVER, *Petitioner*, *v.* BARBER ASPHALT PAVING COMPANY. [No. 628.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. John F. Shafroth for petitioner. *Mr. James H. Brown* for respondent.

May 9, 1898. Denied.

MRS. A. E. FITZHUGH and Husband, *Petitioners*, *v.* MRS. FISHER HAZZARD. [No. 649.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. A. S. Lathrop for petitioners. No counsel for respondent.

May 9, 1898. Denied.

WILLIAM JOHNSTON & CO., *Petitioners*, *v.* HALWARD JOHANSON. [No. 654.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. J. Parker Kirlin for petitioners. No counsel for respondent.

May 9, 1898. Denied.

CHARLES W. NORDSTROM, *Appt.*, *v.* WILLIAM H. MOYER, Sheriff, etc., *et al.* [No. 359.]

Appeal from the Circuit Court of the United States for the District of Washington.

Mr. J. Hamilton Lewis for appellant. *Messrs. P. H. Winston* and *W. C. Jones* for appellees.

May 9, 1898. Order affirmed with costs, on the authority of *Craemer* v. *Washington*, 168 U. S. 124 [42: 407]; *Nordstrom* v. *Washington*, 164 U. S. 705 [41: 1183], and cases cited; and see *State* v. *Nordstrom*, 7 Wash. 506.

CLARENCE H. VENNER, Intervener, *Petitioner*, *v.* FARMERS' LOAN & TRUST COMPANY *et al.* [No. 641.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. W. E. Blake for petitioner. *Messrs. William A. Underwood, F. B. Van Vorst, David McClure*, and *H. B. Turner* for respondents.

May 9, 1898. Denied.

APPENDIX I.

Supreme Court of the United States.

OCTOBER TERM, 1897.

CORRESPONDENCE BETWEEN MR. JUSTICE FIELD AND THE OTHER MEMBERS OF THE COURT WITH REGARD TO HIS RETIRING FROM THE BENCH.

Supreme Court of the United States,
Washington, D. C., October 12, 1897.

Dear Mr. Chief Justice and Brethren:

Near the close of last term, feeling that the duties of my office had become too arduous for my strength, I transmitted my resignation to the President, to take effect on the first day of December next, and this he has accepted, with kindly expressions of regard, as will be seen from a copy of his letter, which is as follows:

"Executive Mansion,
"Washington, D. C., Oct. 9, 1897.

"The Hon. Stephen J. Field,
"Associate Justice of the Supreme Court of the United States, Washington, D. C.

"*My Dear Sir:*

"In April last, Chief Justice Fuller, accompanied by Mr. Justice Brewer, handed me your resignation as Associate Justice of the Supreme Court of the United States, to take effect December 1, 1897.

"In hereby accepting your resignation, I wish to express my deep regret that you feel compelled by advancing years to sever your active connection with the court of which you have so long been a distinguished member.

"Entering upon your great office in May, 1863, you will, on the first of next December, have served upon this bench for a period of thirty-four years and seven months, a term longer than that of any member of the court since its creation, and throughout a period of special importance in the history of the country, occupied with as grave public questions as have ever confronted that tribunal for decision.

"I congratulate you, therefore, most heartily upon a service of such exceptional duration, fidelity, and distinction. Nor can I overlook the fact that you received your commission from Abraham Lincoln, and, graciously spared by a kind Providence, have survived all the members of the court of his appointment.

"Upon your retirement both the bench and the country will sustain a great loss, but the high character and great ability of your work will live and long be remembered, not only by your colleagues, but by your grateful fellow countrymen.

"With personal esteem and sincere best wishes for your contentment and happiness during the period of rest which you have so well earned, I am, dear sir,

"Very truly yours,
"WILLIAM MCKINLEY."

My judicial career covers many years of service. Having been elected a member of the supreme court of California, I assumed that office on October 13, 1857, holding it for five years, seven months, and five days, the latter part of the time being chief justice. On the 10th of March, 1863, I was commissioned by President Lincoln a Justice of the Supreme Court of the United States, taking the oath of office on the 20th day of the following May. When my resignation takes effect my period of service on this bench will have exceeded that of any of my predecessors, while my entire judicial life will have embraced more than forty years. I may be pardoned for saying that during all this period, long in comparison with the brevity of human life, though in retrospect it has gone with the swiftness of a tale that is told, I have not shunned to declare, in every case coming before me for decision, the conclusions which my deliberate convictions compelled me to arrive at by the conscientious exercise of such abilities and acquirements as I possessed.

It is a pleasant thing in my memory that my appointment came from President Lincoln, of whose appointees I am the last survivor. Up to that time there had been no representative here of the Pacific coast. A new empire had arisen in the west whose laws were those of another country. The land titles were from Spanish or Mexican grants, both of which were often overlaid by the claims of the first settlers. To bring order out of this confusion Congress passed an act providing for another seat on this bench, with the intention that it should be filled by someone familiar with these conflicting titles and with the mining laws of the coast, and as it so happened that I had framed the principal of these laws, and was, moreover, chief justice of California, it was the wish of the senators and representatives of that state, as well as those from Oregon, that I should succeed to the new position.

At their request Mr. Lincoln sent my name to the Senate, and the nomination was unanimously confirmed. This kindly welcome was extended in March, but I did not at once enter on the discharge of the duties of the office, for the reason that, as chief justice of California, I had heard arguments in many cases in the disposition of which, and especially in the preparation of opinions, it was fitting that I should participate before leaving that bench; and I fixed the 20th of May as the day on which to take, as I did, the oath, because it was the eighty-second birthday of my father, who indulged a just pride at my accession to this exalted position.

At the head of the court, when I became one of its members, was the venerable Chief Justice Taney, and among the associate justices was Mr. Justice Wayne, who had sat with Chief Justice Marshall, thus constituting a link between the past and the future, and, as it were, binding into unity nearly an entire century of the life of this court. During my incumbency three chief justices and sixteen associate justices have passed away, leaving me precious remembrances of common labors and intimate and agreeable companionship.

When I came here the country was in the midst of war. Washington was one great camp, and now and then the boom of cannon could be heard from the other side of the Potomac. But we could not say *inter arma silent leges.* This court met in regular session, never once failing in time or place, and its work went on as though there were no sound of battle. Indeed, the war itself simply added to the amount of litigation, here as elsewhere. But the war ended in a couple of years, and then came the great period of reconstruction and the

last amendments to the Federal Constitution. In the effort to re-establish the nation, to adjust all things to the changed political, social, and economic conditions, questions of far-reaching import were developed, — questions of personal liberty, of constitutional right, which, after ofttimes heated discussions before the people and in the halls of Congress, came to us for decision. I do not exaggerate when I say that no more difficult or momentous questions were ever presented to this or any other court. I look back with pride and joy to the fact that I was permitted to take part in the consideration of all those important questions, and that not infrequently I was called upon to express the judgment of this court thereon. And now that those times of angry debate, deep feeling, and judicial decision have passed, it is pleasant to realize that the conclusions announced by this court have been accepted, not simply of necessity, as so prescribed by the fundamental law, but, in the main, as in themselves both correct and wise.

As we all know, the period of war was followed by one, continuing even to the present time, of marvelous material development. Wealth accumulated,— such as was never before dreamed of in this country. Gigantic enterprises were undertaken and carried through. Inventions have multiplied the conveniences of life, as well as the possibilities of achievement. Indeed, the conditions of life have essentially changed from those that prevailed prior to the war. Out of this changed social and economic condition have sprung not merely an immense multitude of cases, but litigation of a character vitally affecting the future prosperity and safety of this country. To this court have come for final solution and decision many of these questions and cases. By the blessing of Almighty God, my health and life have been preserved, and I have been enabled to take part in the consideration of all these cases. Few appreciate the magnitude of our labors. The burden resting upon us for the last fifteen or twenty years has been enormous. The volumes of our reports show that I alone have written 620 opinions. If to these are added 57 opinions in the circuit court, and 365 prepared while I was in the supreme court of California, it will be seen that I have voiced the decision in 1042 cases.

If it may be said that all of our decisions have not met with the universal approval of the American people, yet it is to the great glory of that people that always and everywhere has been yielded a willing obedience to them. That fact is eloquent of the stability of popular institutions, and demonstrates that the people of the United States are capable of self-government.

As I look back over the more than a third of a century that I have sat on this bench, I am more and more impressed with the immeasurable importance of this court. Now and then we hear it spoken of as an aristocratic feature of a republican government. But it is the most democratic of all. Senators represent their states and representatives their constituents, but this court stands for the whole country, and as such it is truly "of the people, by the people, and for the people." It has, indeed, no power to legislate. It cannot appropriate a dollar of money. It carries neither the purse nor the sword. But it possesses the power of declaring the law, and in that is found the safeguard which keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistance, is the only safety of a popular government, and it is an additional assurance when the power is in such hands as yours.

With this I give place to my successor, but I can never cease to linger on the

memories of the past. Among the compensations for all the hard work that a seat on this bench imposes have been the intimacies and friendships that have been formed between its members. Though we have often differed in our opinions, it has always been an honest difference, which did not affect our mutual regard and respect. These many years have indeed been years of labor and of toil, but they have brought their own reward, and we can all join in thanksgiving to the Author of our being that we have been permitted to spend so much of our lives in the service of our country.

With profound respect and regard, I am, my dear brethren,

Very sincerely and always yours,

Stephen J. Field.

The following is the court's reply:

Supreme Court of the United States,
Washington, D. C., Oct. 13, 1897.

Dear Brother Field:

We are profoundly moved by the letter in which you announce to us your retirement from the bench. The termination of a judicial career of such length and distinction cannot fail to inspire among all your countrymen, and, indeed, wherever the realm of jurisprudence extends, a keen sense of loss, which to your colleagues assumes the aspect of a personal bereavement. For the intimacy necessarily incident to the conduct of work so constant, so exacting, and of such vital importance as ours, inevitably draws us together by ties of the closest character, which cannot be dissolved without emotions of deep sadness and regret. We feel that our parting involves, not simply the deprivation of the assistance afforded by your learning, your vast experience, and your earnestness in advocacy of your convictions, but the severance of those relations which have contributed so much to lighten the hardest labors of the road.

This is not the time or place to dwell on the reputation you have achieved as a jurist. The record is made up and may safely be committed to the judgment of posterity. But we cannot part with you as an active member of the court without the fervent expression of the hope that you may be spared for many years to enjoy the repose you have so thoroughly earned and the commendation bestowed on good and faithful service.

We are, dear Brother Field, your affectionate brethren,

Melville W. Fuller,
John M. Harlan,
Horace Gray,
David J. Brewer,
Henry B. Brown,
George Shiras, Jr.,
E. D. White,
R. W. Peckham.

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1897.

The Attorney General presented to the court the Hon. John K. Richards as Solicitor General, and it was ordered that his commission be recorded.

October 11, 1897.

APPENDIX III.

Supreme Court of the United States.

OCTOBER TERM, 1897.

ORDER.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, *viz.:*

For the First Circuit, Horace Gray, Associate Justice.
For the Second Circuit, Rufus W. Peckham, Associate Justice.
For the Third Circuit, George Shiras, Jr., Associate Justice.
For the Fourth Circuit, Melville W. Fuller, Chief Justice.
For the Fifth Circuit, Edward D. White, Associate Justice.
For the Sixth Circuit, John M. Harlan, Associate Justice.
For the Seventh Circuit, Henry B. Brown, Associate Justice.
For the Eighth Circuit, David J. Brewer, Associate Justice.
For the Ninth Circuit, David J. Brewer, Associate Justice.

December 13, 1897.

APPENDIX IV.

Supreme Court of the United States.

OCTOBER TERM, 1897.

ORDER.

Ordered, in pursuance of the act of Congress of February 19, 1897 (29 Stat. at L. 536, chap. 263), that the following table of fees and costs in the circuit courts of appeals be, and the same is hereby, established, to take effect on the 1st day of March, A. D. 1898; and no other fees and costs than those therein named shall thereafter be charged:

Docketing a case and filing the record	$ 5.00
Entering an appearance	.25
Transferring a case to the printed calendar	1.00
Entering a continuance	.25
Filing a motion, order, or other paper	.25
Entering any rule, or making or copying any record or other paper, for each one hundred words	.20
Entering a judgment or decree	1.00
Every search of the records of the court and certifying the same	1.00
Affixing a certificate and a seal to any paper	1.00
Receiving, keeping, and paying money, in pursuance of any statute or order of court, 1 per cent on the amount so received, kept, and paid.	
Preparing the record for the printer, indexing same, supervising the printing, and distributing the copies, for each printed page of the record and index	.15
Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing)	.20
Issuing a writ of error and accompanying papers, or a mandate or other process	5.00
Filing briefs, for each party appearing	5.00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed $5 in the whole for any copy)	1.00
Attorney's docket fee	20.00

January 10, 1898.

APPENDIX V.

Supreme Court of the United States.

OCTOBER TERM, 1897.

The Chief Justice said: "It gives me pleasure to announce to the gentlemen of the bar that Mr. Joseph McKenna, of California, has been appointed to a seat upon this bench. Mr. McKenna is present and prepared to take the oath of office. Let his commission be read and recorded and the oath be administered accordingly." The commission was then read and the oath administered by the clerk, and Mr. Justice McKenna took his seat on the bench.

January 26, 1898.

APPENDIX VI.

Supreme Court of the United States.

OCTOBER TERM, 1897.

ORDER.

The reporter having represented that, owing to the number of decisions at the term, it will be impracticable to put the reports in one volume, it is therefore now here ordered that he publish an additional volume in this year, pursuant to § 681 of the Revised Statutes.

February 21, 1898.

APPENDIX VII.

Supreme Court of the United States.

OCTOBER TERM, 1897.

ORDER.

There having been an Associate Justice of this court appointed since the commencement of this term, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, *viz.:*

For the First Circuit, Horace Gray, Associate Justice.

For the Second Circuit, Rufus W. Peckham, Associate Justice.
For the Third Circuit, George Shiras, Jr., Associate Justice.
For the Fourth Circuit, Melville W. Fuller, Chief Justice.
For the Fifth Circuit, Edward D. White, Associate Justice.
For the Sixth Circuit, John M. Harlan, Associate Justice.
For the Seventh Circuit, Henry B. Brown, Associate Justice.
For the Eighth Circuit, David J. Brewer, Associate Justice.
For the Ninth Circuit, Joseph McKenna, Associate Justice.

February 21, 1898.

APPENDIX VIII.

Supreme Court of the United States.

OCTOBER TERM, 1897.

The Solicitor General presented to the court the Honorable John W. Griggs as Attorney General of the United States, and it was ordered that his commission be recorded.

February 21, 1898.

APPENDIX IX.

Supreme Court of the United States.

OCTOBER TERM, 1897.

ORDER.

Ordered, that the table of fees and costs in the circuit court of appeals established, in pursuance of the act of Congress of February 19, 1897, by order of January 10, 1898, be, and the same is hereby, amended as to the item for "preparing the record for the printer, indexing the same, supervising the printing, and distributing the copies, for each printed page of the record and index, .15," by substituting "25 cents" in place of "15 cents" for each printed page, so that said order as amended shall read as follows:

Ordered, in pursuance of the act of Congress of February 19, 1897 (29 Stat. at L. 536, chap. 263), that the following table of fees and costs in the circuit courts of appeals be, and the same is hereby, established, to take effect on the 1st day of March, A. D. 1898, and no other fees and costs than those therein named shall thereafter be charged:

Docketing a case and filing the record.....$ 5.00

Entering an appearance	.25
Transferring a case to the printed calendar	1.00
Entering a continuance	.25
Filing a motion, order, or other paper	.25
Entering any rule, or making or copying any record or other paper, for each one hundred words	.20
Entering a judgment or decree	1.00
Every search of the records of the court and certifying the same	1.00
Affixing a certificate and a seal to any paper	1.00
Receiving, keeping, and paying money, in pursuance of any statute or order of court, 1 per cent on the amount so received, kept, and paid.	
Preparing the record for the printer, indexing the same, supervising the printing, and distributing the copies, for each printed page of the record and index	.25
Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing)	.20
Issuing a writ of error and accompanying papers, or a mandate or other process	5.00
Filing briefs, for each party appearing	5.00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed $5 in the whole for any copy)	1.00
Attorney's docket fee	20.00

Ref 348.73 Un35
United States. Supreme
Court.
Cases argued and decided in
the Supreme Court of the

For Reference

Not to be taken from this room